

WSR 23-15-078
PROPOSED RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 20-03—Filed July 17, 2023, 2:57 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 20-13-094.

Title of Rule and Other Identifying Information: Fishway and screening rules; creating new Washington department of fish and wildlife (WDFW) chapter 220-670 WAC to implement chapter 77.57 RCW.

Hearing Location(s): On September 28, 2023, at 9:00 a.m., at Yakima Convention Center, 10 North 8th Street, Yakima, WA 98901. Detailed information about fish and wildlife commission meetings can be found at <https://wdfw.wa.gov/about/commission/meetings>.

Date of Intended Adoption: October 26, 2023.

Submit Written Comments to: Gabrielle Stilwater, P.O. Box 43200, Olympia, WA 98504-3200, email fish-passage-rules@PublicInput.com, fax 360-902-2946, Attn: Gabrielle Stilwater, phone 855-925-2801, project code 2051, website for comments <https://publicinput.com/fish-passage-rules>, by September 29, 2023.

Assistance for Persons with Disabilities: Contact WDFW Americans with Disabilities Act manager, phone 360-902-2349, fax 360-902-2946, Attn: Gabrielle Stilwater, TTY 360-902-2207, email adaprogram@dfw.wa.gov, by September 15, 2023.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: WDFW is proposing a new WAC chapter implementing chapter 77.57 RCW.

In November 2018, the southern resident orca (SRO) task force published its report identifying lack of prey as a key threat to SROs. Recommendation number three of the 2018 SRO task force report endorsed agencies to apply and enforce laws that protect habitat. Specifically, the SRO task force noted that the governor should direct WDFW to develop rules to fully implement chapter 77.57 RCW. The Washington state legislature supported the SRO task force direction with the approval of the 2019 ESHB 1109 (chapter 415, Laws of 2019), which became effective on May 21, 2019. In 2019, WDFW entered into an informal comanagement agreement with Washington state treaty tribes to incorporate climate change science into policy. Additionally, the proposed rules are intended to be consistent with parallel WDFW rules for construction projects in state waters, chapter 220-660 WAC.

This proposal would create and populate new chapter 220-670 WAC that defines general passability and protection standards for new and existing fishways and water diversions. Consideration of incorporating climate change into the design of new water crossing structures is detailed within the standards as well. The proposal codifies current WDFW practices of using the agency's fish passage inventory and assessment guidance and water crossing design guidelines. These standards are the foundation for establishing compliance measures. Compliance measures detail technical assistance support and voluntary compliance steps a structure owner may follow to correct a barrier fishway or water diversion. Compliance measures also establish the effects of noncompliance when a structure owner does not agree to a WDFW compliance request.

Reasons Supporting Proposal: The proposal was developed over the course of three years with input from WDFW staff, tribal partners, additional Washington state agencies, Washington State Association of

Counties, Association of Washington Cities, nongovernmental agencies, small business economic impacts and cost-benefit analyses, and multiple staff work groups and public comment opportunities, including three public comment meetings on the preproposed draft proposal. The proposal defines important fishway and water diversion standards and WDFW administrative actions.

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

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

Statutory Authority for Adoption: RCW 77.04.012, 77.12.047, 77.57.010, 77.57.030, 77.57.040, 77.57.060, 77.57.070, and 43.05.100; ESHB 1109 (chapter 415, Laws of 2019).

Statute Being Implemented: Chapter 77.57 RCW, Fishways, flow, and screening.

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

Name of Proponent: WDFW, habitat program, fish passage division, governmental.

Name of Agency Personnel Responsible for Drafting and Implementation: Gabrielle Stilwater, 1111 Washington Street S.E., Olympia, WA 98501, 564-999-0768; 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 not required under RCW 34.05.328. Although these proposed rules are not significant legislative rules implementing chapter 77.57 RCW, WDFW voluntarily completed a cost-benefit analysis to provide greater scrutiny of the rules' potential impact. A preliminary cost-benefit analysis can be obtained by contacting Gabrielle Stilwater, P.O. Box 43200, Olympia, WA 98504-3200, email FishPassageRules@dfw.wa.gov, fax 360-902-2946, Attn: Gabrielle Stilwa-

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

Scope of exemption for rule proposal:

Is not exempt.

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

Small Business Economic Impact Statement

See Reviser's note below.

A copy of the statement may be obtained by contacting Gabrielle Stilwater, P.O. Box 43200, Olympia, WA 98504-3200, phone 564-999-0768, fax 360-902-2946, Attn: Gabrielle Stilwater, TTY 360-902-2207, email FishPassageRules@dfw.wa.gov, website <https://wdfw.wa.gov/species-habitats/habitat-recovery/fish-passage/rule-making>.

July 17, 2023

Scott Bird

Rules Coordinator

Reviser's note: The material contained in this filing exceeded the page-count limitations of WAC 1-21-040 for appearance in this issue of the Register. It will appear in the [23-16](#) issue of the Register.