



Fish and Wildlife Commission Presentation Summary Sheet

Meeting date:

4/1/2022

Agenda item:

Petition related to motorized mining

Presenter(s):

Habitat Program: Margen Carlson, Josh Peters, Theresa Nation

Background summary:

Petition

On February 8, 2022, Mr. Dennis Petersen petitioned the Fish and Wildlife Commission (Commission) on behalf of the Washington Small-Scale Miners Action Group. The petition consists of two parts:

1. A narrative request to amend existing Hydraulic Code rules in Washington Administrative Code (WAC) [220-660-300](#) (Mineral prospecting) and [WAC 220-660-305](#) (Mineral prospecting involving motorized or gravity siphon equipment). The petition asks that mineral prospecting rules adopted by the Commission on April 9, 2021 to implement Engrossed Substitute House Bill (ESHB) 1261 be revised to reflect the intent, as the petitioner asserts, of the State Legislature when formulating ESHB 1261 through the 2020 legislative session. According to the petition, amending WAC 220-660-300 and -305 as requested would "...allow use of motorized mining equipment, including but not limited to recirculating systems, which involve no need for an HPA [Hydraulic Project Approval] or discharge to waters of the state." (p. 3).
2. Proposed in-line changes to WAC 220-660-300 and -305. See the petition, pages 4 through 11, for the complete set of proposed rule amendments.

Commission decision

Pursuant to Revised Code of Washington (RCW) [34.05.330](#)(1), within 60 days of receiving a petition to amend rules, the Commission shall:

- a) deny the petition in writing, stating (i) its reasons for the denial, specifically addressing the concerns raised by the petitioner, and, where appropriate, (ii) the alternative means by which it will address the concerns raised by the petitioner; or
 - b) initiate rule-making proceedings in accordance with RCW 34.05.320.
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Staff recommendation:

[Chapter 77.55 RCW](#) contains the laws governing regulation of construction projects in state waters for the specific purpose of protecting fish life. The Washington Department of Fish and Wildlife (WDFW) is the responsive “department” referenced in that chapter. RCW 77.55.021(1) requires a permit (i.e., Hydraulic Project Approval or “HPA”) for any hydraulic project. Per RCW 77.55.011(11), a “Hydraulic project” means the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state.

Mineral prospecting means to excavate, process, or classify aggregate using hand-held mineral prospecting tools and mineral prospecting equipment (WAC 220-660-030(96)). Many methods of mineral prospecting affect the bed and flow of state waters and thus also have the potential to impact fish life regardless of their location; they are therefore subject to WDFW’s regulatory authority through the Hydraulic Code (Chapter 77.55 RCW and Chapter 220-660 WAC).

During previous rule making, WDFW carefully analyzed the risks from mineral prospecting to fish and fish habitat.¹ The Commission adopted comprehensive Hydraulic Code rules in 2014 that included best practices to protect fish life from potential impacts from mineral prospecting. In 2019, the Commission adopted amendments to WAC 220-660-330 that further protected fish life from the impacts of suction dredging by requiring individual permits for those types of mineral prospecting activities.

Individuals engaged in mineral prospecting use a variety of tools to search for and recover gold and other minerals, and those tools range widely from simple handheld ones like pans to motorized suction dredges. The department has defined many of these tools in rule.

Most individual permits require site review and approval of a specific work plan, including as-built drawings of proposed construction projects. This is not the case for mineral prospecting conducted pursuant to the [Gold and Fish pamphlet](#). RCW 77.55.091 authorizes the *Gold and Fish* pamphlet, which contains rules for prospectors to follow when engaged in small scale mineral prospecting and mining activities in Washington. Activities regulated under the pamphlet do not require individual, site-specific HPAs. This means that prospectors do not need to submit HPA applications for activities regulated under the pamphlet unless they wish to deviate from the pamphlet’s rules. This also means that WDFW is not conducting site-specific reviews of such activities. The pamphlet is updated periodically and contains information about impacts of mineral prospecting on fish habitat in addition to specific rules. Adhering to the pamphlet does not relieve individuals of their obligations to obtain other permits as required by federal, state, and local government jurisdictions.

Petition part 1:

[ESHB 1261](#), an act “Ensuring compliance with the federal clean water act by prohibiting certain discharges into waters of the state,” passed during the 2020 legislative session. The new law took effect on June 11, 2020. Sec. 3 of the bill amended RCW 77.55.011 by modifying the definition of “small scale prospecting and mining” and adding a definition for “motorized or gravity siphon aquatic mining.” Sec. 4 of the bill amended RCW 77.55.021 by adding a requirement that HPA applicants proposing mineral prospecting or mining using motorized or gravity siphon equipment, in order to submit a complete permit application, must provide proof of compliance with the requirements of the federal Clean Water Act issued by the Department of Ecology.

¹ Some of this analysis may be found in a 2006 WDFW publication: [Small-Scale Mineral Prospecting White Paper](#).

