

WSR 23-19-072
PROPOSED RULES
DEPARTMENT OF
FISH AND WILDLIFE

[Order 20-03—Filed September 18, 2023, 3:16 p.m.]

Continuance of WSR 23-15-078 filed on July 17, 2023.

Preproposal statement of inquiry was filed as WSR 20-13-094 filed on June 17, 2020.

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.

This continuance is being filed by WDFW solely because there is a change in the scheduled hearing date of September 28, 2023, before the fish and wildlife commission; the new date of the hearing has been re-scheduled to October 26-28, 2023, before the fish and wildlife commission.

Hearing Location(s): On October 26-28, 2023, at 9:00 a.m., at the Natural Resources Building, 1111 Washington Street S.E., Olympia, WA 98501. Detailed information about fish and wildlife commission meetings can be found at <https://wdfw.wa.gov/about/commission/meetings>.

Date of Intended Adoption: November 17, 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 <https://publicinput.com/fish-passage-rules>, by October 28, 2023.

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

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

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

Scope of exemption for rule proposal from Regulatory Fairness Act requirements:

Is not exempt.

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

For the small business economic impact statement (SBEIS), please refer to the original CR-102 form, WSR 23-15-078. The SBEIS has not changed and will not be refiled with this continuance.

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

September 18, 2023

Scott Bird

Rules Coordinator

OTS-4699.3

**Chapter 220-670 WAC
FISHWAY AND SCREENING RULES**

NEW SECTION

WAC 220-670-010 Purpose. The ability of salmon and steelhead to migrate to and from their traditional spawning grounds is vital to their recovery in Washington. Additionally, other fish species and the freshwater life stages of juvenile salmon move between different areas of the stream to find suitable habitat. Barriers such as deteriorating or outdated fishways and water diversions block fish from swimming upstream and moving within the stream, undermining recovery efforts. Two actions crucial to fish recovery are correcting human-made fish passage barriers and properly screening surface water diversions to enable safe upstream and downstream passage for all fish at all life stages.

This chapter establishes rules for the department's fish passage and screening authorities under chapter 77.57 RCW.

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NEW SECTION**WAC 220-670-020 Instructions for using chapter 220-670 WAC.**

This chapter defines passability and protection standards for fishways and fish guards, and with respect to those structures, provides for the protection of fish life at all life stages. These rules are intended to be used in tandem with chapter 220-660 WAC, Hydraulic code rules. The hydraulic code rules contain guidance for the construction or performance of hydraulic projects that will use, divert, obstruct, or change the natural flow or bed of any salt or fresh waters of the state. Both chapters reflect the current and best science, technology, and construction practices related to fish protection.

The department will consider new science and technology as it becomes available and will allow alternative practices that provide equal or greater protection for fish life. In addition to the rules in this chapter, the department has developed guidance to help owners of fishways and water diversions understand and comply with fishway and screening requirements. The guidance reflects the department's experience and expertise with various types of structures. Following the guidance will help ensure that a structure will adequately protect and pass fish. All guidance documents are available on the department's website.

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NEW SECTION

WAC 220-670-030 Definitions. The following are definitions for terms used in this chapter:

(1) "Bankfull width" means the width of the surface of the water at the point where water just begins to overflow into the active flood plain. In streams where there is no flood plain, it is often the width of a stream or river at the dominant channel forming flow that reoccurs every one to two years.

(2) "Climate adapted water crossing" means a water crossing structure for which the design has been modified to accommodate changes in the stream flow and/or channel shape caused by future climate change.

(3) "Department" means the department of fish and wildlife.

(4) "Director" means the director of the department of fish and wildlife.

(5) "Ditch" means a wholly artificial watercourse or a lake, river, or stream altered by humans.

(6) "Diversion" means to divert water from one course to another. Diversion, when used without qualification, includes the diversion of surface water and the withdrawal of groundwater.

(7) "Diversion structure" means any structure that functions to facilitate withdrawal of water from the natural watercourse.

(8) "Emergency" means an immediate threat to life, the public, property, or of environmental degradation.

(9) "Entrained" means the entrapment of fish into a watercourse diversion that has no screen, into high velocity water along the face of an improperly designed screen, or into the vegetation cut by a mechanical harvester.

(10) "Fish" means all fish species, including food fish, shellfish, game fish, unclassified fish and shellfish species, and all stages of development of those species.

(11) "Fish guard" means a device installed at or near a surface water diversion headgate, or on the intake of any device used for removing water from fish-bearing waters, to prevent entrainment, impingement, injury, or death of fish life. Fish guards physically keep fish from entering the diversion or intake and do not rely on avoidance behavior.

(12) "Fish habitat" or "habitat that supports fish life" means habitat, which is used by fish life at any life stage at any time of the year including potential habitat likely to be used by fish life, which could reasonably be recovered by restoration or management and includes off-channel habitat.

