

Summary Sheet

Meeting date: April 10-11, 2020

Agenda item: Incorporating Elements of 2SHB 1579 into the Hydraulic Code Rules – Briefing on Supplemental CR-102 and Public Hearing

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

Background summary:

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 The bill also enhanced authority for the department's civil compliance program and repealed a statute relating to marine beach front protective bulkheads or rockwalls for single-family residences.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 first 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 received. Eight of these are minor and didn't change the effect of the rules. However, one recommended change resulted in a substantial modification to the civil penalty schedule. These proposed changes are in the Table below.

The regulated community wants more certainty in how managers will determine civil penalty amounts. In response, staff amended 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 filed a supplemental CR-102 with the Office of the Code Reviser and reopened the public comment on the proposed changes. We anticipate staff will request rule adoption on the April 24, 2020 commission conference call.

Materials

Because Hydraulic Code Rules are significant legislative rules, you have a large volume of material in your notebook. These include:

- Supplemental CR-102 (WSR 20-06-053) filed on March 2, 2020 and published in Washington State Register 20-06 on March 18, 2019.
- Draft Regulatory Analysis document, including cost-benefit analysis, small business economic impact statement and least-burdensome alternative analysis – version 2

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

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:

| WAC Section | Proposed changes in the Supplemental 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</u> 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. ((, 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)) <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</u> 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 benchmark(s) must be located, marked, and protected | 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 changes in the Supplemental CR-102 | Reason for change |
|------------------------|--|---|
| | 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> | |
| 220-660-480 | <u>Added “The department is responsible to help the regulated community understand how to comply. The department achieves voluntary compliance through education and technical assistance when the department advises and consults on permits, conducts compliance checks, performs on-site technical visits, or provides guidance materials written in easily understood language. When the department cannot get voluntary compliance by issuing a correction request, the department 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> | Proposed change is needed to clarify the compliance sequence in the compliance section introduction. |
| 220-660-480 | This section does not apply to a project, or to that portion of a project, that has received a forest practices HPA <u>hydraulic project (FHP) permit</u> from the department of natural resources under chapter <u>76.09</u> RCW. | A change is needed to avoid confusion because the Department of Natural Resources calls their permit a Forest Practices Hydraulic Project (FPHP). |
| 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</u> | A change is needed to clarify how a penalty amount could be divided among multiple violators. |

| WAC Section | Proposed changes in the Supplemental CR-102 | Reason for change |
|-------------------|---|--|
| | <p>allocate penalty amounts to each person having committed or contributed to the violation.</p> <p>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.</p> | |
| 220-660-480(8)(c) | <p>The department amended the penalty schedule to include a base penalty and numeric penalty values for the considerations listed in RCW 77.55.440(6); previous violation history, severity and reparability of the impacts, intent, and cooperation. The sum of the base civil penalty and penalty amount calculated for the considerations will determine the total civil penalty amount not to exceed \$10,000 for each violation. Please refer to the proposed rule language starting on page 72 of OTS-1840.3.</p> | <p>A change is needed to provide more transparency and clarity about how a manager will calculate the total penalty amount for each violation.</p> |

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 rules which are 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 requested more transparency and certainty in how managers will calculate civil penalty amounts. The department recognized their concern and wanted to address them to the extent we could. In their comment letter, members of the regulated community said they expected a specific list of possible violations and the corresponding penalty amounts. This could be 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 amended the proposed penalty schedule to improve transparency and certainty. We filed a supplemental CR-102 that has the amended penalty schedule and the eight other proposed changes on March 2, 2019. The public comment period was open from March 5, 2020 through April 10, 2020. We anticipate requesting adoption at the April 24, 2020 Commission conference call.

Fiscal impacts of agency implementation

The department requested and received supplemental funding for one year to establish an Administrative Compliance Unit comprised of a manager and eight compliance inspectors.

Public involvement process:

The department reinitiated consultation with tribes prior to filing a supplemental CR-102. The department also notified our citizen advisory group, key stakeholders and other federal and state natural resource agencies, prior to filing the supplemental CR-102. To promote public participation, the department updated the HPA rulemaking web page² with information on supplemental rule making so the public would have access to the documents and could track rule making progress. An email address³ was activated for people to submit public comments. The Notice of Proposed Rule Making was filed on March 2, 2020 and published in Washington State Register 20-06 on March 18, 2020. No public comments were received through March 20, 2020.

Action requested and/or proposed next steps:

This meeting is a public hearing, providing the Commission an opportunity to hear perspectives on the rule change proposal. The public comment period closes at 5pm Friday, April 10, 2020, after which staff will summarize comments, make necessary changes to rule proposals, finalize the Small Business Economic Impact Statement and Regulatory Analysis documents, and

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

³ HPARules@dfw.wa.gov

complete an Implementation Plan and Concise Explanatory Statement. Staff anticipates asking the FWC to adopt the proposed rules at the April 24, 2020 conference call.

Draft motion language:

None, this is a briefing and public hearing only.

Justification for Commission action:

None, this is a briefing public hearing only.

Form revised 2-15-18



PROPOSED RULE MAKING

CR-102 (December 2017) (Implements RCW 34.05.320)

Do NOT use for expedited rule making

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: March 02, 2020

TIME: 3:04 PM

WSR 20-06-053

Agency: Fish and Wildlife

Original Notice

Supplemental Notice to WSR 19-24-081

Continuance of WSR _____

Preproposal Statement of Inquiry was filed as WSR 19-19-056 ; or

Expedited Rule Making--Proposed notice was filed as WSR _____; or

Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1); or

Proposal is exempt under RCW _____.

Title of rule and other identifying information: (describe subject) HPA Rule Making Implementing 2SHB 1579 amending sections WAC 220-660-050 (Procedures—Hydraulic project approvals), WAC 220-660-370 (Bank protection in saltwater areas), WAC 220-660-460 (Informal appeal of administrative actions), WAC 220-660-370 (Formal appeal of administrative actions), and WAC 220-660-480 (Compliance with HPA provisions) of Hydraulic Code Rules in chapter 220-660 WAC.

Hearing location(s):

Date: **Time:** **Location:** (be specific) **Comment:**

| | | | |
|--------------------|---------|--|--|
| April 10 -11, 2020 | 8:00 am | Natural Resources Building, 1111 Washington St. SE, Olympia, WA 98501. | |
|--------------------|---------|--|--|

Date of intended adoption: April 24, 2020 (Note: This is **NOT** the **effective** date)

Submit written comments to:

Name: Randi Thurston

Address: P.O. Box 43200, Olympia, WA 98504-3200

Email: HPARules@dfw.wa.gov

Fax: (360) 902-2946

Other: Web site: <https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking>

By (date) 5pm April 10, 2020

Assistance for persons with disabilities:

Contact Delores Noyes

Phone: (360) 902-2349

Fax: (360) 902-2946 attn: Randi Thurston

TTY: (360) 902-2207

Email: adaprogram@dfw.wa.gov

Other:

By (date) 5pm April 10, 2020

Purpose of the proposal and its anticipated effects, including any changes in existing rules: 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

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

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 CR-101 (WSR 19-19-056) was filed September 16, 2019 and published in the Washington State Register 19-19 on October 2, 2019; and the CR-102 (WSR 19-24-081) was filed December 3, 2019, and published in the Washington State Register 19-24 on December 18, 2019.

The public comment period for this rule making was open from December 3, 2019 through 5:00 p.m. on January 2, 2020. The Washington Fish and Wildlife Commission held a public hearing on January 17, 2020, at 12:30 p.m. 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. One recommended change resulted in a substantial modification to the civil penalty schedule.

Table 1 Proposed change from CR-102

| 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</u> 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 . 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</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). |

| | | |
|------------------------|--|--|
| | <u>department as part of a complete application for an HPA that includes:</u> | |
| 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 <u>local</u> benchmark(s) (fixed objects) ((before starting work on the project)).</u> | Proposed change is needed to clarify these are local benchmarks so a survey with designated vertical or horizontal datum is not required. |
| 220-660-480 | <u>Added “The department is responsible to help the regulated community understand how to comply. The department achieves voluntary compliance through education and technical assistance when the department advises and consults on permits, conducts compliance checks, performs on-site technical visits, or provides guidance materials written in easily understood language.</u> <u>When the department cannot get voluntary compliance by issuing a correction request, the department 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> | Proposed change is needed to clarify the compliance sequence in the compliance section introduction. |
| 220-660-480 | This section does not apply to a project, or to that portion of a project, that has received a forest practices HPA <u>hydraulic project (FHP) permit</u> from the department of natural resources under chapter <u>76.09</u> RCW. | A change is needed to avoid confusion because the Department of Natural Resources calls their permit a Forest Practices Hydraulic Project (FHP). |
| 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.</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</u> | A change is needed to clarify how a penalty amount could be divided among multiple violators. |

| | | | |
|-------------------|---|--|--|
| | <p><u>each person having committed or contributed to the violation.</u></p> <p><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></p> | | |
| 220-660-480(8)(c) | <p>The department amended the penalty schedule to include a base penalty and numeric penalty values for the considerations listed in RCW 77.55.440(6); previous violation history, severity and reparability of the impacts, intent, and cooperation. The sum of the base civil penalty and penalty amount calculated for the considerations will determine the total civil penalty amount not to exceed \$10,000 for each violation. Please refer to the proposed rule language.</p> | <p>A change is needed to provide more transparency and clarity about how a manager will calculate the total penalty amount for each violation.</p> | |

Reasons supporting proposal: The regulated community wants more certainty in how authorized WDFW staff 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 specific to the incident and site stated in the civil penalty statute, RCW 77.55.440. The department is filing a supplemental CR-102 with the Office of the Code Reviser and will reopen the period for the public to comment on the proposed change. This will delay the adoption of the proposed rules originally scheduled for February 21, 2020. We anticipate the second public hearing will occur at the April 10 – 11, 2020, commission meeting, and staff would request adoption of the proposed rules, including those described in WDFW’s supplemental CR-102, during the April 24, 2020, commission conference call.

Statutory authority for adoption: RCWs 77.04.012, 77.12.047, and 77.55.021; 2SHB 1579 (Laws of 2019, chapter 290 PV).

Statute being implemented: Chapter 77.55 RCW Construction projects in state waters; RCW 77.55.400 (Determination as to whether construction is a hydraulic project - Preapplication determination - Review and comment period - Written determination); RCW 77.55.410 (Violation of chapter); RCW 77.55.420 (Stop work order - Notice - Appeal); RCW 77.55.430 (Notice to comply - Notice - Appeal); RCW 77.55.440 (Penalties - Notice - Appeal - Authority of attorney general to recover penalty - Penalty schedule); RCW 77.55.450 (Administrative inspection warrant); RCW 77.55.460 (Disapproval of an application - Notice - Review); RCW 77.55.470 (Remedies under chapter not exclusive).

Is rule necessary because of a:

Federal Law? Yes No

Federal Court Decision? Yes No

State Court Decision? Yes No

If yes, CITATION:

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters: None at this time.

Name of proponent: (person or organization) Washington Department of Fish and Wildlife, Habitat Program, Protection Division Private
 Public
 Governmental

Name of agency personnel responsible for:

| | Name | Office Location | Phone |
|-----------------|------------------|--|----------------|
| Drafting: | Randi Thurston | 1111 Washington St. SE Olympia, WA 98501 | (360) 902-2602 |
| Implementation: | Randi Thurston | 1111 Washington St. SE Olympia, WA 98501 | (360) 902-2602 |
| Enforcement: | Chief Steve Bear | 1111 Washington St. SE Olympia, WA 98501 | (360) 902-2373 |

Is a school district fiscal impact statement required under RCW 28A.305.135? Yes No
 If yes, insert statement here:

The public may obtain a copy of the school district fiscal impact statement by contacting:
 Name:
 Address:
 Phone:
 Fax:
 TTY:
 Email:
 Other:

Is a cost-benefit analysis required under RCW 34.05.328?

Yes: A preliminary cost-benefit analysis may be obtained by contacting:
 Name: Randi Thurston
 Address: P.O. Box 43200 Olympia, WA 98504-3200
 Phone: (360) 902-2602
 Fax: (360) 902-2946
 TTY: (360) 902-2207
 Email: HPARules@dfw.wa.gov
 Other: Web site: <https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking>

No: Please explain:

Regulatory Fairness Act Cost Considerations for a Small Business Economic Impact Statement:

This rule proposal, or portions of the proposal, **may be exempt** from requirements of the Regulatory Fairness Act (see chapter 19.85 RCW). Please check the box for any applicable exemption(s):

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.061 because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Please cite the specific federal statute or regulation this rule is being adopted to conform or comply with, and describe the consequences to the state if the rule is not adopted.

Citation and description:

This rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by RCW 34.05.313 before filing the notice of this proposed rule.

This rule proposal, or portions of the proposal, is exempt under the provisions of RCW 15.65.570(2) because it was adopted by a referendum.

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.025(3). Check all that apply:

| | |
|--|---|
| <input checked="" type="checkbox"/> RCW 34.05.310 (4)(b) (Internal government operations) | <input checked="" type="checkbox"/> RCW 34.05.310 (4)(e) (Dictated by statute) |
| <input type="checkbox"/> RCW 34.05.310 (4)(c) (Incorporation by reference) | <input type="checkbox"/> RCW 34.05.310 (4)(f) (Set or adjust fees) |
| <input checked="" type="checkbox"/> RCW 34.05.310 (4)(d) (Correct or clarify language) | <input type="checkbox"/> RCW 34.05.310 (4)(g) (i) Relating to agency hearings; or (ii) process requirements for applying to an agency for a license or permit) |

This rule proposal, or portions of the proposal, is exempt under RCW _____.

Explanation of exemptions, if necessary: Please see discussion under section 1 of the Small Business Economic Impact Statement included below.

COMPLETE THIS SECTION ONLY IF NO EXEMPTION APPLIES

If the proposed rule is **not exempt**, does it impose more-than-minor costs (as defined by RCW 19.85.020(2)) on businesses?

- No Briefly summarize the agency’s analysis showing how costs were calculated. See below
- Yes Calculations show the rule proposal likely imposes more-than-minor cost to businesses, and a small business economic impact statement is required. Insert statement here:

Small Business Economic Impact Statement

1: Describe rule and compliance requirements

1.1: Background

Background on topic of this rule making activity is provided in Section 2 of *Regulatory Analyses for Incorporating Elements of 2SHB 1579 into HPA rules*. A timeline and actions initiating rule making are provided in subsection 2.3 of this document. Those sections provide detail about the history of and need for the proposal. Section 5 of this document discusses how the proposed rule meets the general goals and specific objectives of the statutes. The *Regulatory Analyses for Incorporating Elements of 2SHB 1579 into HPA rules* document is available at <https://wdfw.wa.gov/licensing/hpa/rulemaking/>.

1.2: Compliance requirements of the proposed rule

Most of these rules do not create additional compliance requirements (Table 2). Three proposals, the “civil penalty amount,” “civil penalty schedule,” and “benchmark” rules can impose additional costs on small businesses. The department has determined that the proposed rule requiring “a report to demonstrate the least impacting technically feasible alternative bank protection design is proposed” will not impose additional costs on small businesses because this proposed change **affects** single-family saltwater shoreline property owners only.

Table 2 Rule groups and their status relative to APA and RFA analysis

| Rule Group | Content | WAC | APA Citation (RCW) | RFA citation (RCW) |
|---------------------------|---|---|--|---|
| “Provisions of 2SHB 1579” | New tools and requirements copied nearly verbatim from statute into rule. | 220-660-050 220-660-370 (except subsection 5) 220-660-460, 470, 480 [except subsections 480(5), 480(7), 480(8)] | 34.05.310(c) Rules adopting or incorporating by reference without material change ... Washington state statutes | 19.85.025(3) rule described in RCW 34.05.310(4) |
| “Signature authority” | Specifies which department staff have authority to issue which compliance tools | 220-660-480(5) 220-660-480(7) | 34.05.310(4)(b) Rules relating only to internal governmental operations that are not subject to violation by a nongovernment party | 19.85.025(3) rule described in RCW 34.05.310(4); 19.85.025(4) Does not affect small businesses |
| “Civil penalty amount” | Specifies the department may levy civil penalties of up to \$10,000 for every violation | 220-660-480(7) | Analysis required | |
| “Civil penalty schedule” | Schedule for determining civil penalties, | 220-660-480(8) | Analysis required | |

| | | | |
|-------------|--|-------------------|---|
| | developed by the department | | |
| “Benchmark” | Requires benchmarks to be shown in the plans submitted as part of a complete application | 220-660-370(5) | Analysis required |
| “Report” | Least impacting feasible alternative analysis report | 220-660-370(3)(d) | Analysis required for APA because the proposed change affects single-family residences and properties. No analysis is required for the RFA because the change does not affect businesses. |

2: Small Business Economic Impact Analysis – Civil Penalty Amount and Civil Penalty Schedule

2.1: Costs associated with compliance

The department presumes that a person who seeks to or does undertake a hydraulic project will comply with the laws and regulations set forth in Chapter 77.55 RCW and Chapter 220-660 WAC. Thus, the department has determined that its proposed rules in WAC 220-660-480 do not pose costs upon businesses that comply with these laws and regulations. The department does not have enough data to calculate costs to businesses for noncompliance with Chapter 77.55 RCW, Chapter 220-660 WAC and the provisions of the HPA, nor to calculate any disproportionate impacts that noncompliance may have on small businesses. To the extent the department’s proposed rules in WAC 220-660-480 impose more than minor costs to businesses that do not comply with Chapter 77.55 RCW, Chapter 220-660 WAC and the provisions of an HPA, the department will mitigate costs to small businesses where doing so is legal and feasible pursuant to RCW 19.85.030, which includes using non-monetary civil enforcement tools made available under Laws of 2019, chapter 290.

2.2: Steps to reduce costs to individuals and small businesses

When costs to comply exceed the minor cost threshold and costs are disproportionate for small businesses, RCW 19.85.030 compels the agency to reduce costs imposed by the rule on small businesses where it is legal and feasible to do so. The agency must consider, without limitation, each of the methods listed on Table 3.

Table 3: Methods of reducing costs to businesses for noncompliance

| Sub-section | Method | WDFW response |
|-------------|--|---|
| a) | Reducing, modifying, or eliminating substantive regulatory requirements | The substantive civil compliance and enforcement requirements are specified in the statute. |
| b) | Simplifying, reducing, or eliminating recordkeeping and reporting requirements | Recordkeeping and recording requirements set forth in the proposed rules are the minimum necessary to ensure compliance with the permit conditions. |
| c) | Reducing the frequency of inspections | Follow-up compliance inspections are limited to those required to confirm that a noncompliant condition has been corrected. |
| d) | Delaying compliance timetables | The department must provide a reasonable time to achieve compliance. A violator can request an extension of a deadline for achieving compliance. |
| e) | Reducing or modifying fine schedules for noncompliance; or | The civil penalty schedule reflects factors statutorily required to be considered. |

| | | |
|----|---|--|
| f) | Any other mitigation techniques, including those suggested by small businesses or small business advocates. | The department supports providing an opportunity for voluntary compliance prior to imposing any monetary civil penalty. This was suggested by a business advocate and is required under 2 SHB 1579, as enacted. Small businesses or business advocates have suggested eliminating the Notice of Civil Penalty, but the statute requires the department to do rulemaking to adopt a civil penalty schedule. Thus, it does not have authority to eliminate the Notice of Civil Penalty as suggested. |
|----|---|--|

2.3 Additional steps the department has taken or will take to lessen impacts

Additional steps the department has taken or will take to reduce costs to businesses for noncompliance

1. Access to technical assistance

The department provides technical assistance to ensure that permitting requirements are understood by proponents of hydraulic projects when we advise and consult on permits, conduct inspections, perform on-site technical visits, and provide regulatory guidance materials. The department also has a technical assistance webpage. A person may request additional technical assistance from the department any time during their project.

2. Opportunity for voluntary compliance

Most people the department works with are not experts in environmental permitting. The department acknowledges that it has a responsibility to help the regulated community understand how to comply with the Hydraulic Code Statute and Rule requirements. When violations or potential violations are observed in the field, the department will issue a Correction Request that describes the measures the project proponent may take to voluntarily address them. The department will use a range of increasingly strict enforcement tools, which could ultimately include monetary civil penalties, but typically only when voluntary compliance cannot be achieved with or without the department’s assistance. The department will provide an opportunity to correct and compensate for damage that results from a violation before issuing a Notice of Civil Penalty.

