

## Summary

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**Meeting dates:** July 21, 2017

**Agenda item:** Supplementing the Hydraulic Code Rule Making Record to Comply with an Agreed Court Order – Prospector’s Administrative Procedures Act - Briefing

**Presenter(s):** Pat Chapman, Habitat Program and Margen Carlson, Habitat Program

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### **Background summary:**

The Chapter 220-660 WAC Hydraulic Code Rules implement Chapter 77.55 RCW Construction Projects in State Waters. The RCW (statute) authorizes the department to issue permits called Hydraulic Project Approvals (HPAs) to protect fish life from construction or other work that affects the bed or flow of state waters.

WDFW performed an extensive revision of mineral prospecting sections of the Hydraulic Code Rules in 2008. That process included consultation with an ad hoc advisory group that included mineral prospectors as well as representatives of conservation organizations.

On November 7, 2014, the Fish and Wildlife Commission adopted changes to the Hydraulic Code rules that included re-organizing and re-codification of all rules existing at that time. The rule changes went into effect on July 1, 2015. This adoption represented the culmination of an exhaustive four-year rule-making process that began in July 2011. Although, overall, the rule changes represented a major overhaul of the chapter only a few changes were made to the mineral prospecting sections of the rules. The changes were the following:

- Consolidating the prospecting rules into one section without substantive changes: rules from former WAC 220-110-200, -201, -202, and -206 were consolidated into WAC 220-660-300.
- Adding a section to allow mineral prospecting on ocean beaches to be conducted under the Gold and Fish pamphlet. This eliminated the need for prospectors to obtain an individual HPA. The department had issued an average of 411 individual HPAs a year for this work.
- Removing the restriction limiting the use of motorized mini high bankers – a type of small-scale mineral prospecting equipment. The department had issued an average of 29 individual HPAs a year for this work.
- Changes to the authorized work times included:
  - Benton County: Name of Amon Creek changed to Amon Wasteway.
  - Chelan County: Wenatchee River divided into two sections and work window lengthened by one month in the lower section.
  - Kitsap County: Work window changes to Dogfish Creek (shortened by six weeks), Gorst Creek (shortened by two weeks), and Grovers Creek (shortened by four weeks). No prospecting occurs in Kitsap County.
  - Skagit and Whatcom Counties: Open periods for certain Nooksack and Suiattle River reaches were changed to require HPA application. These river reaches had formerly been open from two to four weeks.

Prospectors petitioned the court and challenged both the 2008 and 2014 rule-making processes. Prospectors challenged both rulemaking processes by alleging inconsistency with the Administrative Procedures Act’s (APA’s) procedural requirements, declaring both sets of

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rules as arbitrary and capricious, and challenging the 2014 rule regulating prospecting on ocean beaches. At a February 3, 2017 court hearing, prospectors argued the following:

- The 2008 rule-making wasn't a science-based update to the prospecting rules.
- WDFW did not identify the specific objectives of the statute that the 2008 rule implements because it only identified an objective to protect fish life.
- The cost-benefit analysis did not take into account the qualitative and quantitative benefits and costs, and ignored the costs for prospectors.
- It would be less burdensome if the prospecting rules were regulated in a manner different from work windows.
- WAC 220-660-300 is preempted by federal mining law so the State doesn't have the right to regulate mineral prospecting.
- The Commission erred in the timing of its November 2014 implementation plan.
- The Small Business Economic Impact Statement (SBEIS) was not published.
- Work windows that limit the use of motorized equipment in rivers to times when fish are not spawning are arbitrary and capricious.
- The new provision of WAC 220-660-300(6) that regulates prospecting on ocean beaches disregarded WDFW's legislative delegation of authority and is arbitrary and capricious.

The court reviewed the record and heard oral arguments at a hearing on February 3, 2017. In a letter opinion dated March 10, 2017, the court found in favor of the Commission on all but two of the issues under consideration, and ordered that:

- 1) The Commission must conduct a least-burdensome alternative analysis for the 2014 rule changes pertaining to mineral prospecting, and
- 2) The Commission must complete the requirements of the Regulatory Fairness Act by explicitly determining whether a Small Business Economic Impact Statement is needed, and if so, completing that process.

A subsequent petition by the prospectors for reconsideration was denied by the court on March 28, 2017.

The department and the prospectors filed an agreed order which was accepted by the court on June 8, 2017. To comply with the order, the Commission must take the action stated below prior to October 31, 2017. WAC 220-660-300 remains in effect pending these determinations, unless the Commission determines, based upon those reconsiderations or other factors, to revise the mineral prospecting rules.

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

Commission must act to comply with the court's order prior to October 31, 2017.

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

None outside the court proceedings

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**Action requested:**

Briefing only at this time, the department will request that the Commission take action at the August 4-5 meeting so that interested stakeholders have an opportunity to comment during the open public comment period.

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**Draft motion language:**

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**Justification for Commission action:**

The department will request that the Commission explicitly determine that the rule changes adopted in 2014 do not impose more than minor costs on small scale mineral prospecting businesses and, based on that determination, declare that a Small Business Economic Impact Statement is not needed. The department will also request that the Commission determine that the rulemaking alternative adopted in 2014 is the least burdensome of the alternatives presented while also achieving protection of fish life. The justification for this action is based on the following analysis:

**Small Business Economic Impact**

RCW 19.85.020(3) defines a small business as ...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.

