

V. Toolbox for Recovery

➤ ENFORCEMENT OF EXISTING LAWS RELATED TO SALMON

I. Current Situation: *Where are we now?*

Background

The state of Washington faces major challenges relating to salmon and trout resources that if not effectively addressed, will have serious ecological, economic, and social consequences. Accelerated declines in fish population is occurring for fish stocks throughout the state. Habitat loss, environmental degradation, and significant illegal activities, including illegal harvest, are among the most significant factors that have contributed to precipitous declines in fish populations and have led to Federal Endangered Species Act (ESA) listings. (See Chapter II. Background: Setting the Context).

It is certain that successful recovery and restoration of salmon will hinge upon implementation and compliance with state environmental and resource regulations. However, enforcement efforts by the regulatory agencies is highly variable, leading to significant compliance problems in a number of critical environmental and resource programs. The various natural resources compliance programs (water resources, nonpoint water quality, forest practices, hydraulic permits, harvest, and mineral resources) reflect a broad range of staffing levels and approaches from complaint-based responses to having dedicated staff located throughout the state and providing variable levels of service (education, monitoring, enforcement, etc). (See Table 7)

Recent court decisions in the Pacific Northwest make it clear that voluntary programs and good intentions alone will not be enough to satisfy federal standards for listing and species protection and recovery. The state must have a credible compliance and enforcement element in any salmon recovery strategy (statewide, regional, or watershed).

Natural Resource Law Enforcement at Department of Fish and Wildlife

Department of Fish and Wildlife carries out its hydraulics permit issuance by biologists in the field, who also handle first response to problems. Enforcement programs are carried out by the Department's commissioned officers working directly in communities around the state. Currently there are 142 commissioned officers, down from 177 in 1994. These officers are responsible for enforcing all of Department of Fish and Wildlife programs including: Hydraulic Project Approvals, fishing and hunting regulations, habitat protection, and resolving potentially dangerous human and wildlife conflicts. The Departments' enforcement philosophy is to seek voluntary compliance through education, outreach, and technical assistance before using direct enforcement mechanisms available in the law.

Environmental Law Enforcement at Ecology

Ecology is generally organized by programs addressing the primary environmental media (air, water, etc.) Enforcement personnel are located in each program in four regional offices. Enforcement authority is delegated by the Director to individual staff. Enforcement personnel are not commissioned officers, but they do receive training in enforcement policies, procedures and techniques. Staff typically carry out several other responsibilities (write permits, conduct facility inspections) so it is difficult to get more than a general estimate of enforcement resources. Estimates are 1.3 FTE for nonpoint and 1.0 FTE for water resources enforcement. In recent years, emphasis has been placed on using education and technical assistance to gain compliance with environmental laws.

Natural Resource Law Enforcement at Washington Department of Natural Resources

Department of Natural Resources carries out its forest practices compliance program through forest practices field foresters in the seven DNR regions, as well as technical specialists in regions and in Olympia headquarters. Currently there are 106 FTEs in the program, with about half devoted to field compliance. Compliance philosophy emphasizes a graduated approach starting with education and assistance but including civil penalties for repeat offenders. DNR also carries out regulatory programs related to surface mined land reclamation and outdoor burning.

Current Applicable Policies

The Departments of Fish and Wildlife, Ecology, and Natural Resources set and enforce the majority of Washington's statewide natural resource programs. These programs authorize the agencies to protect, regulate and control use of waters of the state, discharge of pollutants into state waters, forest practices, outdoor burning, surface mining, construction in state waters and fish passage, screening of water diversion and harvesting of fish. In some cases the responsibility is shared with local governments. The authorizing statutes and programs to implement the statutes are described below. Further description of these programs can be found in the chapters discussing the core elements.

Shoreline Management - RCW 90.58

- Implementation of the Shoreline Management Act is a joint cooperative responsibility of counties and cities and Department of Ecology (Ecology).
- Both counties and Ecology have a role in monitoring compliance with Shoreline Master Plans.

Water Resources-Surface Water and Ground Water Codes - RCWs 90.03, 90.44 and Water Resource Act of 1971- RCW 90.54

- Primary responsibility to regulate and control waters of the state rests with Ecology.
- Violations addressed through educational efforts, technical assistance, regulatory orders, field citations, civil penalties and criminal sanctions sought through court action.