3. Waiver for first-time paperwork violations

Under RCW 34.05.110, a small business may be eligible for a waiver of first-time paperwork violations. The small business is given an opportunity to correct the violation(s). This applies to Administrative Orders, Notices and Civil Penalties. First time paperwork violations are defined in proposed WAC 220-660-480(12).

4. Staff training

The department’s administrative (civil) enforcement actions must be based in fact and law, well-documented, appropriate to the violation, and issued professionally and fairly. Staff authorized to conduct inspections will receive specialized training to ensure they are professional, knowledgeable, and capable of carrying out their duties.

5. Policy and guidelines

The department will develop implementation guidelines for the civil enforcement program. The guidelines will provide direction to staff on how to appropriately respond to incidents of non-compliance.

3: Small Business Economic Impact Analysis – Benchmarks

3.1: Costs associated with compliance

Applicants might need technical assistance to establish project benchmarks. The department can aid applicants by directing them to technical businesses that can establish the benchmarks and by providing guidance and training for how applicants and contractors can establish adequate benchmarks. As time allows, the department biologists can also offer technical assistance by establishing the benchmarks at no cost to the applicant. When benchmark measurements are needed, they are frequently done by civil engineers, civil engineer technicians,

surveyors, or surveyor technicians. The person establishing the benchmarks will need a tape measure and a compass.

3.2: Identify businesses - minor cost threshold

WDFW analyzed HPA permits issued in 2018 to determine businesses who received an HPA for saltwater bank protection construction, maintenance, or replacement. Fourteen percent (13 HPAs) of the permittees for marine bank protection projects could be identified as businesses. Seventy-two percent (67 HPA) of permittees were individuals or landowners, and fourteen percent (13 HPAs) were governmental entities or nonprofit businesses.

WDFW does not require applicants to identify the person or business that will construct their project. Businesses applying for HPAs to construct projects for landowners can identify as such on the HPA application, and this is how we identified businesses for this analysis. WDFW acknowledges that the rules for bank protection in saltwater areas apply to anyone (or any business) applying for this type of HPA, so the business types identified here are not exclusive.

Once businesses were identified, we used the Washington Department of Revenue Business Lookup tool² to obtain their industry code. When no industry code could be found, we identified the applicant as an individual.

Table 4 provides information about the businesses we identified using this method. We are not able to determine whether businesses are small businesses using this method. This list is not exclusive - anyone who applies for an HPA for bank protection in saltwater areas is subject to the proposed rule. In subsequent analyses we identified additional businesses under the 237990 NAICS code (“Other heavy and civil engineering construction”) that might apply or construct marine bank protection projects.

Table 4 NAICS Codes for 2018 Marine Bank Protection Business Applicants

| Number of permits in 2018 | NAICS code | Industry description |
|---------------------------|------------|---|
| 1 | 236115 | New single-family housing construction |
| 0 | 237990 | Other heavy and civil engineering construction |
| 3 | 238140 | Masonry contractors |
| 2 | 238910 | Site preparation contractors |
| 3 | 238990 | All other specialty trade contractors |
| 3 | 531310 | Offices of real estate agents and brokers (& property managers) |
| 1 | 713930 | Marinas |

3.3: Minor cost threshold

Industry data for determining minor cost thresholds are provided on Table 5. We used a spreadsheet provided by the Washington State Auditor’s Office to determine these values³.

² Available at: https://secure.dor.wa.gov/gteunauth/_/#1

³ *Minor Cost Threshold Calculator July 2019.xlsx* provided through the Governor’s Office of Regulatory Innovation and Assistance at: https://www.oria.wa.gov/Portals/_oria/VersionedDocuments/RFA/Regulatory_Fairness_Act/Minor%20Cost%20Threshold%20Calculator%20July%202019.xlsx . ORIA RFA support website is: https://www.oria.wa.gov/site/alias_oria/934/Regulatory-Fairness-Act-Support.aspx .

Table 5 Washington businesses data for businesses identified under industry classification codes identified for analysis

| Industry 4-digit or 6-digit 2012 NAICS Code | Number of Establishments in WA. | TOTAL Annual Payroll in WA. | TOTAL Annual Revenue in WA. | AVG Annual Payroll in WA. | AVG Annual Revenue in WA. | 1% of Annual Payroll | <0.3% of annual revenue or income or \$100 |
|---|---------------------------------|-----------------------------|-----------------------------|---------------------------|---------------------------|----------------------|--|
| 236115 | 1,261 | \$186,272,000 | D | \$147,718 | D | \$1,477 | D |
| 237990 | 61 | \$174,198,000 | \$948,293,000 | \$2,855,705 | \$15,545,787 | \$28,557 | \$46,637 |
| 238140 | 293 | \$74,067,000 | \$215,274,000 | \$252,788 | \$734,724 | \$2,528 | \$2,204 |
| 238910 | 1,208 | \$490,492,000 | \$2,047,639,000 | \$406,036 | \$1,695,065 | \$4,060 | \$5,085 |
| 238990 | 547 | \$182,710,000 | \$573,308,000 | \$334,022 | \$1,048,095 | \$3,340 | \$3,144 |
| 5313 | 2,852 | \$705,915,000 | \$1,626,984,000 | \$247,516 | \$570,471 | \$2,475 | \$1,711 |
| 713930 | 102 | \$17,667,000 | \$79,013,000 | \$173,206 | \$774,637 | \$1,732 | \$2,324 |

Source: Washington State Auditor *Minor Cost Threshold Calculator July 2019.xlsx*, which uses data from the 2012 Economic Census of the United States.

Code "D" means the U.S. Census Bureau data are withheld to avoid disclosing data for individual companies.

3.4: Identify the minor cost thresholds for each industry

We chose the minimum of the two indicator figures from Table 5 as the minor cost thresholds for these industries (Table 6) and identified \$100 as the minor cost threshold for individuals/landowners and nonprofit businesses. Any costs imposed on a small business that are over these thresholds would be considered for this analysis to be more than minor and potentially disproportionate.

Table 6 Small Business Industry Classification and Minor Cost Thresholds

| NAICS code | Industry description | Minor Cost Threshold |
|------------|---|----------------------|
| 236115 | Residential building construction | \$1,477 |
| 237990 | Other heavy and civil engineering construction | \$28,557 |
| 238140 | Masonry contractors | \$2,204 |
| 238910 | Site preparation contractors | \$4,060 |
| 238990 | All other specialty trade contractors | \$3,144 |
| 531310 | Offices of real estate agents and brokers (& property managers) | \$1,711 |
| 713930 | Marinas | \$1,732 |
| n/a | Individuals/Landowners and nonprofit businesses | \$100 |

3.5: Costs of compliance

Both the department's biologists and a bulkhead business spokesperson indicated that establishing permanent benchmarks takes approximately 10 minutes once a person is on the project site^{4 5}. We assume for this analysis that it takes a person an hour to travel to/from the site. Our business contact suggested that they would hire a civil engineer or a surveyor to conduct the work if they did not already have staff on-board who could establish benchmarks. The benchmarks must be shown on the plans submitted as part of a complete application. We assume for this analysis that it takes a person 10 -15 minutes to include the benchmarks on the plans. We think that the smallest period of billable hours for a civil engineer or surveyor consultant would be one-half hour. Combined with travel, the total time billed would be 1.5 hours.

Next, we looked at U.S. Census data from Bureau of Labor Statistics to determine the average hourly wages for these occupations. We looked at wages for these occupations in the Professional, Scientific, and Technical Services industry groups in Washington. Wages range from \$32.20 per hour for a civil engineering technician to \$46.47 for a civil engineer⁶. We chose the civil engineer wages as providing a worst-case view for this analysis. We also analyzed the \$100.00 billable hourly amount suggested by a civil engineer who commented on the proposed rules.

We anticipate the cost of equipment and supplies to be minimal. Table 7 shows the costs to comply with this proposal.

Table 7 Costs to comply with the benchmark requirement

| Who performs work | Time spent | Cost per hour | Total Cost to Comply per project |
|--|------------|---------------------|----------------------------------|
| Civil engineer in the Professional, Scientific, or Technical Consulting Services business industry group | 1.5 hours | \$46.47 to \$100.00 | \$69.71 to \$150.00 |

3.6: Lost sales or revenues

Income or revenue for each HPA proponent is reduced by between \$69.71 and \$150.00 to comply with this new requirement. If the department can provide technical assistance to the applicant, then there is no loss in revenue.

3.7: Summary of costs to comply

Based on the methods used to estimate costs to comply with the rule proposals, the total cost for each project is estimated at between \$69.71 and \$150.00, as shown on Table 7.

3.8: More than minor costs

Based on the costs of compliance estimated in Table 7, the estimated costs for an individual or a nonprofit business to comply with the proposal are more than the minor cost thresholds shown on Table 6.

3.9: Disproportionate impact on small businesses

The department used employment data from Bureau of Labor Statistics⁷ to analyze employment by size of company. We used the industry codes identified on Table 8, except that data for the 6-digit code 236115 are not available so we used the 4-digit code 2361 instead. We compared the cost-to-comply (\$69.71 - \$150.00) to the numbers of employees in three different groups of establishments: businesses having 1-49 employees (“small businesses”), businesses having 50 or more employees (“large businesses”), and the best available estimate of the number of employees in the 10% largest businesses.

⁴ A. Cook. Pers. Comm. July 29, 2019

⁵ J. Rotsten, Sea Level Bulkhead Builders. Pers. Comm. October 9, 2019.

⁶ May 2018 OES Research Estimates, Occupational Employment Statistics (OES) Survey, Bureau of Labor Statistics, Department of Labor, website: <https://www.bls.gov/oes>. Table of OES estimates for the State of Washington downloaded from https://www.bls.gov/oes/2018/may/oes_research_estimates.htm on 10/9/2019.

⁷ We downloaded data for Washington State for each of the identified industries at U.S. Census Bureau “American FactFinder” available at: <https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t>

Table 8 Compare cost/employee for small businesses versus larger businesses

| NAICS | Industry | Compliance-cost per Employee | | | Amount higher costs for Small v. Largest 10% |
|--------|--|------------------------------|------------------|---------------------------|--|
| | | Small Businesses | Large Businesses | Largest 10% of businesses | |
| 2361 | Residential building construction | \$0.003 - \$0.006 | \$0.02 - \$0.04 | \$0.01 - \$0.02 | -\$0.01 - \$0.02 |
| 237990 | Other heavy and civil engineering construction | \$0.10 - \$0.20 | \$0.05 - \$0.11 | \$0.05 - \$0.11 | \$0.05 - \$0.09 |
| 238140 | Masonry contractors | \$0.04 - \$0.09 | \$0.08 - \$0.17 | \$0.03 - \$0.06 | -\$0.01 - \$0.03 |
| 238910 | Site preparation contractors | \$0.01 - \$0.02 | \$0.02 - \$0.04 | \$0.01 - \$0.02 | -\$0.00 - \$0.00 |
| 238990 | All other specialty trade contractors | \$0.02 - \$0.04 | \$0.07 - \$0.15 | \$0.01 - \$0.02 | -\$0.01 - \$0.02 |
| 53131 | Real estate property managers | \$0.01 - \$0.02 | \$0.02 - \$0.04 | \$0.01 - \$0.02 | -\$0.00 - \$0.00 |
| 713930 | Marinas | \$0.18- \$0.39 | n/a | \$0.70 - \$1.51 | -\$0.52 - \$1.12* |

Of these computations, the cost per employee for the largest 10% of businesses is the least straightforward because, in most cases for these industries, the largest 10% of businesses in an industry included businesses with fewer than 50 employees. We did not use this datum except for the Marinas industry* where data for “Large Businesses” are withheld to avoid disclosing data for individual companies.

The smallest cost/employee is three-tenths to sixth-tenths of a cent, and the largest is 18 to 39 cents (70 cents to one dollar and fifty-one cents using the “largest 10%” figure for the Marinas industry). Costs per employee are smaller for small businesses than for large businesses (or for the largest 10% of businesses for Marinas) except for “Other heavy and civil engineering construction” businesses, for which the cost is five to nine cents higher per employee for small businesses. We conclude there is not a disproportionate impact for small businesses in most cases. In the case where small businesses pay more per employee, that difference represents ten to twenty cents per employee for small businesses versus five to eleven cents per employee for large businesses.

3.10. Methods to reduce costs

When costs to comply exceed the minor cost threshold and costs are disproportionate for small businesses, RCW 19.85.030 compels the agency to reduce costs imposed by the rule on small businesses where it is legal and feasible to do so. The agency must consider, without limitation, each of the methods listed on Table 9.

3.11 Required methods to reduce costs

Table 9 RCW 19.85.030 (2) required methods of reducing costs imposed by the rule on small businesses

| RCW 19.85.030 (2) Requirements | | WDFW response |
|--------------------------------|---|--|
| Sub-section | Method | |
| a) | Reducing, modifying, or eliminating substantive regulatory requirements | Eliminating the requirement for adequate benchmarks makes it impossible for the department to determine whether a project is compliant with provisions of the HPA. This does not meet the objectives of the statute. |
| b) | Simplifying, reducing, or eliminating recordkeeping and reporting requirements | Once benchmarks are established and recorded on the plans, there are no additional recordkeeping or reporting costs. |
| c) | Reducing the frequency of inspections | Not applicable to this proposal. The requirement must be met prior to an HPA being issued. |
| d) | Delaying compliance timetables | This provision is being required currently in most saltwater bank protection project HPAs. Delaying the compliance timetable would not have an effect on businesses. |
| e) | Reducing or modifying fine schedules for noncompliance; or | Not applicable to this proposal. |
| f) | Any other mitigation techniques, including those suggested by small businesses or small business advocates. | No other mitigation techniques have been suggested by small businesses or business advocates. |

3.12: Additional steps the department has taken to lessen impacts

Additional steps the department plans to take to minimize costs to those who must comply with the new rules:

1. The department will provide training to saltwater bank protection permitting biologists on how to establish adequate benchmarks and how to help the applicant record the benchmarks in their application materials.
2. The HPA Technical Assistance webpage has example engineering drawings that show how to establish and document benchmarks on the plans.
3. The department will provide outreach and guidance materials to individuals and businesses for how to establish adequate project benchmarks.

3.13: Involving stakeholders in rule development

Stakeholder outreach is described in Section 6 of the *Regulatory Analyses for HPA Rule Making implementing 2SHB 1579*, and events are summarized on Table 3. One small saltwater bank protection construction business was consulted about this requirement. That business indicated benchmarks are established while they are on-site to take measurements for the structure plans. No additional trips or costs are needed to comply with the new requirement because establishing benchmarks has been a standard practice (the department has been requiring them consistently in HPAs) for the past three-or-more years.

3.14: Number of jobs created or lost

There will likely be no jobs created or lost as a result of this proposal. The time involved to establish benchmarks is small relative to the time required to prepare application materials and structure/site plans. The expertise to establish benchmarks is common to most saltwater bank protection construction businesses.

3.15: Summarize results of small business analysis

Costs to comply are less than the minor cost thresholds for businesses required to comply. Small businesses generally pay less per employee to comply than large businesses, with one exception. For that exception, the cost is five cents more per employee.

The public may obtain a copy of the small business economic impact statement or the detailed cost calculations by contacting:

Name: Randi Thurston

Address: P.O. Box 43200 Olympia, WA 98504-3200

Phone: (360) 902-2602

Fax: (360) 902-2946

TTY: (360) 902-2207

Email: HPARules@dfw.wa.gov

Other: Web site: <https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking>

Current rule making web site: <https://wdfw.wa.gov/about/regulations/development>

Date: March 2, 2020

Name: Michele K Culver

Title: Agency Rules Coordinator

Signature:



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

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 their 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 multiagency 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 ~~((permit))~~ HPA is in effect. The department may also require a person

to provide periodic written reports to assess (~~permit~~) 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 notice 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).

[Statutory Authority: RCW 77.04.012, 77.04.020, 77.12.047, 77.55.021, 77.55.091, 77.55.051, 77.55.081, 34.05.328, and 34.05.350. WSR 18-10-054, § 220-660-050, filed 4/27/18, effective 6/1/18. Statutory Authority: RCW 77.04.012, 77.04.020, and 77.12.047. WSR 15-02-029 (Order 14-353), § 220-660-050, filed 12/30/14, effective 7/1/15.]

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 assess the need for marine bank protection and, if needed, 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 migration 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 construction 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 for the proposed method prepared by a qualified professional ((~~such as a coastal geologist, geomorphologist, etc.~~) for the proposed project and selected technique)). 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 the qualified professional's report to the department as part of a complete application for an HPA that includes:

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

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

(iii) Alternatives considered and the technical rationale specific to the ((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 ~~((bulkhead))~~ 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 local 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.

[Statutory Authority: RCW 77.04.012, 77.04.020, and 77.12.047. WSR 15-02-029 (Order 14-353), § 220-660-370, filed 12/30/14, effective 7/1/15.]

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.

[Statutory Authority: RCW 77.04.012, 77.04.020, 77.12.047, 77.55.021, 77.55.091, 77.55.051, 77.55.081, 34.05.328, and 34.05.350. WSR 18-10-054, § 220-660-460, filed 4/27/18, effective 6/1/18. Statutory Authority: RCW 77.04.012, 77.04.020, and 77.12.047. WSR 15-02-029 (Order 14-353), § 220-660-460, filed 12/30/14, effective 7/1/15.]

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 (~~(pursuant 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 aggrieved by a department HPA decision to take advantage of the informal appeal process under WAC 220-660-460 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 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.

[Statutory Authority: RCW 77.04.012, 77.04.020, 77.12.047, 77.55.021, 77.55.091, 77.55.051, 77.55.081, 34.05.328, and 34.05.350. WSR 18-10-054, § 220-660-470, filed 4/27/18, effective 6/1/18. Statutory Authority: RCW 77.04.012, 77.04.020, and 77.12.047. WSR 15-02-029 (Order 14-353), § 220-660-470, filed 12/30/14, effective 7/1/15.]

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 hydraulic project (FPHP) permit from the department of natural resources under chapter 76.09 RCW.

The department is responsible to help the regulated community understand how to comply. The department achieves voluntary compliance through education and technical assistance when the department advises and consults on permits, conducts compliance checks, performs on-site technical visits, or provides guidance materials written in easily understood language.

When the department cannot get voluntary compliance by issuing a correction request, the department 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.

(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.~~

~~(e))~~ 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 violation, 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) 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.

(f) 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.

(g) 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.

(h) 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 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.

(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 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 a penalty is assessed it will be calculated by the department using the following process:

(i) Determine the base civil penalty:

(A) The following violations have a base civil penalty amount of two thousand dollars: Conducting a hydraulic project without a valid HPA; willful misrepresentation of information on the HPA application; or a significant, in the opinion of the department, deviation from the valid HPA that adversely impacts fish life.

(B) All other violations not specifically mentioned have a base penalty of five hundred dollars.

(ii) Calculate the civil penalty amount from the considerations specific to the incident and the site. The following considerations will be independently evaluated for each violation and added to the

base civil penalty to calculate the total civil penalty for each violation:

(A) 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. Points are assessed to determine the penalty amount imposed under (d) of this subsection according to the following criteria:

0 points = The violator has no documented violations within five years preceding the violation leading to the issuance of the penalty.

2 points = The violator has one documented violation within five years preceding the violation leading to the issuance of the penalty.

4 points = The violator has more than one documented violation within five years preceding the violation leading to the issuance of the penalty.

(B) 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. Points are assessed to determine the penalty amount imposed under (d) of this subsection according to the following criteria:

0 points = There is no adverse impact to fish life.

2 points = There is adverse impact to fish life, but it is minor, and no impacts will last beyond the duration of the construction activity.

4 points = There is extensive and/or significant adverse impact to fish life and impacts will last beyond the duration of the construction activity.

(C) 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. Points are assessed to determine the penalty amount imposed under (d) of this subsection according to the following criteria:

0 points = The violation was not foreseeable.

1 point = The violation was foreseeable, and no precaution was taken to avoid it.

3 points = The violation occurred after consultation, a technical or compliance site visit, or an enforcement action; or there was a clear economic incentive.

(D) 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. Points are assessed to determine the penalty amount imposed under (d) of this subsection according to the following criteria:

0 points = The violator reported the violation in a timely manner and cooperated with department staff to correct the violation.

1 point = The violator did not report the violation in a timely manner, or they did not cooperate with department staff to correct the violation.

3 points = The violator ignored or evaded department contacts or refused to allow department staff to enter the job site where the violation occurred.

