

**WSR 22-19-081  
PROPOSED RULES  
DEPARTMENT OF  
FISH AND WILDLIFE**

[Filed September 20, 2022, 12:34 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 22-11-094.

Title of Rule and Other Identifying Information: 2022 Hydraulic project approval (HPA) marine shoreline stabilization rule amendment. The rule will amend WAC 220-660-370.

Hearing Location(s): On October 28-29, 2022, at 8:00 a.m., in-person at Spokane Community College, 985 South Elm Street, Colville, WA 99114; and webinar/teleconference. Visit our website at <https://wdfw.wa.gov/about/commission/meetings> or contact the commission office at 360-902-2267 (email [commission@dfw.wa.gov](mailto:commission@dfw.wa.gov)) for instructions on how to join the meeting.

Date of Intended Adoption: On or after November 18, 2022.

Submit Written Comments to: Theresa Nation, P.O. Box 43200, Olympia, WA 98504-3200, email [ShorelineStabilizationRule@PublicInput.com](mailto:ShorelineStabilizationRule@PublicInput.com), fax 360-902-2946 Attn: Theresa Nation, submit comments online at <https://publicinput.com/ShorelineStabilizationRule> or by phone at 855-925-2802, project code 2265, by October 31, 2022.

Assistance for Persons with Disabilities: Contact Washington department of fish and wildlife (WDFW) ADA coordinator, phone 360-902-2349, fax 360-902-2946 Attn: Theresa Nation, TTY 360-902-2207, email [ADAProgram@dfw.wa.gov](mailto:ADAProgram@dfw.wa.gov), by October 31, 2022.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: WDFW proposes to amend WAC 220-660-370 Bank protection. The agency's purpose for this rule amendment is to implement SSB 5273, passed by the legislature in 2021. Rule changes will:

- Specify that replacement of residential marine shoreline stabilization must utilize the least impacting technically feasible alternative for the protection of fish life;
- Identify alternatives from most to least preferred;
- Specify that a site assessment and alternatives analysis report prepared by a qualified professional is required as part of an application for an HPA permit for this type of project;
- Identify mandatory report elements; and
- Establish procedures for emergency and expedited shoreline stabilization permits.

Hydraulic code rules in chapter 220-660 WAC, implementing chapter 77.55 RCW, are significant legislative rules under RCW 34.05.328.

Reasons Supporting Proposal: WDFW is proposing rule amendments implementing SSB 5273 (chapter 279, Laws of 2021). SSB 5273 added new requirements for HPA permitting. Many of the proposed changes directly incorporate language or requirements from SSB 5273. The new requirements are similar to those already in WAC 220-660-370 that apply to new shoreline stabilization and waterward replacement or rehabilitation of existing shoreline stabilization. SSB 5273 specifically applies those requirements to replacement of residential shoreline stabilization. In addition, WDFW has developed procedural language regarding how emergency and expedited projects are handled in order to achieve the least impacting technically feasible alternative, as al-

ready required in statute and in rule. This new language will help provide clarity for both HPA applicants and agency staff.

Statutory Authority for Adoption: RCW 77.04.012, 77.12.047, 77.55.021, 77.55.231, 34.05.328; and SSB 5273 (chapter 279, Laws of 2021).

Statute Being Implemented: Chapter 77.55 RCW, Construction projects in state waters.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: WDFW, habitat program, protection division, governmental.

Name of Agency Personnel Responsible for Drafting and Implementation: Theresa Nation, 1111 Washington Street S.E., Olympia, WA 98501, 360-902-2562; Enforcement: Kelly Still, 1111 Washington Street S.E., Olympia, WA 98501, 360-902-2605.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Theresa Nation, 1111 Washington Street S.E., Olympia, WA 98501, phone 360-902-2562, fax 360-902-2946 Attn: Theresa Nation, email HPArules@dfw.wa.gov. The preliminary cost-benefit analysis can be found at <https://wdfw.wa.gov/about/regulations/development/shoreline-stabilization-hpa-rule>.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(3) as the rules only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect; rule content is explicitly and specifically dictated by statute; and rules adopt, amend, or repeal a procedure, practice, or requirement relating to agency hearings; or a filing or related process requirement for applying to an agency for a license or permit.

Explanation of exemptions: Some aspects of the rule proposal that correct or clarify language without changing its effect are exempt. Other aspects are dictated by statute or related to process requirements for applying for an HPA permit.

Scope of exemption for rule proposal:

Is partially exempt:

Explanation of partial exemptions: This rule proposal amends only one section of WAC. Aspects of the proposal that incorporate requirements dictated by RCW 77.55.231 are exempt under RCW 34.05.310 (4)(e). Aspects that modify terms or wording for consistency without changing the effect of the rule are exempt under RCW 34.05.310 (4)(d). Aspects that specify the process for applying for an emergency or expedited HPA are exempt under RCW 34.05.310 (4)(g). The portion of the rule that is not exempt is the requirement that a qualified professional must prepare a site assessment, alternatives analysis and design rationale report when applying for an HPA permit for replacement or rehabilitation of residential marine shoreline stabilization.

The proposed rule does impose more-than-minor costs on businesses.

**Small Business Economic Impact Statement (SBEIS)**

CHAPTER 1 INTRODUCTION: This report evaluates the potential costs to businesses of compliance with a WDFW proposed rule that updates Washington state's hydraulic code to clarify how residential shoreline property owners should comply with recent legislation regarding residential marine shoreline stabilization.<sup>1</sup> This SBEIS was developed in accordance with the Regulatory Fairness Act (RFA), 19.85 RCW to determine whether the proposed rule would result in more-than-minor and disproportionate cost impacts on small businesses. The primary sources of information for this analysis include the following:

1 This report uses the term "shoreline stabilization" to refer broadly to the various shoreline interventions that are used to prevent or reduce erosion of the shoreline and protect upland property and structures, including passive or nature-based techniques, soft shore techniques, and hard structures such as bulkheads.

