SOUNDACTION

TURNING THE TIDE FOR PUGET SOUND

Washington State Department of Fish and Wildlife Hydraulic Project Approval Program Audit - Puget Sound Nearshore

Introduction

Recent science-based evaluations on the health of Puget Sound document an imperiled ecosystem. In recent reports[1], the science panels of the Puget Sound Action Team and Puget Sound Partnership (PSP) note that in spite of decades of work to restore and protect the sound, current trending shows a continued decline in many of the areas considered to be key indicators to the health of the Puget Sound including:

- Decreases in harvested amount for most type of fish over the past two decades.
- A 20% decrease in orca population since the mid 1990s.
- A 40% decline in overall herring biomass since the 1970s.
- An overall decline in eelgrass, with sites suffering long-term decline outnumbering sites with long term increases. Because it is protected by many regulations, eelgrass condition reflects, in part, the success of management actions. Observed decreases suggest that there may be gaps in regulatory protections or their implementation.
- A Chinook biomass value that is far below established recovery targets.
- 10 marine species listed as endangered or threatened with an additional 33 listed as species of concern. Species listed as threatened or endangered under the Endangered Species Act include chinook, steelhead, bulltrout, southern resident killer whales, bocaccio rockfish, canary rockfish and yellow eye rockfish.

Including federal stimulus funding, State and Federal agencies have reportedly spent approximately $230 million dollars a year on Puget Sound restoration since 2008 alone[2], yet findings show that with the exception of limited shellfish areas, we have made no tangible progress in reaching recovery goals.[3] The continued loss of habitat is considered to be a prime contributing factor in this failure.[4]

While issues such as climate change and marine acidification have brought forward new challenges with complex and uncertain resolution pathways, one prime component in Puget Sound recovery is clear. As outlined in the PSP Action agenda, The Federal Recovery Plan for Puget Sound Salmonids, The Federal Recovery plan for Southern Resident Killer Whales, the Joint State and Tribal Wild Salmonid Policy and Recent reports from the Northwest Indian Fisheries Commission (NWIFC),[5] the primary threat to the recovery of Puget Sound is the continued loss of habitat and ecosystem function.

[1] Puget Sound Action Team/Puget Sound Partnership 2007 and 2009 State of the Sound Report
[2] Chris Dunagan: Little progress reported in Puget Sound health, Kitsap Sun, October 27,2012
[3] Puget Sound Partnership 2012 State of the Sound Report
[4] Rights at Risk: A Report from the Treaty Indian Tribes in Western Washington – July 2011
[5] Treaty Rights at Risk: A Report from the Treaty Indian Tribes in Western Washington – July 2011

Puget Sound Protection - State Mandate and Regulatory Authority

In 1943, the Washington State Legislature recognized the need to protect fish and fish habitat from the impacts of in-water development, which includes any work that would use, divert, obstruct or change the natural flow or bed of any river or stream or utilize any waters of the state.

Placed under the jurisdiction of the Washington State Department of Fish and Wildlife (WDFW), The Hydraulic Code found in RCW 77.55 remains the primary fish and shellfish habitat protection law in Washington State. Under this statute, all projects as described above require a Hydraulic Project Approval – commonly called an HPA. Examples of marine projects regulated by the hydraulics code include bulkheads, piers and other overwater structures, dredging, marinas and beach nourishment proposals.

Agency rules to administer, interpret, or clarify the Hydraulic Code are found in WAC chapter 220-110. These rules specify the department requirement to provide protection for all fish life and habitats through the development of a statewide system of consistent and predictable rules[6] and establish a baseline requirement which directs no-net-loss of productive capacity of fish and shellfish habitat in order for a project to be approved [7]

Per statute "No-net-loss" is defined as:

(a) Avoidance or mitigation of adverse impacts to fish life; or

(b) Avoidance or mitigation of net loss of habitat functions necessary to sustain fish life; or

(c) Avoidance or mitigation of loss of area by habitat type.

Required Technical Provisions

In addition to establishing the regulations for the construction of HPA projects, the WACs also define the criteria and technical provisions to be used by the department for project review and for conditioning of HPAs to ensure the no-net loss requirements of the law.

As noted in WAC 220-110-010:

These technical provisions in WAC 220-110-040 through 220-110-338 represent common provisions for the protection of fish life for typical projects proposed to the department. Implementation of these provisions is necessary to minimize project specific and cumulative impacts to fish life. These regulations reflect the best available science and practices related to protection of fish life. The department will incorporate new information as it becomes available, and to allow for alternative practices that provide equal or greater protection for fish life.

The technical provisions shall apply to a hydraulic project when included as provisions on the HPA. Each application shall be reviewed on an individual basis.

[6] WAC 220-110-010
[7] WAC 220-110-030

Rules specific to single family residential bulkhead projects are found in 220-110-285, however, the rules generally require adherence to the technical provisions outlined in 220-110-010.

Although the rules for all HPAs do allow modification to these provisions, the parameters for not applying the provisions or applying modified provisions are very narrow. As outlined in WAC 220-110-032 modifications are only allowed when any of the following is demonstrated:

1. The provision has no logical application to a project;

2. The applicant provides an alternate plan to the provision and demonstrates that it provides equal or greater protection for fish life.

3. Enforcement of the provision would result in denial and there is adequate mitigation to allow the project and achieve no-net-loss of fish life or productive fish or shellfish habitat;

4. The modification or deletion of the provision will not contribute to net loss of fish life;

5. The proposal is part of an approved clean-up action under Model Toxics Control Act; Comprehensive Environmental Response Compensation and Liability Act; or Superfund Amendment and Reauthorization Act; or

6. The technical provisions conflict with applicable local, state, or federal regulations that provide adequate protection for fish life.

HPAs may also include additional special provisions to address project or site-specific considerations not adequately addressed by the technical provisions or to implement management prescriptions developed through watershed analysis.

Provisions specific to marine/saltwater proposals are included in WAC 220-110-240 through 220-110-330 with the heart of these provisions found in 220-110-270 Common Saltwater Technical Provisions, WAC 220-110-250 Saltwater Habitats of Special Concern and in 220-110-271 Prohibited Work Times in Saltwater Areas.

In addition to consideration of overall project impact, the conditioning of work times when considering the listed habitats and species of special concern for any approved permit is potentially one of the most important functions of the HPA regulations.

These timing restrictions were developed to ensure that approved projects do not cause immediate harm to protected species and habitats via direct mortality, interruption of migratory processes, impacts to use of the nearshore area by juveniles and interruption of spawning behaviors or destruction of recently spawned eggs. Thus without the appropriate application of these timing restrictions to a project proposal, the failure to meet the requirement for no-net loss is a near certainty and the absence of the timing restrictions a violation of the HPA regulations.

Audit of WDFW Application of Required Timing Provisions

In recent years, multiple parties, including environmental groups,[8] Public Employees[9] and perhaps most significantly, the Northwest Treaty Tribes[10] have raised concerns related to species and habitat loss resulting from WDFW administration of the HPA program. Similarly, at least one internal WDFW review of the hydraulic program, which was performed in 2006, found only a small portion of HPAs reviewed met the standard of no-net loss.[11]

In order to evaluate WDFW actions and the resulting effectiveness of the HPA program to meet the no net loss standard, and to ensure compliance with the mandated provisions of the code, Sound Action performed an independent audit of all HPAs for Puget Sound marine waters from January 2011 to approximately July 2012 when the audit project began. Documents were received via public disclosure request to WDFW with the request specifying "Any and all HPA permit applications, including supporting documentation and any subsequent approvals or denials for in- water work located in Puget Sound, for the year 2011 and 2012 YTD." Sound Action also requested and received WDFW GIS datasets of documented forage fish spawning and holding areas. Because WDFW has not actively pursued extended surveys of all shoreline areas, these datasets provide a limited picture of actual habitat spawning areas, with nearshore reaches showing no spawning being a result of not being tested rather than confirmed as an area without spawning.

We subsequently reviewed 290 issued project permits using an audit methodology, designed to be a first level review, which was focused on WDFW application of the timing restrictions for in-water work as required in WAC 220-110-271. The decision to narrow the audit focus was made in order to evaluate WDFW regulatory actions which are not impacted by any potential agency budgeting issues or staff workload.