(13) "Fish passage improvement structure" means artificial structures that are used to provide passage through, over, and/or around artificial barriers. They provide a graduated change in gradient with refuge areas allowing for fish to pass barriers.

(14) "Fish screen" means fish guard.

(15) "Fishway" means a structure, facility, or device that is designed to enable fish to effectively pass around or through an obstruction without undue stress or delay. They are generally known as "water crossing structures" or "fish passage improvement structures."

(16) "Game fish" is defined by RCW 77.08.020.

(17) "Hydraulic project" means the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state.

(18) "Impinge" or "impingement" means the condition where a fish comes in contact with the surface of a screen and cannot volitionally escape. This occurs when the approach velocity exceeds the swimming capability of a fish given the screen size and condition.

(19) "Lake" means any natural standing fresh waters or artificially impounded natural fresh waters of the state, except impoundments of the Columbia and Snake rivers.

(20) "Maintenance" means repairing, remodeling, or making minor alterations to a facility or project to keep the facility or project in properly functioning and safe condition.

(21) "Mitigation" means sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts to fish life or habitat that supports fish life.

(22) "Ordinary high water line" or "OHWL" means the mark on the shores of all water that will be found by examining the bed and banks and ascertaining where the presence and action of water are so common and usual, and so long continued in ordinary years as to mark upon the soil or vegetation a character distinct from the abutting upland. Provided, that in any area where the ordinary high water line cannot be found, the ordinary high water line adjoining saltwater is the line of mean higher high water and the ordinary high water line adjoining fresh water is the elevation of the mean annual flood.

(23) "Person" means a structure owner, the owner's agent, or the person in charge of operating the structure. The term person includes an individual, a public or private entity, or organization.

(24) "Protection of fish life" means avoiding, minimizing unavoidable impacts, and compensating for remaining impacts to fish life and the habitat that supports fish life through mitigation sequencing.

(25) "Rehabilitation" means major work required to restore the integrity of a structurally deficient or functionally obsolete structure. This can include partial replacement of a structure.

(26) "Replacement" means the complete removal of an existing structure and construction of a substitute structure in the same location.

(27) "River" means "watercourse."

(28) "Tide gate" means a one-way check valve that prevents the backflow of tidal water.

(29) "Unimpeded fish passage" means the free movement of all fish species at any mobile life stage around or through a human-made or natural structure.

(30) "Water crossing structures" means structures that span over, through, or under a water course. Examples are bridges, culverts, and conduits.

(31) "Water right" means a certificate of water right, a vested water right or claim to a valid vested water right, or a water permit, under Title 90 RCW.

(32) "Watercourse," "river," or "stream" means any portion of a stream or river channel, bed, bank, or bottom waterward of the ordinary high water line. Watercourse also means areas in which fish may spawn, reside, or pass, and tributary waters with defined bed or banks that influence the quality of habitat downstream. Watercourse also means waters that flow intermittently or that fluctuate in level during the year, and the term applies to the entire bed of such waters whether the water is at peak level. A watercourse includes all surface-water-connected wetlands that provide or maintain habitat that supports fish life. This definition does not include irrigation ditches, canals, stormwater treatment and conveyance systems, or entirely artificially watercourses, except where they exist in a natural watercourse that has been altered by humans.

(33) "Written notice" or "written notification" means a communication sent through U.S. mail or email.

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NEW SECTION

WAC 220-670-040 Applicability of fish passage and screening authority. (1) The standards of this chapter apply to the following structures and circumstances:

(a) Performance standards:

(i) Ensuring that all fish species at all life stages can freely move through and/or around fishways.

(ii) Ensuring that all fish species at all life stages are safe from diversion structures that may harm or cause entrainment or impingement.

(b) Projects:

(i) All new fishways and diversion structures connecting to a lake, stream, or river.

(ii) The repair or replacement of existing noncompliant fishways and diversion structures connecting to a lake, stream, or river.

(2) The provisions of this chapter do not apply to the following:

(a) Tide gates, flood gates, and associated human-made agricultural drainage facilities that were originally installed as part of an

agricultural drainage system on or before May 20, 2003, or the repair, replacement, or improvement of such tide gates or flood gates.

(b) Lawful diversions of water from a lake, stream, or river that (i) contain game fish exclusively (do not contain food fish), and (ii) were installed on or prior to June 11, 1947.

(3) For fishways and water diversion devices in existence on September 1, 1963, or before, the director may authorize removal, relocation, reconstruction, or other modification of an inadequate fishway or fish screen without cost to owner. The fishway or diversion structure will be maintained at the expense of the owner.

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NEW SECTION

WAC 220-670-050 Standards for fishways and water diversions.

This section requires fish passage through obstructions and appropriate screening of water diversions. The standards of this section are intended to ensure protection and passability for fish at all life stages.