- Information gathered through outreach to county and municipal planners, businesses providing the services required by the proposed rule, and residential property owners who have experience with marine shoreline stabilization replacement;
- County and municipal Shoreline Master Program (SMP) documents;
- Tax parcel data identifying land use types along marine shorelines;
- Data identifying location of existing shoreline stabilization along the marine shoreline; and
- HPA permit data provided by WDFW.

1.1 BACKGROUND: Washington state's hydraulic code (WAC 220-660-370) outlines requirements for shoreline bank protection in saltwater (i.e., marine) waters of the state in order to protect fish life from the habitat alteration that can result from certain types of shoreline protection. The existing requirements specify that a person wishing to place *new* shoreline protection, or replace existing protection with *protection that extends waterward of the existing protection*, utilize the least impacting technically feasible protection technique, and include a site assessment, alternatives analysis, and design rationale completed by a qualified professional in their permit application. In 2021, the state legislature passed SSB 5273, which amends RCW 77.55.231 to extend these requirements to the *replacement* of existing shoreline stabilization on residential properties. WDFW is now updating WAC 220-660-370 to be consistent with RCW 77.55.231, and to provide additional clarification with respect to the requirements.

1.2 SCOPE OF PROPOSED RULE: The proposed rule affects activities occurring on residential properties along Washington's marine shorelines, including the shorelines of Puget Sound, the Strait of Juan de Fuca, the outer coast, and along coastal estuaries. It does not change existing requirements with respect to commercial or other types of properties, nor does it affect activities occurring on residential properties along nonmarine shorelines (e.g., rivers, ponds, or inland lakes). The proposed rule specifically addresses the requirements related to the *replacement or rehabilitation* of existing shoreline stabilization, and does not change the requirements for installation of new structures or replacement of existing structures where the replacement occurs waterward of the existing structure.

1.3 BASELINE FOR THE SBEIS: RCW 77.55.231 requires that residential property owners on all marine shorelines of Washington state that wish to replace existing shoreline stabilization use the least impacting technically feasible alternative and submit a site assessment and alternatives analysis as part of their permit application package. In certain

jurisdictions, county and municipal SMPs already specify that a qualified professional must be used to develop those reports. Although the requirement to use a qualified professional is not specified for all jurisdictions, interviews with county and municipal planners conducted in July and August 2022 suggest that it would be impossible or very challenging for an individual without the relevant professional background to fulfill the necessary requirements.<sup>2</sup> Therefore, residential applicants looking to replace their shoreline stabilization in the counties where SMPs do not describe that a qualified professional must be hired for the analyses are still likely to hire qualified professionals for this purpose.

<sup>2</sup> Personal and email communication with representatives of county and municipal planning departments conducted in July and August 2022.

1.4 PROPOSED RULE REQUIREMENTS: The proposed rule would update WAC 220-660-370 to implement the RCW 77.55.231 requirement for HPA permit applicants for residential marine shoreline stabilization or armoring replacement or rehabilitation projects. Specifically, the proposed rule includes the following:

- Revises existing language in WAC 220-660-370 to require HPA applicants to use the least impacting technically feasible bank protection alternatives for *replacement or rehabilitation* of residential bank protection projects, and specifies preferences for available alternatives;<sup>3</sup>
- Specifies the reporting elements that must be included in an HPA application for residential replacement projects (outlined in Section 1.2.1 of this SBEIS);
- Requires that HPA permit applicants for replacement or rehabilitation of residential bank protection provide a site assessment, alternatives analysis and design rationale for the proposed method *that is prepared by a qualified professional*; and
- Specifies procedures for how expedited or emergency shoreline stabilization permit applications will be processed.

<sup>3</sup> WAC 220-660-370 (3)(b) provides common alternatives for (1) new bank protection and (2) replacement or rehabilitation of bank protection that extends waterward of existing bank protection structure projects. The proposed rule would modify WAC 220-660-370 to include common alternatives for replacement or rehabilitation of residential bank protection projects, adapted from RCW 77.55.231.

As previously described, RCW 77.55.231 constitutes a preexisting requirement regarding replacement of residential shoreline stabilizations; that is, the requirements of RCW 77.55.231 are part of the baseline of this analysis. Thus, any costs resulting from the requirements specified in RCW 77.55.231, which include the requirement that any person wishing to replace residential marine shoreline stabilization "use the least impacting technically feasible bank protection alternative for the protection of fish life" and "must conduct a site assessment to consider the least impactful alternatives ... and should propose a hard armor technique only after considering site characteristics such as the threat to major improvements, wave energy, and other factors in an analysis of alternatives," are baseline costs of compliance with these preexisting requirements. The procedural language on the processing of emergency and expedited permits is exempt from RFA analysis in RCW 34.05.210 (4)(g). The focus of this analysis is on the incremental costs of the proposed rule that are above and beyond the baseline costs.

The proposed rule is focused specifically on replacement or rehabilitation projects for protecting residential shoreline properties. Accordingly, the rule making applies only to residential property shoreline owners with existing shoreline stabilization in place. The

new requirement specified in the proposed rule is that, when existing stabilization requires replacement or rehabilitation, the permit applicants must hire a qualified professional to complete the site assessment and alternatives analysis. Importantly, the requirement to conduct a site assessment and alternatives analysis is a baseline requirement for these sites; however, RCW 77.55.231 does not specify the need to rely on a qualified professional for the analysis and reporting. Thus, the requirement in the proposed rule to employ a qualified professional may generate incremental compliance costs.

