

Mr. Bob Ziegler
SEPA Responsible Official
WDFW Habitat Program
600 Capitol Way North
Olympia, WA 98501-1091

Ms. Randi Thurston
Washington Department of Fish & Wildlife
600 Capitol Way North
Olympia, WA 98501

Re: Comment on Draft PEIS/ hydraulic code rule update

12/13/2013

Randi and Bob,

The undersigned environmental organizations, on behalf of our members, are commenting on the PEIS related to the department's proposed hydraulic code rule update and are also providing some preliminary, informal summary comments on the first public draft of the proposed rule language. We greatly appreciate both the work the department staff has done on this proposed rulemaking project and the opportunity to provide comment, and look forward to continued discussions in upcoming months.

The hydraulic code is the state's principal regulatory tool to ensure the protection of nearshore and stream habitats and fish life from the harmful impacts of in-water development and construction work. With the continued decline of Washington's freshwater and marine ecosystems, evidenced by the listing of numerous species for protection under the ESA, it is absolutely critical these regulations remain strong and carry a clear intent of habitat protection as the leading standard. Similarly, any changes to the rules should primarily be to strengthen regulations and to provide department staff with effective tools to protect habitat.

After evaluating the rulemaking documents, we have concern that, with some exception where protection language may have been strengthened, much of the proposed language creates exemptions and regulatory loopholes and utilizes language that appears to diminish both department responsibility and the ability to ensure the mandated protection of vital habitats. We have outlined a basis for these concerns in the comment section of this correspondence and would be happy to discuss them further with staff.

We are also concerned about the process that has led to the PEIS and public presentation of rule language as well as the pathway outlined by the department to adopt new rules by mid-2014.

We are aware that, as part of the proposed rulemaking process, WDFW put together a stakeholder group that worked to develop the current version of proposed rule language. However, representatives from regulated parties made up the majority of this stakeholder group and both the environmental community and general public were under represented.

Similarly, while the PEIS suggests previous draft versions of the currently proposed language were posted on the WDFW website and available for public comment, there was virtually no public outreach or public notice by the department. Thus, to date, there has been a lack of opportunity for the greater environmental community and general public to be substantively involved in the *development* of rule language.

We are concerned not only about this past lack of participation opportunity, but also that the current department plan to release a CR102 in April of 2014 and subsequently adopt rules shortly thereafter will not provide adequate opportunity for future input. As these proposed rule changes are extensive and their implications significant, public input should be sought via wider public outreach and informational meetings prior to the filing of a CR102 as should conference with additional stakeholder groups in the environmental community.

Additionally, while we appreciate the department's work on this EIS, the development and request for comments on a PEIS before an official draft of proposed rule language has been completed, is confusing and premature. It is our understanding from department communications that the draft language released with the PEIS is informal only and, while input on the current version of language is welcome, the comment period is for the PEIS only.

Per SEPA regulations found in WAC 197-11-055 (3) (b), a Draft EIS for rulemaking shall normally accompany the actual proposed rule itself. Because the public and environmental community has not yet had opportunity to provide input on the language suggested by WDFW, it is reasonable to anticipate that the language of the proposed rule will change substantially prior to being released in a draft version via CR102.

In effect, we are being asked to evaluate and comment on the potential environmental impacts that would result from a rule change without knowing what the formally proposed language of the rulemaking change will be. Absent a *formal* draft of language there is no way to appropriately ascertain what impacts or risk may be presented, much less effectively evaluate them.

While we are providing some comment on both the PEIS and the informal draft of proposed rules, we ask that WDFW consider suspension of the current PEIS process until a more developed draft version of the rules is established. We also ask that a public outreach plan be developed and implemented to provide opportunity for more meaningful participation by the environmental community and the public prior to moving forward with any rulemaking plans.

Comments on the PEIS:

General

The statutes outlining the hydraulic code (RCW 77.55) hold the protection of fish life and fish habitat as the principal directive of the law. With the understanding that rule changes are sometimes necessary to incorporate legislative changes to statute, the sweeping overhaul of the hydraulic code rules, as currently proposed, should be first and foremost driven by habitat protection goals, and not to provide benefit to regulated parties or to ease the requirements of the department during permit processing.

However, outside of incorporating legislative language, the Draft PEIS primarily describes the benefit of rule changes as a *cost and time savings for some applicants, and a more transparent decision making process for regulated parties as stakeholders.*

Similarly, the included definition of “no net loss,” which is mandated for project approval, generally defines the term as a mitigation approach. Any proposed rule language should clearly outline the term as a standard that finds no overall loss of habitat and ecosystem function. While the avoidance and mitigation sequencing may be tools to reach that standard, they do not appropriately define the term.

Absent a purposeful intent to provide stronger habitat protection tools and authority - with provisions in turn reflected in the rule language, changes to the hydraulic code rules resulting in the above described benefit reflects a weakening loss of habitat protection authority and a detour from the intent of the law.

