

Summary Sheet

Meeting date: February 21, 2020

Agenda item: Incorporating Elements of 2SHB 1579 into the Hydraulic Code Rules – Briefing and New Rulemaking Timeline

Presenter(s): Margen Carlson, Habitat Program Director and Randi Thurston, Protection Division Manager

Background summary:

Habitat Program staff will brief the Commission on public comments received, and the proposed change to the rulemaking process and timeline in response.

Rule amendments are proposed as necessary to implement elements of Second Substitute House Bill 1579 (2SHB 1579)¹ - a bill passed by the legislature during the 2019 legislative session. This bill implements recommendations of the Southern Resident Orca Task Force (task force) related to increasing chinook abundance. The bill adds a procedure for potential applicants to request a preapplication determination of whether a project proposed landward of the ordinary high water line (OHWL) requires a Hydraulic Project Approval (HPA). The bill also enhanced authority for the department's civil compliance program and repealed a statute relating to marine beach front protective bulkheads or rockwalls for single-family residences.

The public comment period was open from December 3, 2019 through January 21, 2020. The Commission's public hearing on proposed rule changes was held January 17, 2020 in Olympia, Washington. A total of 9 written comments were received during the comment period, and four comments were presented orally at the public hearing.

Program staff recommend nine changes to the proposed rules in response to the comments. Eight of these are minor and don't change the effect of the rules. These proposed changes are in the Table below. However, one recommended change would result in a substantial modification to the civil penalty schedule. The regulated community wants more certainty in how managers will determine civil penalty amounts. In response, staff recommend that we amend the penalty schedule to include a base penalty and numeric penalty values for the considerations specified in the civil penalty statute. As a result, the department needs to file a supplemental CR-102 with the Office of the Code Reviser and reopen the public comment on the proposed change. This will delay the adoption of the proposed rules originally scheduled for today. We anticipate the public hearing will occur at the April 9 – 11, 2020 commission meeting and staff would request adoption on the April 24, 2020 commission conference call.

Changes between CR-102 proposed rule and the proposed supplemental CR-102 proposed rule:

There are nine changes between the CR-102 version of the rules and the proposed supplemental CR-102. They are highlighted in yellow in the following table:

¹ Laws of 2019, chapter 290; Codified as RCWs 77.55.400 through 77.55.470.

WAC Section	Proposed change from CR-102	Reason for change
220-660-050(9)(c)(iii)(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 their habitat (and habitat that supports fish life), and plans to mitigate those impacts to ensure the project results in no net loss;	This change is needed to reinforce that habitat that supports fish life must be protected as well.
220-660-370	Appropriate methods to assess the need for marine bank protection and, if needed, to design marine bank protection are available in the department's <i>Marine Shoreline Design Guidelines</i> , as well as other published manuals and guidelines.	A change is needed to clarify that the <i>Marine Shoreline Design Guidelines</i> is also an assessment tool.
220-660-370(3)(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)) <u>an existing bank protection structure must include a site assessment, alternatives analysis and design rationale for the proposed method prepared by a qualified professional ((such as a)) e.g., coastal geologist, geomorphologist((, etc.)) for the proposed ((project and selected technique)) method.</u> 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)) <u>The applicant must submit a the qualified professional's report to the department as part of a complete application for an HPA that includes:</u>	To eliminate confusion about who is a qualified professional the examples are removed. Qualified professional is already defined in WAC 220-660-030(121).
220-660-370(5)(a)	The department ((may require a person to establish)) <u>requires that plans submitted as part of a complete application show the horizontal distances of the structure(s) from ((a)) permanent local benchmark(s) (fixed objects) ((before starting work on the project)). <u>Each horizontal distance shown must include the length and compass bearing from the benchmark to the waterward face of the structure(s).</u> The</u>	Proposed change is needed to clarify these are local benchmarks so a survey with designated vertical or horizontal datum is not required.