(d) The department will calculate a penalty for each violation by adding the points assessed under (c)(ii) of this subsection and applying those corresponding amounts listed in the table below to the base penalty assessed under (c)(i) of this subsection. The base penalty plus the additional amount assessed using the department's point system will determine the total penalty for each violation not to exceed \$10,000.

| | | | | | |
|----------------|----------------|----------------|----------------|----------------|----------------------|
| <u>Points</u> | <u>1</u> | <u>2</u> | <u>3</u> | <u>4</u> | <u>5</u> |
| <u>Penalty</u> | <u>\$1,000</u> | <u>\$2,000</u> | <u>\$3,000</u> | <u>\$4,000</u> | <u>\$5,000</u> |
| <u>Points</u> | <u>6</u> | <u>7</u> | <u>8</u> | <u>9</u> | <u>10 or greater</u> |
| <u>Penalty</u> | <u>\$6,000</u> | <u>\$7,000</u> | <u>\$8,000</u> | <u>\$9,000</u> | <u>\$10,000</u> |

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) 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.

(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.

[Statutory Authority: RCW 77.04.012, 77.04.020, and 77.12.047. WSR 15-02-029 (Order 14-353), § 220-660-480, filed 12/30/14, effective 7/1/15.]



Washington
Department of
**FISH and
WILDLIFE**

Hydraulic Code Rules Chapter 220-660 WAC

Incorporating elements of 2SHB 1579 into HPA rules

WAC 220-660-050 - Procedures - Hydraulic Project Approvals

WAC 220-660-370 - Bank Protection in saltwater areas

WAC 220-660-460 - Informal appeal of administrative actions

WAC 220-660-470 - Formal appeal of administrative actions

WAC 220-660-480 - Compliance with HPA Provisions

Regulatory Analysis

Incorporating:

Small Business Economic Impact Statement

Cost-Benefit Analysis

Least Burdensome Alternatives Analysis

Administrative Procedure Act Determinations

Sources of Information Used

Washington Department of Fish and Wildlife

Habitat Program

Protection Division

Olympia, Washington

Draft February 27, 2020

DRAFT

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.*

DRAFT

Persons with disabilities who need to receive this information in an alternative format or who need reasonable accommodations to participate in WDFW-sponsored public meetings or other activities may contact Dolores Noyes by phone (360-902-2349), TDD (360-902-2207), or by email at dolores.noyes@dfw.wa.gov . For more information, see http://wdfw.wa.gov/accessibility/reasonable_request.html.

DRAFT

SECTION 1: Introduction

The state Legislature gave the Washington Department of Fish and Wildlife (department) the responsibility to preserve, protect, and perpetuate all fish and shellfish resources of the state. To help achieve this mandate, the Legislature passed a state law in 1943 called “Protection of Fish Life.” Now titled “Construction Projects in State Waters” and codified as Chapter 77.55 Revised Code of Washington (RCW), the entire text of the statute can be found at:

<http://app.leg.wa.gov/RCW/default.aspx?cite=77.55> .

Under the authority of Chapter 77.55 RCW, the department issues a construction permit called a Hydraulic Project Approval (HPA). The sole purpose of the HPA is to protect fish life from construction and other work that uses, diverts, obstructs, or changes the natural flow or bed of state waters. HPAs are site-specific, meaning that provisions are tailored to the site conditions and fish species that might be affected by each project. The HPA contains provisions that a permittee must follow in order to mitigate¹ impacts to fish life caused by the project.

The department adopts rules to implement Chapter 77.55 RCW under Chapter 220-660 Washington Administrative Code (WAC) - *Hydraulic Code Rules*. This WAC Chapter establishes regulations for administration of the HPA program. The Hydraulic Code Rules set forth definitions, administrative procedures for obtaining an HPA, steps for HPA appeals and civil compliance, and criteria generally used by the department to review and condition hydraulic projects to protect fish life.

This report presents Washington Department of Fish and Wildlife (department) analyses and determinations pursuant to Chapter 34.05 RCW - Administrative Procedure Act (APA), and Chapter 19.85 RCW - Regulatory Fairness Act (RFA), for proposed amendments to Hydraulic Code Rules in Chapter 220-660 WAC. This document is organized as follows:

SECTION 1: Introduction

SECTION 2: Describe the proposed rule and its history

SECTION 3: Significant Legislative Rule Analysis Required

SECTION 4: Goals and Objectives of the Statute that the Rule Implements

SECTION 5: How the Rule Meets the Objectives of the Statute

SECTION 6: Involving stakeholders in rule development

SECTION 7: Cost-Benefit Analysis

SECTION 8: Small Business Economic Impact Statement

¹ “Mitigation” is defined in WAC 220-660-030(100) to mean sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts to fish life or habitat that supports fish life.

SECTION 9: Least Burdensome Alternative

SECTION 10: Remaining APA Determinations

SECTION 11: Sources of Information Used

Documents relating to this rule making activity are available on the department's HPA rule making web page at <https://wdfw.wa.gov/licenses/environmental/hpa/rulemaking>.

SECTION 2: Describe the proposed rule and its history

Rule amendments are proposed as necessary to implement elements of Second Substitute House Bill 1579 (2SHB 1579)² - 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 about whether a project proposed landward of the ordinary high water line (OHWL) requires an 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.

2.1: Specific Objectives for this Rule Making

In order to implement 2SHB 1579, the department's objectives in this rule making include the following:

- Add a procedure for prospective applicants to request and receive a determination of whether a project proposed landward of the OHWL requires an HPA;
- Add language clarifying that the department can disapprove a new application if the applicant has failed to pay a civil penalty, respond to a stop-work order, or respond to a Notice to Comply;
- Strike language from rule that references the repealed marine beach front protective bulkheads or rockwalls statute (RCW 77.55.141);
- Require saltwater bank protection location benchmarks to be recorded on plans as part of a complete HPA application;
- Clarify the compliance sequence, which ranges from seeking voluntary compliance through technical assistance and correction requests to the use of increasingly stronger civil enforcement tools and add the new compliance tools to the rules:
 - Stop Work Orders;
 - Notice to Comply;

² Laws of 2019, Chapter 290; Codified as RCWs 77.55.400 through 77.55.470.

- Notice of Civil Penalty;
- Specify a maximum civil penalty amount; and
- Provide a civil penalty schedule and specify signature authority for certain compliance tools, as directed by 2SHB 1579.

2.2: Describe the proposed rule

Table 1 presents the proposed rule amendments incorporating elements of 2SHB 1579 (Proposals). The table presents changes listed in sequential order by WAC section and subsection.

Table 1: WDFW 2019 2SHB 1579 Rule Change Proposals presented by section and subsection number

| (WAC Subsection) and Change | Description |
|---|--|
| WAC 220-660-050 - Procedures | |
| 220-660-050(13)(b) | Strikes reference to repealed statute pursuant to 2SHB 1579 section 14. |
| 220-660-050 (18) | Adds the process prescribed in 2SHB 1579 for preapplication determination regarding whether proposed work requires an HPA. |
| 220-660-050 (19) | Adds 2SHB 1579 provisions for disapproving an application submitted by a person who has failed to comply with a formal compliance order issued by the department. |
| WAC 220-660-370 Bank protection in saltwater areas | |
| 220-660-370 (introductory language) and (3), (4), (5) | Strikes language referencing RCW 77.55.141 regarding single-family-residence marine beach front protective bulkheads or rockwalls, which was repealed by 2SHB 1579, section 14. This has the effect of requiring the least impacting technically feasible alternative for every saltwater bank protection project. |
| 220-660-370 (6) | Adds a requirement that benchmarks be established and shown in the plans submitted as part of the HPA application. |
| WAC 220-660-460 - Informal appeal of administrative actions | |
| 220-660-460 | Incorporates statutory definition of “project proponent” set forth in 2SHB 1579. |
| 220-660-460 (2) | Adds clarification that the informal appeal process is not available for challenges to informal Correction Requests conveyed to a project proponent. |
| 220-660-460 (3) | Adds conditions under which an informal appeal is available for certain administrative actions. |
| 220-660-460 (4) | Clarifies the types of Department actions taken under Chapter 220-660 WAC that could be reviewed in an informal appeal. |
| 220-660-460 (6) | Specifies that a copy of the specific department administrative action potentially subject to an informal appeal must be submitted with a request for informal appeal. |
| WAC 220-660-470 - Formal appeal of administrative actions | |

| (WAC Subsection) and Change | Description |
|---|---|
| 220-660-470 | Incorporates statutory definition of “project proponent” set forth in 2SHB 1579. |
| 220-660-470 (2) | Adds clarification that the formal appeal process is not available for challenges to informal Correction Requests conveyed to a project proponent. |
| 220-660-470 (3) | Adds conditions under which a formal appeal is available for certain administrative actions. |
| 220-660-470 (6) | Clarifies the types of Department actions taken under Ch. 220-660 WAC that could be reviewed in a formal appeal. |
| WAC 220-660-480 - Compliance with HPA Provisions | |
| 220-660-480 (introduction) | Adds summary of project proponents’ obligations under Chapter 77.55 RCW and the types of actions the Department can take in response to violations of Chapter 77.55 RCW or Chapter 220-660 WAC. Incorporates statutory definition of “project proponent” set forth in 2SHB 1579. |
| 220-660-480 (1) | Minor language changes clarifying intent and adopting plain language without changing meaning. |
| 220-660-480 (2) | Renames the notice conveyed to project proponents under this section, deletes material that has been moved to another section, and adds language that clarifies conditions under which formal compliance actions, such as a Stop Work Order, Notice to Comply, or Notice of Civil Penalty, can be conveyed to a project proponent during a technical assistance visit. Language is gleaned from both 2SHB 1579 and Chapter 43.05 RCW. |
| 220-660-480 (3) | Renames the notice conveyed to project proponents under this section, deletes material that has been moved to other sections, and adds language that clarifies conditions under which formal compliance actions, such as a Stop Work Order, Notice to Comply, or Notice of Civil Penalty, can be conveyed to a project proponent during a compliance inspection. |
| 220-660-480 (4) | Subsection 4 is replaced with a subsection describing an informal Correction Request. |
| 220-660-480 (5) | Subsection 5 is replaced with a subsection describing details regarding the issuance and contents of a Stop Work Order. |
| 220-660-480 (6) | Subsection 6 is replaced with a subsection describing details regarding the issuance and contents of a Notice to Comply. |
| 220-660-480 (7) | Subsection 7 is replaced with a subsection describing details regarding the issuance and contents of a Notice of Civil Penalty. Includes details regarding how the civil penalty is paid and consequences for not paying. Also includes reference to waivers for first-time paperwork violations by a small business. Language is gleaned from 2SHB 1579 and RCW 34.05.110. |

| (WAC Subsection) and Change | Description |
|---|---|
| 220-660-480 (8) | Subsection 8 is replaced with a subsection containing considerations for setting the amount of a civil penalty for violations of Chapter 77.55 RCW and Chapter 220-660 WAC. The department amended 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 civil penalty and penalty amount calculated for the considerations will determine the total civil penalty amount not to exceed \$10,000 for each violation. |
| 220-660-480 (9) | Subsection 6 becomes subsection 9 - Criminal penalty - without language changes. |
| 220-660-480 (10) | New subsection pursuant to 2SHB 1579 section 11 (RCW 77.55.470) clarifying that remedies in this section are not exclusive. |
| 220-660-480 (11) | New subsection provides transparency regarding the department’s authority under 2SHB 1579 section 9 - RCW 77.55.450 – to apply for an administrative inspection warrant. |
| 220-660-480 (12) | New section incorporates transparency regarding first time paperwork violations by small businesses, per RCW 34.05.110. |
| 220-660-050 220-660-370 220-660-460 220-660-470 220-660-480 | Corrects typographical and grammatical errors and makes minor edits that do not change the effect of the rules. See Table 16 |

2.3: History of this Rule Making Action

| Date | Event |
|--------------------|---|
| July 28, 2019 | 2SHB 1579 became effective. |
| September 16, 2019 | WDFW commenced rule making by filing a CR-101. |
| October 16, 2016 | WDFW received a State Environmental Policy Act exemption for the rule making. |
| December 3, 2019 | WDFW filed CR-102 for rule making implementing 2SHB 1579. |
| December 3, 2019 | Public comment period begins. |
| January 17, 2020 | Public hearing. |

| Date | Event |
|-------------------|--|
| January 21, 2020 | Public comment period closes. |
| February 21, 2020 | Fish and Wildlife Commission briefing on proposed rules changes the revised rulemaking timeline. |
| March 2-4, 2020 | WDFW filed Supplemental CR-102 for proposed changes |
| March 5, 2020 | Public comment period begins. |
| April 10-11, 2020 | Public hearing (tentative) |
| April 10, 2020 | Public comment period closes (tentative) |
| April 24, 2020 | Request Rule adoption (tentative) |

Refer to Section 6 relating to stakeholder outreach, which provides a timeline of outreach milestones related to this rule making activity.

2.3.1: History of 2SHB 1579

Southern Resident Killer Whale Task Force.

In 2018, Governor Inslee issued Executive Order 18-02 which, among other things, created the Southern Resident Killer Whale Task Force (Task Force). Executive Order 18-02 directed the Task Force to identify, prioritize, and support the implementation of a plan to address three threats to southern resident orca whales as identified by the Executive Order: (1) prey availability; (2) contaminants; and (3) disturbance from vessel noise.

The Task Force issued its report and recommendations on November 16, 2018. In its report, the Task Force recommended increased application and enforcement of laws that protect salmon and forage fish habitat. This included the recommendation that the department, together with the Washington Departments of Natural Resources (DNR) and Ecology, strongly apply and enforce existing habitat protection and water quality regulations and provide the department, DNR, and Ecology with the capacity for implementation and enforcement of violations. The Task Force specifically recommended that the department be equipped with civil enforcement tools equivalent to those of local governments, Ecology, and DNR, to ensure compliance with Chapter 77.55 RCW and Chapter 220-660 WAC.

2019 legislative session

2SHB 1579 (Laws of 2019, c. 290) implements recommendations of the Task Force related to increasing chinook abundance.

The original bill was focused on implementing Task Force recommendations by providing tools to protect salmon habitat when development permits are issued along marine and freshwater shorelines. Strengthening the Hydraulic Code Statute helps ensure development projects that affect Chinook salmon and their habitats do no harm. The bill set a maximum civil penalty amount of \$10,000 per violation of Chapter 77.55 RCW or Chapter 220-660 WAC.

On April 10, 2019, the Senate amended the bill through a striker amendment, which added an entirely new section providing for the construction of three river management demonstration suction dredging projects “to test the effectiveness and costs of river management strategies and techniques.” (Section 13 of the bill). These demonstration projects were not among the Task Force’s November 16, 2018, recommendations. The striker amendment also made the maximum civil penalty amount for violations of the Hydraulic Code Statute contingent upon the passage of the newly added section. More specifically, the amended provided that if the new section passed, civil penalty amounts would be capped at \$10,000 per violation, but if it did not pass, civil penalty amounts would be capped at \$100 per violation of Chapter 77.55 RCW or Chapter 220-660 WAC.

The Governor vetoed the new section and contingency language, providing the following veto message:

I am vetoing Section 13, which would require certain state agencies and local governments to identify river management demonstration projects in Whatcom, Snohomish, and Grays Harbor counties, because it is not a recommendation of the task force. As such, it is outside of both the title and scope of the bill, in violation of Article 2, Sections 19 and 38 of our constitution. Section 13 is unrelated, unnecessary and an unfortunate addition to this important bill about salmon and orca habitat and recovery.

In addition, I am also vetoing Section 8(1)(a), which establishes maximum civil penalty amounts for violations of Chapter 77.55 RCW (Construction Projects in State Waters). Consistent with the task force's recommendations, the original bill established a maximum civil penalty of up to ten thousand dollars for each violation. When the Legislature amended the bill to add Section 13, it simultaneously amended Section 8 and tied the original civil penalty amount to passage of Section 13. It did so by reducing the maximum civil penalty to "up to one hundred dollars" if Section 13 is not enacted by June 30, 2019. By making the original civil penalty amount contingent on passage of an unconstitutional section of the bill, the Legislature further compounded the constitutional violation. In addition, by structuring the contingency language within a subsection of Section 8, the Legislature intentionally attempted to circumvent and impede my veto authority by entangling an unrelated and unconstitutional provision within a recommendation of the task force. In vetoing this subsection, I direct the department to continue to use its authority to secure the effect of the statute, to establish a maximum civil penalty not to exceed the civil penalty amount established in the original bill, and to use its rulemaking authority to support these efforts as needed.

Maximum civil penalties are thus proposed pursuant to the legislature’s original language for HB 1579. 2 SHB 1579 as enacted directs the department to adopt a civil penalty schedule in rule. The department determined that other statutory elements presented the bill as enacted should also be reflected in rule to reduce confusion and increase transparency for those affected by the changes.

2.3.2 Crosswalk 2SHB 1579 with statute and rule

The following information provides a crosswalk from the bill as enacted (Laws of 2019, c. 290) to statute to rule (Table 2).

Table 2: Crosswalk from 2SHB 1579 section to statute to proposed rule section and subsection

| Topic | 2SHB 1579 | Statute | Proposed Rule | Rule topic |
|---|---------------|------------------------|---|---|
| Preapplication Determination | Section 4 | RCW 77.55.400 | WAC 220-660-050(18) ³ | Procedures for HPAs |
| Violation of Chapter | Section 5 | RCW 77.55.410 | WAC 220-660-480(4) | Compliance with HPA Provisions - Correction request |
| Stop Work Order - Notice - Appeal | Section 6 | RCW 77.55.420 | WAC 220-660-480(5) ³ | Compliance with HPA Provisions - Stop Work Order |
| Notice to Comply - Notice - Appeal | Section 7 | RCW 77.55.430 | WAC 220-660-480(6) ³ | Compliance with HPA Provisions - Notice to comply |
| Civil penalties - Notice - Appeal - Authority of attorney general to recover civil penalty - Civil penalty schedule | Section 8 | RCW 77.55.440 | WAC 220-660-480(7) ³ and (8) | Compliance with HPA Provisions - (7) Civil penalties & (8) Civil penalty schedule |
| Administrative inspection warrant | Section 9 | RCW 77.55.450 | WAC 220-660-480(11) | Compliance with HPA Provisions - Permission to enter property denied |
| Disapproval of an application - Notice - Review | Section 10 | RCW 77.55.460 | WAC 220-660-050(19) ³ | Procedures for HPAs |
| Remedies under Chapter not exclusive | Section 11 | RCW 77.55.470 | WAC 220-660-480(10) | Compliance with HPA provisions - remedies not exclusive |
| Repeal single-family-residence marine | Section 14(1) | Repealed RCW 77.55.141 | Strike reference in WAC 220-660-050(13) | Procedures for HPAs |

³ Preapplication determinations, stop-work orders, Notices to comply, Notices of Civil Penalty, and Notices of Intent to Disapprove Applications are all added as elements subject to informal (WAC 220-660-460) and formal (WAC 220-660-470) appeal.

| Topic | 2SHB 1579 | Statute | Proposed Rule | Rule topic |
|--|---------------|------------------------|-------------------------------------|------------------------------------|
| beach front protective bulkheads or rockwalls provisions | | | Strike reference in WAC 220-660-370 | Bank Protection in saltwater areas |
| Repeal civil penalty statute | Section 14(2) | Repealed RCW 77.55.291 | n/a | n/a |

SECTION 3: Significant Legislative Rule Analysis Required

RCW 34.05.328(5)(a) “Except as provided in (b) of this subsection, this section applies to: (i) ... the legislative rules of the department of fish and wildlife implementing Chapter 77.55 RCW;...”

Hydraulic Code rules in Chapter 220-660 WAC are significant legislative rules as specified in RCW 34.05.328(5)(a)(i). Analyses pursuant to RCW 34.05.328 are provided for this rule proposal.

SECTION 4: Goals and Objectives of the Statute that the Rule Implements

RCW 34.05.328 (1)(a) “Clearly state in detail the general goals and specific objectives of the statute that the rule implements;”

4.1: Chapter 77.55 RCW - the Hydraulic Code Statute - Goals and Objectives

The state Legislature gave the department the responsibility to preserve, protect, and perpetuate all fish and shellfish resources of the state, and to

“...authorize the taking of wildlife, food fish, game fish, and shellfish only at times or places, or in manners or quantities, as in the judgment of the commission does not impair the supply of these resources.” RCW 77.04.012

The Legislature also granted the Commission very broad authority to adopt rules to protect fish life for a wide variety of activities in Washington waters:

The commission may adopt, amend, or repeal rules: specifying the times when the taking of wildlife, fish, or shellfish is lawful or unlawful; specifying the areas and waters in which the taking and possession of wildlife, fish, or shellfish is lawful or unlawful; specifying and defining the gear, appliances, or other equipment and methods that may be used to take wildlife, fish, or shellfish, and specifying the times, places, and manner in which the equipment may be used or possessed. RCW 77.12.047.