While site visits and compliance or enforcement reviews performed after project completion may be hindered by gaps in these areas – the inclusion of technical provisions is not. Ensuring habitat and species protection via the timing restrictions is as simple as staff including the boilerplate language as a condition of the permit. We also took this approach with the understanding that the findings related to WDFW's approach to the most basic level of environmental protections would potentially provide insight into agency approach during higher levels of permit review.

With the exception of one permit which was declined due to clerical issues, WDFW approved each permit application received during this time frame. As presented in the following charts, we were alarmed to find that the vast majority of the permits approved did not contain the appropriate timing restrictions - which are designed as a frontline measure to ensure the mandate of no–net loss and species protection. While provisions for salmonid protection had a higher degree of compliance, timing restrictions for forage fish species were minimally applied with restrictions related rock sole and lingcod protections essentially absent.

[8] Washington Department of Fish and Wildlife's HPA Process Fails to Protect Salmon Habitat –Washington Trout 1999

[9] Public Employees for Environmental Responsibility v The Members of the Fish and Wildlife Commission and the Director of the Department of Fish and Wildlife

[10] Treaty Rights at Risk: A Report from the Treaty Indian Tribes in Western Washington – July 2011

[11] WDFW A Pilot Study of Hydraulic Permit Compliance, Implementation, and Effectiveness in Region 6

Work allowed by WDFW during the prohibited work times included bulkhead installation, dock construction, pile driving and dredging.

We would like to note that while the focus of our audit was specific to the review of the application of required technical provisions related to timing restrictions, preliminary evaluation of higher level detail found that many of the approved HPAs lacked adequate evaluation of environmental impacts and as approved did not comply with the wider range of protective technical provisions detailed in the hydraulic code. For example, the construction of bulkheads and other bank protection, as well as marina construction, is prohibited in eelgrass bed areas, areas with Pacific herring spawning beds, and lingcod and rockfish settlement and nursery areas[12] - yet we saw many projects of this type that were approved in areas containing the habitats of special concern.

