



Skagit River System Cooperative

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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: version 4, hydraulic code rule update

Dear Randi and Bob;

The Skagit River Systems Cooperative (SRSC), on behalf of our member tribes the Swinomish Indian Tribal Community and the Sauk-Suiattle Indian Tribe, want to take the opportunity once again to comment on the draft rule update for the hydraulic code (WAC 220-110). This version 4 of the rule update includes several new protections not found in the existing WAC, particularly in the technical provisions. We are pleased to note the enhanced requirements for docks, piers, and overwater structures, limitations on marine bulkheads, and recognition of the importance of forage fish spawning habitat. Likewise the entirely new sections on beaver dams and civil authority, while not as rigorous as we would have hoped, are welcome improvements.

However, the general provisions contain some exemptions and loopholes that constitute a loss of oversight by both WDFW and the tribes, and thus a reduction in protection for fish. We realize that many of the shortcomings of the current and proposed code are due to legislation that directs WDFW to issue and condition HPAs in certain ways. We often disagree with these directives, but by that measure we have limited most of our comments to sections of the code where WDFW does exercise full discretion. Many of these comments are similar to what we have said in previous letters, emails, comment spreadsheets, and during conversations and meetings. Our comments, in approximate order as they appear in the current draft, are as follows.

We were surprised and disappointed to see the General HPA provisions (proposed section 220-110-050(3)(b)(iii)) re-inserted from earlier versions of the draft rules. As you are well aware, SRSC has objected to several aspects of the General HPAs in the past, and we thought those concerns had been addressed and put to rest, but here it is again. This is surprising because there is no mention in the hydraulic code (RCW 77.55) of general HPAs, so there is no legislative basis for implementing these provisions in the WAC. Indeed, during the discussions over SB 6406 (the HPA fee bill) the provisions for general HPAs were deliberately struck in committee, because there was no legislative agreement over how or whether the GHPAs could actually work. Earlier provisions that we agreed to-- that would have assured adequate tribal notification-- have been struck. There are no provisions in the draft code for plans or specification or locations of the work under GHPAs. We reiterate from previous comments that it is impossible for WDFW to protect fish life if GHPA activities not being reviewed (and also reviewed by tribes) in advance. All the GHPA provisions should again be struck from the draft code, at least until fish protection and tribal notification procedures can be assured.

By the same token, we have concerns with the simplified HPA section (proposed section 220-110-050(3)(b)(iii)). As with GHPAs, there is no mention of simplified HPAs in the RCW, and little justification for formalizing a simplified review process. There are already expedited HPAs, individual HPA, pamphlet HPAs, chronic danger HPAs, imminent threat HPAs, emergency HPAs, streamlined HPAs, and multi-site HPAs, is it necessary to have another HPA that isn't already served by one of these? While we don't completely disagree with making a simplified *application* process, we must insist that the permit *review* is thorough and flexible enough to actually protect fish life, as required by statute. Unfortunately the currently proposed code does not provide that assurance. There is no assurance in the proposed code that the HPA review will be thorough and complete. There is no definitive list of the activities that can be included under the simplified HPA. Several of the activities currently permitted with simplified HPAs have the potential for substantial impact to habitat (beaver dam and LWD removal are examples). The provisions for tribal review that were in earlier versions have been struck. There are no provisions for listing landowners, much less contacting them or obtaining their approval. Nor is there adequate assurance that the application will include plans for the work or specific locations. Without these details it will be impossible to effectively review activities in the field or assure that fish life will be protected. Unless or until this section can be modified to address these concerns the entire section should be struck.

For reasons we described in previous letters, striking the Permit Consolidation section of the previous draft code is a substantial improvement. We appreciate the change. Similarly, the language granting special authority to the designee of a county legislative authority has been struck, another change that for us represents a vast improvement in the code.