(1) **Water crossing structures.** This subsection applies only to water crossing structures over fish-bearing lakes, streams, and rivers.

(a) **Description:** Water crossing structures are built to facilitate the movement of people, animals, or materials across or over rivers and other water bodies. These structures include bridges, culverts, and conduits.

(b) **Fish life concerns:** Water crossing structures in fish-bearing streams must allow fish to move freely through them at all flows when fish are expected to move. All water crossing structures must retain upstream and downstream connection to maintain fish habitat and provide unimpeded fish movement. Structures that are not designed to accommodate current and future flows can block or alter these processes. Growing evidence shows that climate change is impacting our region's aquatic systems. Washington's hydrology is changing, including reductions in glaciers and snowpack size and earlier peak stream flow in many rivers. Most freshwater fish species can only survive in certain water temperature ranges or stream flow conditions. Climate change can threaten aquatic ecosystems by altering these conditions including increasing stream temperature, altering stream flow due to drought or increased storms, and worsening other stressors. These trends are expected to continue, along with increasing flood size and decreasing summer low flows. Typically, the size of water crossing structures like culverts and bridges is based on bankfull width. As the size of floods increases, water crossing sizes must also increase. Culverts are generally designed to last 50 to 100 years under current stream conditions. Designing culverts to be resilient to future changes in stream conditions will reduce the risk of structural failure and the creation of fish passage barriers.

(c) **Standards:**

(i) Water crossing structures must provide unimpeded passage for all species of adult and life history stages of fish. Passage is assumed when there are no barriers due to behavioral impediments, excessive water slope, drop or velocity, shallow flow, lack of surface flow, and other related conditions. Fish passage improvement struc-

tures will only be approved where (A) extreme and unusual site conditions prevent a person from complying with the standards in this section and (B) associated impacts are adequately mitigated.

(ii) Projections of future 100-year peak flow and future bankfull width shall be fully considered in the design of water crossing structures, and, taking those projections into account, water crossing structures must be capable of freely passing all species and life histories of fish expected to be present in that system. To determine the future bankfull width and future 100-year peak flow, a person must use (A) the department's Culverts and Climate Change web application located on the department's website, or (B) another method approved by the department. If the projected change in bankfull width and 100-year peak flow is less than five percent, further consideration of future bankfull width and future peak flow is not required in the design of the water crossing structure.

(iii) Climate adapted water crossings must still follow the rules provided elsewhere in this chapter and in chapter 220-660 WAC. Appropriate methods to design water crossing structures are available in the department's *Water Crossing Design Guidelines*, or other published manuals and guidelines approved by the department. A list of approved manuals and guidelines is on the department's website.

(iv) Methods and guidance to initially determine if the fishway can freely pass fish can be found within the fish passage inventory and assessment guidance on the department's website. The fish passage inventory and assessment guidance should be considered along with the site-specific metrics listed above.

(d) **Existing water crossing structures:** Structures that were in existence on or before the adoption of this chapter that were legally installed are not required to consider projections of future bankfull width and future 100-year peak flows unless being rehabilitated or replaced, so long as they function as originally intended, have not exceeded their useful life, and are not otherwise required to be replaced relative to an existing agreement.

(2) **Fish passage improvement structures.** The standards in this subsection apply to fish passage improvement structures, including fish ladders, weirs constructed for fish passage management, roughened channels, trap-and-haul operations, and hydraulic design culvert retrofits.

(a) **Description:** Fish passage improvement structures facilitate the passage of fish through or around a barrier. They restore upstream and downstream fish access to habitats that have become isolated by human activities such as placing culverts, dams, and other artificial obstructions.

(b) **Fish life concerns:** Barriers can block fish from using or accessing upstream or downstream spawning and rearing habitat. The preferred method of providing fish passage is to remove artificial fish passage barriers and ensure unimpeded passage of fish at all life stages, as well as to maintain natural channel processes and function. However, when it is not feasible to remove an artificial barrier, a fish passage improvement structure may be an alternative mitigation measure. Fish passage improvement structures are generally not preferred because they can be partial barriers to fish passage and generally require regular maintenance to provide fish passage as intended. Fish passage improvement structures that mainly pass one species, life history stage, or class of fish may unintentionally limit the passage of other species.

(c) **Standards:**

(i) Fish passage improvement structures, such as fish ladders, must not accumulate sediment, ice, and debris at the downstream entrance, or upstream exit of the structure that could impact flow or passage.

(ii) The fish passage structure must not result in significant migratory delays as determined by the department or mortality to fish life due to disorientation, distraction, predation, stress, or injury.

(iii) Water must adequately flow through the structure at a reasonable velocity for the species and life history stages that are expected to be present in that system.

(iv) Any water surface drop present at a fish passage improvement structure must not exceed .24 meters at any of the controls to be fully passable.