Audit Summary: 290 Permits Reviewed

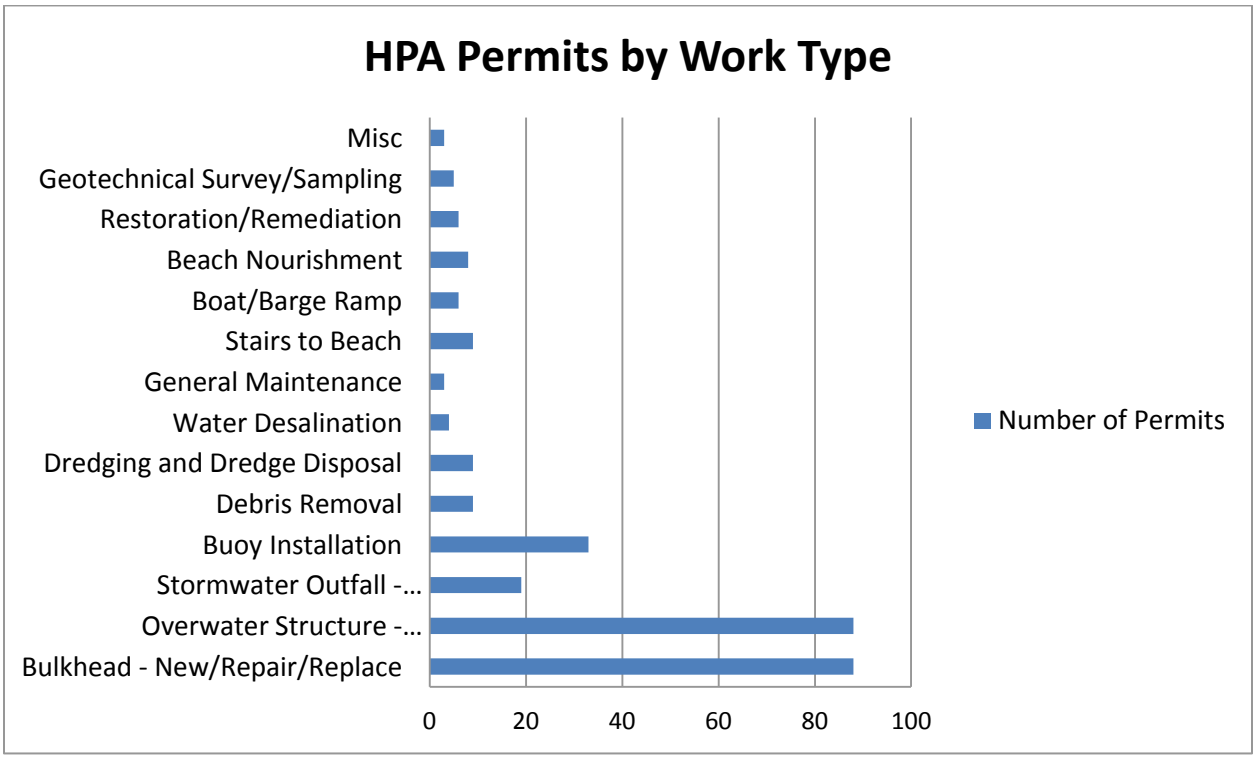

Figure 1

[12] WAC 220-110-230 and WAC 220-110-285

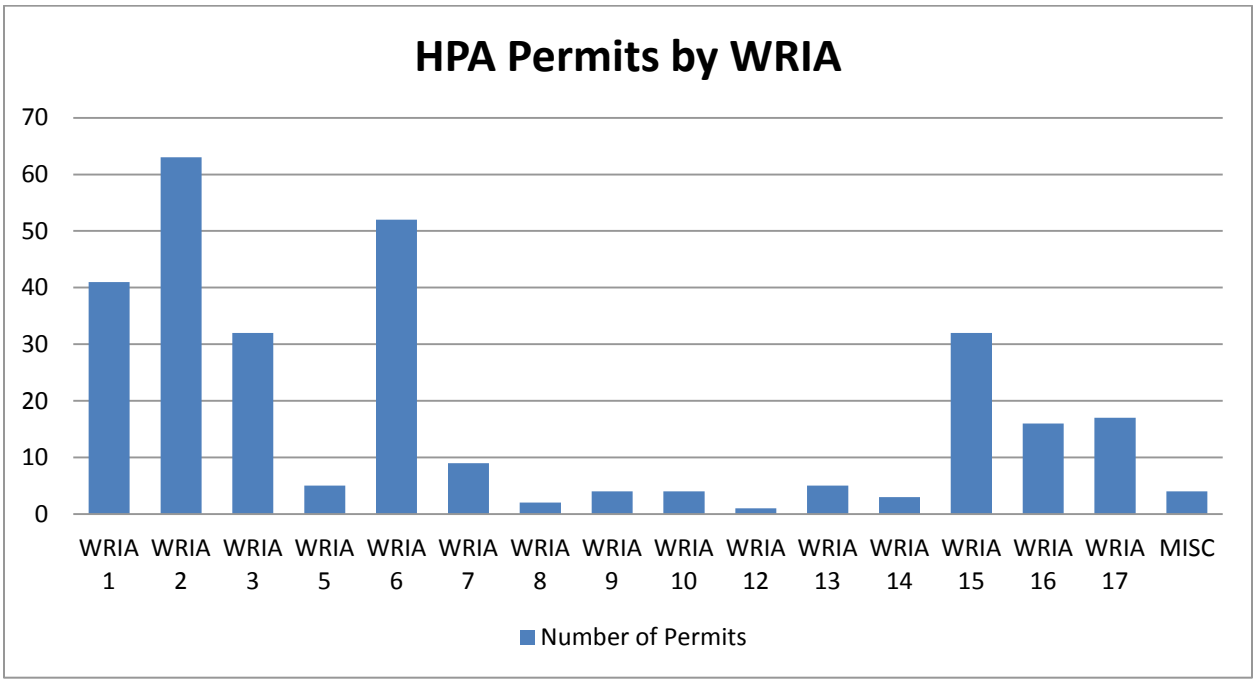

Figure 2

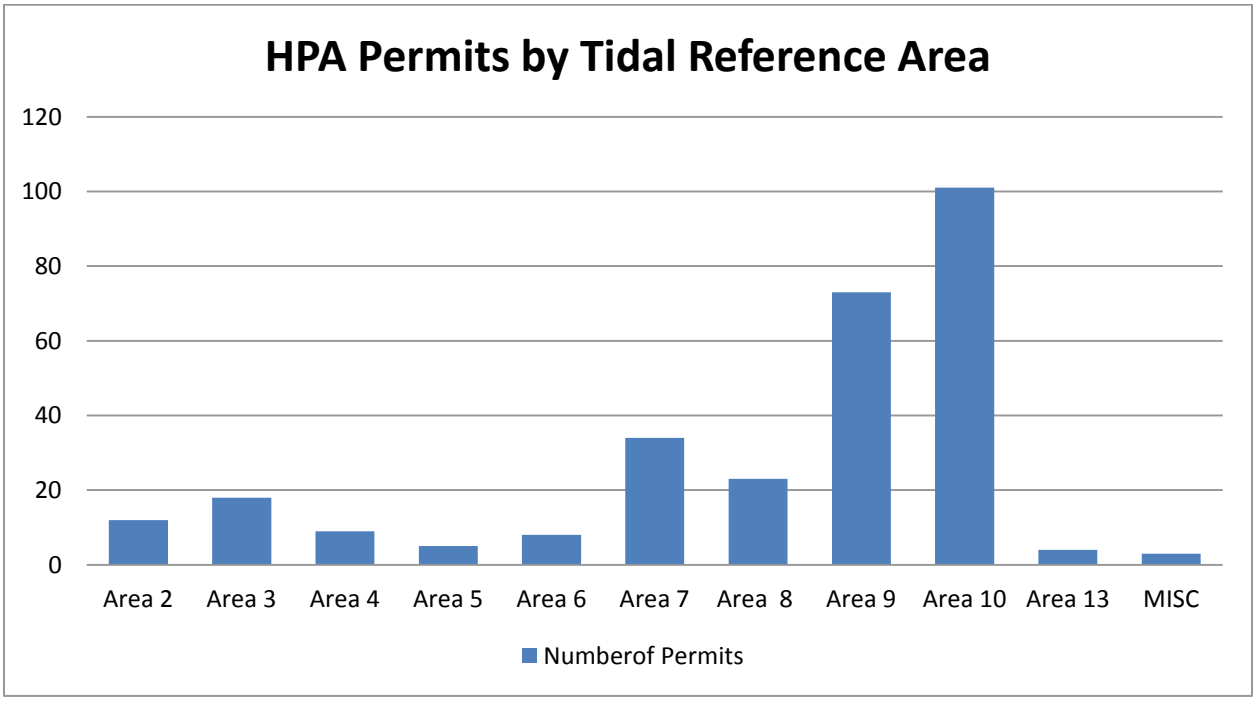

Figure 3

WDFW Application of Timing Restriction Related to Juvenile Salmonids

Puget Sound salmon spawn in freshwater before juveniles move to marine waters to feed and mature. During the transition from freshwater to saltwater, juvenile salmonids occupy nearshore ecosystems throughout in Puget Sound and this period of nearshore dependency is critical to species health and recovery. These nearshore areas are vital to juvenile salmon not only due to the provided food sources found in the intertidal area, but as a refuge from predation which occurs in deeper waters[13]. In-water construction presents risk to juvenile salmonids due to mortality from construction impacts such as pile driving and from loss of food source and increased predation if displaced from nearshore areas during construction activities[14].

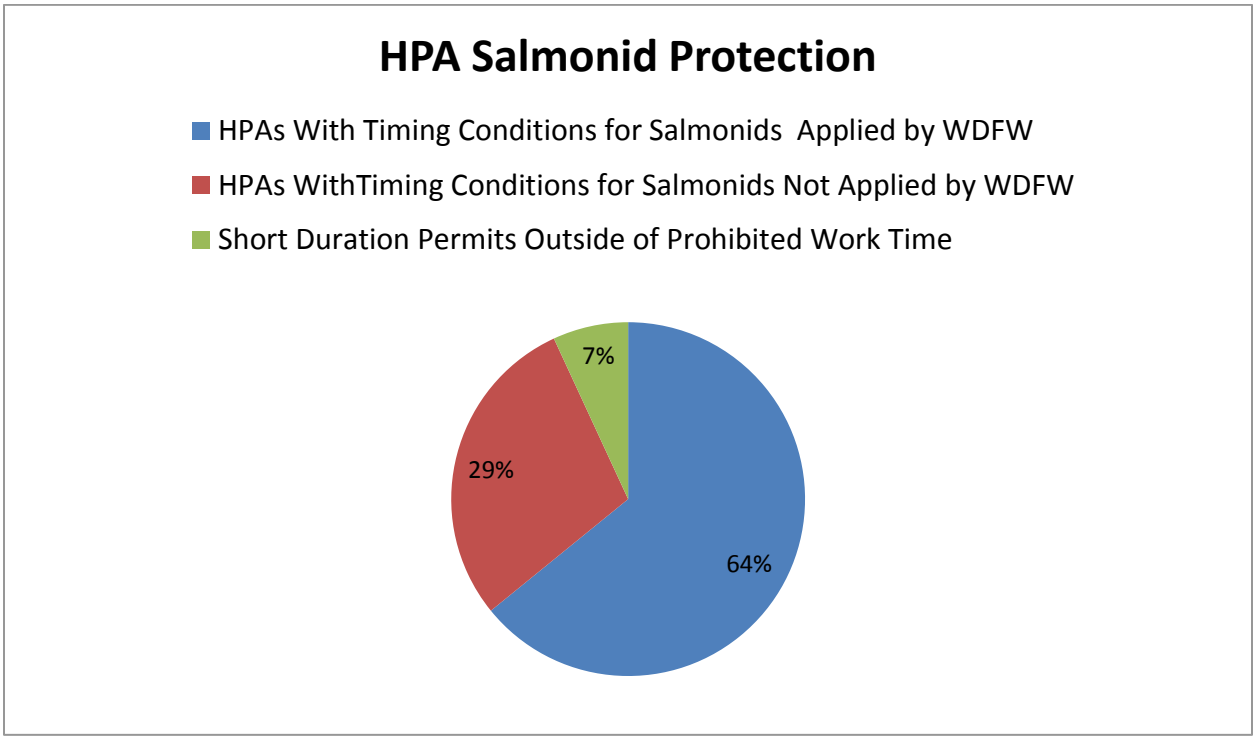

Figure 4

- Number of permits that included WDFW applied Salmonid protection: 186
- Number of permits that did not include WDFW applied salmonid protection: 84
- Number of permits that did not include the provision but were of short duration and outside the restricted timeframe: 20

[13] NMFS Puget Sound Salmon Recovery Plan -2007
[14] WDFW Compiled White Papers For Hydraulic Project Approval Habitat Conservation Plan (HCP) March 2009

WDFW Application of Timing Restriction Related to Herring

Puget Sound herring stocks are dependent on healthy subtidal nearshore habitats for spawning and juvenile rearing and almost exclusively use benthic macro-vegetation, including eelgrass, for egg deposit. Herring rely on specific sites for spawning with congregation in the general are of spawning grounds occurring for several weeks prior to spawning activity[15]. As a critical prey species for salmon, herring are considered indicator species, with the entire Puget Sound ecosystem dependent the health of the herring population. Due to the use of lower intertidal and upper subtidal habitats for spawning, and the nature of herring behavior, including significant aversion to noise, nearshore areas used for herring spawning have been found to be highly vulnerable to shoreline development and in-water construction work[16].

