

TYPICAL PERMITS REQUIRED FOR WORK IN AND AROUND WATER APPENDIX

Local, state, and federal permits may be required for any activity that takes place in or around waters of the state, including habitat restoration projects. The type of impacts a project generates and the project location determine which permits are required. The Office of Permit Assistance can help you determine which state and federal permits are needed for your project. The Office of Permit Assistance may be reached by phone at 360-407-7037 or (800) 917-0043, or on line at <http://www.ecy.wa.gov/programs/sea/pac/index.html>. The Office of Permit Assistance also publishes The Permit Handbook: Commonly Required Environmental Permits for Washington State¹, available on line at the above web address. Contact the city or county where your project is located for information on local permits that may be required.

Contact permitting agencies early in the project planning process to ensure that all necessary permits are obtained before work is scheduled to begin. In addition, if the project is located on either state-owned forest or aquatic lands, the Department of Natural Resources should be contacted for an authorization to lease state land. Early contact not only prevents construction delays, it can result in a better project. Delays in involving the necessary agencies increase the likelihood of project rejection or costly design modifications.

All permits require a review process that takes time to complete. Some reviews are relatively fast (less than a month) while others may take several months. The time needed to complete the permit process, including any environmental review under the State Environmental Policy Act (SEPA) or National Environmental Policy Act (NEPA), combined with the relatively short allowable work period for many types of in-stream construction projects, should be carefully considered when developing project planning, design, and construction schedules. Project proponents must plan ahead, especially when time sensitive grant monies are utilized. In addition to time, many permits require fees and rent is charged for the use of state lands. Fees may be either a flat rate or a percentage of the project's total cost, while rents are based on surrounding land values.

The discussion below is intended to familiarize the reader with the permitting process. The information provided and the specific permits required are subject to change. Contact the appropriate permitting agencies for the most accurate and current information.

1 HOW THE ENDANGERED SPECIES ACT AFFECTS PROJECT PERMITTING

Recent listings of several salmonid fish species in Washington State under the ESA have added complexity to obtaining permits for work in or around water. The Endangered Species Act (ESA) applies to everybody subject to the jurisdiction of the United States, including state and federal agencies, cities, counties, tribes, and individuals. The purpose of the ESA is to ensure the long-term survival of native fish and wildlife and the ecosystems upon which they depend. One component of ESA compliance requires obtaining a permit for any action that may "take" a listed fish or wildlife species. "Take" is defined as to "harass (create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which

include, but are not limited to, breeding, feeding, or sheltering), harm (including significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering), pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct” (ESA Section 3[19]). NOAA Fisheries (formerly the National Marine Fisheries Service) and U.S. Fish & Wildlife Service (USFWS) have the responsibility of ensuring that proposed activities will not jeopardize the continued existence of a listed species, or destroy or adversely modify their critical habitat². NOAA Fisheries has jurisdiction over all fish and wildlife species whose life cycles reside mainly in the marine environment. USFWS has jurisdiction over inland and terrestrial species of fish, wildlife and plants whose life cycles reside mainly outside the marine environment.

All proposed activities that may positively or negatively affect any listed fish, wildlife, or plant species require review by NOAA Fisheries and/or USFWS. The goal of this review is to assess the potential impacts of the proposed activity on listed species, and avoid and minimize adverse effects. These reviews can provide legal coverage for incidental “take” that may occur as a result of otherwise legal project activities. Under the ESA, coverage of a proposed activity may be achieved in one of three ways.

1. Section 7 Consultation

A section 7 consultation is required whenever a federal nexus exists for a project; that is, for all activities carried out, funded, or permitted by a federal agency. Section 7 consultation applies to species listed as either threatened or endangered. In an ESA section 7 consultation, the federal agency responsible for constructing, funding, or permitting the project will be responsible for consulting with NOAA Fisheries and/or USFWS, as appropriate³. That federal agency is referred to as the “action” agency.

A section 7 consultation proceeds in the following manner. A Biological Assessment (BA) or similar analysis of project effects on listed species must be prepared; either by the action agency, or by the applicant and provided to the action agency for edit and review. Limiting the action agency’s involvement to a review may significantly speed up the BA process. Three possible determinations may be made by the action agency:

- a. “No effect” indicates there is no probability of any effect on listed species by the proposed activity. A “no effect” determination does not require NOAA Fisheries or USFWS review.
- b. “May affect, not likely to adversely affect” indicates the proposed activity does not have the potential to hinder the attainment of relevant properly functioning indicators and/or effects are expected to be discountable, insignificant, or completely beneficial (i.e. has a negligible probability of taking proposed or listed species, or destroying or adversely modifying their habitat). This determination requires informal consultation with NOAA Fisheries and/or USFWS, resulting in a written concurrence with the action agency’s determination.
- c. “May affect, likely to adversely affect” indicates that the proposed activity has the potential to hinder attainment of relevant properly functioning indicators, has more than discountable, insignificant, or beneficial effects on the species or its habitat, or

has a more than negligible probability of taking proposed or listed species or destroying or adversely modifying their habitat. This determination requires formal consultation with USFWS and/or NOAA Fisheries. NOAA Fisheries and/or USFWS will conduct a jeopardy analysis and issue a Biological Opinion (BO, or BiOp) regarding whether or not an activity is likely to jeopardize the continued existence of listed species or destroy, or adversely modify designated critical habitat for listed species. Following this analysis, NOAA Fisheries and/or USFWS will either authorize the proposed activity outlining reasonable and prudent measures to minimize the impact of any “take”, or else suggest reasonable and prudent alternatives to the proposed activity if they exist.

2. Section 10 Consultation

If no federal nexus exists, the property owner can get federal assurances regarding their liability for listed and candidate species through a Section 10 Incidental Take Permit. This permit requires the development of a Habitat Conservation Plan (HCP). Under Section 10, the project sponsor will be responsible for development of the HCP and directly applying to NOAA Fisheries and/or USFWS, as appropriate. As such, coverage under section 10 may be more costly and require more of the project sponsor’s time than a section 7 consultation.

Section 10 of the ESA allows NOAA Fisheries and USFWS to permit the “take” of listed species by non-federal entities provided that it is done for scientific research or enhancement purposes or it is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Applicants for an Incidental Take Permit must submit a Habitat Conservation Plan (HCP) to NOAA Fisheries and/or USFWS for review as appropriate. The HCP must identify at a minimum: 1) the impact of any “take” associated with the proposed activity, 2) steps that will be taken to minimize and mitigate for impacts, 3) available funding, and 4) what alternative actions were considered and why they were not utilized. Following a public comment period regarding the HCP and permit application, NOAA Fisheries and/or USFWS can issue an Incidental Take Permit if they find that: the taking will be incidental, the applicant will minimize and mitigate the impacts of the “take”, the applicant will ensure adequate funding for the proposed plan, and the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.⁴

3. Section 4(d) Rule

Section 4d of the ESA allows NOAA Fisheries and USFWS to issue regulations deemed necessary and advisable to provide for the conservation of threatened species. These regulations may exempt certain activities from “take” prohibition. Different 4d exemptions may apply to different species or runs of fish. Project proponents should contact NOAA Fisheries and/or USFWS to find out if their proposed activity is exempt under section 4(d) “take” limits. Note that the 4(d) exemptions only apply to specific species or runs of fish listed as threatened. They do not apply to species listed as endangered.

Always check with NOAA Fisheries and USFW, even if you are not working directly in a waterbody. Activities in the watershed may significantly impact a waterbody. Projects in or near waterbodies may also impact non-aquatic listed species, such as birds nesting in nearby trees, plants growing in the floodplain, or mammals that use the project area as a travel corridor

or foraging area. Unauthorized “take” of endangered or threatened species can result in both civil and criminal penalties!

2 COMMONLY REQUIRED PROJECT PLANNING CHECKLISTS, PERMITS AND AUTHORIZATIONS

The following text describes the most commonly required project planning checklists, permits and authorizations when conducting activities in and around waters of the state, including habitat restoration projects. The information provided is a summary of that provided in The Permit Handbook: Commonly Required Environmental Permits for Washington State, where more detailed information is available. Another good source of information is Guide for the Acquisition of Permits Commonly Needed for Salmon Habitat Restoration or Enhancement Projects in the State of Washington⁵. This is a comprehensive document on permit acquisition. It provides guidance on permits commonly required for salmon habitat restoration projects, information required for permit applications, the content of environmental review under the State Environmental Policy Act, and compliance with the ESA (including preparation of a biological assessment).

2.1 State Environmental Policy Act (SEPA)

SEPA is a review process to ensure that state and local government officials consider environmental values when making decisions about plans and projects. It is required for all state and local agency actions (including providing funding or issuing permits for project proposals, and the adoption of plans, regulations, or ordinances for non-projects) unless those actions are specifically exempted by the SEPA Rules (WAC 197-11-800 to 880) or RCW 43.21C.035, .037, and .0384. The Lead Agency will ask the applicant to fill out an environmental checklist that describes how a proposal will affect the environment. The Lead Agency will vary. In the case of project proposals, if a local permit is required, the local city or county will be the Lead Agency. If no local permits are required but one or more state permits is required, one of the state agencies requiring a permit will be the Lead Agency, according to the order of priority given in WAC 197-11-936. If the project proponent is a non-federal government agency within the State of Washington, that agency shall be the Lead Agency (WAC 197-11-926). Refer to WAC 197-11-922 through 938 for a complete description of Lead Agency rules and the method and criteria for Lead Agency selection.