(v) Fish passage improvement structures should not be used to bypass permanent natural barriers except in limited situations where the department determines they are necessary to restore native fish species.

(vi) Methods and guidance to initially determine if the fish passage improvement structure can pass fish can be found within the fish passage inventory and assessment guidance on the department's website. The fish passage inventory and assessment guidance should be considered along with the site-specific metrics listed above.

(3) **Water diversions.** This subsection applies to water diversions and fish guards. For diversions and fish guards in wholly artificial waterways, the provisions in this section match those of WAC 220-660-250 to ensure consistent design and construction of diversions and screens.

(a) **Description:** Surface water diversions are common instream features in agricultural areas where the water is used for irrigation. Throughout the state, people also divert water for hydropower, industrial, recreational, residential, municipal, and hatchery uses. A water right must be obtained by the Washington department of ecology prior to diverting waters of the state.

(b) **Fish life concerns:** Surface water diversions must be appropriately screened to prevent fish from being drawn into the diversions where they are at risk of injury or death from entrainment and/or impingement. Other elements of a water diversion can result in direct and indirect sources of injury or mortality. Wing and check dams can prevent or delay upstream and downstream fish passage, increase predation, and fish may be physically injured or dewatered by active cleaning mechanisms or bypass mechanisms.

(c) **Standards:** Diversion structures must be designed and maintained so that fish are unharmed if fish life is present at a diversion or water intake. Effective fish screening is assumed when a given fish screen has appropriately sized screen material and approach velocities, no apparent damage, such as holes, dents, or corrosion, and there is no accumulation of woody, vegetative, or other debris near the screen when the device is in use. Fish screen design criteria and methods to initially determine if the diversion structure is protecting fish is described in the fish passage inventory and assessment guidance on the department's website. The fish passage inventory and assessment guidance should be considered along with the site-specific metrics listed in this section.

(d) **Water diversion design, construction, operation, and maintenance:**

(i) A diversion structure must not hinder upstream or downstream adult and juvenile fish passage. If passage problems develop, the department may require a person to modify the diversion structure.

(ii) At pump stations, screens, and headgate areas, a person may use excavation equipment or suction dredge to remove accumulated silts and gravel from within 20 feet of the point of diversion unless otherwise permitted. Place material must be removed from the OHWL so it will not reenter a lake, river, or stream. The water diversion must be open during this work to capture disturbed sediment within the irrigation diversion and minimize loss of sediment into the stream.

(iii) A person must equip and maintain any device used for diverting water from a fish-bearing watercourse with a fish screen approved by the department to prevent passage, entrainment, or impingement of fish into the diversion structure. A person must maintain the fish screen and associated structures as necessary to achieve the appropriate approach velocity, a functional bypass, and fish protection criteria. Methods and guidance to initially determine if the diversion structure is protecting fish life can be found within the fish passage inventory and assessment guidance on the department's website. The fish passage inventory and assessment guidance should be considered along with the site-specific metrics listed in this section.

(iv) Irrigation diversions must not create blind diversion channels leading to the fish screen. Diversions must be equipped with a fish bypass mechanism to provide opportunity for fish entrained within a delivery canal to voluntarily return to the stream.

(v) Gravity diversions:

(A) Wing and check dams.

(I) Prior to constructing a wing or check dam, a person must contact the department for opportunity to assess the site and determine whether active spawning and incubation is occurring at the site.

(II) A person must maintain diversion canals to maximize hydraulic gradient in the diversion canal to minimize the need for work within the natural watercourse. Maintenance includes removing accumulated sediment and debris from the point of diversion.

(III) Unless a permanent structure is approved, temporary wing or check dams for irrigation may be constructed using a combination of local bed materials, jersey barriers, concrete blocks, steel posts and wood, pinned straw bales, plastic sheeting, and similar inert materials.

(IV) Where gravel dams are permitted, they must be constructed with gravels available on-site waterward of the ordinary high water line, or with clean round gravel transported to the site. Limit bed disturbance to the minimum needed to achieve the provisions of the water right.

(V) Bed excavation depth to construct an irrigation diversion must not exceed 18 inches unless otherwise approved by the department to avoid destabilizing the streambed.

(VI) Earth or dirt must not be used to seal check or wing dams. Straw, plastic sheeting, filter fabric, and similar inert materials may be used to seal wing or check dams.

(VII) Do not use logs or other woody material waterward of the ordinary high water line to construct the dam unless approved by the department. Large wood from upland locations may be used to create a wing or check dam.

(VIII) If logs or other large woody material block water flow into a ditch or inhibit construction, a person may relocate them within the ordinary high water line.

(IX) Wing or check dams must be constructed in a manner that does not cause bank erosion.

(X) All foreign materials, except clean or native gravel or large woody material, used to construct wing or check dams must be removed within seven days after the end of the irrigation season.