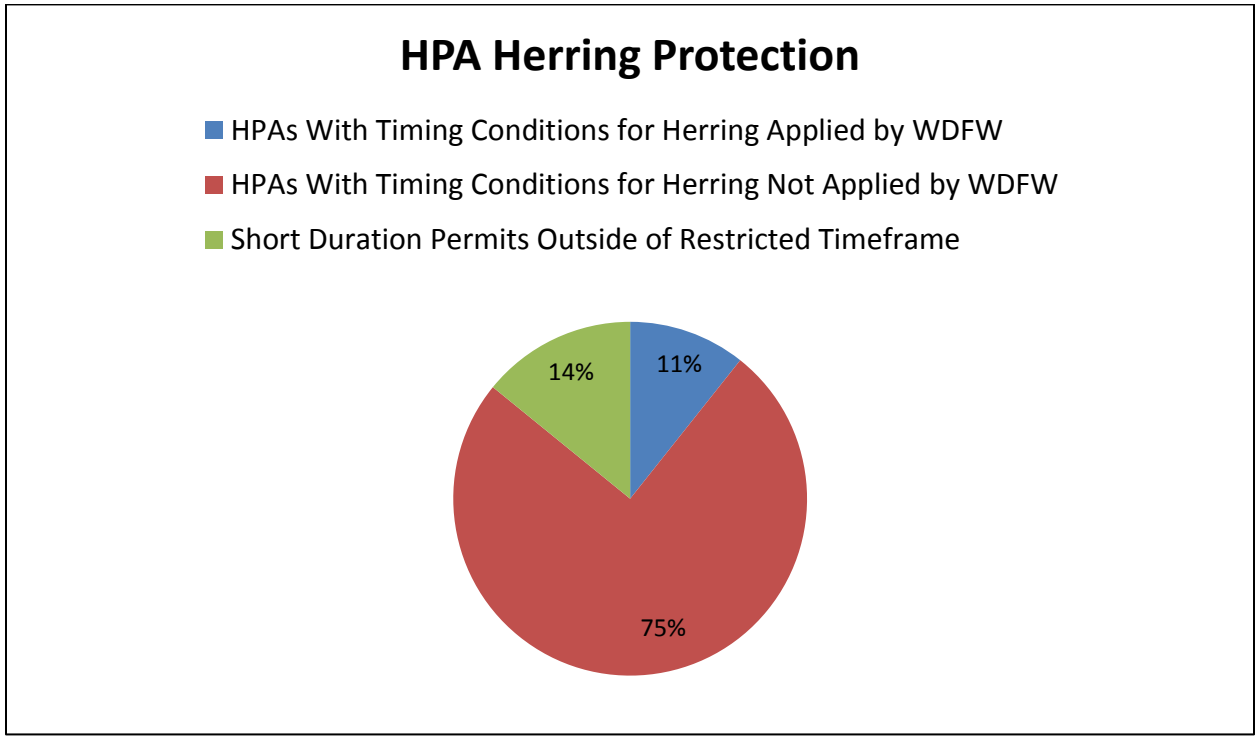

Figure 5

- Number of permits that included WDFW applied herring protection: 31
- Number of permits that did not contain any WDFW applied herring protection: 218***
- Number of permits that did not include the provision but were of short duration and outside the restricted timeframe: 41

*** **Unlike other forage fish species which spawn throughout the Salish Sea, herring spawning habitat is considered to be primarily localized to historic spawning sites, thus there is likelihood that herring spawning was not present in some portion of the areas where permits did not include timing restrictions.**

[15] WDFW Pacific Herring www.wdfw.wa.gov/conservation/fisheries/PacificHerringInformation_121911.pdf
[16] WDFW Compiled White Papers For Hydraulic Project Approval Habitat Conservation Plan (HCP) March 2009

WDFW Application of Timing Restriction Related to Surf Smelt

Surf smelt are widespread nearshore forage fish found throughout Puget Sound waters, with spawning activity occurring across a wide range of nearshore beaches throughout the entire basin. Surf smelt spawn at the highest tides near the water's upper edge on coarse sand and pea gravel beaches and availability of suitable spawning substrate at specific tidal elevations is critical to spawning success[17]. Also considered to be an important prey species for salmonids, surf smelt are like herring, considered to be highly vulnerable to shoreline development and construction activities due to their reliance on nearshore ecosystems[18].

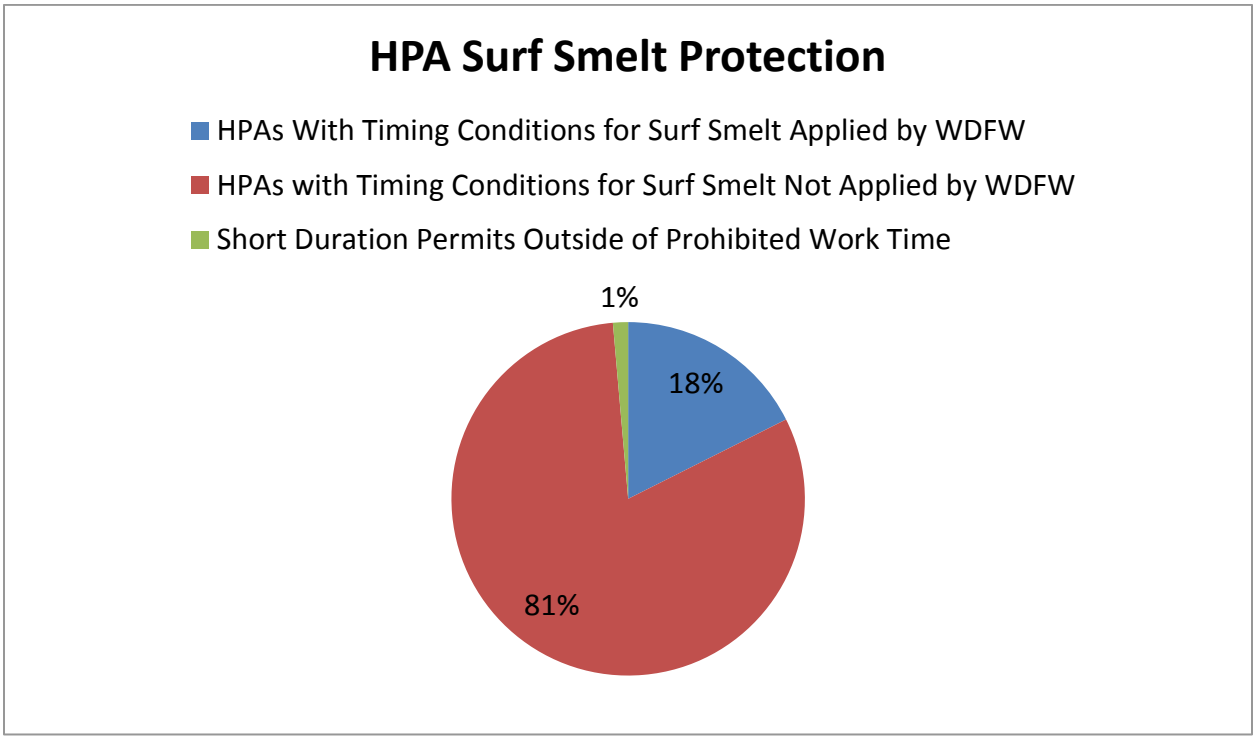

Figure *6*

- Number of permits that included WDFW applied surf smelt protection: 51
  (43 permits required egg sampling only and 15 permits had only partial work closure)
- Number of permits that did not contain any WDFW applied surf smelt protection: 235
- Number of permits that did not include the provision but were of short duration and outside of restricted timeframe: 4

[17] WDFW Surf Smelt Fact Sheet www.wdfw.wa.gov/publications/01219/wdfw01219.pdf
[18] WDFW Compiled White Papers For Hydraulic Project Approval Habitat Conservation Plan (HCP) March 2009

WDFW Application of Timing Restriction Related to Sand Lance

Like surf smelt, Pacific sand lance spawn at high tide throughout the upper intertidal area and the presence of eggs from both species at the same site is common. Pacific sand lance are also documented to be a significant prey species for juvenile salmon with studies showing sand lance providing a high percentage of the diet for juvenile chinook[19]. As with surf smelt sand lance rely on the protected habitats of the upper nearshore reaches with spawning events similarly vulnerable to shoreline development and in-water construction activities[20].