Once the environmental checklist is submitted, the Lead Agency will either:

- a. Issue a Determination of Non-Significance (DNS) or a Determination of Mitigated Non-Significance (MDNS) indicating that, in their opinion, the project will not have a significant adverse environmental impact or that mitigation has been identified to reduce the impacts sufficiently. Mitigation measures are changes or conditions added to your proposal that will avoid, minimize, or compensate for adverse impacts. Other agencies issuing a permit, and interested parties (i.e. the public) will be provided a comment period, after which, permit processing can proceed if no further concerns are raised.
- b. Determine that an environmental impact statement (EIS) is required. This indicates that the project will have a “probable significant adverse environmental impact”. An EIS is a document that identifies potentially harmful environmental effects of various project alternatives, as well as ways to minimize and mitigate for the negative effects. The Lead

Agency will begin the process by issuing a determination of significance (DS)/scoping notice for agencies and the public to review and provide comment. "Scoping" is done to identify key issues related to the project that will be evaluated in the EIS.

Agencies will use the information in the EIS, DNS, or MDNS when they are making permit decisions. Permit conditions may be added to reduce the adverse impacts of a proposal. Under very rare circumstances, if an EIS shows there are likely adverse environmental impacts that cannot be reduced to an acceptable level, licenses or other approvals for the proposal may be denied. It is also possible for permits to be denied under applicable permit regulations. Additional information on SEPA, including the SEPA handbook, is available online at <http://www.ecy.wa.gov/programs/sea/sepa/e-review.html>.

2.2 National Environmental Policy Act (NEPA)

NEPA is a similar process to SEPA that applies to federal agencies making decisions regarding permits, licenses, or approvals. It is triggered whenever a project receives federal funding or if any federal permits, licenses, or approval are required. Under NEPA, the Lead Agency is required to use an environmental assessment (EA) to determine the extent of environmental impacts associated with a project. Response of the Lead Agency may be:

- a. Issuance of a categorical exclusion (CatEx), indicating that the project is exempt from NEPA documentation requirements;
- b. Issuance of a finding of no significant impact (FONSI), indicating that a project will not significantly impact the environment, or
- c. Determination that an environmental impact statement (EIS) is required, if the project will significantly impact the environment.

Participation in either the NEPA or SEPA process does not exempt a project proponent from participation in the other process. However, the state or local agency has several options to reduce redundancy between the two processes. It may confer with federal agencies to develop a joint NEPA/SEPA EIS; develop a supplemental EIS to cover SEPA requirements that are inadequately addressed under NEPA, or, if the NEPA document is adequate, adopt it under SEPA. (Note that issuance of a CatEx under NEPA does not exempt the project from SEPA review.)

2.3 Joint Aquatic Resource Permits Application (JARPA) and Associated Permits

The JARPA is a consolidated application that can be used for all types of water-related projects. Each agency reviewing the JARPA application has its own review period and fee schedule for permit issuance. Contact the local city or county planning office before submitting a JARPA application to them, as not all local government agencies use JARPA.

The JARPA may be used to apply for the following permits:

- *Hydraulic Project Approval (HPA)*
Required for any work that uses, diverts, obstructs, or changes the natural flow or bed of state waters. This approval is issued by the WA Department of Fish and Wildlife.