(B) Diversion dams must not extend completely across the stream unless needed to seal the dam to achieve the water right.

(C) Temporary water control structures must be removed or breached down to the natural bed elevation in at least two locations at the end of the irrigation season. Temporary water control structures include, but are not limited to, gravel berms or temporary check structures made from hay bales, wood, metal, or other materials.

(vi) Start-up and shut-down of water diversions.

(A) A person must clean and maintain the fish bypass mechanism of all roots, sediments, vegetation, and debris prior to diverting water to ensure it is operational and will prevent injury or stranding of fish life.

(B) A person must ensure that there is sufficient flow within the bypass mechanism to safely return fish life from the fish screen to state waters.

(C) If at any point during water diversion there is insufficient instream flow to provide opportunity for fish life to migrate downstream of the bypass outlet, a person must close the fish bypass until there is sufficient flow.

(D) A person must slowly ramp down flows at the end of the irrigation season in a manner that prevents stranding or predation of fish life within a canal above the fish screens or within the fish bypass mechanism. Do not close the headgate completely or remove the diversion structure until fish have either left the canal and bypass or are salvaged and returned to the stream. Headgates located downstream of the fish screen may be closed immediately at the end of the irrigation season.

(e) Limit of department authority over water diversions and intakes:

(i) The department cannot limit emergency water diversions during emergency fire response. When possible, a person must notify the department before the emergency diversion. When advance notification is not possible, a person must notify the department within 24 hours of the emergency diversion, at the 24-hour hotline phone number at 360-902-2537.

(ii) The department cannot limit the amount or timing of water diverted under a water right, other than ensuring that there is sufficient bypass flow to return fish back to the stream of origin from a water diversion. However, the department requires compliance with the provisions within chapter 220-660 WAC for work that will use, divert, obstruct, or change the natural flow or bed of any lake, river, or stream, or that will utilize any of the waters of a lake, river, or stream to divert water under a water right. The department also requires compliance with the provisions of this chapter to ensure adequate fish passage and/or protection at a water diversion site.

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NEW SECTION**WAC 220-670-060 Compliance with chapter 220-670 WAC standards.**

A person must comply with all applicable standards of chapters 77.57 and 77.55 RCW, and this chapter. The department will help the regulated community understand how to voluntarily comply through education and technical assistance.

When a person does not voluntarily comply, the department may progressively elevate enforcement responses to achieve a compliant structure. The type of enforcement actions range from issuing a voluntary correction request, to issuing a mandatory notice to comply and, when appropriate, civil and/or criminal enforcement actions, such as injunctive relief or criminal prosecution. This section outlines the enforcement tools available to WDFW to facilitate compliance with chapter 77.57 RCW and this chapter.

(1) Voluntary compliance:

(a) "Voluntary compliance" means an act of following a rule or law, or of acting according to an agreement without being forced to comply.

(b) For the construction of a new fishway, diversion, or fish screen, or rehabilitation, replacement, or maintenance of an existing fishway, diversion, or fish screen, a person must obtain a construction permit called the hydraulic project approval (HPA) from the department when applicable. Procedures for an HPA can be found in chapter 220-660 WAC.

(c) At proposed or existing structure locations where an HPA is not required, the department may request a structure owner enter into an agreement to ensure the construction of a new fishway, diversion, or fish screen, or the rehabilitation, replacement, or maintenance of an existing fishway, diversion, or fish screen is done in a manner that protects fish life. In the absence of such an agreement, the department will assess compliance with the requirements of chapter 77.57 RCW and this chapter independently. The agreement must protect fish life as follows:

(i) Technical provisions in the agreement must meet requirements within this chapter for fishways and water diversions; and

(ii) The provisions in the agreement may include the proposed project plans for meeting the requirements of this chapter and a narrative that includes detail on construction materials, timing, invasive species control, pre- and post-construction notifications, clean up, and other considerations specific to the site and project.

(2) Technical assistance program: The department will continue to develop programs to encourage voluntary compliance. These programs include technical assistance visits, printed information, information and assistance by telephone, training meetings, and other appropriate delivery methods of technical assistance. Technical assistance includes:

(a) Information on the laws, rules, and compliance methods and technologies applicable to the department's programs;

(b) Information on methods to avoid compliance problems;

(c) Assistance in applying for required department permits; and

(d) Information on the mission, goals, and objectives of the program.

(3) Technical assistance site visit:

(a) A technical assistance visit is defined as a visit by the department to a project site or other location that:

(i) Has been requested or is voluntarily accepted; and

(ii) The department declares to be a technical assistance visit at the start of the visit.

(b) If during a technical assistance visit the department identifies any violations of law or department rules, the department will inform the person of the violation, including a description of what is not in compliance and how to achieve compliance during the visit or within a reasonable time thereafter. The technical assistance visit may result in a correction request or notice to comply.