We recognize the proposed rule language is informal and may not represent the draft that will ultimately move forward for formal comment and consideration. However, should the majority of provisions be retained, the language of the proposed rules as well as the rulemaking change would not be supported by the environmental community as the current proposal presents risk of adverse environmental impact when compared to existing rules.

The PEIS incorrectly assumes that the proposed rules provide increased habitat protections.

The PEIS appears to base some of this finding on an incorrect understanding that certain actions would be *required* by the proposed rules. In fact, these actions would not be *required* by the proposed rules; the language only directs they *may* be used if deemed appropriate by the department.

- The PEIS reports 220-110-340 would result in improved protections due to a new rule requiring project applicants to conduct forage fish spawning surveys prior to work. This is not a required action under the proposed language and should be reflected in the PEIS considerations.
- The PEIS reports 220-110-350 would result in improved protections due to a new rule requiring vegetation surveys at project sites. This is not a required action under the proposed language and should be reflected in PEIS considerations.
- The PEIS reports 220-110-360 would result in improved protections due to the requirement that a professional risk and justification assessment for approval of a bulkhead waterward of the OHWL. This is not a required action under the proposed language and should be reflected in PEIS considerations.
- The PEIS reports that 220-110-370 through 440 would result improved conditions due to new construction requirements. However, the provisions noted are with few exceptions, already required by the department under the current rules when conditioning permits.

Although not exhaustive, the following outlines areas of concern where the proposed rules appear to provide weaker protection than the current WACs:

- The introduction of a simplified permit, which allows approval with no impact review or site visit, is a significant step backwards and weakens the current protection in the rules.

- The new general permit, which allows work across a wide range of geographical areas without site-specific review and which includes language allowing the permit applicant to “negotiate” timing restrictions for work, reflects a similar loss of oversight.
- Although it may not have been the intent of the department, the tone and language related to when protective technical provisions are applied has also been weakened. These technical provisions, which have been a longstanding tool to ensure protection of fish life, are currently held as requirements unless a specific list of parameters are met. However, the proposed language softens this and sets up a standard where, in effect, the department is given great discretion to eliminate these provisions.

For example:

- Current WACs direct that work below the OHWL shall be prohibited during certain times of the year to protect fish life and/or spawning activity. While modification to these provisions is currently allowed, the overall directive of the rule is to apply the restriction unless the brief set of provision exemptions established in WAC 220-110-032 is met. The proposed rule language sets a very different baseline, outlining that these provisions may be removed under very ambiguous scenarios, such as what is described as the *department interpretation of expected impact, weather conditions* and, most troubling, what is listed as simply *other circumstances and conditions*.
- Similar language is in place regarding other technical provisions. A plain reading of the proposed rules shows that rather than providing some narrow areas of exemption for application of these protective provisions, the new rules establish murky areas that would allow the department to arbitrarily omit conditions from a permit. This represents a significant weakening of the long held guidelines.
- Rock sole spawning protections have been omitted from rule language. Larval rock sole are a food source for juvenile salmonids and spawning activity occurs in the marine nearshore areas most impacted from the project work subject to HPAs.
- Changes proposed in the mitigation section also represent an unfortunate shift that weakens existing rules.
 - Section 220-110-080(4)(c) incorporates language found in statute which states that *the department may not limit the scope of options in a mitigation plan to areas on or near the project site, or to habitat types of the same type as contained on the project site*. However, the proposed rule omits critical language found in RCW 90.4.020 which clearly allows the department to deny off site mitigation plans. Absent this language, it could easily be argued that the department would be bound to approve off-site mitigation whenever proposed.
 - Mitigation banking and in-lieu fee programs have been introduced without any connection to statute. This provides an unacceptable loophole where project applicants are simply allowed to pay a “fee” after a project results in habitat damage rather than perform actions that result in clear and measurable mitigation success.

The PEIS incorrectly assumes that the best available science was used to develop rule language

Throughout the PEIS document and throughout the proposed rule language, reference is made to the use of best available science with multiple supporting documents cited. However, the White Papers commonly cited were developed for the department by professionals who commonly work with regulated parties during permitting projects. There also appears to have been very little analysis or inclusion of outside science-based information. In order to incorporate the best available science, the department must look beyond its own border and utilize information from a wide range of ecosystem and impact study and study sources.