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- *Shoreline Management Act Permit (including Substantial Development, Conditional Use, Variance Permit, or Exemption)*
Required for any development or activity valued at \$5,000 or more that is located on the water or shoreline area. It is also required for any use or activity that interferes with normal public use of water/shorelines of the state regardless of cost, and uses that constitute a conditional use or variance under the local master program. Shorelines are lakes, including reservoirs, of 20 acres or greater; streams with a mean annual flow of 20 cubic feet per second or greater; marine waters; plus an area landward for 200 feet measured on a horizontal plane from the ordinary high water mark; and all associated marshes, bogs, swamps, and river deltas. Floodplains and floodways incorporated into local shoreline master programs are also included. The local city or county government issues this permit.
- *Floodplain Management Permits and/or Critical Areas Ordinances*
Required for work (including development and filling or grading activities) in frequently flooded areas, geologically unstable areas, wildlife habitats, aquifer recharge areas, and wetlands. The local city or county government issues this permit.
- *Section 401 of the Clean Water Act Water Quality Certification*
Required of any applicant for a federal license or permit to conduct any activity that may result in any discharge into surface waters. This includes the discharge of dredge and fill material into water or wetlands. A 401 Certification is required whenever a US Army Corps of Engineers' 404 permit is required. This certification, stating that the discharge complies with federal and state law requirements, is issued by the WA Department of Ecology.
- *Section 404 of the Clean Water Act Permit: Discharge of Dredge and Fill Material*
- Required when placing a structure, excavating (including land clearing), or discharging dredged or fill material into waters of the United States, including wetlands. The U.S. Army Corps of Engineers issues the Section 404 permit. *Section 10 of the Rivers and Harbors Act Permit: Work in Navigable Waters*
Required for any work in or affecting navigable waters of the United States, including wetlands. The U.S. Army Corps of Engineers issues the Section 10 permit.
- *Section 9 of the Rivers and Harbors Act Permit*
Required for construction of a new bridge or modification to an existing bridge over a navigable waterway. The Coast Guard issues the Section 9 permit.

Two alternative JARPAs are currently available that simplify the process for securing permits for fish habitat enhancement and watershed restoration projects. They are:

1. Streamlined Process for Fish Habitat Enhancement Projects

Projects qualifying under RCW 77.55.290 are entitled to a streamlined HPA process, and will be exempt from SEPA as well as from all local government permits and fees. However, qualifying projects are still subject to state and federal permits and their review schedules and fees. The Washington Department of Fish and Wildlife and local government have 15 days to determine if the project qualifies under RCW 77.55.290. If the project qualifies, Washington Department of Fish and Wildlife must approve or deny the HPA within 45 days.

To qualify for the fish habitat enhancement expedited permit application process, projects

must accomplish one or more of the following:

- Removal of human-made fish passage barriers; or
- Restoration of an eroded or unstable stream bank using bioengineering techniques; or
- Placement of woody debris or other in-stream structures that benefit natural reproducing fish stocks
- and must be approved in one or more of the following ways:
 - By WA Department of Fish and Wildlife, through the Salmon Enhancement, or Volunteer Cooperative Fish and Wildlife Enhancement Programs,
 - By the sponsor of a watershed restoration plan as provided in chapter 89.08RCW,
 - By WA Department of Fish and Wildlife, as a department-sponsored fish enhancement or restoration project,
 - Through the review and approval process for Conservation District sponsored projects, where the project complies with design standards established by the Washington Conservation Commission through interagency agreement with the U.S. Fish and Wildlife Service and the Natural Resource Conservation Service, or
 - Through a formal grant program established by the legislature or the Washington Department of Fish and Wildlife for fish habitat enhancement or restoration.
- Approval to qualify for the process is not the same as permit approval. The HPA is still required prior to conducting work.

2. Expedited Permit Application for Watershed Restoration Projects

Qualifying projects under RCW 89.08.450 through 89.08.510 are also entitled to a streamlined permitting process and are exempt from the requirements of SEPA and permit fees. The expedited permit application has two parts: the expedited permit application and the JARPA. The expedited permit application is a worksheet to help applicants determine whether or not the project qualifies for this process. Qualifying projects are exempt from needing a Substantial Development Permit, but they may still need a Conditional Use Permit or Shoreline Variance under the local shoreline master program.

The expedited process may only be used for projects designed to enhance fish and wildlife habitat. To qualify for the watershed restoration project expedited permit application process, a project must:

- Be part of a watershed restoration plan which has undergone public review pursuant to SEPA requirements,
- Be principally designed to enhance fish and wildlife habitat, and
- Meet one of the following criteria:
 - A project that affects less than 10 miles of stream reach, in which less than 25 cubic yards of sand, gravel or soil is imported, removed, or disturbed, and in which no existing vegetation is removed except as necessary to facilitate additional plantings;
 - A project for the restoration of an eroded or unstable streambank that employs the principles of bioengineering and has a primary emphasis on using native vegetation;
 - A project primarily designed to improve fish and wildlife habitat by removing or reducing impediments to migration of fish or enhancing the fishery resource available for use by all citizens of the state, provided that any structure, other than

a bridge or culvert or instream habitat enhancement structure associated with the project, is less than 200 square feet in floor area and is located above the ordinary high water mark of the stream.

Contact your local conservation district, the Washington Conservation Commission, or the Office of Permit Assistance for more information regarding the expedited permit process.