To help achieve the agency’s mandate, the Legislature passed a state law in 1943 called *Protection of Fish Life*, now recorded as [Chapter 77.55 RCW](#) - Construction projects in state waters. The entire text of the statute can be found at: <http://app.leg.wa.gov/RCW/default.aspx?cite=77.55> .

[RCW 77.55.011](#)(11) defines a “hydraulic project” as

“the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwater of the state.”

[RCW 77.55.021](#)(1) states

“...In the event that any person⁴ or government agency desires to undertake a hydraulic project, the person or government agency shall, before commencing work thereon, secure the approval from the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life.”

The department’s statutory authority under Chapter 77.55 RCW is not unlimited: the department can only deny or condition approval of permit applications as necessary to protect fish life; it cannot unreasonably withhold or unreasonably condition an HPA [[RCW 77.55.021](#)(7)(a)], nor can the department impose conditions that optimize fish life:

“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.” [RCW 77.55.231](#)(1)

The Hydraulic Code Statute is intended to ensure that hydraulic projects adequately protect fish life.

SECTION 5: How the Rule Meets the Objectives of the Statute

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;”

5.1: Why is the Proposed Rule Needed?

- 1. The proposed rule is needed to implement elements of 2SHB 1579, as enacted, into Chapter 220-660 WAC, which establishes and/or alters compliance and enforcement tools to help enable the department to ensure that hydraulic projects provide adequate protection of fish life.** The proposed rule clarifies how the department will provide preapplication determinations of whether an HPA is needed for specific projects and implements new civil enforcement authorities, such as Stop Work Orders, Notices to Comply and Notices of Civil Penalty. In addition, rules that implemented special permitting exceptions for single-family residence marine beach front protective bulkheads or rockwalls are removed because the

⁴ A “person” is defined in WAC 220-660-030(112) as meaning “an applicant, authorized agent, permittee, or contractor. The term person includes an individual, a public or private entity, or organization.” This term is used throughout this document to refer to individuals, organizations, and businesses.

enabling statute for such exemptions was repealed via 2SHB 1579.

2. **The proposed rule is needed to implement a civil penalty schedule and to specify signature authorities for certain compliance and enforcement tools, as required in 2SHB 1579.** A civil penalty schedule is provided so permittees can understand how civil penalties are assessed for certain violations of Chapter 77.55 RCW and Chapter 220-660 WAC. The legislature directed the department to specify what is meant by the “senior or executive department personnel” language stated in the statute, and the proposed rule is needed in order to comply with this legislative direction.
3. **The proposed rule is needed to change the provision benchmarks for saltwater bank protection projects from a discretionary HPA provision to a required element included on plans submitted as part of a complete HPA application.** Research has concluded that benchmarks are necessary in order to implement the other compliance elements of 2SHB 1579. In addition, requiring benchmarks on the plans will eliminate the need for a project proponent to conduct an additional site visit to establish the benchmarks after the HPA is issued but prior to construction of the proposed project subject to the HPA. If benchmarks are established by the project proponent during the design phase, this will eliminate the cost an additional site visit. It will also allow the biologist to confirm prior to issuing the HPA that the location of the bank protection complies with the regulations, thereby helping the permittee ensure compliance with Chapter 220-660 WAC.

5.2: Alternatives to rule making?

Following is a discussion of alternatives to rule making that we considered before filing a Preproposal Notice of Inquiry.

5.2.1: Alternative 1: No action - do not adopt the new statutes into rule

People wanting to know about the department’s responsibilities and authorities can find that information in statute². Under this alternative, a civil penalty schedule would not be adopted in rule, nor would signature authority to approve certain compliance tools be specified in rule. Because the legislature specifically directed the agency to adopt a civil penalty schedule and signature authority assignments in rule, the “no action” alternative is not a viable alternative for these topics.

For the benchmark requirement, the “no action” alternative would mean staff could issue an HPA that requires the permittee to establish benchmarks before starting work on the bank protection project. Finally, rules for saltwater bank protection would continue to cite the repealed single-family-residence marine beach front protective bulkheads or rockwalls provisions. Concerns with this approach include:

- The department’s constituents would not have as much notice or opportunity to participate in the development of considerations for assessing civil penalty amounts as is afforded via APA rulemaking procedures.

- The department’s constituents would not have as much notice or opportunity to participate in the development of new compliance tools within the department’s compliance program as is afforded via APA rulemaking procedures.
- The department’s constituents would not have as much notice or opportunity to participate in the development of procedures for pursuing informal or formal appeals on the new compliance tools as is afforded via APA rulemaking procedures.
- Most HPAs issued for saltwater bank protection projects include a benchmark provision based on the current rule; prospective applicants are alerted to this by the current rule. However, benchmarks are not required as part of a complete HPA application. Requiring benchmarks on the plans will eliminate the need for a project proponent to conduct an additional site visit to establish the benchmarks after the HPA is issued but prior to construction. It will also allow the biologist to confirm that the location of the bank protection complies with the regulations prior to issuing the HPA, thereby helping the permittee.
- Rules would include marine beach front protective bulkhead and rockwall provisions for single-family residences that reference a statute that has been repealed.

5.2.2: Alternative 2: Adopt the civil penalty schedule and signature authorities into rule (and not other provisions of the new statute)

The civil penalty schedule would be adopted into rule, and signature authorities would be specified for Stop Work Orders and Notices of Civil Penalty. The benchmark requirement would not be adopted into rule. People wanting to know about the department’s other new responsibilities and authorities would need to find that information in statute. Concerns with this approach include:

- The benchmark requirement could be implemented as a result of an HPA provision, but the benchmarks themselves would not be established and documented as part of a complete application. Requiring benchmarks on the plans will eliminate the need for a project proponent to conduct an additional site visit to establish the benchmarks after the HPA is issued but prior to construction. It will also allow the biologist to confirm prior to issuing the HPA that the location of the bank protection complies with the regulations, thereby helping the permittee.
- The department’s constituents would not have as much notice or opportunity to participate in the development of new compliance tools within the department’s compliance program as is afforded via APA rulemaking procedures.
- The department’s constituents would not have as much notice or opportunity to participate in the development of procedures for pursuing informal or formal appeals on the new compliance tools as is afforded via APA rulemaking procedures.
- Rules would include marine beach front protective bulkhead and rockwall provisions for single family residences that reference a statute that has been repealed. This could cause confusion about which saltwater bank protection rules are in force.

5.2.3: Alternative 3: Adopt the civil penalty schedule, signature authorities, repealer, and benchmark requirements into rule (and not other provisions of the new statute)

These are the key elements of the proposal that are defined by the department (i.e. not provided in statutory language). The civil penalty schedule and signature authorities are required to be developed by the department and adopted in rule.

- The department's constituents would not have as much notice or opportunity to participate in the development of new compliance tools within the department's compliance program as is afforded via APA rulemaking procedures.
- The department's constituents would not have as much notice or opportunity to participate in the development of procedures for pursuing informal or formal appeals on the new compliance tools as is afforded via APA rulemaking procedures. Rules would include marine beach front protective bulkhead and rockwall provisions for single-family residences that reference a statute that has been repealed. This could cause confusion about which saltwater bank protection rules are in force.

5.2.4: Alternative 4: Adopt all proposals except eliminate any benchmark requirement in WAC 220-660-370

Requiring benchmarks in project plans was not included in 2SHB 1579. The department has intended to make this change since 2017, and we propose to take advantage of the opening of this section for amendment. This change is not critical to the implementation of 2SHB 1579 but is important for permit review for proposed saltwater bank protection projects to ensure protection of fish life.

Requiring benchmarks on the plans will eliminate the need for a project proponent to conduct an additional site visit to establish the benchmarks after the HPA is issued but prior to construction. It will also allow the biologist to confirm prior to issuing the HPA that the location of the bank protection complies with the regulations, thereby helping the permittee.

5.3: Consequences of not adopting the rule

Declining to adopt rules would be inconsistent with statute with respect to compliance tools, civil penalties, pre-application determinations, and single-family residence marine beach front protective bulkheads or rockwalls.

Considerations for assessing the civil penalty amount would not be as transparent for people receiving civil penalty notices from the department without doing so through formal rulemaking procedures.

Lack of a benchmark requirement means that a project proponent must conduct an additional site visit to establish the benchmarks after the HPA is issued but prior to construction. It also means the biologist cannot confirm the location of the bank protection prior to issuing the HPA. Research suggests this leads to increased noncompliance.

SECTION 6: Involving stakeholders in rule development

The department launched a web page⁵ with information on rule making and a way for people to track rule making progress. An email address⁶ was activated for people to submit preproposal comments and formal public comments. The department initiated consultation with tribes on September 13, 2019, prior to filing a CR-101. Table 3 includes a list of outreach events and milestones during the preproposal period of rule development and the proposed rulemaking period.

Table 3: Stakeholder contact events

| Date(s) | Person(s) | Activity |
|--|---|---|
| September 13, 2019 | Tribes | The department initiated government-to-government consultation, inviting tribes with questions or comments about the proposal to meet with the department. |
| September 16, 2019 | Agencies Key stakeholders | The department notified state and federal agencies and key stakeholders that it had filed a preproposal statement of inquiry (CR-101) this rule proposal, inviting comments on scoping the rules. |
| September 26, 2019 | Hydraulic Code Implementation Citizen Advisory Group | The department presented rule change objectives and civil penalty schedule alternatives for feedback from members to aid in shaping the proposed rules; |
| October 22, 2019 | Hydraulic Code Implementation Citizen Advisory Group | The department held a conference call to discuss proposed rule language. |
| November 19, 2019 | Hydraulic Code Implementation Citizen Advisory Group | The department presented proposed rule changes and answered questions. Members discussed and commented on the proposed rule changes. |
| December 3, 2019 – January 21, 2019 | Public | Public Comment Period |

⁵ <https://wdfw.wa.gov/licensing/hpa/rulemaking/>

⁶ HPARules@dfw.wa.gov

| Date(s) | Person(s) | Activity |
|--------------------------|---|--|
| December 16 and 17, 2020 | Agencies Key stakeholders | The department notified state and federal agencies and key stakeholders that it had filed a Notice of Proposed Rule Making (CR-102), inviting comments on the proposed rule changes. |
| January 16, 2020 | Tribes | The department sent tribes a reminder about the public comment period. |
| January 17, 2020 | Public Hearing | Fish and Wildlife Commission held a public hearing on the proposals. |
| January 23, 2020 | Hydraulic Code Implementation Citizen Advisory Group | Citizen Advisory Group members reviewed the public comments received and provided recommendations on how the department should address them. |
| February 21, 2020 | Fish and Wildlife Commission | Commission briefed on the supplemental CR-102 and the revised rule making timeline. |
| March 4, 2020 | Agencies Key stakeholders Tribes | The department notified tribes, state and federal agencies, and key stakeholders that it had filed a Supplemental Notice of Proposed Rule Making (CR-102), inviting comments on the proposed rule changes. |

SECTION 7: Cost-Benefit Analysis

RCW 34.05.328 (1)(d) Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented;

7.1: Which rules require analysis?

Most of the rules being proposed adopt language nearly verbatim from 2SHB 1579 and the resulting statute. The rules place elements in context with existing rules and modify language for clarity. These are exempt from cost-benefit analysis required under the APA and from analysis required under the regulatory fairness act because they adopt state statutes without material change.

Three elements are developed by the department that relate to actions by the agency to which permittees are not required to comply: signature authority in WACs 220-660-480(5) and (7) and the civil penalty amount and civil penalty schedule in WAC 220-660-480(8). Signature authority is exempt because it relates only to internal governmental operations that are not subject to violation by a nongovernment party. However, the civil penalty amount and the civil penalty schedule have the potential to impose costs on HPA applicants and require analysis.

The least impacting feasible alternative analysis report (220-660-370(3)(d)) requires analysis under APA and the benchmark requirement in WAC 220-660-370(6) requires analysis under APA and RFA. Table 4 shows the rule groups, the general content of that group, the WAC number references, and the citations for exemptions under APA and RFA.

Table 4: Rule groups and their status relative to APA and RFA analysis.

| Rule Group | Content | WAC | APA Citation (RCW) | RFA citation (RCW) |
|---------------------------|---|---|--|---|
| “Provisions of 2SHB 1579” | New tools and requirements copied nearly verbatim from statute into rule. | 220-660-050 220-660-370 (except subsection 5) 220-660-460, 470, 480 [except subsections 480(5), 480(7), 480(8)] | 34.05.310(c) Rules adopting or incorporating by reference without material change ... Washington state statutes | 19.85.025(3) rule described in RCW 34.05.310(4) |
| “Signature authority” | Specifies which department staff have authority to issue which compliance tools | 220-660-480(5) 220-660-480(7) | 34.05.310(4)(b) Rules relating only to internal governmental operations that are not subject to violation by a nongovernment party | 19.85.025(3) rule described in RCW 34.05.310(4); 19.85.025(4) Does not affect small businesses |
| “Civil penalty amount” | Specifies the department may levy civil penalties of up to \$10,000 for every violation | 220-660-480(7) | Analysis required | |
| “Civil penalty schedule” | Schedule for determining civil penalties, developed by the department | 220-660-480(8) | Analysis required | |
| “Benchmark” | Requires benchmarks to be shown in the plans submitted as | 220-660-370(5) | Analysis required | |

| Rule Group | Content | WAC | APA Citation (RCW) | RFA citation (RCW) |
|------------|--|-------------------|---|--------------------|
| | part of a complete application | | | |
| “Report” | Least impacting feasible alternative analysis report | 220-660-370(3)(d) | Analysis required for APA because the proposed change effects single-family residences and properties. No analysis is required for the RFA because the change does not affect businesses. | |

7.2 Cost-benefit analysis for proposed civil penalty amount and civil penalty schedule

The department has determined that the probable benefits of the proposed civil penalty amount and schedule rules are greater than their probable costs for the reasons stated in this Section 7.2. The proposed text of the civil penalty amount and civil penalty schedule rules is:

WAC 220-660-480 (7)(a) Civil penalties:

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. Civil penalties are issued in accordance with the civil penalty schedule provided in subsection (8) of this section.

WAC 220-660-480(8) Civil penalty schedule:

(c) Determining civil penalty amounts: When a penalty is assessed it will be calculated by the department using the following process:

(i) Determine the base civil penalty:

(A) The following violations have a base civil penalty amount of two thousand dollars: conducting a hydraulic project without a valid HPA; willful misrepresentation of information on the HPA application; or a significant, in the opinion of the department, deviation from the valid HPA that adversely impacts fish life.

(B) All other violations not specifically mentioned have a base penalty of five hundred dollars.

(ii) Calculate the civil penalty amount from the considerations specific to the incident and the site. The following considerations will be independently evaluated for each violation and added to the base civil penalty to calculate the total civil penalty for each violation:

(A) 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. Points are assessed to determine the penalty amount imposed under subsection (d) according to the following criteria:

0 points = The violator has no documented violations within five years preceding the violation leading to the issuance of the penalty.

2 points = The violator has one documented violation within five years preceding the violation leading to the issuance of the penalty.

4 points = The violator has more than one documented violation within five years preceding the violation leading to the issuance of the penalty.

(B) 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. Points are assessed to determine the penalty amount imposed under subsection (d) according to the following criteria:

0 points = There is no adverse impact to fish life.

2 points = There is adverse impact to fish life, but it is minor, and no impacts will last beyond the duration of the construction activity.

4 points = There is extensive and/or significant adverse impact to fish life and impacts will last beyond the duration of the construction activity.

(C) 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. Points are assessed to determine the penalty amount imposed under subsection (d) according to the following criteria:

0 points = The violation was not foreseeable.

1 point = The violation was foreseeable, and no precaution was taken to avoid it.

3 points = The violation occurred after consultation, a technical or compliance site visit, or an enforcement action; or there was a clear economic incentive.

(D) 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. Points are assessed to determine the penalty amount imposed under subsection (d) according to the following criteria:

0 points = The violator reported the violation in a timely manner and cooperated with department staff to correct the violation.

1 point = The violator did not report the violation in a timely manner, or they did not cooperate with department staff to correct the violation.

3 points = The violator ignored or evaded department contacts or refused to allow department staff to enter the job site where the violation occurred.

(d) The department will calculate a penalty for each violation by adding the points assessed under subsection (c)(ii) and applying those corresponding amounts listed in the table below to the base penalty assessed under subsection (c)(i). The base penalty plus the additional amount assessed using the department's point system will determine the total penalty for each violation not to exceed \$10,000.

| | | | | | |
|----------------|----------------|----------------|----------------|----------------|----------------------|
| <u>Points</u> | <u>1</u> | <u>2</u> | <u>3</u> | <u>4</u> | <u>5</u> |
| <u>Penalty</u> | <u>\$1,000</u> | <u>\$2,000</u> | <u>\$3,000</u> | <u>\$4,000</u> | <u>\$5,000</u> |
| <u>Points</u> | <u>6</u> | <u>7</u> | <u>8</u> | <u>9</u> | <u>10 or Greater</u> |
| <u>Penalty</u> | <u>\$6,000</u> | <u>\$7,000</u> | <u>\$8,000</u> | <u>\$9,000</u> | <u>\$10,000</u> |

Under the proposed rule, the department may level civil penalties of up to \$10,000 per violation. Civil penalties for Hydraulic Code Statute violations are enforcement tools that provide an economic motivation to change behavior and ensure compliance with the law. In nearly all cases, civil penalties will be used only after other enforcement tools, including attempts at gaining voluntary compliance through the department's technical assistance program, have not worked to bring a violator into compliance with Chapter 77.55 RCW and/or Chapter 220-660 WAC.

The department's decision to issue a civil penalty is based upon the following considerations consistent with RCW 77.55.440:

- Previous violation history of the person incurring the civil penalty;
- Severity, timing, and repairability of the impact of the violation(s) on fish life;
- Whether the violation(s) was intentional;
- The extent, to which the person who would be incurring the civil penalty has cooperated or is cooperating with the department in addressing the violation(s) and its impact on fish life; and
- If the civil penalty will be imposed on a person for a violation committed by another, the extent to which the person incurring the civil penalty was unaware of the violation, and whether that person received a substantial economic benefit from the violation.

The proposed civil penalty schedule in WAC 220-660-480(8) describes these considerations in more detail and explains how the department will use these considerations to determine the civil penalty amount for each violation.

Costs:

- A project proponent who fails to complete the actions required in a Correction Request, Stop Work Order or Notice to Comply within the time period required for completion contained in the request or notice could be assessed a civil penalty of up to \$10,000 per violation.

Benefits:

- Changes the behavior of a specific violator.
- Provides an economic incentive to comply.
- Acts as a deterrent for non-compliant behavior by the regulated community in general.
- Compensates the state for harm done to the state's fish resources.

7.2.1 Key variables to determine costs

The department presumes that a person who seeks to or does undertake a hydraulic project will comply with the laws and regulations set forth in Chapter 77.55 RCW and Chapter 220-660 WAC. Thus, the department has determined that its proposed rules in WAC 220-660-480 do not pose costs upon persons who comply with these laws and regulations. The department does not have enough data to calculate costs for noncompliance with Chapter 77.55 RCW, Chapter 220-660 WAC or the provisions of an HPA.

7.2.2 Benefits of the proposals

Studies have found that most compliance with environmental statutes and regulations is accomplished by deterrence. To be an effective deterrent, civil penalties must exceed the benefit of the noncompliant activity. The department recognizes that compliance with Chapter 77.55 RCW, Chapter 220-660 and the provisions of an HPA are associated with cost. Thus, the absence

of an effective deterrent has the unintended consequence of rewarding people willing to violate the statute and regulations and penalizes those who comply. While the primary goal of deterrence is to avoid violations of Chapter 77.55 RCW, Chapter 220-660 WAC and the provisions of an HPA in the first place, it is also useful in gaining compliance after a violation has happened.

7.2.3: Reducing costs for those who must comply

Additional steps the department plans to take to avoid and/or reduce costs for noncompliance

1. Access to technical assistance

The department provides technical assistance to ensure that permitting requirements are understood by proponents of hydraulic projects, as we advise and consult on permits, conduct inspections, perform on-site technical visits, and provide regulatory guidance materials. The department also has a technical assistance webpage. A person may request additional technical assistance from the department any time during their project.