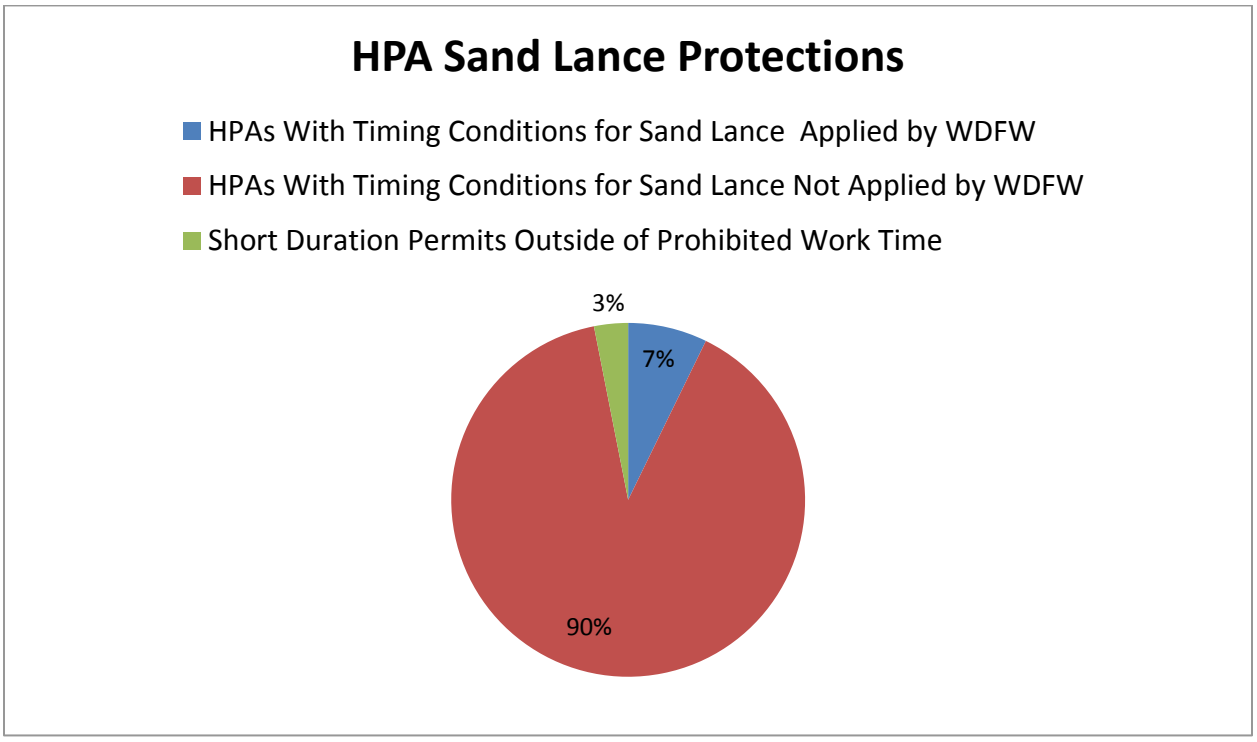

Figure 7

- Number of permits that included WDFW applied sand land protection: 21
  (6 permits required egg sampling only and 5 permits had only partial work closure)

- Number of permits that did not contain any WDFW applied sand lance protection: 260

- Number of permits that did not include the provision but were of short duration and outside of restricted timeframe: 9

[19] Whatcom County Marine Resources Committee Marine Life Fact Sheets – Sand Lance
[20] WDFW Compiled White Papers For Hydraulic Project Approval Habitat Conservation Plan (HCP) March 2009

WDFW Application of Timing Restriction Related to Lingcod

Puget Sound lingcod are largely non-migratory with adults typically occupying rocky habitats and reef areas found in deeper waters. However, adult lingcod do move into nearshore spawning grounds to lay their eggs with males migrating first to establish nest sites in rock crevices or on ledges. After eggs are laid by the females, the male lingcod stay behind to defend the eggs. Once hatched, the lingcod become pelagic and move with the currents until they settle to the bottom of nearshore areas with juveniles initially living in eelgrass beds, then moving to flat sandy areas before migrating to deeper water with full maturity[21]. It is these shallower settlement and nursery areas utilized by juveniles that are at high risk from nearshore development and in-water construction activities.

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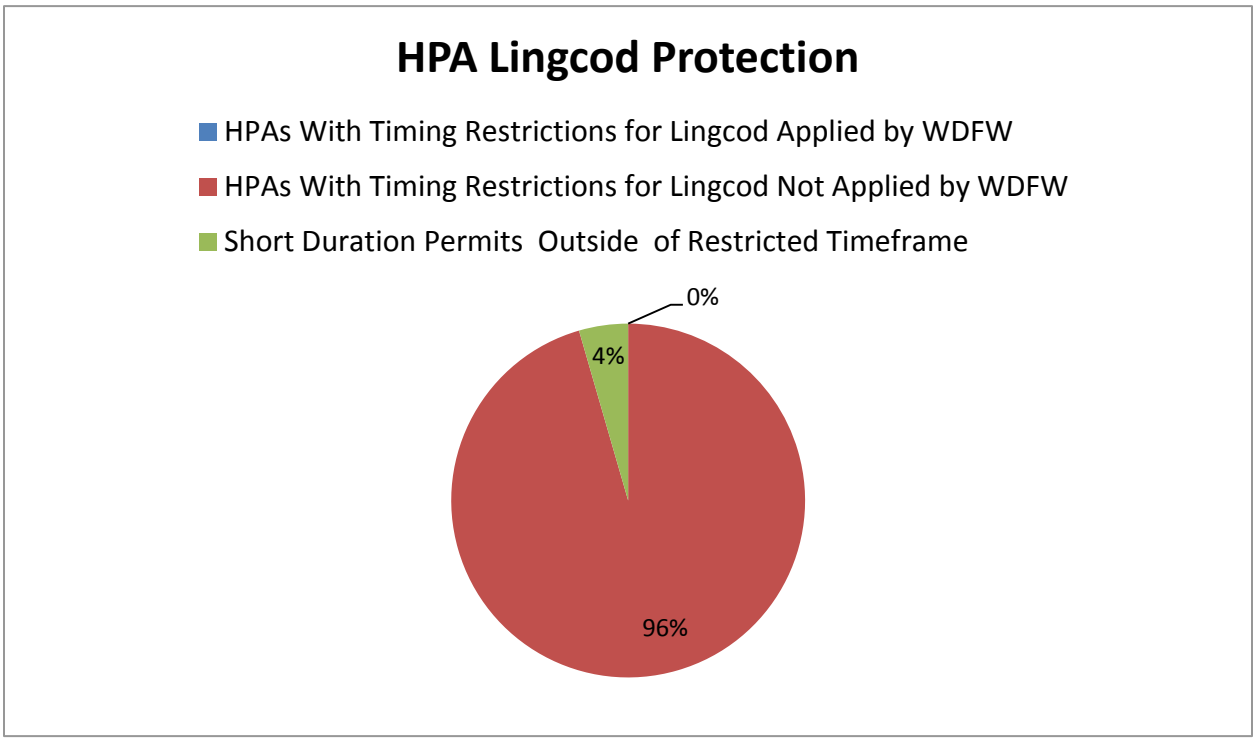


Figure 8

- Number of permits that include WDFW applied Lingcod protection: 0
- Number of permits that did not include any WDFW applied Lingcod protection: 277
- Number of permits that did not include the provision but were of short duration and outside of restricted timeframe: 13

[21] National Marine Fisheries Service FBE Species of Interest Lingcod

WDFW Application of Timing Restriction Related to Rock Sole

Adult rock sole are most frequently found in deeper marine waters with migration into shallower nearshore areas for spawning in the upper to mid intertidal zones. Rock sole spawn from winter through spring, producing demersal egg masses that adhere to benthic substrates. After spawning, juvenile rock sole will reside in nearshore habitats and reef structures, including docks and pilings before moving into deeper waters[22]. Due to dependence on access to nearshore waters and appropriate benthic substrates, rock sole spawning actions can be significantly impacted by in-water construction including direct egg mortality.