2.4 Aquatic Use Authorization

Anybody wishing to use state-owned aquatic lands (including owners of adjacent lands) must get authorization from the Washington Department of Natural Resources (DNR). In addition to responsibilities for long-term ecosystem protection, the DNR is charged with ensuring the value of the land for current and future citizens of Washington. Information required on the application includes location; proposed use; existing structures; project description; local, state, and federal regulatory requirements; and a property survey. Application processing time generally ranges from six months to one year.

3 OTHER PERMITS THAT MAY APPLY

The following is not an all-inclusive list, but covers most other permits that may apply. Again, contact the Office of Permit Assistance for further information.

3.1 Forest Practices Approval

Required before beginning any forest practice (harvesting, reforestation, road construction/abandonment, fertilization, prevention, and suppression of diseases and insects, tree salvage, brush control, and/or chemical application). This permit is issued by the Washington Department of Natural Resources.

3.2 Coastal Zone Management Certification (CZM)

Required for U.S. Army Corps of Engineers authorized projects, and/or when applying for certain federal permits or funding. The project proponent prepares the certification. The Washington Dept of Ecology reviews the certification and the proposed project for compliance with state environmental requirements.

3.3 Noxious Aquatic and Emergent Weed Transport Permit

Required for transporting whole or parts of various plants that have been designated as noxious weeds by the Washington State Noxious Weed Control Board. The Director of Agriculture issues the permit.

3.4 Short-term Water Quality Modification

Required for the use of aquatic herbicides or pesticides, including those used to control noxious and non-noxious aquatic plants. The WA Department of Ecology issues this permit.

3.5 Stormwater Discharges from Construction Sites

Required for construction that disturbs five or more acres. The Washington Department of Ecology issues this permit.

3.6 Hazardous Waste Release Notification

The Washington Department of Ecology must receive prompt notification of any spills or releases of hazardous substance that occur that have the potential to impact human health or the environment. This includes spills resulting from breaks in the hydraulic lines and fuel hoses of construction equipment.

3.7 Archeological Excavation Permit

Required when excavating, altering or removing archaeological resources or Native American gravesites. The Washington Department of Community Development, Office of Archaeology and Historic Preservation issues this permit. Historic settlements were often located near waterways.

3.8 Pesticide Permits

Anyone planning to use pesticides, herbicides, insecticides, miticides, or other such products should contact the Washington State Department of Agriculture (WSDA) Pesticide Management Division at (877) 301-4555 to determine if, and what type of, a license or permit may be required.

Many people involved in the pesticide industry are required to obtain at least one of 9 different pesticide licenses issued by the WSDA. A licensee may only perform the technical activities (agricultural weed control, aquatic weed control, structural pest control, etc.) for which they have been certified. In addition to a license, permits may be required for applying certain pesticides. These permits generally cover certain geographical areas and times of the year.

Before pesticides are used in or near water, a Short-term Water Quality Modification Permit from the Washington Department of Ecology will likely be required. Some cities and counties also have special requirements related to pesticide use, so it is important to check with them especially when considering pesticide use in sensitive areas, such as wetlands, surface waters, and groundwater recharge areas and other environmentally sensitive areas.

3.9 Other local permits

These may include, but are not limited to, Clearing and Grading Permits, and permits required for compliance with Critical Areas Standards. Critical areas are locally designated wetlands, geological hazard areas, aquifer recharge areas, fish and wildlife habitat conservation areas, and frequently flooded areas.

4 REFERENCES

¹ Washington Department of Ecology. 1998. Permit Handbook: Commonly Required Environmental Permits for Washington State. Publication Number 90-29. 75 pp.
<http://apps.ecy.wa.gov/permithandbook/>

² National Marine Fisheries Service (NMFS). 1999. The Habitat Approach: Implementation of Section 7 of the Endangered Species Act for Actions Affecting the Habitat of Pacific Anadromous Salmonids. National Marine Fisheries Service, Northwest Region, Habitat Conservation and Protected Resources Division. 12 pp.

³ U.S. Fish and Wildlife Service and National Marine Fisheries Service. 1998. Endangered Species Consultation Handbook – Procedures for Consultation and Conference Activities Under Section 7 of the Endangered Species Act. Washington, D.C.

⁴ U.S. Fish and Wildlife Service and National Marine Fisheries Service. 1996. Habitat Conservation Planning Handbook. Washington, D.C.

⁵ Ecocline Fisheries Habitat Consulting LTD. 2001. Guide for the Acquisition of Permits Commonly Needed for Salmon Habitat Restoration or Enhancement Projects in the State of Washington. Prepared for People for Salmon, North Bend, Washington. 158 pp.
<http://www.peopleforsalmon.org/permits.html>