2. Opportunity for voluntary compliance

Most people the department works with are not experts in environmental permitting. The department acknowledges that it has a responsibility to help the regulated community understand how to comply with its Hydraulic Code Statute and Rule requirements. When violations or potential violations are observed in the field, the department will issue a Correction Request that describes the measures the project proponent may take to voluntarily address them. The department will use a range of increasingly strict enforcement tools, which could ultimately include monetary civil penalties, only in instances when voluntary compliance cannot be achieved with or without the department's technical assistance. The department will provide an opportunity to correct and mitigate for damage to fish life that results from a violation before issuing a Notice of Civil Penalty.

3. Waiver for first-time paperwork violations

Under RCW 34.05.110, a small business may be eligible for a waiver of first-time paperwork violations. The small business is given an opportunity to correct the violation(s). This applies to Administrative Orders, Notices and Civil Penalties. First time paperwork violations are defined in proposed WAC 220-660-480(12).

4. Staff training

The department's administrative enforcement actions must be based in fact and law, well documented, appropriate to the violation, and issued professionally and fairly. Staff authorized to conduct inspections will receive specialized training to ensure they are professional, knowledgeable, and capable of carrying out their duties.

5. Policy and guidelines

The department will develop implementation guidelines for the civil enforcement program. The guidelines will provide direction to staff on how to appropriately respond to incidents of non-compliance.

7.2.4: Recap of costs and benefits and determination

RCW 34.05.328 (1)(d) Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented

The department determines that the probable benefits of the proposed benchmark rule are greater than the probable costs, considering both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented.

A well-known characteristic of compliance and enforcement is how difficult it is to undo a violation. Consequently, the best approach is prevention. It is important for the department to obtain voluntary compliance as much as possible—meaning that the regulated community makes the choice to comply with permits or law instead of violating them. While there are different ways to gain voluntary compliance, deterrence is the most effective. The proposed civil penalty amount will motivate permittees to comply with the permit conditions, but it also serves as a motivator for those who conduct illegal or unpermitted work to act in accordance with Chapter 77.55 RCW and Chapter 220-660 WAC.

7.3 Cost-benefit analysis for proposed benchmark rule

The department has determined that the probable benefits of the proposed benchmark rule are greater than its probable costs for the reasons stated in this Section 7.3. The marked-up text of the proposed benchmark rule is:

WAC 220-660-370(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 ((~~⊗~~) permanent local 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.

This change means that the benchmark requirement becomes obligatory, not discretionary. Currently, the department can include benchmark requirements as a provision of an HPA if it determines the benchmarks are necessary to demonstrate compliance with the permit, plans, and specifications for the project. The current rule language was written to allow biologist discretion in requiring benchmarks in project-specific circumstances.

Requiring benchmarks to be included as part of a complete application means the applicant must establish the benchmarks prior to submitting their application for review. Under the current rule, the department has been requiring benchmarks for most projects by applying the discretionary authority conveyed in WAC 220-660-370 since about 2016. The proposed rule makes the benchmarks requirement mandatory statewide rather than at the discretion of individual habitat biologists after a project proponent has already submitted a complete HPA application.

Costs:

- The applicant must expend time or money (contractor time) to establish the benchmarks prior to submitting the application.

Benefits:

- Eliminates the need for a project proponent to conduct an additional site visit to establish the benchmarks after the HPA is issued but prior to construction.
- Saves time during the permit review phase; permit can be approved and issued more quickly.
- Projects with benchmarks can be adequately assessed for compliance with HPA provisions for this project type; it is extremely difficult to assess projects without benchmarks.

7.3.1: Key variables to determine costs

The department considers the following questions when estimating costs and benefits attributable to rule changes:

- How many HPAs were issued that require people to comply with the rule?
- How many persons/businesses must comply?
- Which business industries are represented among those who must comply?
- Do individuals and businesses have different costs for the same requirement?
- What are the sizes of businesses that must comply? How many are “small businesses”?

The department analyzed standard HPA permits issued in 2018 to establish a baseline for this analysis. A total of 1,918 permits were issued in 2018, down from 1,993 in 2016 and 1,944 in 2017⁸.

⁷ RCW 19.85.020(3) "Small business" means any business entity, including a sole proprietorship, corporation, partnership, or other legal entity, that is owned and operated independently from all other businesses, and that has fifty or fewer employees.

⁸ T. Scott. 2019. Preliminary Annual HPA Statistics Review for calendar year 2018. Unpublished data summary.

7.3.2: How many HPAs are issued for projects with the requirement?

Of the 1,918 total permits issued in 2018, 93 permits (4.8%) were relating to saltwater bank protection projects.

7.3.3: Which industries are represented among business permittees?

Table 5 shows the business industry sectors, industry descriptions, numbers of permits and percent of permits issued in 2018 for saltwater bank protection projects.

7.3.4: How many people/businesses must comply?

Fourteen percent (13 HPAs) of the HPA permittees for saltwater bank protection projects could be identified as businesses (Table 5). Sixty-nine HPAs for either individuals/landowners or nonprofit businesses represent 74.2 percent of the total. Eleven HPAs for governmental entities or special districts represent 11.8 percent of the total. Costs to government organizations are exempt from RFA analysis, so we must estimate costs for the remainder of saltwater bank protection HPA holders - a total of 82 applicants in 2018.

Table 5: Distribution of permittee types for saltwater bank protection projects in 2018

| Business Sector | Sector Title | Number of permits | Percent of permits |
|-----------------|--|-------------------|--------------------|
| 23 | Construction | 9 | 9.7% |
| 53 | Real Estate and Rental and Leasing | 3 | 3.2% |
| 71 | Recreation (including Arts, Entertainment) | 1 | 1.1% |
| | Individuals (Landowners) | 67 | 72.0% |
| | Other nongovernmental organizations | 2 | 2.2% |
| | Subtotal | 82 | 88.2% |
| | Government and Special Districts | 11 | 11.8% |

7.3.5: Costs to comply

The department offers estimates for costs to comply with the benchmark proposals based on information from habitat biologists, a bulkhead building business and a civil engineer about how long it takes them to establish benchmarks for a client, and costs per hour for technical contractors.

For this analysis, we assume saltwater bank protection subject to WAC 220-660-370 will be primarily in Puget Sound or the Strait of Juan de Fuca. In 2018, 10% of saltwater bank protection projects occurred on the outer coast or Willapa/Grays Harbors, and 90% in Puget Sound/Strait; no HPAs were issued for saltwater bank protection in the Lower Columbia River in 2018.

Both department biologists and a bulkhead business spokesperson indicated that establishing permanent benchmarks takes approximately 10 minutes once a person is on the project site^{9 10}. We assume for this analysis that it takes a person an hour to travel to/from the site. Our business contact suggested that they would hire a civil engineer or a surveyor to conduct the work if they did not already have staff on-board who could establish benchmarks. We think that the smallest period of billable hours for a civil engineer or surveyor consultant would be one-half hour. If a separate preapplication site visit is needed, the when combined with travel, the total time billed would be 1.5 hours.

Next, we looked at U.S. Census data from Bureau of Labor Statistics to determine the average hourly wages for these occupations. We looked at wages for these occupations in the Professional, Scientific, and Technical Services industry groups in Washington. Wages range from \$32.20 per hour for a civil engineering technician to \$46.47 for a civil engineer¹¹. We chose the civil engineer wages as providing a highest cost view for this analysis. A civil engineer who commented¹² on the proposed rules suggested that we chose \$100.00 per hour for a civil engineer to account for business overhead. Table 6 shows the costs to comply with this proposal.

Table 6 Costs to comply with the benchmark requirement based on

| Who performs work | Time spent | Cost per hour | Total Cost to Comply per project |
|--|------------|---------------------|----------------------------------|
| Civil engineer in the Professional, Scientific, or Technical Consulting Services business industry group | 1.5 hours | \$46.47 to \$100.00 | \$69.71 to \$150.00 |

Costs for 82 HPA applicants to comply with the requirement for benchmarks are estimated to be \$5,716 to \$12,300.

7.3.6: Income or Revenue

To comply with this new requirement, Income or revenue for each HPA proponent is reduced from \$69.71 to \$150.00. This assumes a civil engineer would make a special trip to come out on site because there was a lack of prior knowledge that benchmarks would be required.

⁹ A. Cook. Pers. Comm. July 29, 2019

¹⁰ J. Rotsten, Sea Level Bulkhead Builders. Pers. Comm. October 9, 2019.

¹¹ May 2018 OES Research Estimates, Occupational Employment Statistics (OES) Survey, Bureau of Labor Statistics, Department of Labor, website: <https://www.bls.gov/oes>. Table of OES estimates for the State of Washington downloaded from https://www.bls.gov/oes/2018/may/oes_research_estimates.htm on 10/9/2019.

¹² S. Phillips. Pers. Comm. January 11, 2020

7.3.7: Other potential costs

Contractors generally already have the equipment needed to establish benchmarks, whether it be sophisticated survey equipment or an extra-long tape measure. Recordkeeping and reporting for this requirement are integrated into the HPA application. No addition costs are estimated for this analysis.

7.3.8: Benefits of Proposals

Primary benefits of the proposal include:

1. Eliminates the need for a project proponent to conduct an additional site visit to establish the benchmarks after the HPA is issued but prior to construction. Eliminating the extra trip reduces costs for a project proponent.
2. Saves time during the permit review phase; permits can be approved and issued more quickly. Faster review time can save costs for project proponents.
3. Projects with benchmarks can be adequately assessed for compliance with HPA provisions for this project type; it is extremely difficult to assess projects without benchmarks.

This has been problematic for the department, which is why projects since about 2017 have been required to establish benchmarks as a provision of their HPA. The department began conducting implementation monitoring of bank protection and fish passage projects in 2013 to assess whether hydraulic projects are yielding the desired habitat conditions. What researchers found in 2013¹³ was:

- In the 2013 analysis, 38% of 106 active permits for marine shoreline armoring had no clear statement of the project's length in the permit's text.
- Of 26 hard armoring permits that year, only 12% described the structure's location as a distance to a benchmark or permanent structure.
- For the other 88% of hard armoring permits in 2013, determining compliance with the permitted location was difficult if not impossible.

Performance improved in 2014, 2015, and 2016, when specifications for both armor location and armor length for saltwater bank protection projects were present for 88%, 96% and 89% of permitted projects, respectively¹⁴. This represents an average of 90% of HPA permits providing location of armor structure consistent with HPA rules.

¹³ Wilhere, G. et al. 2015. Year One Progress Report: Implementation and Effectiveness Monitoring of Hydraulic Projects. Washington Department of Fish and Wildlife, Habitat Program, Science Division.

¹⁴ Wilhere, G. et al. 2019. Implementation and Effectiveness Monitoring of Hydraulic Projects - Year-five Progress Report. Washington Department of Fish and Wildlife, Habitat Program, Science Division.

Further, the department conducted a civil compliance pilot in Hood Canal in 2016-2018¹⁵ to determine whether compliance with HPA provisions could be improved when a compliance inspector was actively and regularly visiting project sites. The department wanted to assess whether having dedicated administrative compliance staff to provide education and technical assistance to permittees during project construction improved compliance with permit provisions and therefore provided the envisioned fish protection. One recommendation is relevant to the current WAC proposal:

Recommendation 10: Benchmarks are critical to constructing a structure according to permitted plans and specifications. The department should A) Ensure HPAs require benchmarks for all relevant projects; B) Train biologists to establish adequate benchmarks; and C) Provide technical assistance materials (and training) for project proponents and local governments regarding how to establish adequate benchmarks.

Requiring benchmarks is thus critical to both determining compliance with permit provisions and measuring effectiveness of permit provisions relative to fish protection.

7.3.9: Reducing costs for those who must comply

The most important ways the department reduces costs for those who must comply is that requiring benchmarks on the plans will eliminate the need for a project proponent to conduct an additional site visit to establish the benchmarks after the HPA is issued but prior to construction. The department offers technical assistance by establishing the benchmarks at no cost to the applicant (on a time-available basis), directing applicants to businesses who can provide the service, and providing guidance and training for how applicants and contractors can establish adequate benchmarks.

7.3.10: Recap of costs and benefits and determination

RCW 34.05.328 (1)(d) Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented

Costs to comply with the proposal is between \$69.71 and \$150.00 each for 82 landowners/individual applicants, nonprofit businesses, or contractor businesses, and \$0 if a Department biologist can provide the service for free. However, the department assumes most benchmarks will be established when the engineer/designer takes measurements for the bank protection plans.

¹⁵ Cook, A., et al. 2019. Hydraulic Project Approval Program Hood Canal Compliance Pilot Final Report. Project was funded by the U.S. Environmental Protection Agency through a grant from the Puget Sound Marine and Nearshore Grant Program.

The department determines that the probable benefits of the proposed benchmark rule are greater than the probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented.

This is because:

1. Establishing benchmarks during the project design site visit eliminates the need for a project proponent to conduct an additional site visit to establish the benchmarks after the HPA is issued but prior to construction.
2. Establishing benchmarks helps permittees demonstrate compliance of their project with HPA provisions, and
3. Projects that are demonstrably compliant with their HPA provide the envisioned protection of fish life and fish habitat.

7.4 Cost-benefit analysis for the least impacting technically feasible bank protection alternative analysis and report

The department has determined that the probable benefits of the proposed rule requiring “a report to demonstrate the least impacting technically feasible alternative bank protection design is proposed” is greater than its probable costs for the reasons stated in this Section 7.4. The marked-up text of the proposed rule is:

WAC 220-660-370(3) Bank protection design:

(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 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. 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 the qualified professional’s report to the department as part of a complete application for an HPA that includes:

- (i) An assessment of the level of risk to existing buildings, roads, or services being threatened by the erosion;*
 - (ii) Evidence of erosion and/or slope instability to warrant the stabilization work;*
 - (iii) Alternatives considered and the technical rationale specific to the ~~((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.*

2SHB 1579 rescinded RCW 77.55.141 Single-family residence marine beach front bulkheads and rockwalls. This change means that applications for a new or expanded single-family residence bulkhead and rockwall must comply with the same rules as a non-single family bulkhead and rockwall. These structures are no longer exempt from this requirement. As a result, applications for the structures must include a report to demonstrate the least impacting technically feasible alternative bank protection design is proposed.

Requiring this report

Costs:

- The applicant must expend time or money (contractor time) to assess the site, conduct the analysis and write the report, prior to submitting the application.

Benefits:

- Ensures new marine bank protection is only constructed when it's necessary.
- Saves time during the permit review phase; permit can be approved and issued more quickly.

7.4.1: Key variables to determine costs

The department considers the following questions when estimating costs and benefits attributable to the rule change:

- How many HPAs were issued for which people must comply with the rule?

the department analyzed emergency, expedited and standard HPA permits issued in 2018 to establish a baseline for this analysis. A total of 20 permits were issued in 2018 for new saltwater bank protection projects¹⁶. Of the 20 permits, 15 were issued to protect single-family residences or property.

- How many persons/businesses must comply?

Currently, business, government agencies, non-profits and other non-single-family property owners must submit report with their application documenting that the least impacting technically feasible alternative bank protection design is proposed. The rescinding of RCW 77.55.141 and the corresponding proposed rule change only affects single-family property owners. However, it's likely that most property owners will employ a qualified professional to do the analysis and write the report. This will increase demand for this professional service. It is estimated that 15 single-family residential property owners must comply with this prosed rule change annually.

¹⁶ P. Chapman. 2020. HPA Statistics Review for calendar year 2018. Unpublished data summary.

7.4.2: How many HPAs are issued for projects with the requirement?

Of the 1,918 total permits issued in 2018, A total of 20 permits were issued in 2018 for new saltwater bank protection projects¹⁷. Of the 20 permits, 15 were issued to protect single-family residences or property. Of the remaining 5, 4 were issued to government agencies or special districts and 1 was issued to a condominium association.

7.4.3: Costs to comply

Currently, the Shoreline Master Program regulations (WAC 173-26-231(3)(a)(iii)(D) require a person to submit a geotechnical report to demonstrate shoreline stabilization is necessary to protect a primary structure. These reports include site assessment information, an alternatives analysis and design rationale so they meet the requirements in proposed WAC 220-660-370(3)(d). A single-family property owner can provide the same report to both the department and the local government. As a result, single-family property owner should not incur an additional cost from the proposed rule change.

The department offers estimates for costs to comply with the report requirement based on information from two consultant spokespersons. One consultant spokesperson estimated the cost to assess the site, conduct the analysis and write the report for the client to be \$2,400 to \$2,800¹⁸ and the second consultant spokesperson estimated the cost for this service to be \$4,500 to \$6,500¹⁹.

Costs for 15 HPA applicants to comply with the report requirement are estimated to be \$36,000 to \$97,500.

7.4.4: Other potential costs

Consultants generally already possess the equipment needed to conduct the analysis. Recordkeeping and reporting for this requirement are integrated into the HPA application. No addition costs are estimated for this analysis.

7.4.5: Benefits of Proposals

The proposed rule change will reduce the amount of unnecessary shoreline armoring. The effects of armor on Puget Sound shores are strongly related to the processes that shape the shoreline and maintain beaches and coastal habitats. Successful control of erosion of coastal bluffs (feeder bluffs) removes an important source of beach-forming sediment. It may also reduce the natural supply of large wood and detritus to the shoreline ecosystem that accompanies natural erosion events. The significant role of longshore sediment transport on Puget Sound increases the likelihood that alterations to sediment processes in one location may eventually impact conditions

¹⁷ P. Chapman. 2020. HPA Statistics Review for calendar year 2018. Unpublished data summary.

¹⁸ R. Cayan. Coastal Geologic Services, Inc. Pers. Comm. February 6, 2020.

¹⁹ A. Dennison. Aspect Consulting LLC. Pers. Comm. February 6, 2020.

elsewhere within a littoral cell. The construction of seawalls and bulkheads on eroding coastlines may effectively protect upland areas but does not prevent continued retreat of the beach itself, with the result being the gradual narrowing of the upper beach and loss of upper intertidal habitats²⁰. This alteration can cause a loss of the beach spawning habitat for Pacific sand lance and surf smelt. These forage fish species are a primary food source for some adult salmon species which in turn, are eaten by endangered southern resident orca.

7.4.9: Reducing costs for those who must comply

The department offers technical assistance and can direct applicants to businesses who can conduct the site assessment and the analysis and write the report. The department also offers low or no cost training to those who want to use the Marine Shoreline Design Guidelines. The department publishes a booklet entitled “Your Marine Waterfront: A guide to protecting your property while promoting healthy shorelines” to help marine residential property owners understand causes of shoreline erosion and options for addressing erosion.

7.4.10: Recap of costs and benefits and determination

RCW 34.05.328 (1)(d) Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented

Costs to comply with the proposal is between \$2,400 and \$6,500 each for 15 single-family resident property owners. However, the department assumes there will be no additional cost because the property owners can submit a geotechnical report currently required by the local government to comply with their shoreline master program.

The department determines that the probable benefits of the proposed rule are greater than the probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented.

This is because:

1. Population growth is likely to result in more bank protection as shoreline areas continue to be more heavily developed. As erosion continues to affect Puget Sound shorelines, demand for bank protection will persist, even in locations where it is not present today. Concurrently, as the prospect of higher sea levels intensifies shoreline erosion and potential storm damage, property owners will seek to construct ever more bank protection. Ensuring new bank protection designs use the least impacting technically feasible alternative will reduce impacts to shoreline processes and functions that maintain fish and shellfish habitat.
2. The department’s habitat biologists and civil engineers are trained in the Marine Shoreline

²⁰ 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, Washington.

Design Guidelines methodology. This bill will allow our staff to work with local governments and project proponents to ensure alternatives for constructing new traditional hard bank protection are considered.

SECTION 8: Small Business Economic Impact Statement

8.1: Describe rule and compliance requirements

8.1.1: Background

Background on topic of this rule making activity is provided in Section 2. A timeline and actions initiating rule making are provided in Subsection 2.3. These sections provide detail about the history of and need for the proposal. Section 5 discusses how the proposed rule meets the general goals and specific objectives of the statutes. HPA rule making documents are available at <https://wdfw.wa.gov/licensing/hpa/rulemaking/>.

8.1.2: Compliance requirements of the proposed rule

RCW 19.85.040(1) “A small business economic impact statement must include a brief description of the reporting, recordkeeping, and other compliance requirements of the proposed rule, and the kinds of professional services that a small business is likely to need in order to comply with such requirements.”

Most of these rules do not create additional compliance requirements (Table 4). Three proposals, the “civil penalty amount”, “civil penalty schedule” and “benchmark” rules, can impose additional costs on small business. The department has determined that the proposed rule requiring “a report to demonstrate the least impacting technically feasible alternative bank protection design is proposed” will not impose additional costs on small business because this proposed change effect single-family saltwater shoreline property owners only.