WAC Section	Proposed change from CR-102	Reason for change
	<p>benchmark(s) must be located, marked, and protected to serve as a post-project reference for <u>at least ten years from the date the HPA application is submitted to the department.</u></p>	
220-660-480	<p><u>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.</u></p> <p><u>WDFW is responsible to help the regulated community understand how to comply. We achieve voluntary compliance through education and technical assistance when we advise and consult on permits, conduct compliance checks, perform on-site technical visits, or provide guidance materials written in easily understood language.</u></p> <p><u>When we cannot get voluntary compliance by issuing a correction request, WDFW staff may use a range of increasingly strict enforcement tools. This ranges from issuing notices of correction and stop work orders to penalties and, when appropriate, criminal prosecution.</u></p>	Proposed change is needed to clarify the compliance sequence in the compliance section introduction.
220-660-480	<p>This section does not apply to a project, or to that portion of a project, that has received a forest practices <u>HPA hydraulic project (FPHP) permit</u> from the department of natural resources under chapter <u>76.09</u> RCW.</p>	A change is needed to avoid confusion because the Department of Natural Resources calls their permit a Forest Practices Hydraulic Project (FPHP).

WAC Section	Proposed change from CR-102	Reason for change
220-660-480(6)(e)	<u>Signature authority for a notice to comply: A notice to comply 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.</u>	The change is needed to clarify who is authorized to issue a notice to comply.
220-660-480(7)(a)	<u>The department may levy civil penalties of up to ten thousand dollars for each and 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.</u>	The change is needed to clarify the civil penalty is per violation and not per violation per day.
220-660-480(8)(d)(iii)	<u>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.</u> <u>The department will determine whether all or a portion of a penalty should be assessed against a landowner, lessee, contractor or another project proponent. The department should consider the responsible party, the degree of control, the sophistication of the party, and whether different parties conducted different violations.</u>	A change is needed to clarify how a penalty amount could be divided among multiple violators.
220-660-480(8)(c)	<u>The department will amend the penalty schedule to include a base penalty and numeric penalty values for the considerations; previous violation history, severity and reparability of the impacts, intent, and cooperation. The sum of the base penalty and penalty amount calculated for the considerations would determine the total penalty amount not to exceed \$10,000 for each violation.</u>	A change is needed to clarify how a manager will calculate the penalty amount.

Policy issue(s) and expected outcome:

2SHB 1579 and the resulting statute (RCW 77.55.440 Penalties) directed the department to adopt by rule a penalty schedule 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.

These considerations mirror those of the Department of Natural Resources (DNR) in the forest practices statute (RCW 76.09.170 Violations). So, to develop the department's civil penalty rules, staff looked at WAC 222-46-060 Forest practice rules for civil penalties. The original method we proposed to calculate the department's civil penalty was modeled after the forest practices method which is also narrative in nature. The main difference is the forest practices method has a base penalty amount of either \$500 or \$2,000 depending on the nature of the violation.

The regulated community wants more transparency and certainty in how managers will calculate civil penalty amounts. The department recognizes their concern and wants to address it to the extent we can. In their comment letter, members of the regulated community said they expected a specific list of possible violations and the corresponding penalty amounts. Something like the list of infractions the Fish and Wildlife Officers have. While this isn't feasible given that the considerations in statute must be independently considered and applied to a specific incident and site, the department can provide more transparency and certainty by establishing a base penalty and assigning numeric penalty values to the considerations. This is something DNR has done in their Forest Practices Enforcement Handbook.

Staff will amend the penalty schedule to improve transparency and certainty. We will file a supplementary CR-102 that has the amended penalty schedule and the eight other proposed changes on or before March 4th. The public comment period will be open from March 5, 2020 through April 11, 2020. We anticipate the public hearing on the proposed changes will occur at the April Commission meeting.

Fiscal impacts of agency implementation

Additional staff and AAG time will be needed to complete the rulemaking.

Public involvement process:

The department will reinitiate consultation with tribes prior to filing a supplemental CR-102. The department will also notify key stakeholders and other federal and state natural resource agencies, prior to filing the supplemental CR-102. To promote public participation, the

department will update the HPA rulemaking web page² with information on supplemental rule making so the public can have access to the documents and track rule making progress. An email address³ is activated for people to submit public comments.

Action requested and/or proposed next steps:

No action is requested. Staff will file a supplemental CR-102 with the Code Reviser's Office.

Draft motion language:

None, this is a briefing only.

Justification for Commission action:

None, this is a briefing only.

Form revised 2-15-18

² <https://wdfw.wa.gov/licensing/hpa/rulemaking/>

³ HPARules@dfw.wa.gov