(c) The department may issue a notice to comply under this section without first issuing a correction request when a violation is observed during a technical assistance visit if:

(i) The person has previously been notified for the same or similar type of violation under chapter 77.57 or 77.55 RCW; or

(ii) The violation has a probability of causing more than minor harm to fish life.

(4) **Compliance inspections:** If the department becomes aware of conditions that do not comply with the applicable laws and rules enforced by the department, the department may conduct a compliance inspection site visit.

(a) During a compliance inspection the department may issue a correction request or notice to comply. If the department identifies any violations of law or department rules, the department will inform the fishway or diversion structure owner of the violation, including a description of what is not in compliance and how to achieve compliance during the visit or within a reasonable time thereafter.

(b) The department recognizes the high volume of existing fish passage and diversion structures throughout Washington. When prioritizing compliance inspection site visits, prioritizing the deployment of compliance resources, and determining the appropriate enforcement response to a violation, the department will consider the nature of the fish resources impacted by the existing noncompliant structure as well as the quality and quantity of associated habitat.

(c) The department will also consider the following when determining the appropriate enforcement response to a violation:

(i) Previous violation history of the person;

(ii) Severity and repairability of the impact of the violation(s) on fish life;

(iii) Whether the violation(s) was intentional; and

(iv) The extent, if any, to which the person has cooperated or is cooperating with the department in addressing the violation(s) and its impact on fish life.

(5) **Compliance pathways:**

(a) **Correction request:**

(i) A correction request is an informal written request issued to a fishway owner, the owner's agent, or the person in charge, or the diversion structure owner, which can be used to gain compliance and communicate violations discovered during a technical assistance site visit or compliance inspection.

(ii) When issuing a correction request, the department must provide for a reasonable time to achieve compliance.

(iii) Contents of a correction request: A correction request must include:

(A) A description of what is not in compliance with chapter 77.57 RCW or this chapter;

(B) The text of the specific section(s) or subsection(s) of chapter 77.57 RCW or this chapter;

(C) A statement of what is required to achieve compliance;

(D) The date by which the fishway or fish screen owner must achieve compliance;

(E) Notice of the means to obtain technical assistance services provided by the department or others; and

(F) Notice of when, where, and to whom a request may be submitted to the department to extend, for good cause, the deadline for achieving compliance with the correction request.

(iv) The correction request may request the structure owner to enter into an agreement with the department in order to correct a non-compliant structure. The agreement must protect fish life as follows:

(A) The agreement must specify the corrective action to be taken and may also require additional action to avoid, minimize, and rectify for adverse impacts to fish life associated with the corrective action;

(B) Technical provisions in the agreement must meet requirements within this chapter for fishways and water diversions; and

(C) The provisions in the agreement must include the proposed project plans for meeting the requirements of this chapter and a narrative that includes detail on construction materials, timing, invasive species control, pre- and post-construction notifications, clean up, and other considerations specific to the site and project.

(v) The department must provide for a reasonable time to achieve compliance.

(vi) Time extension to comply: A request for an extension of the deadline for achieving compliance with the correction request must be submitted to the department in writing. The department must respond in writing to a request for extension of the deadline.

(vii) A correction request is not a formal enforcement action and is not subject to appeal under WAC 220-670-070 or 220-670-080.

(viii) The department may issue a notice to comply without first issuing a correction request when a violation is observed if:

(A) The person has previously been notified for the same or similar type of violation under chapter 77.57 or 77.55 RCW; or

(B) The violation has a probability of causing more than minor harm to fish life.

(b) **Notice to comply:**

(i) If a correction request does not effectuate full compliance with chapter 77.57 RCW and this chapter, the person has previously been subject to an enforcement action for the same or similar type of violation under chapter 77.57 or 77.55 RCW, or there is probability a violation may cause more than minor harm to fish life, the department may issue a notice to comply to the structure owner.

(A) A notice to comply must specify the corrective action to be taken, and may also require additional action to avoid, minimize, and rectify adverse impacts to fish life associated with the corrective action.

(B) Contents of a notice to comply. A notice to comply must include:

(I) A description of the condition that is not in compliance with chapter 77.57 RCW and/or this chapter;

(II) The text of the specific section(s) or subsection(s) of chapter 77.57 RCW and/or this chapter;

(III) A statement of what is required to achieve compliance;

(IV) The date by which the department requires compliance to be achieved;

(V) Notice of the means to obtain any technical assistance services provided by the department or others;

(VI) Notice of when, where, and to whom a request may be submitted to the department to extend, for good cause, the deadline for achieving compliance with the order; and

(VII) The right to appeal.

(ii) The department must provide for a reasonable time to achieve compliance, which shall not be less than 30 days.