CHAPTER 2 SMALL BUSINESS IMPACTS: 2.1 POTENTIALLY AFFECTED SMALL BUSINESSES: Absent detailed data on businesses that own residential properties along marine shorelines of Washington, we rely upon the best available information regarding the potential extent of businesses affected by the rule. We begin by describing the extent of shoreline properties that may be affected by the proposed rule, and then describe the universe of businesses that could incur costs as a result of the rule.

Owners of marine shoreline property in Washington, whether individuals or businesses, are only affected by the proposed rule under the following circumstances:

- The property is identified as residential;
- The property already has existing shoreline stabilization in place; and
- Existing requirements with respect to the local jurisdictions' SMPs do not already require the use of a qualified professional to develop the requisite site assessment and alternatives analysis.

Available data suggest 64.3 percent of Washington's marine shoreline parcels (31,823 tax parcels) are affirmatively identified as residential tax parcels, most of which are single-family residential.<sup>4,5</sup> Exhibit ES-1 identifies the tax parcels along the marine shoreline identified as residential. For residential property owners, costs are only incurred when and if there is shoreline stabilization on their property that needs to be repaired or replaced. Of the 31,823 residential tax parcels along the Washington's marine shorelines, 8,260 (26 percent) are identified as being 100 percent modified by some type of anthropogenic intervention, while another 20,683 are identified as having some "non-zero" extent of modification.<sup>6</sup> Finally, even in cases where residential property has existing shoreline stabilization that may require replacement, a substantial portion of Washington's marine shoreline is already subject to the requirements that are being clarified in the proposed rule (i.e., the requirement for use of a qualified professional to develop the site assessment and alternatives analysis). Specifically, five counties and 13 municipalities require that a qualified professional be used to develop the requisite analyses. Residential property owners located in these jurisdictions are not expected to incur costs due to the rule.

<sup>4</sup> For this analysis, we identify the marine shoreline as including the extent of Washington's marine shoreline where marine shoreline protection has been identified in existing data. This includes the coastlines of Puget Sound, the Strait of Juan de Fuca, the Pacific Coast, and major coastal estuaries.

<sup>5</sup> Private geospatial data identifying existing marine shoreline parcels provided via secure server to IEC by WDFW on May 23, 2022. Residential parcels are identified using the property type code included in the data. Of the parcels within the area of focus, four percent do not include a property type code, and may also be residential.

<sup>6</sup> Publicly accessible geospatial data from the Washington State Shorezone Inventory. Developed by the Nearshore Habitat Program between 1994 and 2000. Downloaded July 2022. Available at <https://www.dnr.wa.gov/programs-and-services/aquatics/aquatic-science/nearshore-habitat-inventory>.

While nine counties and 33 municipalities do not specify this requirement, interviews with county and municipal planners conducted in July and August 2022 suggest that it would be impossible or very challenging for an individual without the relevant professional background to fulfill the necessary requirements. Therefore, residential applicants looking to replace their shoreline stabilization in the counties where SMPs do not describe that a qualified professional must be hired for the analyses are still likely to hire qualified professionals for this purpose. Residential property owners (potentially including small businesses) within these jurisdictions needing to repair or rehabilitate shoreline stabilization are unlikely to, but could potentially, incur costs as a result of the rule.

Costs of residential shoreline stabilization projects are generally borne by the property owners, which are frequently residents (i.e., households) and not businesses. However, in some cases, businesses may own residential properties or otherwise bear costs for replacing or rehabilitating residential shoreline stabilizations. Specifically, businesses that may incur costs as a result of the proposed rule may include those within the following North American Industry Classification System (NAICS) codes defining economic sectors:

- 813990 - *Business, Professional, Labor, Political, and Similar Organizations/Other Similar Organizations* (except business, professional, labor, and political organizations): Includes (but is not limited to) property owners' associations, condominium and homeowners' associations (HOAs), and tenants' associations.<sup>7</sup>
- 531110 - *Lessors of Residential Buildings and Dwellings*.

<sup>7</sup> Homeowners' associations, tenants' associations, and property owners' associations would only be considered businesses to the extent they are incorporated. RCW 64.38.010 (Definitions) defines HOAs as a "corporation, *unincorporated association*, or other legal entity, each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member." The inclusion of "unincorporated association" within the definition suggests that not all HOAs are considered businesses in Washington.

Additionally, businesses that are run out of an individual's residence may be affected by the rule. There are a wide range of business types that may fit this description and data are not available identifying the numbers and types of businesses associated with residential shoreline properties.

Data limitations do not allow for a specific enumeration and identification of the potentially affected businesses. Specific limitations include:

- NAICS code 813990 (*Other Similar Organizations*) includes a substantially greater universe of businesses than the property owners' associations that are of interest to this analysis;
- Businesses in NAICS code 53110 (*Lessors of Residential Building and Dwellings*) do not comprehensively pay business and occupation (B&O) tax to the department of revenue, and thus are not comprehensively tracked by the agency;<sup>8</sup>
- It is not possible to isolate businesses that are located on marine shorelines (which are the only ones potentially affected by the rule), so any counts of these businesses would grossly overstate the number of potentially affected businesses; and finally
- Data are not available to identify businesses being operated out of residential homes.

<sup>8</sup> Specifically, businesses offering long-term rentals are exempted from paying B&O tax (personal communication with the department of revenue on July 8, 2022).

