



PROPOSED RULE MAKING

CR-102 (July 2022) (Implements RCW 34.05.320) Do NOT use for expedited rule making

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STATE OF WASHINGTON
FILED

DATE: September 18, 2023

TIME: 3:16 PM

WSR 23-19-072

Agency: Washington Department of Fish and Wildlife (WDFW), P2020-03

- Original Notice
- Supplemental Notice to WSR _____
- Continuance of WSR 23-15-078 filed on July 17, 2023.

- Preproposal Statement of Inquiry was filed as WSR 20-13-094 filed on June 17, 2020; 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) Fishway and Screening Rules – creating new WDFW WAC chapter 220-670 to implement RCW chapter 77.57.

This Continuance is being filed by WDFW solely because there is a change in the scheduled hearing date of September 28, 2023, before the Fish and Wildlife Commission; the new date of the hearing has been rescheduled to October 26-28, 2023 before the Fish and Wildlife Commission.

Hearing location(s):

Date:	Time:	Location: (be specific)	Comment:
10/26-28/2023	9:00am	Natural Resource Building, 1111 Washington St SE, Olympia, WA 98501	Detailed information about Fish and Wildlife Commission meetings can be found at https://wdfw.wa.gov/about/commission/meetings

Date of intended adoption: 11/17/2023 (Note: This is **NOT** the effective date)

Submit written comments to:

Name: Gabrielle Stilwater
 Address: P.O. Box 43200 Olympia, WA 98504-3200
 Email: fish-passage-rules@PublicInput.com
 Fax: (360) 902-2946 Attn: Gabrielle Stilwater
 Other: Phone for voice 855-925-2801, project code 2051; or website for comments: <https://publicinput.com/fish-passage-rules>
 By (date) October 28, 2023

Assistance for persons with disabilities:

Contact WDFW ADA Manager
 Phone: (360) 902-2349
 Fax: (360) 902-2946 Attn: Gabrielle Stilwater
 TTY: (360) 902-2207
 Email: adaprogram@dfw.wa.gov
 Other:
 By (date) October 15, 2023

Purpose of the proposal and its anticipated effects, including any changes in existing rules: WDFW is proposing a new WAC chapter implementing RCW 77.57.

In November 2018, the Southern Resident Orca (SRO) Task Force published its report identifying lack of prey as a key threat to Southern Resident Orcas. Recommendation number three of the 2018 SRO Task Force report endorsed agencies to apply and enforce laws that protect habitat. Specifically, the SRO Task Force noted that the Governor should direct WDFW to develop rules to fully implement RCW 77.57 The Washington State Legislature supported the SRO Task Force direction with the approval of the 2019 Engrossed Substitute House Bill 1109 (Laws of 2019, chapter 415), which became effective on May 21, 2019. In 2019, WDFW entered into an informal co-management agreement with Washington State Treaty Tribes to incorporate climate change science into policy. Additionally, the proposed rules are intended to be consistent with parallel WDFW rules for construction projects in state waters, WAC 220-660.

This proposal would create and populate a new chapter in WAC (220-670) that defines general passability and protection standards for new and existing fishways and water diversions. Consideration of incorporating climate change into the design of new water crossing structures is detailed within the standards as well. The proposal codifies current WDFW practices of using the agency’s fish passage inventory and assessment guidance and Water Crossing Design Guidelines. These standards are the foundation for establishing compliance measures. Compliance measures detail technical assistance

support and voluntary compliance steps a structure owner may follow to correct a barrier fishway or water diversion. Compliance measures also establish the effects of non-compliance when a structure owner does not agree to a WDFW compliance request.

Reasons supporting proposal: The proposal was developed over the course of three years with input from WDFW staff, tribal partners, additional Washington State agencies, Washington State Association of Counties, Association of Washington Cities, nongovernmental agencies, small business economic impacts and cost-benefit analyses, and multiple staff work groups and public comment opportunities, including three public comment meetings on the pre-proposed draft proposal. The proposal defines important fishway and water diversion standards and WDFW administrative actions.

Although this proposal is rooted in restoring Southern Resident Orca populations, there are other reasons supporting this proposal. As the human population grows, land use policies that allow development in or near floodplains can lead to degradation and loss of functioning habitat necessary to support salmon and other fish species. Structures built to protect or support human development activities such as bridges, culverts, and water diversions often further impact fish habitat. In addition to effects of urbanization, transportation, agriculture, logging, mining and other forms of land use, many rivers have been straightened, diked, and cleared of complex habitat features. Converting natural habitats into lands and rivers that support human uses often degrades the health of the habitat and the fish that depend upon it.