(iii) Signature authority for a notice to comply: A notice to comply must be authorized by a regional habitat program manager, regional director, habitat program division manager, habitat program director, habitat program deputy director, or department director.

(iv) Providing notice: Within five business days of issuing a notice to comply, the department must mail a copy of the notice to the last known address of the structure owner or, at the department's option if the structure is a fishway or requires a fishway, to the last known address of the owner's agent or the person in charge of operating the structure. Within five business days of issuing a notice to comply, the department must also mail a copy of the notice to the local jurisdiction in which the fishway or diversion structure is located.

(v) Consequences of noncompliance: Failure to comply with a notice to comply can result in subsequent civil or criminal enforcement actions.

(vi) Time extension to comply: A request for an extension of the deadline for achieving compliance with the notice to comply must be submitted to the department in writing. The department must respond in writing to a request for extension of the deadline.

(vii) Appealing a notice to comply: A notice to comply may be appealed within 30 days from the date of receipt of the notice by the structure owner. Informal appeals must be filed in the form and manner provided in WAC 220-670-070 and formal appeals must be filed in the form and manner provided in WAC 220-670-080.

(c) Additional responses to noncompliance:

(i) The department may initiate additional civil or criminal enforcement actions in circumstances where a structure owner has failed to comply with a notice to comply.

(ii) Civil or criminal enforcement action may include any remedy available under Washington law, specifically including, but not limited to:

(A) An action for injunctive relief to abate a noncompliant obstruction or diversion structure as a public nuisance.

(B) Reporting the violation to law enforcement as a gross misdemeanor under RCW 77.15.310.

(C) Reporting the violation to law enforcement as a gross misdemeanor under RCW 77.15.320.

(D) Department removal of obstruction(s) and construction of fishway(s).

(I) If a person fails to construct and maintain a fishway or to remove the dam or obstruction in a manner satisfactory to the director, then within 30 days after written notice to comply has been served upon the owner, their agent, or the person in charge, the director may construct a fishway or remove the dam or obstruction. Expenses incurred by the department constitute the value of a lien upon the dam or obstruction and upon the personal property of the person owning the dam or obstruction. Notice of the lien shall be filed and recorded in the office of the county auditor of the county in which the dam or obstruction is situated. The lien may be foreclosed in an action brought in the name of the state.

(II) If, within 30 days after notice to construct a fishway or remove a dam or obstruction, the owner, the owner's agent, or the person in charge fails to do so, the dam or obstruction is deemed a public nuisance and the director may take possession of the dam or obstruction and destroy it. No liability shall attach for the destruction.

(E) Replacement/repair of a noncompliant diversion structure by the department:

(I) If an owner fails to equip a diversion structure with a fish guard approved by the director, the director or the director's designee may close a water diversion structure and keep it closed until it is properly equipped with a fish guard, screen, or bypass.

(II) The fish screens must be installed at places and times prescribed by the director, and based on plans approved by the director prior to construction, upon 30 days' notice to the owner of the diversion structure.

(III) If within 30 days after notice to equip a diversion structure the owner fails to do so, the director may take possession of the diversion structure and close the device until it is properly equipped. Expenses incurred by the department constitute the value of a lien upon the diversion structure and upon the real and personal property of the owner. Notice of the lien will be filed and recorded in the office of the county auditor of the county in which the action is taken.

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NEW SECTION

WAC 220-670-070 Informal appeal of notice to comply. An informal appeal is an internal department review of a notice to comply and is conducted under chapter 34.05 RCW (Administrative Procedure Act).

(1) The department recommends that a structure owner aggrieved by a notice to comply issued under this chapter contact the department employee responsible for issuing the notice before initiating an informal appeal. Discussion of concerns with the department employee may result in a resolution without the need for an informal appeal.

(2) The department encourages a structure owner aggrieved by a notice to comply to take advantage of the informal appeal process before initiating a formal appeal. However, a structure owner may pursue a formal appeal under WAC 220-670-080 without first obtaining informal review under this section. This rule does not apply to correction requests.

(3) Requesting an informal appeal. A notice to comply may be informally appealed only by the structure owner.

(4) A request for an informal appeal must be in writing and must be received by the department within 30 days from the date of receipt of the notice to comply. "Date of receipt" means:

(a) Five business days after the date of mailing; or

(b) The date of actual receipt, when the actual receipt date can be proven by a preponderance of the evidence, up to 45 days from the date of mailing. A sworn affidavit or declaration indicating the date of receipt, which is unchallenged by the department, must constitute enough evidence of actual receipt.

(5) A request for informal appeal must be submitted in one of the following ways:

(a) Mailed to:

Fishways & Diversion Appeals Coordinator
Department of Fish and Wildlife
Habitat Program
P.O. Box 43234
Olympia, WA 98504-3234

(b) Email: FishPassageRules@dfw.wa.gov

(c) Fax: 360-902-2946; or

(d) Hand delivered to the Natural Resources Building, 1111 Washington Street S.E., Olympia, Washington 98501, Habitat Program, Fifth Floor.