The mitigation section (proposed 220-110-080) has been modified since the last version, and not for the better. The modified sub-section 4c includes a new requirement that contradicts other sections in 220-110-080. That new requirement is marked in strikethrough text below:

~~When compensatory mitigation is necessary to offset impacts, the department prefers compensatory mitigation actions that restore impacted functions on-site or immediately adjacent to the impact site. However, the department will consider off-site mitigation if it is more cost effective and it provides more benefit to the fish species or fish stock impacted by the work. The department may not limit the scope of compensatory mitigation options to areas on or near the project site, or to habitat types of the same type as contained on the project site.~~ The department must fully review and give due consideration to compensatory mitigation proposals that improve the overall biological functions and values of the watershed or bay and accommodate the mitigation needs of the infrastructure development or non-infrastructure development, including proposals or portions of proposals that are explored or developed in RCW 90.74.040

The new requirement would prevent the Department from pursuing effective on-site mitigation (as provided earlier in the same paragraph) even if such a solution is available, in situations where the applicant chooses otherwise. This section prevents the Department from doing exactly what it should be doing. It is a clear loophole for applicants that would prefer to purchase credits in a mitigation bank (a bank that may not adequately compensate for the lost habitat) rather than avoid, restore, or otherwise compensate on-site. Although the offending passage does appear in RCW 90.74, so does the stipulation that the Department should not approve any mitigation “that does not provide equal or better habitat functions and values” (RCW 90.74.030(2)(b)) which *should* be included in the WAC and given equal weight. The new requirement is in direct contradiction with the spirit and letter of the other mitigation provisions in WAC 220-110, as well as WDFW Policy M5002, and does not need to be explicitly repeated in the WAC.

Also in the mitigation section is a lost opportunity to close a loophole that has bedeviled the Department and led to frequent and unnecessary habitat modification. Proposed section 220-110-080 (4)(j) states that rehabilitation and replacement of a structure does not require compensatory mitigation unless the footprint of the structure is expanded or there is a new loss of habitat. We disagree with this approach, and see replacements as continuing an impact indefinitely in the future, which should be mitigated. Furthermore, and as you and I have recently discussed, *there is no time limit on replacements*, so a structure that was destroyed years or even a decade ago can be replaced, regardless of the impact, with no mitigation, even when a clear mitigation option is at hand. This could be changed easily here, by including a one-year limit on applications for replacements, and a similar limit on substantial repairs and rehabilitation. The related time-limit on replacing marine bulkheads (proposed 220-110-360(3)(a)) would be better applied as a time limit on *all* replacement structures.

Another missed opportunity is in proposed section 220-110-100 on common construction requirements. This section discusses all manner of construction procedures such as site

access, equipment use, erosion control, fish removal, bypass pumps, cofferdams and revegetation, but barely mentions protecting the existing vegetation. Riparian vegetation removal should be afforded substantial weight in staging and conducting construction projects in or near streams. The sizes and types of vegetation that can be cut, removed, or disturbed should be specified in advance, and trees approved for removal should be clearly marked in the field. Every effort should be made to work around woody vegetation more than 4" in diameter, and the vegetation that does have to be removed should be mitigated appropriately. Replacing mature trees with seedlings does not provide equivalent function, so a replacement formula should be devised. Riparian protection is one of the most overlooked aspects of current HPAs, and that could be directly rectified with appropriate provisions in the common construction requirements.

It is not at all clear why the freshwater habitats of special concern (220-110-120) are all spawning habitats. These include spawning for chinook, spawning for coho, spawning for steelhead and chum and pinks and sockeye and sturgeon and chub and mudminnow and a list of other species, yet no rearing habitats are protected this way. Off channel areas and flood refuge and winter rearing habitats are not included, other than to define them as habitat *functions*. In some basins (such as the Skagit) the habitat bottleneck is not in spawning habitat, but in certain types of rearing habitat, so these should be protected at the same (or perhaps higher) levels. Recovery plans for chinook and other species could be used to identify which habitats are limiting in each basin. We would be happy, if called upon, to work with your department to designate these habitats for the Skagit.