8.2: Small Business Economic Impact Analysis – Civil Penalty Amount and Civil Penalty Schedule

8.2.1: Costs associated with compliance

The department presumes that a person who seeks to or does undertake a hydraulic project will comply with the laws and regulations set forth in Chapter 77.55 RCW and Chapter 220-660 WAC. Thus, the department has determined that its proposed rules in WAC 220-660-480 do not pose costs upon businesses that comply with these laws and regulations. The department does not have enough data to calculate costs to businesses for noncompliance with Chapter 77.55 RCW, Chapter 220-660 WAC and the provisions of the HPA, nor to calculate any disproportionate impacts that noncompliance may have on small businesses. To the extent the department’s proposed rules in WAC 220-660-480 impose more than minor costs to businesses that do not comply with Chapter 77.55 RCW, Chapter 220-660 WAC and the provisions of an HPA, the department will mitigate costs to small businesses where doing so is legal and feasible pursuant to

RCW 19.85.030, which includes using non-monetary civil enforcement tools made available under Laws of 2019, chapter 290.

8.2.2: Steps to reduce costs to individuals and small businesses

When costs to comply exceed the minor cost threshold and costs are disproportionate for small businesses, RCW 19.85.030 compels the agency to reduce costs imposed by the rule on small businesses where it is legal and feasible to do so. The agency must consider, without limitation, each of the methods listed on Table 7.

Table 7: Methods of reducing costs to businesses for noncompliance

| Sub-section | Method | WDFW response |
|-------------|---|--|
| a) | Reducing, modifying, or eliminating substantive regulatory requirements | The substantive civil compliance and enforcement requirements are specified in the statute. |
| b) | Simplifying, reducing, or eliminating recordkeeping and reporting requirements | Recordkeeping and recording requirements set forth in the proposed rules are the minimum necessary to ensure compliance with the permit conditions. |
| c) | Reducing the frequency of inspections | Follow-up compliance inspections are limited to those required to confirm that a noncompliant condition has been corrected. |
| d) | Delaying compliance timetables | The department must provide a reasonable time to achieve compliance. A violator can request an extension of a deadline for achieving compliance. |
| e) | Reducing or modifying fine schedules for noncompliance; or | The civil penalty schedule reflects factors statutorily required to be considered. |
| f) | Any other mitigation techniques, including those suggested by small businesses or small business advocates. | The department supports providing an opportunity for voluntary compliance prior to imposing any monetary civil penalty. This was suggested by a business advocate and is required under 2 SHB 1579, as enacted. Small businesses or business advocates have suggested eliminating the Notice of Civil Penalty, but the statute requires the department to do rulemaking to adopt a civil penalty schedule. Thus, it does not have authority to eliminate the Notice of Civil Penalty as suggested. |

8.2.3 Additional steps the department has taken or will take to lessen impacts

Additional steps the department has taken or will take to reduce costs to business for noncompliance

1. Access to technical assistance

The department provides technical assistance to ensure that permitting requirements are understood by proponents of hydraulic projects when we advise and consult on permits, conduct inspections, perform on-site technical visits, and provide regulatory guidance materials. The department also has a technical assistance webpage. A person may request additional technical assistance from the department any time during their project.

2. Opportunity for voluntary compliance

Most people the department works with are not experts in environmental permitting. The department acknowledges that it has a responsibility to help the regulated community understand how to comply with the Hydraulic Code Statute and Rule requirements. When violations or potential violations are observed in the field, the department will issue a Correction Request that describes the measures the project proponent may take to voluntarily address them. The department will use a range of increasingly strict enforcement tools, which could ultimately include monetary civil penalties, but in most instances only when voluntary compliance cannot be achieved, with or without the department's assistance. The department will provide an opportunity to correct and compensate for damage that results from a violation before issuing a Notice of Civil Penalty.

3. Waiver for first-time paperwork violations

Under RCW 34.05.110, a small business may be eligible for a waiver of first-time paperwork violations. The small business is given an opportunity to correct the violation(s). This applies to Administrative Orders, Notices and Civil Penalties. First time paperwork violations are defined in proposed WAC 220-660-480(12).

4. Staff training

The department's administrative (civil) enforcement actions must be based in fact and law, well documented, appropriate to the violation, and issued professionally and fairly. Staff authorized to conduct inspections will receive specialized training to ensure they are professional, knowledgeable, and capable of carrying out their duties.

5. Policy and guidelines

The department will develop implementation guidelines for the civil enforcement program. The guidelines will provide direction to staff on how to appropriately respond to incidents of non-compliance.

8.3.13: Involving stakeholders in rule development

RCW 19.85.040(2) "A small business economic impact statement must also include:... (b) A description of how the agency will involve small businesses in the development of the rule."

RCW 19.85.040(3) "To obtain information for purposes of this section, an agency may survey a representative sample of affected businesses or trade associations and should, whenever

possible, appoint a committee under RCW [34.05.310\(2\)](#) to assist in the accurate assessment of the costs of a proposed rule, and the means to reduce the costs imposed on small business.”

Stakeholder outreach is described in Section 6, and events are summarized on Table 3.

8.3: Small Business Economic Impact Analysis - Benchmarks

8.3.1: Costs associated with compliance

Applicants might need technical assistance to establish project benchmarks. The department can aid applicants by directing them to technical businesses that can establish the benchmarks and by providing guidance and training for how applicants and contractors can establish adequate benchmarks. As time allows, the department biologists can also offer technical assistance by establishing the benchmarks at no cost to the applicant. When benchmark measurements are needed, they are frequently done by civil engineers, civil engineer technicians, surveyors, or surveyor technicians. The person establishing the benchmarks will need a tape measure and a compass.

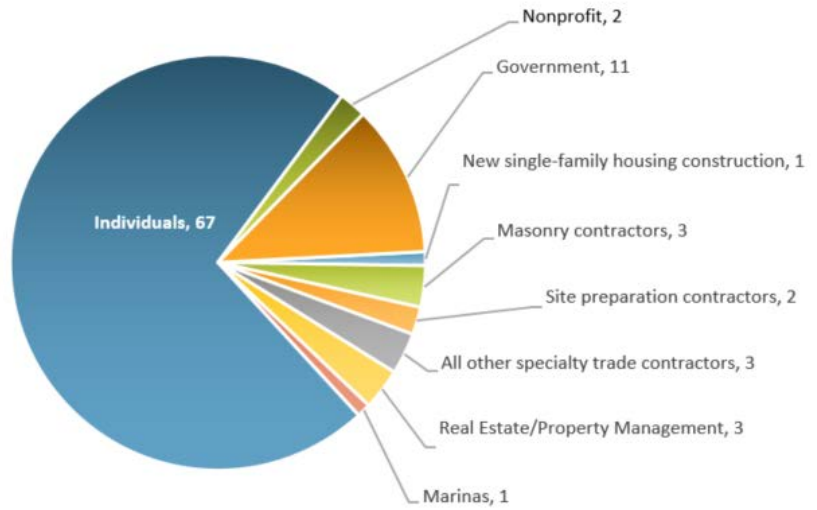
8.3.2: Identify businesses - minor cost threshold

RCW 19.85.040(2)(c) “Provide a list of industries that will be required to comply with the rule. However, this subsection (2)(c) shall not be construed to preclude application of the rule to any business or industry to which it would otherwise apply.”

RCW 19.85.020(1) “‘Industry’ means all of the businesses in this state in any one four-digit standard industrial classification as published by the United States department of commerce, or the North American industry classification system as published by the executive office of the president and the office of management and budget.’

RCW 19.85.020(2) “‘Minor cost’ means a cost per business that is less than three-tenths of one percent of annual revenue or income, or one hundred dollars, whichever is greater, or one percent of annual payroll.

The department analyzed HPA permits issued in 2018 to determine businesses that received an HPA for saltwater bank protection construction, maintenance, or replacement. Fourteen percent (13 HPAs) of the permittees for saltwater bank protection projects were identified as businesses. Seventy-two percent (67 HPA) of permittees were individuals or landowners, 2.2 percent (2 HPAs) were nonprofit businesses, and 11.8 percent (11 HPAs) were governmental entities.



The department does not require applicants to identify the person or business they intend to employ to construct their project.

Businesses applying for HPAs to construct projects that are employed to build the project can be identified on the HPA application, and this is how we identified businesses for this analysis. The department acknowledges that the rules for saltwater bank protection apply to everyone (including businesses) applying for this type of HPA, so the business types identified here are not exclusive.

Once businesses were identified, we used the Washington Department of Revenue Business Lookup tool²¹ to obtain their industry code. When no industry code could be found, we identified the applicant as individual.

In subsequent analyses we identified additional businesses under the 237990 NAICS code (“Other heavy and civil engineering construction”) that might apply or construct saltwater bank protection projects. Table 8 provides information about the businesses we identified using these methods. We are not able to determine whether businesses are small businesses using these methods. This list is not exclusive - anyone who applies for an HPA for a saltwater bank protection project is subject to the proposed rule.

Table 8: NAICS Codes for 2018 saltwater bank protection business applicants

| Number of permits in 2018 | NAICS code | Industry description |
|---------------------------|------------|--|
| 1 | 236115 | New single-family housing construction |
| 2 | 237990 | Other heavy and civil engineering construction |

²¹ Available at: https://secure.dor.wa.gov/gteunauth/_/#1

| | | |
|---|--------|---|
| 3 | 238140 | Masonry contractors |
| 2 | 238910 | Site preparation contractors |
| 3 | 238990 | All other specialty trade contractors |
| 3 | 531310 | Offices of real estate agents and brokers (& property managers) |
| 1 | 713930 | Marinas |

8.3.3: Minor cost threshold

Industry data for determining minor cost thresholds are provided on Table 9. We used a spreadsheet provided by the Washington State Auditor’s Office to determine these values²².

Table 9: Washington businesses data for businesses identified under industry classification codes identified for analysis

| Industry 4-digit or 6-digit 2012 NAICS Code | Number of Establishments | TOTAL Annual Payroll | TOTAL Annual Revenue | AVG Annual Payroll | AVG Annual Revenue | 1% of Annual Payroll | <0.3% of annual revenue or income or \$100 |
|---|--------------------------|----------------------|----------------------|--------------------|--------------------|----------------------|--|
| 236115 | 1,261 | \$186,272,000 | D | \$147,718 | D | \$1,477 | D |
| 237990 | 61 | \$174,198,000 | \$948,293,000 | \$2,855,705 | \$15,545,787 | \$28,557 | \$46,637 |
| 238140 | 293 | \$74,067,000 | \$215,274,000 | \$252,788 | \$734,724 | \$2,528 | \$2,204 |
| 238910 | 1,208 | \$490,492,000 | \$2,047,639,000 | \$406,036 | \$1,695,065 | \$4,060 | \$5,085 |
| 238990 | 547 | \$182,710,000 | \$573,308,000 | \$334,022 | \$1,048,095 | \$3,340 | \$3,144 |
| 5313 | 2,852 | \$705,915,000 | \$1,626,984,000 | \$247,516 | \$570,471 | \$2,475 | \$1,711 |
| 713930 | 102 | \$17,667,000 | \$79,013,000 | \$173,206 | \$774,637 | \$1,732 | \$2,324 |

Source: Washington State Auditor *Minor Cost Threshold Calculator July 2019.xlsx*, which uses data from the 2012 Economic Census of the United States.
Code “D” means the U.S. Census Bureau data are withheld to avoid disclosing data for individual companies.

²² *Minor Cost Threshold Calculator July 2019.xlsx* provided through the Governor’s Office of Regulatory Innovation and Assistance at: https://www.oria.wa.gov/Portals/_oria/VersionedDocuments/RFA/Regulatory_Fairness_Act/Minor%20Cost%20Threshold%20Calculator%20July%202019.xlsx . ORIA RFA support website is: https://www.oria.wa.gov/site/alias_oria/934/Regulatory-Fairness-Act-Support.aspx .

8.3.4: Identify the minor cost thresholds for each industry.

Pursuant to RCW 19.85.020(2), "Minor cost" means "a cost per business that is less than three-tenths of one percent of annual revenue or income, or one hundred dollars, whichever is greater, or one percent of annual payroll."

We chose the minimum of the two indicator figures from Table 9 as the minor cost thresholds for these industries (Table 10) and identified \$100 as the minor cost threshold for individuals/landowners and nonprofit businesses. Any costs imposed on a small business that are over these thresholds would be considered for this analysis to be more than minor and potentially disproportionate.

Table 10: Small Business Industry Classification and Minor Cost Thresholds

| NAICS code | Industry description | Minor Cost Threshold |
|------------|---|----------------------|
| 236115 | Residential building construction | \$1,477 |
| 237990 | Other heavy and civil engineering construction | \$28,557 |
| 238140 | Masonry contractors | \$2,204 |
| 238910 | Site preparation contractors | \$4,060 |
| 238990 | All other specialty trade contractors | \$3,144 |
| 531310 | Offices of real estate agents and brokers (& property managers) | \$1,711 |
| 713930 | Marinas | \$1,732 |
| n/a | Individuals/Landowners and nonprofit businesses | \$100 |

8.3.5: Costs of compliance

RCW 19.85.040(1) "...It [the SBEIS] shall analyze the costs of compliance for businesses required to comply with the proposed rule adopted pursuant to RCW 34.05.320, including costs of equipment, supplies, labor, professional services, and increased administrative costs..."

Both the department biologists and a bulkhead business spokesperson indicated that establishing permanent benchmarks takes approximately 10 minutes once a person is on the project site^{23 24}. We assume for this analysis that it takes a person an hour to travel to/from the site. Our business contact suggested that they would hire a civil engineer or a surveyor to conduct the work if they did not already have staff on-board who could establish benchmarks. The benchmarks must be shown on the plans submitted as part of a complete application. We assume for this analysis that it takes a person 10 -15 minutes to include the benchmarks on the plans. We think that the

²³ A. Cook. Pers. Comm. July 29, 2019

²⁴ J. Rotsten, Sea Level Bulkhead Builders. Pers. Comm. October 9, 2019.

smallest period of billable hours for a civil engineer or surveyor consultant would be one-half hour. Combined with travel, the total time billed would be 1.5 hours.

Next, we looked at U.S. Census data from Bureau of Labor Statistics to determine the average hourly wages for these occupations. We looked at wages for these occupations in the Professional, Scientific, and Technical Services industry groups in Washington. Wages range from \$32.20 per hour for a civil engineering technician to \$46.47 for a civil engineer²⁵. We chose the civil engineer wages as providing a worst-case view for this analysis. We also analyzed the \$100.00 billable hourly amount suggested by a civil engineer who commented on the proposed rules.

We anticipate the cost of equipment and supplies to be minimal.

8.3.6: Lost sales or revenues

RCW 19.85.040(1) "...It [The SBEIS] shall consider, based on input received, whether compliance with the rule will cause businesses to lose sales or revenue..."

Income or revenue for each HPA proponent is reduced by between \$69.71 and \$150.00 to comply with this new requirement. If the department can provide technical assistance to the applicant, there is no loss in revenue.

8.3.7: Summary of costs to comply

Based on the methods used to estimate costs to comply with the rule proposals, total cost for each project is estimated at between \$69.71 and \$150.00, as shown on Table 6.

8.3.8: More than minor costs

RCW 19.85.030(1)(a) "In the adoption of a rule under Chapter 34.05 RCW, an agency shall prepare a small business economic impact statement: (i) If the proposed rule will impose more than minor costs on businesses in an industry; ..."

RCW 19.85.020(2) "'Minor cost' means a cost per business that is less than three-tenths of one percent of annual revenue or income, or one hundred dollars, whichever is greater, or one percent of annual payroll...'

Based on the costs of compliance estimated in Section 7.3, the estimated costs for an individual or a nonprofit business to comply with the proposal are more than the minor cost thresholds shown on Table 10.

²⁵ May 2018 OES Research Estimates, Occupational Employment Statistics (OES) Survey, Bureau of Labor Statistics, Department of Labor, website: <https://www.bls.gov/oes>. Table of OES estimates for the State of Washington downloaded from https://www.bls.gov/oes/2018/may/oes_research_estimates.htm on 10/9/2019.

8.3.9: Disproportionate impact on small businesses

RCW 19.85.040(1) “...To determine whether the proposed rule will have a disproportionate cost impact on small businesses, the impact statement must compare the cost of compliance for small business with the cost of compliance for the ten percent of businesses that are the largest businesses required to comply with the proposed rules using one or more of the following as a basis for comparing costs: (a) Cost per employee; (b) Cost per hour of labor; or (c) Cost per one hundred dollars of sales.”

The department used employment data from Bureau of Labor Statistics²⁶ to analyze employment by size of company. We used the industry codes identified on tables 8 and 9, except that data for the 6-digit code 236115 are not available so we used the 4-digit code 2361 instead. We compared the cost-to-comply (\$69.71 - \$150.00) to the numbers of employees in three different groups of establishments: businesses having 1-49 employees (“small businesses”), businesses having 50 or more employees (“large businesses”), and the best available estimate of the number of employees in the 10% largest businesses.

Table 11: Compare cost/employee for small businesses versus larger businesses

| NAICS | Industry | Compliance-cost per Employee | | | Amount higher costs for Small v. Largest 10% |
|--------|--|------------------------------|------------------|---------------------------|--|
| | | Small Businesses | Large Businesses | Largest 10% of businesses | |
| 2361 | Residential building construction | \$0.003 - \$0.006 | \$0.02 - \$0.04 | \$0.01 - \$0.02 | -\$0.01 - \$0.02 |
| 237990 | Other heavy and civil engineering construction | \$0.10 - \$0.20 | \$0.05 - \$0.11 | \$0.05 - \$0.11 | \$0.05 - \$0.09 |
| 238140 | Masonry contractors | \$0.04 - \$0.09 | \$0.08 - \$0.17 | \$0.03 - \$0.06 | -\$0.01 - \$0.03 |
| 238910 | Site preparation contractors | \$0.01 - \$0.02 | \$0.02 - \$0.04 | \$0.01 - \$0.02 | -\$0.00 - \$0.00 |
| 238990 | All other specialty trade contractors | \$0.02 - \$0.04 | \$0.07 - \$0.15 | \$0.01 - \$0.02 | -\$0.01 - \$0.02 |
| 53131 | Real estate property managers | \$0.01 - \$0.02 | \$0.02 - \$0.04 | \$0.01 - \$0.02 | -\$0.00 - \$0.00 |

²⁶ We downloaded data for Washington State for each of the identified industries at U.S. Census Bureau “American FactFinder” available at: <https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t>

| | | | | | |
|--------|---------|----------------|-----|-----------------|-------------------|
| 713930 | Marinas | \$0.18- \$0.39 | n/a | \$0.70 - \$1.51 | -\$0.52 - \$1.12* |
|--------|---------|----------------|-----|-----------------|-------------------|

Of these computations, the cost per employee for the largest 10% of businesses is the least straightforward because, in most cases for these industries, the largest 10% of businesses in an industry included businesses with fewer than 50 employees. We did not use this datum except for the Marinas industry* where data for “Large Businesses” are withheld to avoid disclosing data for individual companies.

The smallest cost/employee is three-tenths to sixth-tenths of a cent, and the largest is 18 to 39 cents (70 cents to one dollar and fifty-one cents using the “largest 10%” figure for the Marinas industry). Costs per employee are smaller for small businesses than for large businesses (or for the largest 10% of businesses for Marinas) except for “Other heavy and civil engineering construction” businesses, for which the cost is five to nine cents higher per employee for small businesses. We conclude there is not a disproportionate impact for small businesses in most cases. In the case where small businesses pay more per employee, that difference represents ten to twenty cents per employee for small businesses versus five to eleven cents per employee for large businesses.

8.3.10: Steps to reduce costs to individuals or small businesses

RCW 19.85.030(2) “Based upon the extent of disproportionate impact on small business identified in the statement prepared under RCW 19.85.040 [i.e. in Section 7 of this document], the agency shall, where legal and feasible in meeting the stated objectives of the statutes upon which the rule is based, reduce the costs imposed by the rule on small businesses. The agency must consider, without limitation, each of the following methods of reducing the impact of the proposed rule on small businesses:” [Note: RCW 19.85.030(2)(a) through (f) lists the methods, which are also listed under items (a) through (f) in Table 11 of this document].

RCW 19.85.030(3) “If a proposed rule affects only small businesses, the proposing agency must consider all mitigation options defined in this Chapter.”