(6) The request must be plainly labeled as "Request for Informal Appeal" and must include the following:

(a) The appellant's name, address, email address (if available), and phone number;

(b) The specific components of the notice to comply that the appellant contests;

(c) The date of the notice being contested;

(d) A copy of the notice that the appellant contests;

(e) A short and plain statement explaining why the appellant considers the notice to be unlawful;

(f) A clear and concise statement of facts to explain the appellant's grounds for appeal;

(g) The specific relief requested;

(h) The attorney's name, address, email address (if available), and phone number, if the appellant is represented by legal counsel; and

(i) The signature of the appellant or their attorney.

(7) Upon receipt of a valid request for an informal appeal, the department may initiate a review of the notice to comply.

(8) Informal conference. If the appellant agrees, resolution of the appeal may be facilitated through an informal conference. The informal conference is an optional part of the informal appeal and is normally a discussion between the appellant, the department employee responsible for the decision, and a supervisor. The time period for the department to issue a decision on an informal appeal is suspended during the informal conference process.

(9) Informal appeal hearings. If a resolution is not reached through the informal conference process, then the fishway and water diversion appeals coordinator or designee may conduct an informal appeal hearing or review. Upon completion of the informal appeal hearing or review, the fishway and water diversion appeals coordinator or designee must recommend a decision to the director or designee. The director or designee must approve or decline to approve the recommended decision within 60 days of the date the department received the request for informal appeal, unless the appellant agrees to an extension of time. The department must notify the appellant in writing of the decision of the director or designee.

(10) If the department declines to initiate an informal review of its action after receipt of a valid request, or the appellant still wishes to contest the department action following completion of the informal appeal process, the appellant may initiate a formal appeal under WAC 220-670-080. Formal review must be requested within the time periods specified in WAC 220-670-080.

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NEW SECTION

WAC 220-670-080 Formal appeal of notice to comply. A formal appeal is an adjudicative proceeding under chapter 34.05 RCW.

(1) The department recommends that a structure owner aggrieved by a notice to comply issued under this chapter contact the department employee responsible for making the decision on the fishway or water diversion before initiating a formal appeal. Discussion of concerns with the department employee may result in a resolution without the need for a formal appeal.

(2) The department encourages a structure owner aggrieved by a notice to comply issued under this chapter to take advantage of the informal appeals process under WAC 220-670-070 before initiating a formal appeal. However, a structure owner may pursue a formal appeal under this section without first completing the informal appeal process under WAC 220-670-070. This rule does not apply to correction requests.

(3) Requesting a formal appeal. Issuance of a notice to comply may be formally appealed only by the structure owner.

(4) A request for formal appeal must be in writing and must be received by the department within 30 days from the date of receipt of the notice to comply. "Date of receipt" means:

(a) Five business days after the date of mailing; or

(b) The date of actual receipt, when the actual receipt date can be proven by a preponderance of the evidence, up to 45 days from the date of mailing. A sworn affidavit or declaration indicating the date of receipt, which is unchallenged by the department, must constitute enough evidence of actual receipt.

(5) A request for formal appeal must be submitted in one of the following ways:

(a) Mailed to:

Fishways & Diversion Appeals Coordinator
Department of Fish and Wildlife
Habitat Program
P.O. Box 43234
Olympia, WA 98504-3234

(b) Email: FishPassageRules@dfw.wa.gov

(c) Fax: 360-902-2946; or

(d) Hand delivered to the Natural Resources Building, 1111 Washington Street S.E., Olympia, Washington 98501, Habitat Program, Fifth Floor.

(6) The request must be plainly labeled as "Request for Formal Appeal" and, must include the following:

(a) The appellant's name, address, email address (if available), and phone number, and if represented by an attorney, the attorney's name, mailing address, email address, and phone number;

(b) The specific components of the notice to comply that the appellant contests;

(c) The date of the notice to comply being contested;

(d) A copy of the notice to comply that the appellant contests;

(e) A short and plain statement explaining why the appellant considers the notice to be unlawful;

(f) A clear and concise statement of facts to explain the appellant's grounds for appeal;

(g) The specific relief requested;

(h) The signature of the appellant or their attorney.

(7) The time period for requesting a formal appeal is suspended during consideration of a timely informal appeal. If there has been an informal appeal, the deadline for requesting a formal appeal must be within 30 days from the date of receipt of the department's written decision in response to the informal appeal.

(8) The department at its discretion may stay the effectiveness of any decision or order that has been formally appealed. At any time during the appeal, the appellant may seek a stay from the presiding officer pursuant to RCW 34.05.467.

(9) If there is no timely request for an appeal, the notice to comply will be final and nonappealable.

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