The changes brought about by ESHB 1261 require that “small scale prospecting and mining” no longer includes any prospecting or mining using motorized equipment. Pursuant to RCW 77.55.091, the *Gold and Fish* pamphlet is intended to enable mineral prospectors to engage in “small scale prospecting and mining” activities covered in the pamphlet without need for an individual permit, so long as they follow the conditions in the pamphlet. At the time that ESHB 1261 was enacted, the *Gold and Fish* pamphlet included the use of certain motorized concentrators, along with nonmotorized equipment. The enactment of ESHB 1261 necessitated a change to the *Gold and Fish* pamphlet to remove mineral prospecting and mining using any motorized equipment to reflect the change in the definition of “small scale prospecting and mining.” The Commission adopted rule changes to that effect in 2021, and WDFW adjusted the *Gold and Fish* pamphlet accordingly. The rule making included a thorough process of public review and feedback.

Clean Water Act compliance associated with discharge is administered by the Department of Ecology.

Conclusion regarding petition part 1:

Staff’s analysis for part 1 of this petition is that that amending the *Gold and Fish* rules for “small scale prospecting and mining” (WAC 220-660-300) to include motorized mining would be inconsistent with current statute. The requested changes would be invalid in that rules revised as requested would be contrary to state law.

Petition part 2:

In addition to the narrative request regarding the *Gold and Fish* pamphlet, the petition includes specific edits to WAC 220-660-300 and -305. Most of these appear to reflect the petitioner’s expectations for reintroducing motorized equipment to the *Gold and Fish* rules. The petition includes additional changes that are not directly related to that expectation. These edits are offered with little or no explanation. They include, in part:

- Amendment of a statement regarding fish life concerns by addition of language stating that mineral prospecting can “improve as well as” harm fish life and habitat that supports fish life;
 - Elimination of “mortality” from a statement regarding the physical effects of disturbing eggs and fry;
 - Elimination of the provision that, “A person may not undermine, cut, or disturb live, rooted woody vegetation of any kind”;
 - Elimination of the provision that, “A person must fill all excavation sites and level all tailing piles before moving to another excavation site or abandoning an excavation site”;
 - Amendment to the authorized work times that applies them only to work within the wetted perimeter;
- and
- Other changes that would have no apparent effect on the regulation of mineral prospecting.

Conclusion regarding petition part 2:

Because the department has carefully analyzed the risks from mineral prospecting and mining to fish and their habitat during previous rule making, and the Commission adopted rules that reflect best practices to protect these resources, staff’s analysis is that the proposed in-line rule changes are neither consistent with best practices nor the protection of fish or their habitat. The petitioner has provided no compelling reason as to why WDFW should initiate rule making to amend WAC 220-660-300 and -305. There is no new statute or case law that warrants re-initiating rule making for the regulation of mineral prospecting.

Staff recommendation for Commission response to petition:

Staff recommends denial of this petition for the following reasons.

Amending the rules for “small scale prospecting and mining” covered by the *Gold and Fish* pamphlet to include motorized mining would be inconsistent with RCW 77.55.021 as amended by ESHB 1261, and RCW 77.55.091.

The proposed set of amendments to WAC 220-660-300 and -305 are neither consistent with best available practices as adopted by the commission, nor the protection of fish or their habitat, and there is no new statute or case law that warrants re-initiating rule making for the regulation of mineral prospecting.

The Commission adopted the current rules for mineral prospecting following extensive public process associated with rule making for ESHB 1261, as well as earlier rule making for the Hydraulic Code that included provisions addressing impacts to fish life from mineral prospecting. WDFW carefully analyzed the risks from mineral prospecting and mining to fish and their habitat during previous rule making. Best practices to protect fish life are reflected in the current rules.

Policy issue(s) and expected outcome:

If the Commission denies the petition, the current rules protecting fish and fish habitat will remain in place. Department staff will also likely need to continue communication and outreach to the mineral prospecting community to describe the current HPA rules, and to help them connect with the Department of Ecology regarding Clean Water Act compliance.

If the Commission decides to undertake rule making, based on past experience with mineral prospecting regulations, staff expect that rule making would be contentious and necessitate a significant investment of staff time. Such an effort would have to be weighed against current, ongoing rule making, as described below.

Fiscal impacts of agency implementation:

If the Commission decides to undertake rule making, it must be conducted according to the standards set in the Administrative Procedures Act and Regulatory Fairness Act. These statutes require the development of a number of rule-making documents. In addition, public outreach must be conducted. As noted above, based on past experience with mineral prospecting, staff expect that rule making would be contentious. This would increase necessary staff time and expense. If adopted, we would expect a high likelihood of legal challenges to the rule, further increasing costs to the agency.

WDFW is currently working to complete three rounds of rule making for the Hydraulic Code before the 2023 legislative session. These are all in response to bills passed in the 2021 session. The legislature has taken an interest in hydraulic permitting in recent sessions, passing several bills on the topic. We anticipate that this trend will continue into the near future. Separate rounds of rule making generally cannot be run concurrently for the same rule. Barring unforeseen delays, our current efforts to integrate 2021 laws will take until at least the start of the 2023 legislature. Rule making for mineral prospecting at this time would require additional staff resources and would cause WDFW to fall behind with the implementation of legislation.

Public involvement process used and what you learned:

N/A

Action requested and/or proposed next steps:

The department requests that the Commission deny the subject petition.

Draft motion language:

I move to deny the petition from Dennis Petersen, received by the department on February 28, 2022, to amend rules for mineral prospecting and mining in WAC 220-660-300 and WAC 220-660-305.

Post decision communications plan:

Staff will prepare a letter from the Commission to Mr. Peterson. The letter will describe the Commission response to the petition submitted by Mr. Petersen.

Form revised 1-20-21