RCW 19.85.030(4) “In the absence of sufficient data to calculate disproportionate impacts, an agency whose rule imposes more than minor costs must mitigate the costs to small businesses, where legal and feasible, as defined in this Chapter.”

RCW 19.85.030(5) “If the agency determines it cannot reduce the costs imposed by the rule on small businesses, the agency must provide a clear explanation of why it has made that determination.”

RCW 19.85.040(2) “A small business economic impact statement must also include: (a) A statement of the steps taken by the agency to reduce the costs of the rule on small businesses...”

The goals and objectives of the statutes that the proposed rule is intended to implement are discussed fully in Section 4.

8.3.11: Required methods to reduce costs

Table 12: Required methods of reducing costs imposed by the rule on small businesses

| RCW 19.85.030 (2) Requirements | | WDFW response |
|--------------------------------|---|--|
| Sub-section | Method | |
| a) | Reducing, modifying, or eliminating substantive regulatory requirements | Eliminating the requirement for adequate benchmarks makes it impossible for the department to determine whether a project is compliant with provisions of the HPA. This does not meet the objectives of the statute. |
| b) | Simplifying, reducing, or eliminating recordkeeping and reporting requirements | Once benchmarks are established and recorded on the plans, there are no additional recordkeeping or reporting costs. |
| c) | Reducing the frequency of inspections | Not applicable to this proposal. The requirement must be met prior to an HPA being issued. |
| d) | Delaying compliance timetables | This provision is being required currently in most saltwater bank protection project HPAs. Delaying the compliance timetable would not have an effect on businesses. |
| e) | Reducing or modifying fine schedules for noncompliance; or | Not applicable to this proposal. |
| f) | Any other mitigation techniques, including those suggested by small businesses or small business advocates. | No other mitigation techniques have been suggested by small businesses or business advocates. |

8.3.12: Additional steps the department has taken to lessen impacts

Additional steps the department plans to take to minimize costs to those who must comply with the new rules:

1. The department will provide training to saltwater bank protection permitting biologists on how to establish adequate benchmarks and how to help the applicant record the benchmarks in their application materials.
2. The HPA Technical Assistance webpage has example engineering drawings that show how to establish and document benchmarks on the plans.
3. The department will provide outreach and guidance materials to individuals and businesses

for how to establish adequate project benchmarks.

8.3.13: Involving stakeholders in rule development

RCW 19.85.040(2) “A small business economic impact statement must also include:... (b) A description of how the agency will involve small businesses in the development of the rule.”

RCW 19.85.040(3) “To obtain information for purposes of this section, an agency may survey a representative sample of affected businesses or trade associations and should, whenever possible, appoint a committee under RCW 34.05.310(2) to assist in the accurate assessment of the costs of a proposed rule, and the means to reduce the costs imposed on small business.”

Stakeholder outreach is described in Section 6, and events are summarized on Table 3. One small saltwater bank protection construction business was consulted about this requirement. That business indicated benchmarks are established while they are on-site to take measurements for the structure plans. No additional trips or costs are needed to comply with the new requirement because establishing benchmarks has been a standard practice (the department has been requiring them consistently in HPAs) for the past three-or-more years.

8.3.14: Number of jobs created or lost

RCW 19.85.040(2) “A small business economic impact statement must also include:... (d) An estimate of the number of jobs that will be created or lost as the result of compliance with the proposed rule.”

There will likely be no jobs created or lost as a result of this proposal. The time involved to establish benchmarks is small relative to the time required to prepare application materials and structure/site plans. The expertise to establish benchmarks is common to most saltwater bank protection construction businesses.

8.3.15: Summarize results of small business analysis

Costs to comply are less than the minor cost thresholds for businesses required to comply. Small businesses generally pay less per employee to comply than large businesses, with one exception. For that exception, the cost is five cents more per employee.

SECTION 9: Least Burdensome Alternative

RCW 34.05.328 (1)(e) Determine, after considering alternative versions of the rule and the analysis required under (b) [Section 5 of this document], (c) [Notification in CR-102], and (d) [Section 7 of this document] of this subsection, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under (a) of this subsection [i.e. for the statute being implemented];

9.1: Introduction

In order to propose and adopt significant legislative rules, the department must evaluate alternative versions of the rule. Once this analysis is complete, the department must determine that the rule proposed for adoption is the least burdensome version of the rule that will achieve the goals and objectives of the authorizing statute(s) as discussed in Section 4. Alternatives to rule making are addressed in Section 5.2 and consequences of not adopting the proposal are included in Section 5.3.

9.2: Alternatives considered

9.2.1 Alternative rule language

Comments or alternatives the department heard during the preproposal period and responses relating to incorporation into proposed rule language are included on Table 13. Comments were actively solicited from members of the Hydraulic Code Implementation Citizen Advisory Group. Advice we considered for proposed rule language contributed to ensuring the proposal represents the *“least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under Chapter 77.55 [RCW].”*

Table 13 Suggestions for alternative rule language provided during the preproposal period

| Suggested Alternative | WDFW Response |
|--|---|
| General comments on civil penalty schedule assessment considerations²⁷ | |
| Everyone associated with a project/permit should be subject to civil penalties - contractors and homeowners should share this responsibility. Important to look at which party received the economic benefit from the violation. E.g., Contractors who cut corners - thereby receiving the economic benefit - should be the ones penalized (not the landowner). [If the landowner is penalized,] the landowner needs to be responsible to pass along civil penalties to contractors. | We would not include this level of detail in proposed rule language. However, we are looking into this as it relates to implementation. Assuming everyone associated with a project is subject to civil penalties, we will consider how to do that when we develop implementation guidelines. |
| Civil penalties should be assessed on a per-day basis where work windows are violated. | It would be inappropriate to include this in rule language. In keeping with the Governor’s veto, maximum civil penalties are proposed on a per-violation basis. The legislature, in the original language of HB 1579, did not establish each day as a separate HPA violation as it has for other agencies and civil violations. |

²⁷ Many of the comments/suggestions will be considered for inclusion in implementation guidelines.

| Suggested Alternative | WDFW Response |
|--|--|
| Suggest a tracking system like Ecology’s ERTS for tracking violation history. Also, many local governments have violation tracking systems - King County in particular. | We would not establish a tracking system in rule but will develop a tracking system as part of rule implementation. |
| Deviations from plans that have no material effect should not be a violation. Violations should have material effect on fish/habitat. | We are not proposing to change how we handle project modifications. The department needs to be able to assess deviations from plans/specifications for impacts to fish/habitat prior to construction of the modification. |
| Comments on “Past Violation History” considerations | |
| [Referring to the case studies,] civil penalty schedules that address licensing or certification status seem generally inapplicable to the HPA situation. | We agree and have not included this consideration in the proposed rule. |
| Past violations by a person are important in considering the amount of a civil penalty for the current violation. More past violations would yield a higher civil penalty. (Similar to Agriculture’s civil penalty criteria.) | Comment incorporated into proposal. |
| Compliance/violation history for the same or similar historic department or environmental incident(s) should be an important consideration. History for at least 5 previous years should be considered, but only those that are uncontested or upheld upon appeal. | It seems reasonable to establish criteria and this suggestion is like what other agencies consider. We’ve incorporated this concept into proposed rule language. |
| Assess number/duration of violation(s) under an HPA. | The department notes that compliance inspections occurring prior to the civil penalty step in the compliance sequence can provide valuable data for this assessment. |
| Comments on “Impact/Severity” considerations | |
| Severity of adverse environmental impacts - to fish or fish habitat or public or private resources - should be considered. | Our statutory authority is limited to work that affects the natural flow or bed of state waters. We can only deny, or condition permits for the protection of fish life. However, we recognize fish are a public resource. |
| Civil penalty assessment should look at harm that is likely to persist beyond the construction period or HPA 5-year period. The group indicated general agreement on this. | Comment incorporated into proposal. Whether the impacts are temporary, short-term, long-term, or permanent should factor into determining the severity and reparability. |
| With respect to the time frame to repair: It’s difficult to impose greater civil penalties for longer timeframe to repair when different | Please keep in mind we would only assess a civil penalty when a violator didn’t repair and compensate for the damage. For the civil penalty, we’d be |

| Suggested Alternative | WDFW Response |
|--|---|
| jurisdictions require permits (or other permission) to conduct the repair work. | evaluating the length of time required for restoration (repair) to occur naturally. |
| Civil penalty schedule should use ESA-listing status to add to the civil penalty. | We can only enforce Chapter 77.55 RCW. However, to determine the severity of the impact we must assess the value of the impacted habitat among other things. To do this we consider the scarcity of the habitat in a landscape context, suitability of the impacted habitat to support fish species, and the importance of the habitat to achieving conservation objectives for the fish species. Thus, the federal population status likely is captured in this assessment indirectly. |
| Generally, procedural or paperwork violations are less likely to be critical/damaging to fish/habitat than design or implementation violations (which should include maintenance/operation where appropriate). Regarding notification that is a couple of days late or contractors who don't have the HPA on-site, need some form of leniency for violations that don't affect fish/habitat. | Comment incorporated into proposal. Whether the violation impacted fish/habitat needs to be considered. In most cases, however, first-time violations of notification or HPA-on-site provisions would not advance to the civil penalty stage unless they co-occur with more damaging violations that are not corrected. This is also good topic for inclusion in implementation guidelines. |
| Case studies do not adequately assess failure to maintain mitigation measures, operating conditions (if any) or BMPs that are or should be a condition of ongoing HPAs. | We agree these are important, and these are usually specified as individual HPA provisions. Violations of different provisions are separate actions treated independently throughout the compliance sequence. |
| [Referring to the civil penalty schedule considerations provided in RCW,] the trade-off of reparability and mitigation, especially as it relates to offsite mitigation, is a call that needs to be made independent from the department. | This suggestion is not applicable to developing rule language for a civil penalty schedule. The department has responsibility under the Hydraulic Code Statute to assess impacts of a hydraulic project on fish/habitat and determine whether proposed mitigation is enough to address those impacts. For the civil penalty assessment, we would only be considering the severity of the damage at the site from the violation, including whether the damage is repairable. How, whether, and where to mitigate for that damage are not part of the civil penalty assessment. |
| The case studies do not look at timing issues. Whether a violation occurred inside the timing windows prescribed in an HPA should be a critical consideration for civil penalties. | Comment incorporated into proposal under "Impact." This is a unique and important aspect of HPA compliance that could be a consideration in evaluating the severity. |
| Comments on "Intent" considerations | |

| Suggested Alternative | WDFW Response |
|--|--|
| Generally, violations that occur because of accidental or unique (e.g., weather) conditions should be of less concern than negligent or intentional violations. | Comment incorporated into proposal. |
| Elements relating to “intent” such as negligence or recklessness should be assessed separately from a person’s knowledge about what constitutes a violation when determining civil penalty amount. | Comment incorporated into proposal. |
| Important to look at which party received the economic benefit from the violation. | Comment incorporated into proposal. |
| Assess whether the violator(s) attempted to or successfully mitigated the damage caused by the violation in whole or in part - noting that remediation may be evidence of knowledge. | Comment incorporated into proposal. This also is a consideration for evaluating cooperation. |
| Difficult for public sector entities, who must accept low bid, to control violations by that low bidder. | We agree this needs to be considered, which makes it even more important to assess which party was the violator and which parties received economic benefit. |
| Whether the HPA/project is an emergency should be a consideration in determining civil penalty. | Comment incorporated into proposal; unique circumstances should be considered. |
| Financial or reputational advantage to the violator should be evaluated. | We will explore whether this should be a consideration in evaluating intent. |
| Comments on “Cooperation” considerations | |
| Assess whether the violator acted alone, or in concert or conspiracy with others. | Comment addressed into proposal. This situation might be more appropriate for criminal enforcement. |
| Assess responsiveness or evasion of responsibility or attempting to conceal the violation. | Comment incorporated into proposal. |

9.2.2 Alternatives to rule making

Four alternatives to rule making are presented and discussed in Section 5.2 and summarized on Table 14.

The term “*least burdensome alternative*,” when used within this table and subsequently, means “*least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under Chapter 77.55 [RCW].*”

Table 14: Least Burdensome analysis of alternative rule language

| Alternative/Comment | Proposed Rule Change | WDFW Response | Least Burdensome Alternative |
|---------------------|--|--|------------------------------|
| Alternative 1: | No action - do not adopt the new statutes into rule | <ul style="list-style-type: none"> • Places burden on applicants to find and read the statute to discover the new the department compliance tools/authorities • Civil penalty-setting and signature authorities are not as readily transparent as they would be in a formal rulemaking setting. • Failing to adopt features of the new statutes (civil penalty schedule, signature authority) into rule is a violation of those statutes. | Proposed rule |
| Alternative 2: | Adopt the civil penalty schedule and signature authorities into rule (and not other provisions of the new statute including the repeal of RCW 77.55.141) | <ul style="list-style-type: none"> • Not as readily transparent to an applicant how the new compliance tools fit within the department’s compliance program. • Appeal procedures for new compliance tools would not be as readily transparent. • Confusion about which saltwater bank protection rules are in force. | Proposed rule |
| Alternative 3: | Adopt the civil penalty schedule, signature authorities, benchmark requirements, and repealer into rule (and not other provisions of the new statute) | <ul style="list-style-type: none"> • Not as readily transparent how the new compliance tools fit within the department’s compliance program. • Appeal procedures for new compliance tools would not be as readily transparent as they are in a formal rulemaking. • Confusion about which saltwater bank protection rules are in force. | Proposed rule |
| Alternative 4: | Adopt all proposals except eliminate any benchmark requirement in WAC 220-660-370 | Benchmarks are necessary to establish whether a project is compliant with HPA provisions providing fish life protection. Taking out this requirement would be counter to the goal of Chapter 77.55 | Proposed rule |

| Alternative/Comment | Proposed Rule Change | WDFW Response | Least Burdensome Alternative |
|---------------------|----------------------|--|------------------------------|
| | | RCW to provide protection for fish life. | |

9.3: Determination: Least Burdensome

After considering alternative versions of the rule in context with the goals and objectives of the authorizing statute, **the department determines that the proposed rule represents the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under Chapter 77.55 RCW.**

SECTION 10: Remaining APA Determinations

The remaining narrative in this document addresses determinations pursuant to RCW 34.05.328(1)(f) through (1)(i) relating to state and federal laws, equal requirements for public and private applicants, and coordination with state, federal, tribal, and local entities.

10.1: Violation of other state or federal laws

RCW 34.05.328 (1)(f) Determine that the rule does not require those to whom it applies to take an action that violates requirements of another federal or state law.

There are no provisions in the Hydraulic Code Statute and Rules (Chapter 77.55 RCW and Chapter 220-660 WAC) requiring those to whom they apply to take an action that violates requirements of another federal or state law.

We make this determination because the HPA permit does not compel persons to take an action. Consistent with other state authorities, the Hydraulic Code Rules regulate the time, place, and way an action can occur to adequately protect fish life. The HPA also does not convey permission to use public or private property to conduct the project. Applicants must seek permission to use property from the landowners of properties that will be accessed for project completion. Authorization by the department to conduct any hydraulic project does not exempt anyone from the requirements of other regulatory agencies or landowners. Every HPA issued in Washington contains notice that

“...[the HPA permit] pertains only to requirements of the Washington State Hydraulic Code Statute, specifically Chapter 77.55 RCW. Additional authorization from other public agencies may be necessary for this project. The person(s) to whom this Hydraulic Project Approval is issued is responsible for applying for and obtaining any additional authorization from other public agencies (local, state and/or federal) that may be necessary for this project.”

Hydraulic Code Rules do not supersede existing federal and state requirements. Further, the department's proposal is designed to enable the department to collect data for purposes of protecting fish life, which is not in conflict with state or federal law.

The department has determined that the proposed rule does not require those to whom it applies to take an action that violates requirements of another federal or state law.

10.2: Equal Requirements for Public and Private

RCW 34.05.328 (1)(g) Determine that the rule does not impose more stringent performance requirements on private entities than on public entities unless required to do so by federal or state law.

The Hydraulic Code Rules generally apply equally to all public and private HPA applicants. Requirements are the same for public and private entities.

The department has determined that the rule does not impose more stringent performance requirements on private entities than on public entities.

10.3: Difference from other state and federal rules

RCW 34.05.328 (1)(h) Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by the following: [(i) explicit state statute..., (ii) substantial evidence that the difference is necessary...].

10.3.1: Other federal, state, or local agencies with authority to regulate this subject

The department has sole authority to implement the Hydraulic Code Rules (Chapter 220-660 WAC) under Chapter 77.55 RCW (Construction Projects in State Waters). Under 77.55.361, the Department of Natural Resources has authority to carry out the requirements of the Hydraulic Code Statute for forest practices hydraulic projects regulated under Chapter 76.09 RCW. The department and DNR have a process for concurrent review of such projects.

Local and state government regulations pertaining to land use and development, shoreline use, and clean water appear to have overlapping authorities, but have different fundamental purposes. Washington Department of Ecology regulates water diversions, discharges, and stormwater outfalls, features that could occur concurrently with a project that is regulated under the Hydraulic Code Statute and Rules. Local governments have regulations for the location (such as under the Shoreline Management Act) and methods (building codes) for construction projects. These aspects of a construction project also can co-occur with hydraulic project requirements, but none of these other authorities either duplicates or supersedes the Hydraulic Code Statute authority.

10.3.1.1: The rule differs from federal regulations or statutes applicable to the same activity.

The Hydraulic Code Statute and Rules regulate hydraulic projects for the protection of fish life.

Hydraulic projects are construction projects and other work that uses, diverts, obstructs, or changes the natural flow or bed of state waters. Federal protections under the Rivers and Harbors Act, Clean Water Act (U.S. Army Corps of Engineers and Washington Department of Ecology), and Endangered Species Act (U.S. Fish and Wildlife Service and National Marine Fisheries Service) may regulate hydraulic projects; however, the general goals and specific objectives of these federal acts are different from the state Hydraulic Code Statute and Rules.

Local, state, and federal agencies may have jurisdiction over the same project. Table 14 provides an overview of the characteristics of some aquatic permits at the federal, state, and local levels. At each jurisdictional level, priorities and legal mandates determine the resources or interests that are protected and the extent of the protection that is applied. Mitigation requirements also vary according to the agencies' protection priorities and legal mandates. As a result, regulatory efforts may share intentions or could have entirely different animal or habitat protection objectives.

The federal Endangered Species Act (ESA) comes closest to regulating the same subject matter - the protection of fish life. But while the state Hydraulic Code Statute and Rules regulate the way a project is constructed (so that the project is protective of fish life), the ESA regulates the "take" or kill of species listed as threatened or endangered under the Act. ESA jurisdiction relates only to animals or plants listed as threatened or endangered under the Act. The state Hydraulic Code Statute and Rules applies to all fish species.

The Hydraulic Code Statute and Rules fills a unique niche because its permits are issued solely to protect (all) fish life. In many cases, the HPA is the only permit required for:

- Hydraulic projects in streams too small to be considered a shoreline of the state (relevant to the state Shorelines Management Act) or navigable waters (relevant to Corps of Engineers permitting);
- Hydraulic projects not regulated under the Clean Water Act;
- Hydraulic projects not subject to state or federal landowner notification or permit requirements;
- Hydraulic projects exempt from state or national Environmental Policy Act review (refer to SEPA statute and rules for criteria for SEPA exemption); or
- Hydraulic projects exempt from local permits.

[10.3.1.2: Determination: Difference is necessary](#)

Differences between state HPA authority (and the current rule proposal) and federal authorities are necessary because there are no federal laws or rule protecting all fish life from the effects of construction projects.

The department has determined that the rule differs from any federal regulation or statute applicable to the same activity or subject matter and that the difference is necessary to meet the general goals and specific objectives of the Hydraulic Code Statute.

10.3.2: Coordination with state, federal and local laws

RCW 34.05.328 (1)(i) Coordinate the rule, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter.

10.3.3: Coordination with state and federal agencies

The department distributed information on September 16, 2019 and December 17, 2019, to agencies regarding the content and general objectives for rule making and seeking feedback from agencies on how the department can construct proposed rules that meet the department's needs while avoiding impact to other agencies' activities and permitting. That information requested agencies contact the department if they are concerned about impacts to their activities or authorities.

Ongoing coordination with federal, state, and local agencies occurs because, while the objectives of regulation are different, projects being reviewed under the HPA program are potentially reviewed by these other jurisdictions as well. The department coordinates mitigation requirements with federal agencies so that mitigation required for construction project impacts can satisfy mitigation required for impacts to other authorities; this coordination prevents imposing double the mitigation for the same project impact.