The technical sections on freshwater dredging (220-110-190) and gravel removal (220-110-200) need to be elaborated and augmented. For one thing, it is unclear which (if either) of these sections applies to dredging in small streams to alleviate localized flooding. The sand and gravel removal section applies directly to commercial bar scalping, but has few provisions that apply to small streams. Likewise the freshwater dredging section applies to river dredging for vessel navigation, but not necessarily to dredging small coho creeks using backhoes. For instance, there are few provisions in either section that would prevent headcutting resulting from gravel removal, although this is a common provision in small stream HPAs. There should be provisions requiring dredging to be conducted when streams are dry, if they do go dry. Small stream dredging should not result in gravel starvation in downstream reaches. The loss and disturbance of benthic macroinvertebrate populations should be recognized, and mitigation required. Section 220-110-200(2) mentions that removing gravel disrupts the sediment balance and can cause unforeseen channel adjustments in rivers, but has no provisions to alleviate this concern. There are also no provisions to assure that LWD and riparian vegetation will be protected during dredging projects. Most of all, there is no requirement to show that the dredging is necessary, or will be effective, as in other sections (e.g. marine bulkheads). This is important because small stream dredging is often proposed by landowners and county departments that have only minimal knowledge of (and little regard for) sediment transport processes, and thus "maintenance dredging" becomes a chronic impact to habitat. Dredging is frequently used to temporarily solve problems caused by other

factors, such as undersized or misplaced culverts that impede sediment transport. Requiring a technical justification could clarify these problems and the potential solutions. The lack of protective provisions in the proposed code is unfortunate, because in certain circumstances sediment removal can actually be used to improve some habitats, such as creating off-channel and backwater refugia. As proposed the improvement is limited to fish spawning areas only. These two dredging sections could be greatly improved to protect, rather than diminish, habitat in small streams.

Given the controversy over blocking culverts (section 220-110-190) and the difficulty of both properly permitting culverts and installing culverts that actually pass fish, we would have expected the updated hydraulic code to place more emphasis on stream simulation culvert designs. Indeed, earlier versions of the rule update required that permittees “shall install stream simulation culverts unless the permittee can show that stream simulation is not feasible, or that another design will provide equal or better protection of fish life.” (draft for advisors 2011-10-11, page 85). We agreed with this approach at the time, and we are disappointed that the current proposed rules do not take a similar stance with regard to StreamSim designs. The new proposed code mentions StreamSim design, but is ambiguous on whether StreamSim is required or merely suggested. The WDFW crossing guidelines, as well as testimony from WDFW engineers and biologists, make clear that StreamSim culverts are the best solution to eliminating fish passage barriers, passing flood flows, passing debris, and reducing maintenance due to gravel and wood accumulation, all of which are clearly required in the proposed code. Given these advantages, the code should reflect the best available science and give AHBs the authority to require StreamSim as the first acceptable standard.

A short note on channel change and realignment (WAC 220-110-210) is in order. This section emphasizes that channel change is discouraged and will only be approved when there’s a benefit to fish. We agree. However, it goes on to say that the new channel must be similar in length, width, depth, gradient, and plan configuration. The problem is that many streams have been mis-aligned in the past, particularly to move channels aside for development or agriculture. Often the best solution to aggradation problems, and therefore avoid the need for future dredging, is to re-align the channel. Shorter and steeper channels are generally better at moving sediment. Channel realignment is in some instances tantamount to restoration. This section has few provisions that allow or encourage channel re-alignments when such a change is actually a benefit for fish.

The proposed section on large woody material removal (220-110-220) actually has weaker habitat protection than the current code. Whereas the proposed code allows LWD removal for protection of “life, the public, property, or where necessary to construct or mitigate for a hydraulic project” the current code provides that LWD removal

“...shall only be approved where necessary to address safety considerations, or its removal would not diminish the fish habitat quality of the watercourse. The department may approve the repositioning of large woody material within the

watercourse to protect life and property or as needed to conduct a hydraulic project” (emphasis added).

