



Fish and Wildlife Commission Presentation Summary Sheet

Meeting date:

7/14/2023

Agenda item:

Petition related to mineral prospecting

Presenter(s):

Habitat Program: Margen Carlson, Matt Curtis, Theresa Nation

Background summary:

Petition

On June 2, 2023, Ms. Kim McDonald petitioned the Fish and Wildlife Commission (Commission) on behalf of Fish Not Gold. The petition requests rulemaking to introduce two new requirements for Hydraulic Project Approval (HPA) permit applications. Specifically, the request is to amend [WAC 220-660-305](#) (Mineral prospecting involving motorized or gravity siphon equipment). The rule amendment would require proof of compliance with water rights regulations and proof of a State Waste Discharge permit, as part of a complete application.

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:

Staff recommends denial of this petition. The Commission and WDFW have a long history of evaluating mineral prospecting impacts and have conducted extensive public input during rule making. The petition asks for rule amendments that do not align with direction from the legislature, thus posing a high risk of legal action were

they to be implemented. Applicants have other ways to learn about permitting that does not fall under WDFW's jurisdiction.

[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. Water rights and state waste discharge permits are administered by the Department of Ecology and are not within WDFW's statutory authority.

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 220-660 WAC and Chapter 77.55 RCW).

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 (chapter 220-660 WAC) 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. In 2021, the Commission adopted rules related to mineral prospecting to implement ESHB 1261.

Anyone wishing to conduct mineral prospecting involving motorized or gravity siphon equipment or discharge effluent from such an activity to waters of the state must apply for an individual HPA permit². The mandatory elements of an HPA application for this activity are defined by law in RCW 77.55.021. They include:

- General plans for the overall project;
- Plans and specifications of the proposed work within the ordinary high water line;
- Plans and specifications for the protection of fish life;
- Notice of compliance with applicable requirements of the State Environmental Policy Act; and
- Proof of compliance with the requirements of the federal Clean Water Act issued by Ecology.

Once WDFW receives a complete application, it is reviewed, and a permit is issued or denied. Incomplete applications do not move forward for processing until they have been completed. Permits are conditioned for the protection of fish life. These conditions are the best practices which are found in the Hydraulic Code³. RCW 77.55.021(7)(a) requires: *Protection of fish life is the only ground upon which approval of a permit may be denied or conditioned. Approval of a permit may not be reasonably withheld or unreasonably conditioned.* The language here indicates that protection of fish life occurs during the permitting stage. The petitioner asserts that requiring proof of other permits will protect fish life. However, denying or conditioning an HPA to protect fish life is different than making a determination that an application is complete and can be processed in the first place.

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

² Metals mining and milling operations as defined in chapter [78.56](#) RCW do not fall under the Hydraulic Code.

³ Custom or modified conditions may also be used on a project-specific basis.

WDFW strongly agrees that clean water and sufficient flows are necessary for fish to survive. We respect the goals of the petitioner but have concluded that amending the rules as requested without direction from the legislature would create a high legal risk for the department. The legislature has clearly defined the requirements for a complete application. The Hydraulic Code reflects that statutory direction and does not impose additional requirements. In some instances, the legislature has required that the applicant submit evidence of compliance with other laws, but that is not the case with respect to water rights and waste discharge permits. If WDFW were to adopt the proposed rules, we would be establishing criteria for a complete application that differs from statute. In the case of motorized mineral prospecting, the Legislature chose to be very specific about additional application requirements. By extension they actively chose not to include other requirements. Therefore, it would be difficult to defend adding requirements that the Legislature did not include when they were so specific about what constitutes a complete application. Additionally, we were unable to find any authority in WDFW's enabling statutes that would authorize WDFW to require the collection of the proposed information as a condition of either a complete application or as a provision of our permit. This means there is a substantial risk of challenge if WDFW were to adopt the petition's proposal, on the basis that it imposes additional requirements that are outside the agency's statutory authority.

The petitioner suggests that the proposed requirements will help make applicants aware of additional permits needed for their project. Water rights and waste discharge permits are programs vested to Ecology. Ecology has already integrated information about additional Ecology permits into their letter acknowledging compliance with the Clean Water Act, which an applicant must have before they apply for an HPA. WDFW strives to dispel the idea that an HPA covers other permitting requirements by including the following note that is not a legal provision of the permit that we can enforce with our own authority, but that informs the applicant that there may be additional authorizations needed:

This Hydraulic Project Approval pertains only to those requirements of the Washington State Hydraulic Code, 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.

Conclusion regarding this petition:

Staff recommends denial of this petition for the following reasons. The Commission and the department have exerted considerable effort over the last 10 years to analyze the risks from mineral prospecting and mining to fish and their habitat. The current rules reflect best practices to protect those resources, and the HPAs issued for projects associated with mineral prospecting are fully protective of fish life for those activities within our authority. A party that wishes to apply for a mineral prospecting HPA must submit a complete application as defined in statute. That HPA will then be conditioned to protect fish according to the rules. Requiring additional application materials not defined in statute carries a high legal risk and would be difficult to defend from a

challenge. Applicants have other ways to learn about additional permits outside of the HPA application process. The current rules reflect both the language and the intent of Chapter 77.55 RCW.

Staff recommendation for Commission response to petition:

The amendments proposed in this petition are not consistent with direction from the legislature regarding HPA applications. 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 their 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 Ecology regarding additional permitting.

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 other rule-making needs.

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, legal challenges to the rule are likely, further increasing costs to the agency. If such a rule was to be struck down, the Hydraulic Code would revert to how it reads today.

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 Kim McDonald, received by the department on June 2, 2023, to amend rules for mineral prospecting and mining in WAC 220-660-305.

Post decision communications plan:

Staff will prepare a letter from the Commission to Ms. McDonald. The letter will describe the Commission response to the petition submitted by Ms. McDonald.

Form revised 1-20-21