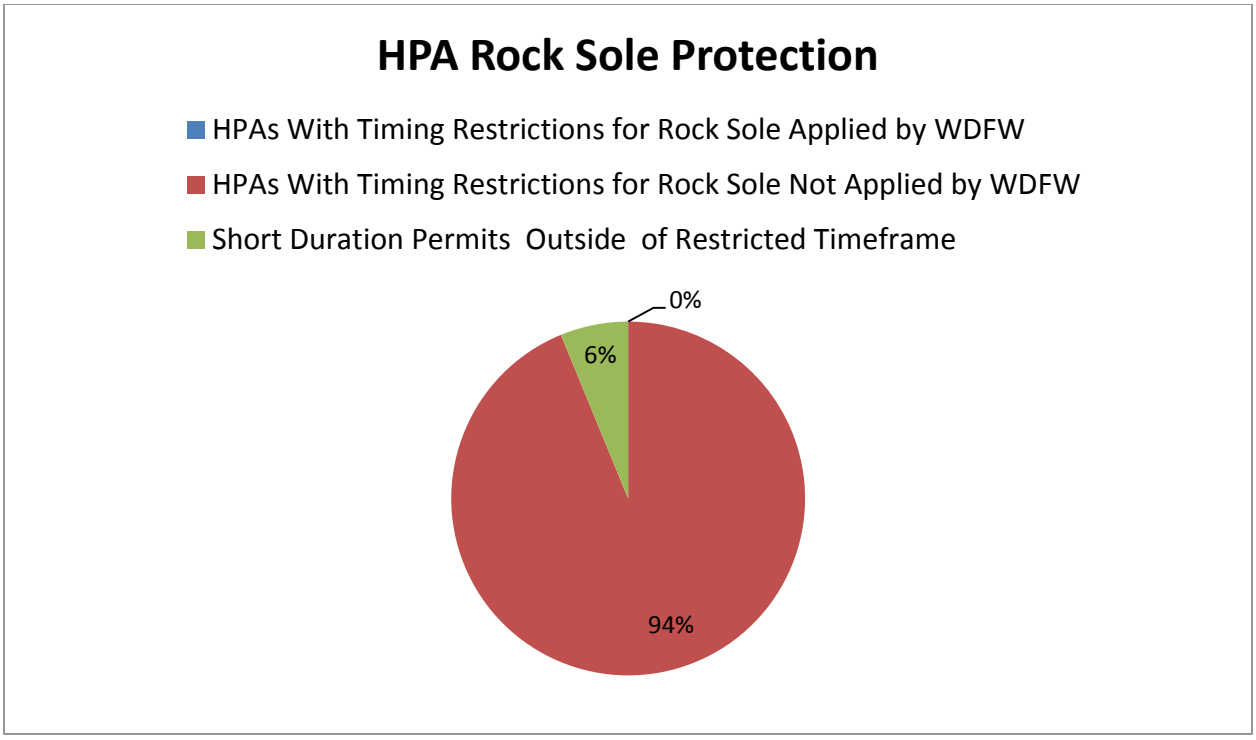


Figure 9

- Number of permits containing WDFW applied rock sole protection: 0
- Number of permits that contained no WDFW applied rock sole protection: 272
- Number of permits that did not include the provision but were of short duration and outside of restricted timeframe 18

[22] Whatcom County Marine Resources Committee Marine Life Fact Sheets – Flounder and Sole

Conclusions:

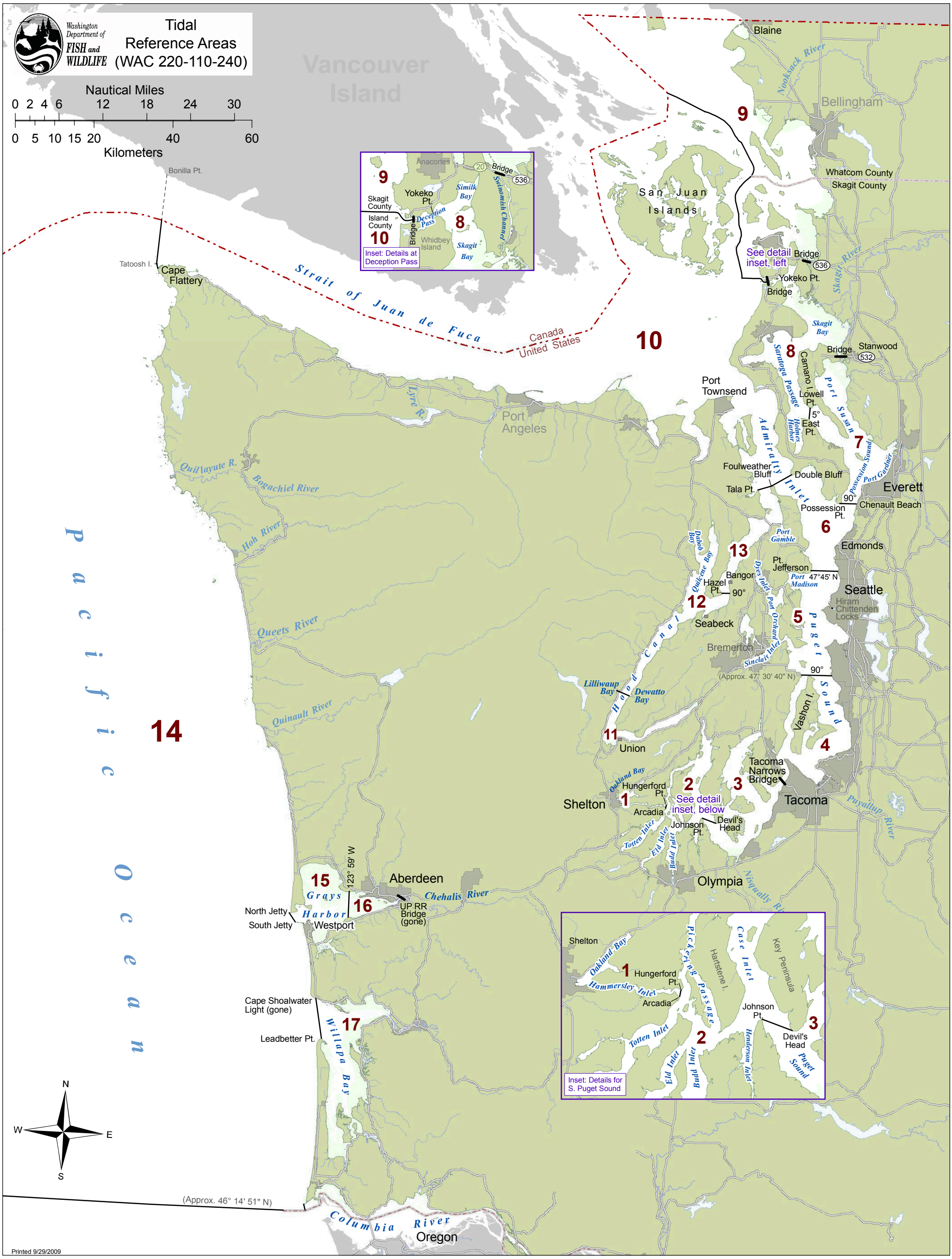
Review of the HPAs issued for Puget Sound development projects over the course of approximately 18 months finds that in the vast majority of the permits issued, WDFW failed to appropriately apply the protective timing restrictions for in-water work as directed in WAC 220-110-271.

As shown in Figures 3-8, approximately 30% of the project permits contained no timing restrictions for juvenile salmonids, 80% contained no timing restrictions for surf smelt spawning, 90% contained no timing restrictions for sand lance spawning, 96% contained no restriction for lingcod settlement and nursery areas and 94% of the permits provide no restriction for rock sole spawning. Similarly, while herring spawning is understood to be generally localized to specific areas rather than sound wide, approximately 75% of the permits contained no timing restrictions for herring. It is signifcant to note that when evaluating the application of timing restrictions relevant to lingcod and rock sole, we found that WDFW did not apply timing restrictions to even one permit, with the small percentage of HPAs shown which did not allow work during restricted timeframes being solely due to the permits themselves being of very short duration.

While it is of course possible, and even likely that some of the project sites did not contain the protected habitats, species or spawning events the timing restrictions are designed to protect, we saw no indication in the supporting documents provided to us that WDFW provided any substantive analysis to confirm presence or absence. Further, as the 290 permits were for in-water constuction work along many miles of nearshore areas throughout the entire Salish Sea, it would be incredibly unlikely - with the exception of herring which have specific spawning areas - that these protected habitats, particularly surf smelt and sand lance, were not present in a high number of the project areas subject to HPA approval. Indeed, supplemental review by Sound Action, using WDFW provided documented habitat overlays found many of the project sites were documented to contain the species and habitats of concern, including herring spawning sites.

Not only does the failure to apply appropriate timing restrictions appear to present a direct violation of the hydraulic code and a clear pathway for the allowed destruction of habitat, species and ecosystem functions, the resulting impacts allowed by permit approval may also find WDFW to be in violation the Endangered Species Act by allowing both direct and indirect “take” of listed salmonid species and their critical habitats.

As the state continues continues work to restore Puget Sound by 2020, these regulatory failures and the role they play in the continued decline of vital ecosystems and species must be addressed. Similarly, WDFW should take immediate actions to correct agency procedure to ensure that all applicable provisions of the hydraulic code are applied consistently and to fully document the extentof current spawning and priority habitat areas.



Tidal reference areas are defined as follows:

1) Tidal Reference Area 1 (Shelton): All saltwater areas in Oakland Bay and Hammersley Inlet westerly of a line projected from Hungerford Point to Arcadia.