Fishway barriers limit fish life from accessing spawning and rearing habitat. Barriers can negatively affect streambed movement and large wood movement, prevent fish from moving up or downstream, concentrate predators, impact water temperature, and effects other natural ecological functions. In some cases, the effects associated with barriers can be as impactful as the barrier itself. Culverts are generally designed to last 50 to 100 years. Designing culverts to be resilient to future changes in stream conditions can reduce the risks of culvert failure and the creation of barriers to migrating fish. Culverts and bridges built to accommodate higher stream flows are less likely to fail and block fish, which reduces future maintenance and repair costs. Improperly designed water diversions can reduce the amount of useable fish habitat. In addition, unscreened withdrawal points can trap fish in conveyance structures that pump water from its source to its final destination, leading to injury or death.

Statutory authority for adoption: RCWs 77.04.012, 77.12.047, 77.57.010, 77.57.030, 77.57.040, 77.57.060, 77.57.070, and 43.05.100; ESHB 1109 (Laws of 2019, chapter 415)

Statute being implemented: Chapter 77.57 - Fishways, Flow, and Screening

Is rule necessary because of a:

Federal Law?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Federal Court Decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
State Court Decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

If yes, CITATION:

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

Type of proponent: Private Public Governmental

Name of proponent: (person or organization) WDFW, Habitat Program, Fish Passage Division

Name of agency personnel responsible for:

	Name	Office Location	Phone
Drafting:	Gabrielle Stilwater	1111 Washington St. SE Olympia, WA 98501	564-999-0768
Implementation:	Gabrielle Stilwater	1111 Washington St. SE Olympia, WA 98501	564-999-0768
Enforcement:	Kelly Still	1111 Washington St. SE Olympia, WA 98501	360-902-2605

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:
Address:
Phone:
Fax:
TTY:
Email:
Other:

No: Please explain: Although these proposed rules are not significant legislative rules implementing RCW 77.57, WDFW voluntarily completed a cost-benefit analysis to provide greater scrutiny of the rules' potential impact. A preliminary cost-benefit analysis can be obtained by contacting Gabrielle Stilwater, address: P.O. Box 43200, Olympia, WA 98504-3200, Email: FishPassageRules@dfw.wa.gov, Fax: 360) 902-2946 Attn: Gabrielle Stilwater, Website: <https://wdfw.wa.gov/species-habitats/habitat-recovery/fish-passage/rule-making>.

Regulatory Fairness Act and Small Business Economic Impact Statement

Note: The [Governor's Office for Regulatory Innovation and Assistance \(ORIA\)](#) provides support in completing this part.

(1) Identification of exemptions:

This rule proposal, or portions of the proposal, **may be exempt** from requirements of the Regulatory Fairness Act (see [chapter 19.85 RCW](#)). For additional information on exemptions, consult the [exemption guide published by ORIA](#). 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 type="checkbox"/> RCW 34.05.310 (4)(b)
(Internal government operations) | <input 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 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 19.85.025\(4\)](#) (does not affect small businesses).

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

Explanation of how the above exemption(s) applies to the proposed rule:

(2) Scope of exemptions: Check one.

The rule proposal is fully exempt (*skip section 3*). Exemptions identified above apply to all portions of the rule proposal.

The rule proposal is partially exempt (*complete section 3*). The exemptions identified above apply to portions of the rule proposal, but less than the entire rule proposal. Provide details here (consider using [this template from ORIA](#)):

The rule proposal is not exempt (*complete section 3*). No exemptions were identified above.

(3) Small business economic impact statement: Complete this section if any portion is not exempt.

If any portion of 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 minor cost analysis and how the agency determined the proposed rule did not impose more-than-minor costs. _____

Yes Calculations show the rule proposal likely imposes more-than-minor cost to businesses and a small business economic impact statement is required. Insert the required small business economic impact statement here:

For the Small Business Economic Impact Statement (SBEIS), please refer to the original CR-102 form, WSR 23-15-078. The SBEIS has not changed and will not be refiled with this Continuance.

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

Name: Gabrielle Stilwater

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

Phone: 564-999-0768

Fax: (360) 902-2946 Attn: Gabrielle Stilwater

TTY: (360) 902-2207

Email: FishPassageRules@dfw.wa.gov

Other: <https://wdfw.wa.gov/species-habitats/habitat-recovery/fish-passage/rule-making>

Date: September 18, 2023

Signature:

Name: Scott Bird



Title: Rules Coordinator