Retaining these protections currently in the code is necessary to assure that LWD is not removed merely to avoid erosion of private property, which is frequently the case even *with* the current protection. The proposed code is far too flexible in allowing LWD removal and repositioning. As you know, LWD is a crucial feature of aquatic habitat, particularly in small streams, and its removal is rarely mitigated. Furthermore, it is often the *stability* of LWD that is crucial to its function, since only stable LWD can create scour pools or flood refuge. Stability of LWD is primarily a function of its size, so either cutting or repositioning LWD substantially diminishes habitat value, even if the wood is returned to the stream. A third problem is that the proposed code specifically allows LWD to be removed and deposited on the floodplain, where it has little if any effect on fish habitat. The updated code should instead prohibit the removal, repositioning, or cutting of LWD unless the effects can be fully mitigated by placing equivalent LWD, in a stable configuration, elsewhere in the same reach of stream or river. The italicized text above, which is in the current code, should be retained.

The provisions for recreational mineral prospecting (220-110-300) are still controversial, despite years of legislative and administrative discussion. While we accept the minimal disturbance resulting from gold panning, SRSC and our member tribes are opposed to the use of suction dredges in anadromous waters, which carries a substantial potential to harm juvenile fish and fish habitat. Two issues on suction dredges are particularly problematic. First is the work windows, which allows suction dredging in anadromous reaches of the Suiattle River when juvenile salmonids are present and adult fish are migrating. Suction dredging in the Suiattle River should require an individual HPA, so that activities can be monitored closely. To properly protect fish life the Suiattle work window should be changed to “submit application” and that application should require a JARPA, with full tribal notification as with any other individual HPA. Second is the use of “simplified” applications to issue suction dredging permits. The simplified application does not require landowner information, nor is the location information precise enough to allow these activities to be monitored.

It is unclear what exactly is intended in the section on Artificial Aquatic Habitat Structures (220-110-410). The term is not defined in 220-110-030. The context and wording of the proposed code imply that these “structures” are piles of rocks deposited in marine waters to provide complexity for fish. However the description says “an artificial aquatic habitat structure is a human placed and designed structure that is intended to provide long-term alterations to fresh or saltwater bottom or mid-water habitat.” That description would appear to apply to engineered logjams and LWD installations in rivers and streams, particularly those that are intended to create scour pools. To prevent confusion, and to avoid discouraging instream restoration projects by adding unnecessary requirements, this section should be clarified so that it does not apply to freshwater habitat restoration structures.

A frequent problem with utility crossings in saltwater areas (220-110-430) is that many of them don't actually cross, but instead follow the shoreline. Utility maintenance is a chronic disturbance that interrupts the establishment of riparian vegetation, and the utility pipes and cables frequently are protected with bank stabilization, whether they need it or not. This section of code needs provisions that require utility companies to locate their infrastructure far upland of the ordinary high water mark whenever feasible. Some of the language for marine bulkheads could be repeated here. For that matter, the same concept applies to utilities located along freshwater bodies as well.

In summary, although the proposed rule update has many changes that will result in increased protections for fish, a few sections will actually weaken that protection. In particular, the sections on general HPAs, simplified HPAs, mitigation requirements, replacement structures, protecting existing vegetation, freshwater dredging, LWD removal, work windows, and other aspects of the proposed code do not adequately protect fish and fish habitat and need amending. That said, we appreciate changes made in enhancing civil authority, beaver dam management, overwater structures, bank stabilization, and other sections that improve protections.

Finally, we understand that this is but the most recent stage in a long and complex process to update the code. We appreciate the opportunity to comment, both at this stage and in the past. If there is anything else that we can provide, please don't hesitate to call me at (360) 466-7308 or email at thyatt@skagitcoop.org

Sincerely,

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