As described previously, most residential property owners with existing shoreline stabilization are likely already using qualified professionals to develop site assessments and alternatives analyses and are unlikely to incur costs as a result of the proposed rule. Nonetheless, there is some potential that individual property owners outside of areas where qualified professionals are required may incur the costs of utilizing a professional as a result of the proposed rule, and these property owners may include businesses.

Data limitations preclude the specific identification of businesses that have the potential to incur costs as a result of the rule. Within the counties with marine shorelines, including those where use of a qualified professional for site assessment and alternatives analysis is explicitly already required, there are 12,279 businesses representing NAICS 813990 (organizations including HOAs) and 4,547 representing NAICS 531110 (lessors of residential properties).<sup>9</sup> Of this universe of businesses in counties with marine shorelines, over 99 percent of those businesses are small (i.e., employ fewer than 50 people). Importantly, these businesses may be located anywhere within the county, are not specifically located on the marine shoreline, and are not specifically located on residential property. Data on home-based businesses are not available. This analysis conservatively assumes that all home-based businesses employ fewer than 50 individuals and are small.

<sup>9</sup> Business records for businesses within each identified NAICS code within Washington counties with marine shorelines obtained from the D&B Hoovers database on August 2, 2022, <https://www.dnb.com/products/marketing-sales/dnb-hoovers.html>.

"Minor cost" is defined in RCW 19.85.020 as "a cost per business that is less than 0.3 percent of annual revenue or income or one hundred dollars, whichever is greater, or one percent of annual payroll." Data limitations prevent identification of the average annual revenues for the potentially affected businesses. As such, this analysis conservatively assumes a minor cost threshold of \$100, which is more likely to underestimate than overestimate the minor cost threshold for a given business.

**EXHIBIT 1. NUMBER OF BUSINESSES, AVERAGE ANNUAL REVENUES, AND MINOR COST THRESHOLD FOR RELEVANT INDUSTRIES - PUGET SOUND AND PACIFIC OCEAN-ADJACENT COUNTIES**

TYPE OF BUSINESS (NAICS CODE) <sup>1</sup>	NUMBER OF BUSINESSES ON RESIDENTIAL MARINE-FRONTING PROPERTY	NUMBER OF BUSINESSES IN MARINE-ADJACENT COUNTIES <sup>2</sup>	PERCENTAGE OF BUSINESSES CONSIDERED SMALL <sup>3</sup>	AVERAGE ANNUAL REVENUES (2021\$)	MINOR COST THRESHOLD
813990 - Other similar organizations, including homeowners' and property owners' associations <sup>4</sup>	Unknown	12,279	>99 percent	Unknown	\$100
531110 - Lessors of Residential Buildings and Dwellings	Unknown	4,547	>99 percent	Unknown	\$100
Home-based business	Unknown	Unknown	Assume 100 percent	Unknown	\$100

TYPE OF BUSINESS (NAICS CODE) <sup>1</sup>	NUMBER OF BUSINESSES ON RESIDENTIAL MARINE-FRONTING PROPERTY	NUMBER OF BUSINESSES IN MARINE-ADJACENT COUNTIES <sup>2</sup>	PERCENTAGE OF BUSINESSES CONSIDERED SMALL <sup>3</sup>	AVERAGE ANNUAL REVENUES (2021\$)	MINOR COST THRESHOLD
<p><b>Notes:</b></p> <p>1. Type of business as identified by primary NAICS code. Relevant business types identified through interviews with county and municipal planners conducted in July and August 2022.</p> <p>2. Represents the total number of businesses within each identified NAICS code within Washington counties with marine shorelines. Count is not limited to businesses actually located along marine shorelines, or to businesses located on residential tax parcels.</p> <p>3. Percent of businesses with &lt;50 employees based on employment data obtained from the D&amp;B Hoovers database for businesses within each NAICS code within Washington counties with marine shorelines. Count is not limited to businesses actually located along marine shorelines or to businesses located on residential tax parcels.</p> <p>4. NAICS code includes a variety of other business/organization types that are not associated with residential property, including athletic associations.</p> <p><b>Source:</b> Business records for businesses within each identified NAICS code within Washington counties with marine shorelines obtained from the D&amp;B Hoovers database on August 2, 2022, <a href="https://www.dnb.com/products/marketing-sales/dnb-hoovers.html">https://www.dnb.com/products/marketing-sales/dnb-hoovers.html</a>.</p>					

2.2 COST OF COMPLIANCE: Consistent with RCW 77.55.040, this analysis evaluates the relevance of the following potential categories of costs to comply with the proposed rule:

- **Reporting, recordkeeping, and other compliance requirements:** The proposed rule does not include any new reporting or recordkeeping requirements beyond what is already required by RCW 77.55.231. The sole compliance requirement that is incremental to existing regulation is the need for use of a qualified professional to conduct the site assessment and alternatives analysis.
- **Professional services that a small business is likely to need in order to comply with such requirements:** The rule requires residential shoreline property owners (which, in some cases, may be small businesses) to acquire professional services to support HPA applications for replacing shoreline stabilizations. The rule requires that applicants use qualified professionals, which may be permitting facilitators, geotechnical engineers, coastal engineers, or shoreline stabilization design and construction firms, to provide site assessment and alternatives analysis support.
- **Costs required to comply with the proposed rule, including costs of equipment, supplies, labor, professional services, and increased administrative costs:** As previously described, the costs of professional services are relevant to the rule making and described in detail below.
- **Based on input received, determine whether compliance with the rule will cause businesses to lose sales or revenue:** The proposed rule making does not restrict the regulated business' economic activities or projects. Additionally, the costs of professional services, as described below, are relatively low and only incurred at a time when shoreline stabilizations need replacement. Thus, the rule making is not anticipated to affect sales or revenues of regulated businesses.

