

## Summary

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**Meeting dates:** February 17, 2017 Conference Call

**Agenda item:** Petition - Beach Mining Rule Changes - Decision

**Presenter(s):** Pat Chapman, Regulatory Services Coordinator, Habitat Program

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### **Background summary:**

On December 28, 2016, Mr. Dennis Petersen petitioned the Fish and Wildlife Commission to repeal the rule for mineral prospecting on ocean beach adopted by the Commission in December 2014. That rule is incorporated in WAC 220-110-206.

Following a legislatively mandated 2-year joint pilot program for ocean beach prospecting conducted by Washington State Parks and Recreation Commission (Parks) and WDFW, in October 2011 Parks conducted a State Environmental Policy Act review and adopted rules regulating aspects of that activity over which it has authority. Between October 2011 and June 2015 WDFW issued approximately 1,500 individual Hydraulic Project Approvals (HPAs) for beach prospecting.

To reduce the significant workload associated with those individual permits, WDFW incorporated rules for ocean beach prospecting in its overhaul of Hydraulic Code rules that the Commission adopted under Chapter 220-660 WAC in December 2014. Those rules went into effect July 2015. To implement the ocean beach prospecting rule, WDFW incorporated it into the 2015 version of the Gold and Fish pamphlet HPA. Prospectors holding a copy of the Gold and Fish pamphlet may engage in ocean beach prospecting by following the conditions in the pamphlet without need for further authorization or they can choose to use a previously issued HPA for the activity as long as it is still active.

In his filing, Mr. Petersen contends that the WAC conflicts with another federal, state, or local law or rule and requests its repeal. Specifically, he claims:

1. The WAC conflicts with WAC 352-37-340 (adopted by Washington State Parks and Recreation Commission (Parks)) by adding additional and unsubstantiated rules and requirements for beach mining. WAC 220-660-300 (6) includes language about moving beach driftwood and site excavation requirements that are different from WAC 352-37-340.
2. WAC 220-660-300 (6) conflicts with RCW 34.05 at least minimally in the following ways:
  - a. There is a lack of coordination between beach mining rules in WAC 220-660-300 (6) and with State Parks and Recreation beach mining rules in WAC 352-37-340.
  - b. There has not been any effort to reach an agreement among interested parties (small-scale miners) before the publication of the notice and adoption of the proposed rule.
3. WAC 220-660-300 (6) is poorly written because it conflicts with existing beach mining HPAs that have been approved for the same time window and same locations.

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### **Policy issue(s) you are bringing to the Commission for consideration:**

Pursuant to RCW 34.05.330 (1) should the Commission:

- 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
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- 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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**Public involvement process used and what you learned:**

In addition to the public rulemaking process required by the Administrative Procedure Act (Chapter 34.05 RCW) which included publication of draft rules, and solicitation and receipt of comments on the proposed rules, WDFW extensively engaged the public during the drafting and adoption of the rules, including those for ocean beach prospecting. WDFW established an advisory group composed of interested stakeholders to consult with WDFW on proposed rules. Two members of the prospecting community, Bill Thomas and Robert Cunningham, participated in that workgroup. WDFW also held a series of open public meetings on draft rule language, including one meeting specifically devoted to mineral prospecting. Those meetings occurred on October 17, 23, 24, 28, 29, 30 2013 and November 4 2013. WDFW received a variety of comments, only a few of which applied to the ocean beach prospecting portion of the rule. It carefully considered each one, but ultimately recommended no change to the draft ocean beach prospecting rule and the Commission adopted them unchanged.

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**Action requested:**

The department requests that the Commission deny the petition to repeal WAC 220-660-300 (6).

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**Draft motion language:**

I move to deny the petition to repeal work windows for mineral prospecting in WAC 220-660-300 (6).

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**Justification for Commission action:**

Parks' and WDFW's rules do not conflict, but rather supplement each other. Each agency regulates based on what their authority requires – Parks' is over the use of and access to lands in the Seashore Conservation Area, and WDFW's is solely regarding the protection of fish life in those areas. WDFW is in the process of updated an agreement regarding joint enforcement of the rule with Parks. Because the Administrative Procedure Act does not contain a deadline to reach agreement on rule implementation with other agencies having similar rules, WDFW has not violated the Administrative Procedure Act. There is no requirement in the Administrative Procedure Act to reach agreement with stakeholders on proposed rules. WDFW extensively sought input on the proposed rules from interested parties and carefully considered all comments received, but ultimately did not recommend any changes to the draft submitted for Commission consideration. The rule for ocean beach prospecting is not poorly written and does not conflict with individual HPAs previously issued. Prospectors may choose to operate under the Gold and Fish pamphlet or may use a previously issued active HPA for this activity. Repeal of the rule would require the WDFW to issue individual HPAs to applicants for beach prospecting. This would result in a significant workload increase for Region 6 or headquarters staff.

Thurston County Superior Court is scheduled to rule on a lawsuit regarding many of these issues by April 3, 2017. Additionally, significant staff time is focused on another lawsuit in that court regarding all of the rules in Chapter 220-660 WAC. It would be prudent to use the limited agency resources to leave the existing rule intact while awaiting the decision by the court. WDFW staff will provide an update to the Commission following the announcement of the court's decision and will recommend further action if necessary.

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**Communications Plan:**

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*Form revised 12/5/12*