(2) Tidal Reference Area 2 (Olympia): All saltwater areas between a line projected from Hungerford Point to Arcadia and a line projected from Johnson Point to Devil's Head. This includes Totten, Eld, Budd, Case and Henderson Inlets, and Pickering Passage.

(3) Tidal Reference Area 3 (South Puget Sound): All saltwater areas easterly and northerly of a line projected from Johnson Point to Devil's Head and southerly of the Tacoma Narrows Bridge.

(4) Tidal Reference Area 4 (Tacoma): All saltwater areas northerly of the Tacoma Narrows Bridge and southerly of a line projected true west and true east across Puget Sound from the northern tip of Vashon Island.

(5) Tidal Reference Area 5 (Seattle): All saltwater areas northerly of a line projected true west and true east across Puget Sound from the northern tip of Vashon Island and southerly of a line projected true east from Point Jefferson at 47° 15' N. latitude across Puget Sound. This area includes Port Orchard, Port Madison, and Dyes and Sinclair Inlets.

(6) Tidal Reference Area 6 (Edmonds): All saltwater areas northerly of a line projected true east from Point Jefferson at 47° 15' N. latitude across Puget Sound and southerly of a line projected true east from Possession Point to Chenault Beach and from Foulweather Bluff to Double Bluff.

(7) Tidal Reference Area 7 (Everett): All saltwater areas northerly of a line projected true east from Possession Point to Chenault Beach, easterly of a line projected 5° true from East Point to Lowell Point, and southerly of the Stanwood to Camano Island Highway. This area includes Port Gardner, Port Susan, and parts of Possession Sound and Saratoga Passage.

(8) Tidal Reference Area 8 (Yokeko Point): All saltwater area westerly and northerly of a line projected 5° true from East Point to Lowell Point, north of the Stanwood to Camano Island Highway, and easterly and southerly of Deception Pass Bridge and the Swinomish Channel Bridge on State Highway 536. This area includes Holmes Harbor, Saratoga Passage, Skagit Bay, Similk Bay, and most of the Swinomish Channel.

(9) Tidal Reference Area 9 (Blaine): All saltwater area in Skagit County and Whatcom County that lies northerly of the Swinomish Channel Bridge on State Highway 536 and westerly and northerly of Deception Pass Bridge.

(10) Tidal Reference Area 10 (Port Townsend): All saltwater area of Puget Sound as defined in WAC 220-16-210 except Hood Canal south of a line projected from Tala Point to Foulweather Bluff, and except all waters defined in Tidal Reference Areas 1 through 9. Area 10 includes waters of the San Juan Islands, Admiralty Inlet, the Strait of Juan de Fuca, and associated bays and inlets.

(11) Tidal Reference Area 11 (Union): All saltwater area of Hood Canal southerly and easterly of a line projected from Lilliwaup Bay to Dewatto Bay.

(12) Tidal Reference Area 12 (Seabeck): All saltwater areas of Hood Canal northerly of a line projected from Lilliwaup Bay to Dewatto Bay and southerly of a line projected true east from Hazel Point. This area includes Dabob Bay and Quilcene Bay.

(13) Tidal Reference Area 13 (Bangor): All saltwater area of Hood Canal northerly of a line projected true east from Hazel Point and south of a line projected from Tala Point to Foulweather Bluff. This area includes Port Gamble.

(14) Tidal Reference Area 14 (Ocean Beaches): All saltwater area between Cape Flattery and the Oregon border at the mouth of the Columbia River, excluding Grays Harbor and Willapa Bay.

(15) Tidal Reference Area 15 (Westport): All saltwater area in Grays Harbor easterly of a line projected from the outermost end of the north jetty to the outermost end of the south jetty, and westerly of 123° 59' W. longitude.

(16) Tidal Reference Area 16 (Aberdeen): All saltwater area in Grays Harbor easterly of 123° 59' W. longitude and westerly of the Union Pacific railroad bridge across the Chehalis River.

(17) Tidal Reference Area 17 (Willapa Bay): All saltwater area in Willapa Bay easterly of a line projected from Leadbetter Point to Cape Shoalwater Light.

[Statutory Authority: RCW 75.08.080. 94-23-058 (Order 94-160), § 220-110-240, filed 11/14/94, effective 12/15/94. Statutory Authority: RCW 75.20.100 and 75.08.080. 83-09-019 (Order 83-25), § 220-110-240, filed 4/13/83.]

WAC 220-110-271
Prohibited work times in saltwater areas.

Work waterward of the ordinary high water line shall be prohibited or conditioned for the following times and areas. These timing restrictions shall be applied to projects in the following saltwater areas except when allowed under subsection (6) of this section or WAC 220-110-285 (Single family residence bulkheads in saltwater areas).

(1) The prohibited times and areas for protection of migrating juvenile salmonids, surf smelt, and Pacific herring spawning beds are listed in the following table:

	PROHIBITED TIMES		
TIDAL REFERENCE AREA	JUVENILE SALMONID MIGRATION FEEDING AND REARING AREAS	SURF SMELT SPAWNING BEDS	HERRING SPAWNING BEDS
1	March 15 - June 14	—	January 15 - March 31
2	March 15 - June 14	July 1 - March 31	January 15 - March 31
3	March 15 - June 14	October 1 - April 30	January 15 - March 31
4	March 15 - June 14	October 1 - April 14	January 15 - April 14
5	March 15 - June 14	September 1 - March 31 in all areas except Eagle Harbor and Sinclair Inlet Year round in Eagle Harbor and Sinclair Inlet	January 15 - April 30
6	March 15 - June 14	—	—
7	March 15 - June 14	Year round	February 1 - April 14
8	March 15 - June 14	Year round	February 1 - April 14
9	March 15 - June 14	Year round	February 1 - April 14 south of a line running due west from Governor's point February 1 - June 14 north of a line running due west from Governor's point
10	March 15 - June 14	Sept. 15 - October 31 in Kilisut Harbor October 15 - January 14 in Dungeness Bay May 1 - August 31 in Twin Rivers and Deep Creek Year round in San Juan Islands	January 15 - April 30
11	March 15 - June 14	September 15 - March 1	January 15 - March 31
12	March 15 - June 14	—	February 15 - April 14

13	March 15 - June 14	October 15 - January 31	January 15 - April 14
14	March 1 - June 14	—	—
15	March 1 - June 14	—	—
16	March 1 - June 14	—	—
17	March 1 - June 14	—	February 1 - March 14

(2) Tidal Reference Areas 1 through 17; October 15 through March 1 for projects in or adjacent to Pacific sand lance spawning beds.

(3) Tidal Reference Areas 1 through 17; December 15 through March 31 for projects in or adjacent to rock sole spawning beds.

(4) Tidal Reference Areas 1 through 17; May 15 through October 14 for projects in or adjacent to lingcod settlement and nursery areas.

(5) Additional timing restrictions may apply for protection of other important species of fish or shellfish or if necessary to protect fish life at a particular site.

(6) If the surf smelt spawning season for the project location is six months or longer, work may be permitted if it commences within forty-eight hours after the location is inspected by a department representative or biologist acceptable to the department and it is determined that no spawning is occurring or has recently occurred. The project may be further conditioned to require completion within a particular time.

[Statutory Authority: RCW 75.08.080. 94-23-058 (Order 94-160), § 220-110-271, filed 11/14/94, effective 12/15/94.]

Representative Examples of HPAs Missing Required Timing Protections.

HPA 127129 No Timing Restriction for Sand Lance

Project Site location: N 48.487798 W 122.481694 - Padilla Bay/ Bayview State Park

Project Type: Nearshore revetment removal, substrate removal and nearshore substrate fill

Summary

The project site contains WDFW documented sand lance habitat. The presence of this habitat is also specifically noted in the Biological Assessment provided to WDFW by the project applicant[1]

This project included a significant amount of work in the nearshore areas utilized for sand lance spawning. As noted in the application, project work includes the removal of revetments, groins and coarse substrates in an approximate 107,000 square feet of the nearshore area located below the MHHW mark. Following this removal work, a substantial amount of fill material will be added to the intertidal areas along the entirety of the project site.

This project is located in Tidal Reference Area 9 which directs a work closure from October 15 – March 1 for projects located in or adjacent to Pacific Sand Lance Spawning beds. The WDFW approved permit allows work from June 15, 2012 – March 14, 2013 and does not contain the required timing restriction for sand lance spawning protections.