The proposed rule would only generate additional costs to residential shoreline property owners, including businesses, if, absent the rule, they would comply with existing requirements without the use of a qualified professional (e.g., by having a construction firm submit a report to document slope instability). Most residential property owners with existing shoreline stabilization are likely already using qualified professionals to develop site assessments and alternatives



analyses and are unlikely to incur costs as a result of the proposed rule. To the extent that a residential shoreline property owner's use of a qualified professional results specifically from the proposed rule, this analysis identifies the costs associated with having a qualified professional complete this report.

The cost of employing a qualified professional to complete the site assessment and alternatives analysis ranges from \$3,000 to \$10,000.<sup>10</sup> This range of costs represents estimates from industry representative interviews and email communications. This range of costs is relevant to multiple project types (new armoring structure project, rehabilitation or replacement shoreline stabilization project), proposed armoring types (e.g., hard armoring, hybrid armoring, soft-shore armoring), number of considered alternatives, and residential property shoreline length. This is because the base level of geotechnical analysis and reporting is unchanged across these metrics. For the same reasons, costs are also similar whether a residential applicant is applying for a general HPA, emergency, or expedited permit.<sup>11</sup> The range of costs is also unlikely to differ between residential property owners who operate their property as a business and property owners who simply reside within their property.

<sup>10</sup> Before RCW 77.55.231 was codified, permit applicants for residential rehabilitation and replacement bank protection projects in select areas spent as low as \$1,000 to provide proof of slope instability to necessitate the proposed work. However, since RCW 77.55.231 changed the reporting requirements for these applicants, we assume that the costs to prepare these deliverables are, on average, no lower than \$3,000.

<sup>11</sup> Personal and email communication with representatives of firms providing shoreline stabilization-related services conducted in July 2022.

2.3 ASSESSMENT OF MINOR COST: Given data limitations, the minor cost threshold for businesses potentially incurring costs due to the proposed rule (i.e., located on a residential, marine-facing parcel, having existing shoreline stabilization that requires replacement, and not already required to engage a qualified professional to develop a site assessment and alternatives analysis due to local ordinances) is assumed to be \$100. Because the minor cost threshold is the greater of \$100 or 0.3 percent of average annual revenues, this assumption is more likely to understate than overstate the minor cost threshold for these businesses.<sup>12</sup> As noted above, the cost of engaging a qualified professional to develop the requisite report could range, on average, from \$3,000 to \$10,000. As described previously, it is unlikely that businesses will experience new costs as a result of this rule. To the extent that a business will incur costs as a result of the proposed rule, those costs are likely to be more than minor.

<sup>12</sup> For businesses whose true minor cost threshold is greater than \$100, this analysis would identify that the minor cost threshold has been exceeded at cost point that is lower than the true minor cost threshold. For businesses whose true minor costs are lower than \$100, \$100 is the appropriate minor cost threshold to use.

2.4 DISPROPORTIONATE ECONOMIC IMPACT ANALYSIS: When proposed rule changes cause more-than-minor costs to small businesses, RFA (RCW 19.85.040) requires an analysis that compares the cost of compliance for small businesses with the cost of compliance for the 10 percent of businesses that are the largest businesses required to comply with the proposed rules to determine whether the costs are considered disproportionate. As described in section 2.1, over 99 percent of the businesses operating within the counties with marine shorelines in the relevant NAICS code categories are small, and the analysis assumes that most home-based businesses are also small. As such, this analysis finds that, to the extent that businesses will incur costs associated with the rule, the proposed rule is likely to disproportionately impact small businesses. Accordingly, this SBEIS identifies and documents cost mitigation strategies.<sup>13</sup>

<sup>13</sup> RFA provides several options for comparing costs, including: (a) Cost per employee; (b) cost per hour of labor; (c) cost per \$100 of sales (RCW 19.85.040(1)). In the absence of sufficient data to calculate disproportionate impacts, an agency whose rule imposes more-than-minor costs must mitigate the costs to small businesses, where legal and feasible, as defined in this chapter (RCW 19.85.030(4)).

2.5 COST MITIGATION STRATEGIES: RCW 19.85.030 requires that, when a rule is expected to disproportionately impact small businesses, the agency consider several methods for reducing the impact of the rule on small businesses. These methods may include decisions that were made in determining the provisions of the rule itself or opportunities to reduce the costs of implementing the rule as written. WDFW has considered the following opportunities to limit the costs of the rule to businesses.

WDFW acknowledges that the pool of qualified professionals who possess the skills to prepare site assessments and alternatives analysis reports is limited. WDFW has partnered with sea grant and the shore friendly program to develop the *Alternatives to Bulkheads* training series. The series is geared toward shoreline planners, consultants, and marine contractors. It is WDFW's hope that training more practitioners will increase industry capacity and minimize costs by reducing the potential for project delays and/or increased costs that may result from high demand and low supply of qualified professionals. The first two units of the series were launched through the coastal training program in the spring of 2022.

WDFW has chosen to apply new rule requirements only to residential shoreline stabilization replacement, mirroring the legislative changes in SSB 5273. However, the ecological impacts of replacing shoreline stabilization are accrued for all such projects, including commercial and industrial properties, and not just residential projects. Commercial and industrial shorelines are much more likely to have small business landowners than residential sites. By not expanding the rule to include commercial and industrial shorelines at this time, WDFW is taking the potential effects on small businesses into consideration.

RCW 19.85.030(2) specifies particular options that the agency must consider in mitigating rule costs. Exhibit 2 identifies each type of cost mitigation opportunity and how WDFW has considered them during this rule-making process.