Department staff determined a Small Business Economic Impact Statement and Cost Benefit Analysis for the Hydraulic Code rules were necessary. The economist who authored the Detailed Small Business Economic Impact Statement and Cost Benefit Analysis for the Hydraulic Code rules concluded based on her analysis that none of the proposed rule changes would have a disproportionate cost impact on small business. In addition, the economist concluded there was an economic saving from the proposed changes to WAC 220-660-300 due to the incorporation of the ocean beach prospecting rules that eliminated the need for individual HPAs for this activity.

The court found that the 2014 rule-making file did not address whether the rule changes would create costs for businesses in the prospecting industry. Following the issuance of the Court's letter opinion, department staff reviewed the analysis completed in 2014, and conducted another analysis specific to mineral prospecting businesses. Staff designed the analysis to identify as many of the mineral prospecting businesses in Washington as possible, and interview each one to determine the impact to that business from the 2014 mineral prospecting rule changes – particularly the changes to work windows in the Nooksack, or Suiattle Rivers.

A public disclosure request was submitted to Washington State Department of Revenue for the names of businesses self-identifying as metal ore mining businesses. Revenue does not maintain data regarding the number of people employed by each business. Revenue provided the department with business and entity names, Uniform Business Identifier, business address, and North American Industry Classification System (NAICS) identifier for fourteen businesses in Washington associated with the metal ore mining industry. None of the fourteen has applied for an HPA. Out of the fourteen businesses identified, business status was discussed with five businesses. Messages requesting return calls or email were left for three businesses, and contact information is not available or was confirmed to be incorrect for five of the businesses. No return calls or emails have been received.

None of the five businesses contacted qualifies as a business affected by WDFW hydraulic code rules. Four of the businesses identified themselves as hard rock mining companies that aren't regulated by the hydraulic code (one of which is a subsidiary of a larger company, and therefore doesn't qualify as a small business for the purposes of this analysis). A principal for a fifth company indicated that his business is defunct, and he has not mined in Washington for decades (never in the Nooksack or Suiattle).

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Four small-scale mineral prospecting clubs are registered as non-profit small businesses. Clubs are funded by dues. As a result, they are not economically affected by rule-making.

Staff also searched the Department of Licensing business and professional licenses database for the names of all prospectors who applied for individual Hydraulic Project Approvals from February 14, 2016 – March 16, 2017. Staff found no record that any of the 58 prospectors applying for HPAs had a current mineral prospecting business license. Although prospectors may get income and pay taxes on their prospecting earnings they are not a legal entity under the definition in the Regulatory Fairness Act unless their businesses are registered with the State of Washington.

As a result of these findings, department staff determined there is no evidence to suggest the proposed rule will not impose more than minor costs on businesses in the metal ore mining industry that are regulated by the hydraulic code, and therefore, a Small Business Economic Impact Statement is not required under RCW 19.85. Under RCW 19.85.030(1)(a), the Commission needs to determine whether an SBEIS is required.

### **Least burdensome alternative**

During the court proceedings, the prospectors argued that the Commission did not in fact adopt the least burdensome alternative from their perspective, and also that the Commission did not explicitly determine that the rules adopted were the least burdensome alternative. The court only agreed that the Commission failed to make a determination that the 2014 rules were the least burdensome alternative.

Department staff presented four alternatives to the Commission in the 2014 rule-making. Alternative One was a no-action alternative. The other three alternatives were compiled from comments received during the Programmatic Environmental Impact Statement public comment period. The department received several comments advocating for additional restrictions or prohibitions especially for suction dredging. Prospectors advocated for changing the authorized work times back to those in the 1994 or 1999 rules. The department recommended that the Commission adopt the alternative that was the least burdensome to HPA applicants while still meeting the goal of the statute to protect fish life. This preferred alternative did the following:

- Consolidated the four mineral prospecting rule sections into one section and retained the most of the 2008 rule provisions.
- Added an additional sub-section to allow mineral prospecting on ocean beaches to occur under the Gold and Fish pamphlet.
- Lifted the restriction limiting the use of motorized mini-highbankers because staff determined that the change would not increase impacts to fish life.
- Amended the authorized work timing in six waterbodies and changed one waterbody name.

The addition of ocean beaches and motorized mini-highbankers in the small-scale mineral prospecting rule pamphlet meant a reduction in about 440 individual HPAs a year, which is a significant reduction in regulatory burden for these individuals.

Work timing in six waterbodies (only three of which have gold) was amended in 2014 based on science that was received and vetted by the department. Salmon and steelhead in the Nooksack and Suiattle Rivers (many of which are listed as Threatened under the federal Endangered Species Act) require the protection afforded by these changes.

Although mineral prospecting in the Nooksack and Suiattle Rivers now requires a prospector to submit an application for an individual HPA, it is still possible to receive a permit to prospect in these streams. Other alternatives would have eliminated mineral prospecting in these areas

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entirely, and the no-action alternative would have left fish vulnerable to impact from mineral prospecting. As part of the application process prospectors may go in the field with a habitat biologist to identify the places they can work where eggs are least likely to be incubating.

Under the statute for changes to significant legislative rules [RCW 34.05.328(1)(e)], the Commission must conduct an analysis of the alternatives and issue a determination that the chosen alternative is the least burdensome alternative that will achieve the general goals and specific objectives of the statute that the rule implements (RCW 77.55.091). The preferred alternative, which allows mineral prospecting under an individual HPA, is determined by staff to be least burdensome while affording adequate protection to fish life.

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**Communications Plan:**

The court and petitioners will be informed that the Commission has complied with the agreed order.

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*Form revised 12/5/12*