Missing elements and opportunities:

- While the inclusion of construction design elements may help inform project proponents of construction requirements prior to application, the provisions themselves appear to be arbitrary in nature and not supported by current study or best practices. For example, the proposed language directs replacement floats up to 6 feet have thirty percent grating with floats wider than 6 feet requiring a fifty percent grated surface. Similarly, a pier is noted to require a forty-two to sixty percent open area. These values have no apparent basis with study clearly showing this limited amount of grating provides no substantial mitigation of light impacts. Current USACE guidelines call for one hundred percent grating for dock and float permits. The department should adopt similar policy and language and should also incorporate provisions related to the height of structures as increased dock height has been found to have less impact on light reduction.
- The department should firmly require an engineer's report that unequivocally determines shoreline stabilization is required before allowing any form of bulkhead or armoring.
- If stabilization is warranted, the department should firmly require soft stabilization be used unless an engineer clearly finds that a hard bulkhead is the only option.
- In order to protect fish life and spawning events, timing restrictions and other technical provisions should be applied to HPAs in shoreline reaches containing appropriate habitat even if these areas have not yet been documented as spawning areas or other habitats of special concern. To date, the majority of the Puget Sound nearshore, as well as upland freshwater areas, have not had adequate survey work. In order to ensure the no net loss standard, the department should employ the precautionary principle and apply protective provisions to a project when habitat features supporting the life stage or spawning event are present even if the site is not currently listed as containing a "documented" habitat.
- The department should establish a time limit for repair work to be conducted before being considered a new project with a new environmental baseline. The proposed language suggests this for repair of bulkheads but the provision should be applied to all structures and development.
- Compensatory mitigation should be required for the repair or replacement of structures even without an increase in footprint as this prolongs the habitat impact.

- The department should establish a stop-work provision in the enforcement and compliance section. While the notice of correction and subsequent civil penalty are both valuable tools, the department must be able to halt improper work in the event a project applicant is in violation of any permit provision. Absent this provision, significant and often irreversible damage is allowed and the no net loss standard cannot be ensured.
- Evaluation of cumulative effects and impacts should be incorporated into permit review in order to meet the no net loss standard. Although the department has argued that they do not hold this authority, review of the RCW finds no language that would prevent this consideration. And, the agency's own policy, "Requiring or Recommending Mitigation," which specifies that "Cumulative impacts of projects shall be considered and appropriate measures taken to avoid or minimize those impacts," appears to require this evaluation when issuing an HPA.
- The department should request a new review related to the applicability of the hydraulic code on the in-water development and construction work related to aquaculture. We recognize that a 2007 AGO opinion reported any practice related to aquaculture was exempt from a HPA due to the provisions in RCW 77.115.010(2). However, that RCW is specific to disease prevention only and the application to the opinion is highly questionable.

Preliminary legal review has found that the language noted in this statute - which clarifies that the subsection outlined is the only authority of the department to regulate private sector aquaculture products and farmers, does not create an exemption from the HPA process. Rather, this statute speaks only to limitations of the department of fish and wildlife and the department of agriculture to regulate the aquaculture industry as it relates to *disease elements only*.

Thank you again for the opportunity to provide comment and for the work performed by the department in support of ecosystem protection. The environmental community is continuing in our detailed review of the proposed rulemaking language and will provide additional comment on draft language in upcoming months. We look forward to additional dialogue about this important environmental issue and welcome any questions.

Sincerely,

Pat Dickason, 1st Vice President, Action Chair
 League of Women Voters of Washington
 1402 Third Avenue, Suite 430
 Seattle, WA 98101
 (206)622-8961
p.dickason@comcast.net

Amy Carey, Executive Director
 Sound Action
 PO Box 845
 Vashon, WA 98070
 (206)745-2441
amy@soundaction.org



Anne Shaffer, Executive Director
Coastal Watershed Institute
PO Box 2263
Port Angeles, Washington 98362
(360)461-0799
anne.shaffer@coastalwatershedinstitute.org



Bart Mihailovich, Director
Spokane Riverkeeper
35 W. Main Avenue Suite 300
Spokane, WA 99201
(509)835-5211
bart@cforjustice.org



Suzanne Skinner, Executive Director
Center for Environmental Law and Policy
11 Western Ave #305
Seattle, WA 98104
(206) 829-8366
sskinner@celp.org



Kurt Beardslee, Executive Director
Wild Fish Conservancy
PO Box 402
Duvall, WA 98019
(425)788-1167
kurt@wildfishconservancy.org



Stephanie Buffum, Executive Director
Friends of the San Juans
650 Mullis St
Friday Harbor, WA 98250
(360) 378-2319
stephanie@sanjuans.org



Leslie Ann Rose, Senior Policy Analyst
Citizens for a Healthy Bay
535 Dock Street, Suite 213
Tacoma, WA 98402
(253)383-2429
larose@healthybay.org



Fred Felleman, NW Consultant
Friends of the Earth
3004 NW 93rd St.
Seattle, Washington 98117
(206)783-6676
felleman@comcast.net



Crina Hoyer, Executive Director
RE Sources
2309 Meridian Street
Bellingham, WA 98225
(360)715-8434
crinah@re-sources.org



Laura Hendricks
Sierra Club Cascade Chapter
180 Nickerson Street, Suite 202
Seattle, WA 98109
(206) 378-0114
laura.l.hendricks@gmail.com