**EXHIBIT 2. WDFW ASSESSMENT OF COST MITIGATION OPPORTUNITIES OUTLINED IN RCW 19.85.030**

RCW 19.85.030(2) REQUIREMENTS	WDFW RESPONSE
(a) Reducing, modifying, or eliminating substantive regulatory requirements	WDFW considered reducing, modifying, or eliminating substantive regulatory requirements in the proposal. The resulting requirements are limited to those necessary to align chapter 220-660 WAC with SSB 1382 (chapter 279, Laws of 2021) and clarify the intent of WAC.
(b) Simplifying, reducing, or eliminating recordkeeping and reporting requirements	The proposed rule does not create any new recordkeeping or reporting requirements.
(c) Reducing the frequency of inspections	The proposed rule does not generate any new inspection requirements.
(d) Delaying compliance timetables	The new requirement of the proposed rule is intended to reduce regulatory uncertainty for the regulated community. Thus, delaying compliance timetables in this case may have the effect of increasing the time it takes for HPA approvals if applicants produce site assessments and reports that require additional work and iteration in order to comply with the existing requirements of RCW 77.55.231.
(e) Reducing or modifying fine schedules for noncompliance	The proposed rule does not introduce fines for noncompliance.
(f) Any other mitigation techniques, including those suggested by small businesses or small business advocates.	WDFW has been and will continue working with the regulated community to identify and implement actions to lessen impacts.

2.6 INVOLVEMENT OF SMALL BUSINESSES IN RULE-MAKING PROCESS: The proposed rule targets shoreline stabilization activities on residential properties and does not directly regulate a specific industry or group of businesses. While residential property owners may be businesses, this is generally not the case. In order to ensure due consideration of potential effects on small businesses, WDFW is taking a broad approach to outreach, communicating the objectives of the rule making and capturing input from diverse stakeholders. This provided opportunities for potentially affected small businesses to be involved in the rule-making process. The outreach activities and events as of September 1, 2022, are summarized in Exhibit 3.

EXHIBIT 3. WDFW OUTREACH ACTIVITIES FOR PROPOSED RULE

DATE	PERSON(S)	ACTIVITY
12/16/2021	Hydraulic code implementation advisory group (HCIAG)	Presentation and discussion on implementation of SSB 5273
1/27/2022	Consultant and contractor businesses; sea grant shoreline and coastal planners listserv	Information regarding implementation of SSB 5273
3/10/2022	Sea grant shoreline local government working group	Presentation and discussion on SSB 5273 and rule making
5/12/2022	Sea grant shoreline local government working group	Further discussion on rule making to implement SSB 5273
5/24/2022	Tribes	Email notification of rule-making initiation and overview
6/22/2022	Stakeholders and agencies; sea grant shoreline and coastal planners listserv	Email notification regarding publication of CR-101
8/3/2022	Tribes	Rule proposal distributed for review
8/4/2022	Fish and wildlife commission habitat committee	Introduction to rule making in response to SSB 5273
8/12/2022	Tribes	Webinar to review the rule proposal and take comments
8/18/2022	Selected stakeholders	Rule proposal distributed for preliminary review
<p><b>Note:</b> Information was not available to directly identify businesses operating on residential properties along marine shorelines that may be affected by the proposed rule. Instead, WDFW focused outreach on entities that communicate and provide assistance directly to residential shoreline property owners with respect to the hydraulic code, some of whom would presumably be the small businesses potentially affected by the proposed rule.</p>		

2.7 JOBS CREATED OR LOST: Through the requirement that residential property owners wishing to replace or rehabilitate existing marine shoreline stabilization utilize a qualified professional to develop a site assessment and alternatives analysis, the rule has the potential to impose costs on small businesses operating on residential marine parcels. These costs would only be incremental costs of the proposed rule if the requirement to use a qualified professional to develop a site assessment and alternatives analysis is not already in place through the local government's SMP and would only be incurred in the event that existing shoreline stabilization requires replacement or rehabilitation. As repair and replacement for a given shoreline stabilization project occurs infrequently, these costs are generally anticipated to be incurred one time, or infrequently (rather than being ongoing costs). Although the costs are more-than-minor, they are relatively low and would occur only infrequently, and it is thus unlikely that the costs incurred would result in job loss.

A requirement that a qualified professional be used to develop a site assessment and alternatives analysis may result in an increased demand for those services. Several individuals interviewed identified

that a relatively limited pool of qualified individuals exists to perform these services in the region. To the extent that increased demand for these services results in qualified professional firms hiring additional staff, creation of jobs could be considered an indirect effect of the rule. However, whether this would occur, and the number of businesses or jobs affected, is uncertain.

2.8 SUMMARY CONCLUSIONS: This rule making applies specifically to residential shoreline property owners who need to replace existing shoreline stabilization. The rule making requires this population, which may include small businesses, to employ a qualified professional in developing site assessments and alternatives analyses. It is unlikely that this rule will generate costs, and if it does, the costs to small businesses are likely to be very limited for the following reasons:

- Residential shoreline property owners include, but are not limited to, businesses. However, it is likely that businesses that do own residential shoreline properties are small.
- Shoreline property owners are required to comply with existing requirements under RCW 77.55.231, including the need to develop a compliant site assessment and alternatives analysis. The new rule making does not generate requirements for new reports.
- Many existing SMPs for counties and municipalities require the use of a qualified professional to develop these reports. In these cases, the new rule making does not impose any new requirements.
- While some property owners may attempt to accomplish the analysis and reporting requirements without the use of a qualified professional, outreach and interviews conducted in the context of this SBEIS identify that most of the time, property owners recognize a need to rely upon the expertise of a qualified professional, even absent the requirement being written into regulation.
- The rule making may reduce the costs of HPA permits for the subset of residential property owner that would attempt to comply with reporting requirements without the use of a qualified professional absent this rule making. This is because not using a qualified professional may result in noncompliant reports and analyses that result in comments from WDFW and require reanalysis and revision. Use of a qualified professional reduces the risk of submitting noncompliant reports the first time.