The department also solicits input from federal, state, and local agencies on ways to improve HPA program implementation, including both the regulation of projects and with the technical assistance that the department provides to other agencies and to project proponents.

10.3.4: Consultation with tribes

On September 13, 2019, the department distributed information about the content and impact of the proposed rules and requested to meet with tribes having concerns about the rules or wishing to convey comments to assist the department in drafting the rule proposals. The department received one comment during the preproposal period emphasizing the importance of moving forward with rulemaking to implement provisions of 2SHB 1579.

10.3.5: Permittee Responsibilities

Permittees are notified in HPA permits that it is the permittee's responsibility to meet legal requirements of other state, federal, and local agencies in order to conduct the hydraulic project activity. Permits from and notifications to other regulatory agencies may be required and applicable landowners must be consulted before conducting any activity. These responsibilities are independent from permitting under the Hydraulic Code Rules.

10.3.6: Determination: Coordinated with other federal, state, and local laws

The department has demonstrated that the rule has been coordinated, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter.

SECTION 11: Sources of Information Used

RCW 34.05.271(1)(a) Before taking a significant agency action, the department of fish and wildlife must identify the sources of information reviewed and relied upon by the agency in the course of preparing to take significant agency action. Peer-reviewed literature, if applicable, must be identified, as well as any scientific literature or other sources of information used. The department of fish and wildlife shall make available on the agency's web site the index of records required under RCW [42.56.070](#) that are relied upon, or invoked, in support of a proposal for significant agency action.

Following are references for material reviewed and relied upon by the department in the course of preparing to take this rule making action (Table 16), which is a significant legislative rule pursuant to RCW 34.05.328(5)(a). Each reference is categorized for its level of peer review pursuant to RCW 34.05.271. A key to the review categories under RCW 34.05.271 is provided on Table 17.

DRAFT

Table 15: Comparison of some common aquatic permits

| Permit | Agency | Goals/Objectives | Trigger activity | Action | Limitations |
|---|----------------------------|---|--|---|---|
| Hydraulic Project Approval | WDFW | Protect fish/shellfish and their habitats | Projects that use, divert, obstruct, or change the natural flow or bed of salt or fresh state waters. | Construction permit issued with conditions that mitigate impacts | May not optimize conditions for fish or unreasonably restrict a project. |
| ESA Incidental Take Permit | USFWS, NMFS | Ensure activities are not likely to jeopardize the continued existence of listed species, or destroy or adversely modify their critical habitat | Anyone whose otherwise-lawful activities will result in the “incidental take” of a listed species needs an incidental take permit. | Incidental take permit and terms and conditions | Applies only to ESA-listed species; “take” includes harm to designated critical habitat |
| Shoreline Substantial Development Permit | Local governments, Ecology | Encourages water-dependent uses, protects shoreline natural resources, and promotes public access. | Any project, permanent or temporary, which interferes with public use of shorelands. Projects in or within 200 feet of marine waters, streams, lakes, and associated wetlands and floodplains. | Development permit issued by local government | Conditional Use and Variance require review by Ecology. |
| NPDES construction stormwater or general permit | Ecology | Protects and maintains water quality and prevents or minimizes sediment, chemicals, and other pollutants from entering surface water and groundwater. | Construction activities that disturb 1 or more acres of land and have potential stormwater or storm drain discharge to surface water. | Construction permit or general permit with conditions to minimize discharge and/or report | Apply to projects disturbing 1 or more acres of land |

| Permit | Agency | Goals/Objectives | Trigger activity | Action | Limitations |
|---|------------------------------|---|--|--|--|
| Aquatic Use Authorization | DNR | Allows use of state- owned aquatic lands. Washington State Department of Natural Resources (DNR) determines if aquatic land is state- owned, if it is available for use, and if the use is appropriate. | Project located on, over, through, under, or otherwise impacts state- owned aquatic lands. Aquatic lands are defined as tidelands, shorelands, harbor areas, and the beds of navigable waters. | Use authorization permit or lease | Only for state-owned aquatic lands |
| Section 404 Permit (Regional, Nationwide, or Individual) for Discharge of Dredge or Fill Material | U.S. Army Corps of Engineers | Restores and maintains chemical, physical, and biological integrity of national waters. Authorized under Section 404 of the Clean Water Act. | Excavating, land clearing, or discharging dredged or fill material into wetlands or other U.S. waters. | Permit to discharge dredged or fill material | Concurrent consultation on 401 Certification, CZM, National Historic Preservation Act, Endangered Species Act, Tribal Trust Issues, and National Environmental Policy Act. |

Source: Excerpted from Governor’s Office of Regulatory Innovation and Assistance detailed [comparison of aquatic permits](#) by local, state, and federal agencies.

Table 16: Proposed minor edits that do not change the effect of the rules

| WAC Subsection | Description | Reason |
|---|---|--|
| WAC 220-660-050 – Procedures | | |
| 050 | “HPA Permit” and “permit” changed to “HPA” | Improve consistency of terms and/or phrases with other rules and remove superfluous words. |
| 050 (9)(c) | “fish life and habitat that supports fish life” changed to “fish life and their habitat” | Remove superfluous words. “Protection of Fish Life” definition 030 (119) includes fish life and the habitat that supports fish life. |
| 050 (13)(b) | “... these projects must meet the mitigation provisions in WAC 220-660-080 and the provisions in WAC 220-660-100 through 220-660-450 that are included in the HPA” is changed to “...these projects must comply with the provisions in this Chapter that are included in an HPA.” | Simplify language to improve readability and understanding |
| 050 (13) (d) | Added “or other work” | Improve consistency of language with words used in the definition of a hydraulic project 030 (76) |
| 050 (17) (a)(v) | “application for an HPA” changed to “HPA application” | Improve consistency of words with other rules |
| WAC 220-660-370 – Bank protection in saltwater areas | | |
| 370 | Removed reference to RCW 77.55.021. Added language to clarify the purpose of the Marine Shoreline Design Guidelines | Clarify language to improve readability and understanding of intent |
| 370 (1) | Changed description of bank protection techniques to better align with (3)(b) in this subsection | Improve consistency of words with other rules |
| 370 (2) | Changed fish life concerns language to more clearly explain what the concerns are and to better align with section 320 | Clarify language to improve readability and understanding of intent |
| 370 (3) | “Bulkheads and other bank protection design” changed to “Bank Protection Design” | Improve conciseness |
| 370 (3)(a) | Spelled out “ordinary high water line” Specified that this provision applies to “hard” structures Specified the application is an “HPA” application | Clarify language to improve readability and understanding of intent |
| 370(3)(b) | Added a description of how to determine the least impacting technically feasible bank protection alternative | Clarify language to improve readability and understanding of intent |
| 370(3)(b) | Added a comma | Improve readability |

| | | |
|--|---|---|
| 370(3)(b) 370(3)(c) 370(3)(d) | Removed bank protection examples | Remove superfluous language; these structures are described in (370)(1) |
| 370(3)(d) | Added “bank protection” structure | Clarify that the rule applies to a bank protection structure |
| 370(3)(d) | Added “prepared” | Clarify a qualified professional must repair this report |
| 370(3)(d) | Replaced “project and selected technique” with “method” | Improve consistency of words with other rules |
| 370(3)(d) | Added “The applicant must submit the qualified professionals report to the department as part of a complete application for an HPA that includes:” | Clarify this report must be submitted with the application |
| 370(3)(d) | Removed the qualified professional examples and restructured the sentence | Clarify language to improve understanding of intent |
| 370(3)(d)(iii) | Added “Alternative considered and the” | Improve consistency of words with those used in 370(3)(d) |
| 370(3)(e) | Added “hard” and replaced “projects” with “structures” | Clarify that the rule applies to a hard bank protection structure |
| 370(4)(a) 370(4)(b) | Replaced “bulkhead” with “hard bank protection structure” | Improve consistency of words with those used in 370(1) |
| 370(4)(a) | Replaced “stabilization techniques that provide restoration of shoreline ecological functions may be permitted” with “methods that allow beach processes and habitat to remain intact may extend” | Clarify that the rule applies to all soft shoreline methods |
| 370(5)(a) | Added “local” between permanent and benchmark(s) | Clarify that the benchmarks are local |
| 370(5)(d) | Removed “waterward of the bulkhead footing or base rock” | Clarify that the rule applies to both hard and soft shoreline methods |
| WAC 220-660-460 – Informal appeal of administrative actions | | |
| 460(1) | Removed “appeal to the department pursuant to” and replaced with “internal department review of a department HPA decision and is conducted under” | Improve informal appeal description |
| 460(1) | Replaced “the issuance, denial, provisioning, or modification of an HPA” with “a department HPA decision” | Clarify the rule to improve readability |
| 460(1) | Removed “on the HPA” | Remove superfluous language |

| | | |
|--|--|---|
| 460(1) | Removed “of the problem” | Remove superfluous language |
| 460(2) | Replaced “aggrieved persons” with “a person aggrieved by a department HPA decision” | Clarify language to improve readability and understanding of intent |
| 460(2) | Removed “the informal appeal process is not mandatory, and” | Remove superfluous language |
| 460(2) | Replaced “proceed directly to” with “pursue” | Improve readability |
| 460(2) | Added “without first obtaining informal review under this section” | Clarify rule to improve understanding of intent |
| 460(2) | Removed “any provisions in” | Remove superfluous language |
| 460(4) | Replaced “the date of actual receipt, however, may not exceed forty-five days from the date of mailing” with “up to forty-five days from the date of mailing” | Simplify language to improve readability |
| 460(6)(c) | Replaced “issued, denied, provisioned, or modified an HPA, or date the department issued the order imposing civil penalties” with “specific department action being contested” | Simplify language to improve readability |
| 460(6)(d) | Removed order imposing civil penalties” and replaced with “specific department action being contested” | Improve understanding and consistency of language with other rules |
| WAC 220-660-470 – Formal appeal of administrative actions | | |
| 470 | Removed “pursuant to” Added “board” | Improve readability |
| 470(1) | Replaced “the issuance, denial, provisioning, or modification of an HPA” with “a department HPA decision” | Simplify language to improve readability |
| 470(1) | Removed “of the problem” | Remove superfluous language |
| 470(2) | Replaced “aggrieved persons” with “a person aggrieved by a department HPA decision” | Clarify rule to improve readability and understanding of intent |
| 470(2) | Removed “the informal appeal process is not mandatory, and” | Remove superfluous language |
| 470(2) | Replaced “proceed directly to” with “pursue” | Simplify language to improve readability |
| 470(2) | Added “without first obtaining informal review under this section” | Clarify rule to improve understanding of intent |
| 470(2) | Removed “any provisions in” | Remove superfluous language |
| 470(5) | Removed “pollution control hearings board” and “PCHB” and replaced with “board” | Remove redundant language; improve |

| | | |
|---|--|--|
| | | consistency of language with other rules |
| 470(5)(b) | Replaced “the date of actual receipt, however, may not exceed forty-five days from the date of mailing” with “up to forty-five days from the date of mailing” | Simplify language to improve readability |
| 470(6) | Replaced “pursuant to” with “under” | Simplify language to improve readability |
| 470(6)(c) | Replaced “issued, denied, provisioned, or modified an HPA, or date the department issued the order imposing civil penalties” with “specific department action being contested” | Simplify language to improve readability |
| 470(9) | Replace “PCHB” with “board” | Improve consistency of language with other rules |
| WAC 220-660-480 – Compliance with HPA Provisions | | |
| 480 | Replaced “forest practices HPA” with “forest practices hydraulic project (FPHP) permit | Clarify rule to improve understanding of intent |
| 480 | Added two paragraphs to clarify how the department will the compliance tools | Clarify rule to improve understanding of intent |
| 480(1) 480(2) | Replaced “pursuant to” with under | Simplify language to improve readability |
| 480(1) | Added “continue to” | Reflect there is currently a program |
| 480(1) | Removed “HPA provisions” | Remove superfluous language |
| 480(1) | Removed “provisions of Chapter 43.05 RCW require” | Remove superfluous language |
| 480(1) | Removed “including private companies” | Remove superfluous language |
| 480(1) | Added “must” | Convey this is a requirement |
| 480(1) | Replaced “must be” with “is” | Simplify language to improve readability |
| 480(2)(b) | Renamed “Notice of Violation” and Notice of Correction” a correction request | Simplify language to improve readability and understanding of intent |
| 480(2)(b) 480(3)(a) | Moved “information required in a correction request to subsection 4 | Simplify language to improve readability and understanding of intent |
| 480(5) | Added a comma | Improve readability |
| 480(6) | Added “signature authority for a Notice to Comply” | Clarify rule to improve transparency |
| 480(7) | Added “each and” before every | Clarify rule to improve understanding of intent |
| 480(8) | Removed “timing” | Remove superfluous words. The “timing” of a violation is |

| | | |
|-----------|--|---|
| | | considered when determining the severity of a violation |
| 480(8)(d) | Replaced original language with “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.” | Clarify rule to improve understanding of intent |

Table 17: References for material reviewed in preparation for 2SHB 1579 HPA rule making

| Reference Citation | Category |
|--|----------|
| 2SHB 1579 (Laws of 2019, chapter 290 PV) | v |
| RCW 18.104.155 [Water Well Construction] Civil civil penalties—Amount and disposition. | v |
| RCW 70.95.315 [Solid Waste Management - Reduction and Recycling] Civil Penalty. | v |
| RCW 70.105.080 [Hazardous Waste Management] Violations—Civil civil penalties. | v |
| RCW 70.105.095 [Hazardous Waste Management] Violations—Orders—Civil Penalty for noncompliance—Appeal. | v |
| RCW 70.107.050 [Noise Control] Civil civil penalties. | v |
| RCW 90.03.600 [Water Code] Civil civil penalties. | v |
| RCW 90.48.144 [Water Pollution Control and Spill Prevention/Response] Violations—Civil Penalty—Procedure. | v |
| RCW 76.09.170 Violations—Conversion to nontimber operation—Civil penalties—Remission or mitigation—Appeals—Lien. | v |
| RCW 76.09.190 Additional civil penalty, gross misdemeanor. | v |
| RCW 90.64.010 Definitions. | v |
| RCW 90.64.040 Appeal from actions and orders of the department. | v |
| RCW 90.64.102 Recordkeeping violations—Civil penalty. | v |
| WAC 16-90-005 [Animal Industry Civil Penalty Schedule] Purpose. | v |
| WAC 16-90-010 [Animal Industry Civil Penalty Schedule] Civil penalty outline. | v |
| WAC 16-90-015 [Animal Industry Civil Penalty Schedule] Revoking, suspending, or denying a permit or license. | v |
| WAC 16-90-020 [Animal Industry Civil Penalty Schedule] Issuance of a civil penalty without first issuing a Notice of Correction. | v |
| WAC 16-90-030 [Animal Industry Civil Penalty Schedule] Civil penalty schedule. | v |
| WAC 16-139-005 [Dairy, Food, and Eggs Civil Penalties] Definitions. | v |

| Reference Citation | Category |
|---|----------|
| WAC 16-139-010 [Dairy, Food, and Eggs Civil Penalties] Calculation of civil penalty. | v |
| WAC 16-139-020 [Dairy, Food, and Eggs Civil Penalties] Civil penalty assignment schedule— Critical violations. | v |
| WAC 16-139-030 [Dairy, Food, and Eggs Civil Penalties] Civil penalty assignment schedule— Significant violations. | v |
| WAC 16-139-040 [Dairy, Food, and Eggs Civil Penalties] Civil penalty assignment schedule— Economic and other violations of chapters 16.49, 19.32, 69.04, 69.07, and 69.10 RCW. | v |
| WAC 16-228-1110 What are the definitions specific to civil penalties? | v |
| WAC 16-228-1120 How are civil penalties calculated? | v |
| WAC 16-228-1125 When can the department revoke or deny a license? | v |
| WAC 16-228-1130 What is the civil penalty assignment schedule? | v |
| WAC 16-228-1150 What are the other dispositions of alleged violations that the department may choose? | v |
| WAC 16-611-100 Assessing civil penalties. | v |
| WAC 16-611-110 Issuing a civil penalty without first issuing a Notice of Correction. | v |
| WAC 16-611-200 Civil penalty for lack of recordkeeping. | v |
| WAC 16-611-300 Civil penalty for discharge of pollutants. | v |
| WAC 222-46-060 Forest Practice Rules for civil penalties. | v |
| WAC 222-46-065 [Forest Practices Rules] Base civil penalty schedule. | v |
| Cook, A. Pers. Comm. July 29, 2019 | viii |
| Cook, A., et al. 2019. Hydraulic Project Approval Program Hood Canal Compliance Pilot Final Report. Project was funded by the U.S. Environmental Protection Agency through a grant from the Puget Sound Marine and Nearshore Grant Program. | iii |
| Governor's Office of Regulatory Innovation and Assistance. Aquatic Permits Sheet . ORIA Publication ENV-011-08. | viii |
| Governor's Office of Regulatory Innovation and Assistance. 2019. <i>Minor Cost Threshold Calculator July 2019.xlsx</i> available at: https://www.oria.wa.gov/Portals/_oria/VersionedDocuments/RFA/Regulatory_Fairness_Act/Minor%20Cost%20Threshold%20Calculator%20July%202019.xlsx | viii |
| Patterson, D. et al. 2014. Practical Guide: Cost-Effective Compliance with Shoreline Regulations | iv |
| Rotsten, J. Sea Level Bulkhead Builders. Pers. Comm. October 9, 2019. | viii |
| Scott, T. 2019. Preliminary Annual HPA Statistics Review for calendar year 2018. Unpublished data summary. | viii |
| Southern Resident Orca Task Force. 2018. "Southern Resident Orca Task Force Report and Recommendations" available at | iv |

| Reference Citation | Category |
|---|----------|
| https://www.governor.wa.gov/sites/default/files/OrcaTaskForce_reportandrecommendations_11.16.18.pdf | |
| U.S. Census Bureau. 2019. "American FactFinder" available at: https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t | viii |
| U.S. Department of Labor, Bureau of Labor Statistics. May 2018. OES Research Estimates, Occupational Employment Statistics (OES) Survey website: https://www.bls.gov/oes . Table of OES estimates for the State of Washington downloaded from https://www.bls.gov/oes/2018/may/oes_research_estimates.htm on 10/9/2019. | viii |
| Washington State Auditor <i>Minor Cost Threshold Calculator July 2019.xlsx</i> , which uses data from the 2012 Economic Census of the United States. | viii |
| Washington Department of Ecology Water Quality Compliance Assurance Manual. | v |
| Washington Department of Natural Resource Enforcement Handbook – Forest Practices. December 2016 | v |
| Washington State Department of Revenue Business Lookup Tool Available at: https://secure.dor.wa.gov/gteunauth/_/#1 | viii |
| Wilhere, G. et al. 2015. Year One Progress Report: Implementation and Effectiveness Monitoring of Hydraulic Projects. Washington Department of Fish and Wildlife, Habitat Program, Science Division. | ii |
| Wilhere, G. et al. 2019. Implementation and Effectiveness Monitoring of Hydraulic Projects - Year-five Progress Report. Washington Department of Fish and Wildlife, Habitat Program, Science Division. | ii |

Table 18: Key to RCW 34.05.271 Categories Relating to Level of Peer Review

| Category Code | RCW 34.05.271 Section 1(c) |
|---------------|---|
| i | Independent peer review: Review is overseen by an independent third party |
| ii | Internal peer review: Review by staff internal to the department of fish and wildlife; |
| iii | External peer review: Review by persons that are external to and selected by the department of fish and wildlife; |
| iv | Open review: Documented open public review process that is not limited to invited organizations or individuals; |
| v | Legal and policy document: Documents related to the legal framework for the significant agency action including but not limited to: (A) Federal and state statutes; (B) Court and hearings board decisions; (C) Federal and state administrative rules and regulations; and (D) Policy and regulatory documents adopted by local governments; |
| vi | Data from primary research, monitoring activities, or other sources, but that has not been incorporated as part of documents reviewed under the processes described in (c)(i), (ii), (iii), and (iv) of this subsection; |

| | |
|------|---|
| vii | Records of the best professional judgment of department of fish and wildlife employees or other individuals; or |
| viii | Other: Sources of information that do not fit into one of the categories identified in this subsection (1)(c). |

For Further Information

This report was prepared by:

Randi Thurston
Protection Division Manager
Habitat Program
360-902-2602
randi.thurston@dfw.wa.gov

Teresa Scott
Protection Division Environmental Planner 4, Ret.
Habitat Program
360-902-2713
teresa.scott@dfw.wa.gov

DRAFT