[1] Grette and Associates: Washington State Parks Bay View State Park Shoreline Stabilization, Improvements and Restoration January 2012

HPA 127240 No Timing Restriction for Herring

Project Site location: N 48.97359 W 123.08442 - Point Roberts

Project Type: Overwater structure repair, pile removal and new pile driving

Summary

The project site contains WDFW documented herring spawning habitat and is also in an area of documented surf smelt spawning. The boat launch renovation project includes removal of 11 existing pile structures with a vibratory hammer and the installation of 8 new steel piles using an impact and vibratory hammer. Renovation to a boat ramp in the nearshre will include installing new concrete paver sections and concrete curbs will be installed at each side of the existing ramp and dowelled into the existing ramp.

This project is located in Tidal Reference Area 9 which has directs a work closure from Feb 1– June 14 for the protection of herring spawning beds.

The WDFW approved permit allows work over a 5 year period beginning July 15, 2012 and does not contain the required timing restriction for herring spawning protections.

HPA 126309 No Timing Restriction for Surf Smelt

Project Site location: N 48.21904 W 122.5354 – Camano Island

Project Type: Bulkhead removal and construction

Summary

This project is in a WDFW documented surf smelt spawning area. The project work includes the repair and replacement of 102 feet of bulkhead. The Project application directs use of heavy machinery on the beach – both at the project site and via driving an excavator along 200 feet of beach area at low tide. Construction also requires the excavation of beach materials along a 100 foot stretch of the OHW mark, and the use of machinery on the beach for demolition and construction. The project also calls for gravel to be installed on the beach in front of the new bulkhead, which is at the OHW, for a distance of approximately 9 feet waterward. This work is all proposed in the area most typically used for surf smelt spawning.

This project is located in Tidal area 8 which has a year round work closure for the protection of Surf Smelt. However, as a result of this extended closure period, HPA regulations allow work if a biologist confirms the absence of surf smelt spawning and work commences within 48 hours of the sampling.

Although located in a documented surf smelt spawning area, the permit does not contain any timing restrictions or even sampling requirement designed to protect surf smelt spawning.

HPA 122637 No Timing Restriction for Surf Smelt

Project Site location: N 48.58738 W 123.15323 – English Camp/San Juan Island

Project Type: Repair and Replacement of large overwater structure

Summary

This project is an area documented by WDFW to contain surf smelt spawning. Project work includes the removal and replacement construction of 100+ foot pier and float structure. Extensive in-water construction work includes the removal of existing creosote pilings and the installation of replacement steel pilings. Piling removal and replacement will require the use of both a vibratory and impact hammer.

This project is located in Tidal area 10 which has a year round work closure for the protection of Surf Smelt. However, as a result of this extended closure period, HPA regulations allow work if a biologist confirms the absence of surf smelt spawning and work commences within 48 hours of the sampling.

Although located in a WDFW documented surf smelt spawning area, the permit does not contain any timing restrictions or sampling requirements designed to protect surf smelt spawning.

HPA 122608 – No Timing Restriction for Surf Smelt

Project Site: N 48.82681 W 122.71705 - Conoco Phillips refinery dock/Ferndale, WA

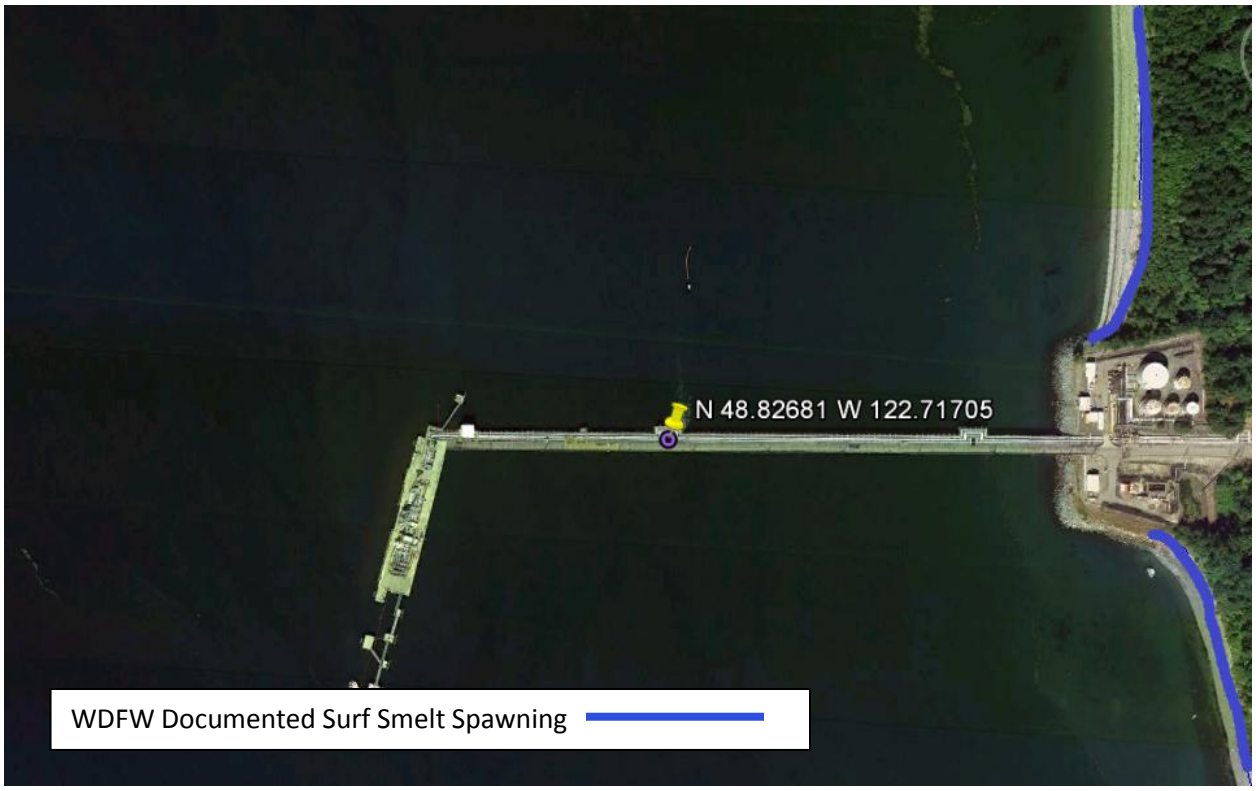
Project Type: Overwater structure repair and replacement

Summary

This project is located in a documented WDFW surf smelt spawning area. Project work includes repair work to overwater pier structure including fender repair and replacement, dolphin repair and replacement, pipeline repair and the removal and installation of piling – including the use of vibratory and impact hammers.

This project is located in Tidal area 9, which has a year round work closure for the protection of Surf Smelt. However, as a result of this extended closure period, HPA regulations allow work if a biologist confirms the absence of surf smelt spawning and work commences within 48 hours of the sampling.

Although located in a WDFW documented surf smelt spawning area, the permit does not contain any timing restrictions or sampling requirements designed to protect surf smelt spawning.



HPA 121924 – No Timing Restriction for Juvenile Salmonids or Surf Smelt.

Project Site: N 48.30289 W 122.72318 Whidbey Island

Project Type: Bulkhead Construction

Summary

This project is in WDFW documented surf smelt spawning area and as with all Puget Sound nearshore areas, is also utilized by juvenile salmonids. Project work includes the construction of a new 180 foot bulkhead in an area below the OHW mark. Work involves machinery on the beach with the removal of a large area of bulkhead pilings, rocks, beach stairs and the contraction of the new bulkhead. This type of work typically causes increased sedimentation and can damage nearshore vegetation and habitats.

This project is located in Tidal Reference Area 10 which directs a work restriction from 3/14-6/14 for the projection of juvenile Salmonids and a year round restriction for surf smelt. Although located in a WDFW documented salmonid and surf smelt spawning area, the HPA permit for this work does not contain either restriction – nor does it contain a sampling requirement for surf smelt spawning. It is also significant to note that subsequent to initial approval WDFW received correspondence from Skagit River System Cooperative as representatives of the fisheries interest for the Swinomish Tribe. This letter documented the clear risk to habitat and noted that the approval of the bulkhead was a violation of the HPA code. Although WDFW has authority to either modify or rescind the permit – the approval was allowed with no modifications made.