Available data do not allow for a specific identification of the number of small businesses operating on marine shoreline residential properties that may experience costs as a result of the rule, or the extent to which those businesses are small. Employment data for businesses potentially operating on residential parcels within the affected counties suggest 99 percent of these businesses are small. It is unlikely that residential property owners, including small businesses, will incur costs as a result of this rule. However, to the extent that businesses do incur these costs, the costs would be borne disproportionately by small businesses, and are likely to be more-than-minor.

A copy of the statement may be obtained by contacting Theresa Nation, 1111 Washington Street S.E. Olympia, WA 98501, phone 360-902-2562, fax 360-902-2946 Attn: Theresa Nation, email HPArules@dfw.wa.gov. Please refer to the full SBEIS document with appendices found at <https://wdfw.wa.gov/about/regulations/development/shoreline-stabilization-hpa-rule>.

September 20, 2022

## OTS-4064.2

AMENDATORY SECTION (Amending WSR 20-11-019, filed 5/12/20, effective 6/12/20)

**WAC 220-660-370 ((Bank protection)) Shoreline stabilization in saltwater areas.** Appropriate methods to assess the need for marine ((bank protection)) shoreline stabilization and, if needed, to design marine ((bank protection)) shoreline stabilization are available in the department's *Marine Shoreline Design Guidelines*, as well as other published manuals and guidelines.

(1) **Description:** A broad spectrum of ((bank protection)) shoreline stabilization techniques can be applied to protect property. These range from ((natural)) passive techniques that require minimal or no engineering ((to)), engineered soft shore protection ((to)), and hard ((shore)) shoreline armor. ((Natural)) Passive techniques include planting native vegetation, improving drainage, and relocating ((structures. Natural)) buildings, roads, and improvements (e.g., wells, utilities, septic fields, and the like). Passive techniques typically preserve the natural condition of the shore and have few to no negative impacts on fish life. Soft shore techniques ((include)) such as log placement, beach nourishment, resloping the bank, and re-vegetation can provide erosion protection using strategically placed natural materials while allowing beach processes and fish habitat to remain intact. Conventional hard techniques include bulkheads, sea-walls, revetments and ((retaining walls)) related structures, which are designed to preclude shoreline migration and bank erosion. Each type of approach has varying degrees of impact. In general, ((natural)) passive techniques result in the fewest impacts to fish life and hard ((armor)) techniques have the most impacts.

(2) **Fish life concerns:** Conventional hard techniques as well as some soft shore techniques can physically alter the beach and disrupt beach processes. This alteration can cause a loss of the beach spawning habitat for Pacific sand lance and surf smelt. These forage fish species are a primary food source for some adult salmon species. This alteration can also reduce beach complexity, the presence of marine riparian vegetation including overhanging vegetation alongshore that produces terrestrial insects that are eaten by juvenile salmon. To protect fish life, the department protects both beaches where saltwater habitats of special concern occur and the beach processes that form and maintain this habitat.

(3) ((Bank protection)) **Alternative selection:**

(a) To ensure the protection of fish life, a person must use the least impacting technically feasible shoreline stabilization alternative. For the purpose of this section, "feasible" means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. A person should propose a hard armor technique only after considering site characteristics such as the threat to major improvements, wave energy, and other factors in an alternatives analysis.

(b) Common alternatives for both new shoreline stabilization and the replacement or rehabilitation of shoreline stabilization that extends waterward of an existing shoreline stabilization structure are, from most preferred to least preferred:

(i) Remove any existing shoreline stabilization structure and restore the beach;

(ii) Control upland drainage;

(iii) Protect, enhance, and replace native vegetation;

(iv) Relocate buildings and improvements;

(v) Construct a soft structure;

(vi) Construct upland retaining walls;

(vii) Construct a hard structure landward of the ordinary high water line; and

(viii) Construct a hard structure at the ordinary high water line.

(c) Common alternatives for replacement or rehabilitation of residential shoreline stabilization are, from most preferred to least preferred:

(i) Remove the existing shoreline stabilization structure and restore the beach;

(ii) Remove the existing shoreline stabilization structure and install native vegetation;

(iii) Remove the existing shoreline stabilization structure and control upland drainage;

(iv) Remove the existing shoreline stabilization structure and replace it with a soft structure constructed of natural materials, including bioengineering;

(v) Remove the existing hard structure and construct upland retaining walls;

(vi) Remove the existing hard structure and replace it landward with another hard structure, preferably at or above the ordinary high water line; or

(vii) Remove the existing hard structure and replace it in the same footprint with another hard structure.

(d) Except as provided in (f) of this subsection, HPA applications for the following types of projects must include a site assessment, alternatives analysis and design rationale for the proposed method(s) prepared by a qualified professional (Qualified Professional's Report):

(i) New shoreline stabilization;

(ii) Replacement or rehabilitation of shoreline stabilization that extends waterward of an existing shoreline stabilization structure; and

(iii) Replacement or rehabilitation of residential shoreline stabilization.

(e) The applicant must submit the Qualified Professional's Report to the department as part of a complete application for an HPA that includes:

(i) An assessment of the level of risk to existing buildings, roads, or services being threatened by the erosion;

(ii) Evidence of erosion and/or slope instability to warrant the stabilization work;

(iii) Alternatives considered and the technical rationale specific to the shoreline stabilization technique proposed;

(iv) An analysis of the benefits and impacts associated with the chosen protection method; and

(v) An explanation of the method chosen, design parameters, types of materials, quantities, staging, and site rehabilitation.

(f) The department may grant an exemption to the Qualified Professional's Report required under (d) and (e) of this subsection based on the scale and nature of the project for the following:

(i) Projects for the removal of an existing shoreline stabilization structure and restoration of the beach.

(ii) Projects employing passive techniques such as controlling upland drainage or planting native vegetation.

(iii) Other projects as assessed by the department.

(g) Emergency or expedited applications submitted under RCW 77.55.021 (12), (14), or (16) that do not include a site assessment and alternatives analysis report should identify the work necessary to address the immediate situation authorized under RCW 77.55.021. A site assessment and alternatives analysis report must be submitted within 90 days from the permit issuance unless the department issues an exemption. After consideration of the assessment and analysis report, if the department determines that shoreline stabilization work conducted under the emergency or expedited permit is not the least impactful technically feasible alternative, the applicant may be required to replace the structure with one that is the least impactful technically feasible alternative.

**(4) Shoreline stabilization design:**

(a) If the ordinary high water line (OHWL) has changed since an existing hard ((bank protection)) shoreline stabilization structure was built, and OHWL reestablishes landward of the structure, the department will consider this reestablished OHWL to be the existing OHWL for permitting purposes. If an HPA application is submitted for repairs within three years of the breach, the ((bank protection structure may be repaired or replaced in the original footprint)) prior OHWL may be considered for permitting purposes.

(b) ((A person must use the least impacting technically feasible bank protection alternative. A person should propose a hard armor technique only after considering site characteristics such as the threat to major improvements, wave energy, and other factors in an alternatives analysis. The common alternatives below are in order from most preferred to least preferred:

(i) Remove the bank protection structure;

(ii) Control upland drainage;

(iii) Protect, enhance, and replace native vegetation;

(iv) Relocate improvements or structures;

(v) Construct a soft structure;

(vi) Construct upland retaining walls;

(vii) Construct hard structure landward of the OHWL; and

(viii) Construct hard structure at the OHWL.

(e)) The construction of all ((bank protection)) shoreline stabilization must not result in a permanent loss of surf smelt or Pacific sand lance spawning beds.

((d) An HPA application for new bank protection, or the replacement or rehabilitation of bank protection that extends waterward of an existing bank protection structure must include a site assessment, alternatives analysis and design rationale for the proposed method prepared by a qualified professional. The department may grant an exemption depending on the scale and nature of the project. The applicant must submit the qualified professional's report to the department as part of a complete application for an HPA that includes:

- ~~(i) An assessment of the level of risk to existing buildings, roads, or services being threatened by the erosion;~~
- ~~(ii) Evidence of erosion and/or slope instability to warrant the stabilization work;~~
- ~~(iii) Alternatives considered and the technical rationale specific to the bank protection technique proposed;~~
- ~~(iv) An analysis of the benefits and impacts associated with the chosen protection method; and~~
- ~~(v) An explanation of the method chosen, design parameters, types of materials, quantities, staging, and site rehabilitation.~~

~~(e))~~ (c) The department may require the design of hard ((bank protection)) shoreline stabilization structures to incorporate beach nourishment, large woody material or native vegetation as mitigation.

~~((4) Bank protection))~~ (5) Shoreline stabilization location:

(a) Locate the waterward face of a new hard ((bank protection)) shoreline stabilization structure at or above the OHWL. Where this is not feasible because of geological, engineering, or safety concerns, the hard ((bank protection)) structure may extend waterward of the OHWL the least distance needed to excavate for footings or place base rock, but no greater than six feet. Soft shoreline methods that allow beach processes and habitat to remain intact may extend waterward of the OHWL.

(b) Do not locate the waterward face of a replacement or repaired hard ((bank protection)) shoreline stabilization further waterward than the structure it is replacing. Where removing the existing hard ((bank protection)) structure will result in environmental degradation such as releasing deleterious material or problems due to geological, engineering, or safety concerns, the department will authorize the replacement ((bank protection)) shoreline stabilization to extend waterward of, but directly abutting, the existing structure. In these instances, a person must use the least-impacting type of structure and construction method.

~~((5) Bank protection))~~ (6) Shoreline stabilization construction:

(a) The department requires that plans submitted as part of a complete application show the horizontal distances of the structure(s) from permanent local benchmark(s) (fixed objects). Each horizontal distance shown must include the length and compass bearing from the benchmark to the waterward face of the structure(s). The benchmark(s) must be located, marked, and protected to serve as a post-project reference for at least ~~((ten))~~ 10 years from the date the HPA application is submitted to the department.

(b) A person must not conduct project activities when tidal waters cover the work area including the work corridor, except the area occupied by a grounded barge.

(c) No stockpiling of excavated materials containing silt, clay, or fine-grained soil is approved waterward of the OHWL.

(d) The department may allow stockpiling of sand, gravel, and other coarse material waterward of the OHWL. Place this material within the designated work corridor. Remove all excavated or stockpiled material from the beach within ~~((seventy-two))~~ 72 hours of construction.

(e) Backfill all trenches, depressions, or holes created during construction that are waterward of the OHWL before they are filled by tidal waters.

[Statutory Authority: RCW 77.04.012, 77.12.047, 77.55.021, 34.05.328, and 2019 c 290. WSR 20-11-019 (Order 20-75), § 220-660-370, filed



5/12/20, effective 6/12/20. Statutory Authority: RCW 77.04.012, 77.04.020, and 77.12.047. WSR 15-02-029 (Order 14-353), § 220-660-370, filed 12/30/14, effective 7/1/15.]