Water Quality- Water Pollution Control Act - RCW 90.48

- Primary responsibility rests with Ecology in managing point source and non-point discharges and protecting water quality standards, both surface and ground water.

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- Violations addressed through education and technical assistance, notice of violation, regulatory orders and civil penalties. Resource damages may be recovered from the violator.

Forest Practices Act - RCW 76.09

- Primary responsibility for implementation and enforcement rests with DNR.
- Enforcement occurs through voluntary compliance, remedial enforcement, and civil and criminal statute.

Fish and Wildlife Enforcement Codes - RCWs 75.10, and 75.12

- WDFW is responsible for ensuring compliance with state statutes and rules of the Fish and Wildlife Commission and Director.
- Violations may trigger technical assistance, warnings, and penalties.
- Additionally these RCWs authorize, when acting within the scope of these authorities and when an offense occurs in the presence of a Fish and Wildlife Enforcement Officer, the officer can enforce all criminal laws of the state of Washington.

The intent of this chapter is for state natural resource agencies to lead efforts that achieve a high degree of compliance with environmental and natural resource regulation. This includes compliance with laws and regulations designed to protect water quality and instream flows, regulate alteration of riparian, forest and stream habitat, and prevent illegal take through harvest or other methods.

Note: discussion and strategies on enforcement is included in each of the core elements. This chapter supplements those discussions and strategies.

A fundamental principle of the Statewide Strategy to Recover Salmon is that agencies will promote collaborative, incentive-based approaches coupled with enforcement of existing authorities to protect salmonid species and salmonid habitat. Programs will strive first on using voluntary compliance and support through comprehensive interaction and problem solving at the community level. However, collaborative problem solving takes time and sometimes is not successful. Therefore immediate actions will be taken in ESA areas to protect and prevent further harm to salmon. In the meantime, long term strategies for compliance will be developed and implemented statewide. Default actions will also be defined and will be taken if collaboration is unsuccessful.

The enforcement strategy includes:

- Increase coordination, and collaboration among the three principle state regulatory agencies- Departments of Fish and Wildlife, Ecology, and Natural Resources
- Prioritize compliance and enforcement programs to improve the least effective enforcement programs and build credibility. Also, target enforcement to geographical areas with ESA listings and potential listings and where very limited effort is being made to comply with existing laws or where performance measures are not being met after a reasonable period of time.

- Keep support and commitment to compliance from a wide variety of interests. Also increase public awareness and understanding of applicable laws and regulations.
- Enhance enforcement of natural resources laws and regulations where necessary to improve compliance and enforcement of existing environmental and resources laws.
- Enhance resources to build capacity within state agencies.
- Assist local governments to improve performance and increase compliance. Local land use laws need to be better enforced at the local level.

II. Goal and Objectives: *Where do we want to be?*

Goal:

Enhance compliance with environmental and resources laws that support salmon protection and restoration.

Objectives:

- Maintain and strengthen existing laws and regulations to reduce illegal activities.
- Implement statewide enforcement that is predictable and consistent in application, but targeted to priority areas and problems first.
- Coordinate enforcement responsibilities among agencies.
- Generate public support and commitment to compliance.

III. Solutions: *What is the route to success?*

Compliance and enforcement are approaches that use a mix of cooperative/voluntary tools and traditional regulatory techniques. Voluntary compliance efforts will include the use of educational, technical assistance, economic, and market based incentives. When voluntary compliance efforts are unsuccessful, enforcement tools will be employed that include administrative processes such as inspections, warnings, orders, sanctions, injunctions, and civil penalties and criminal sanctions.

Efforts by state and local agencies to improve compliance will consist of a variety of actions.

- First, efforts are needed to enhance monitoring and tracking, coordination of compliance programs, technical assistance, public awareness and community involvement, and use of legal instruments as deterrents.
- Second, efforts will be prioritized and targeted across geographic regions, among a variety of resource protection programs, and throughout all stages of a regulatory system.

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- Third, while most of the natural resources agencies have generally adequate authorities to enforce their laws and regulations, enhancement of the authorities and tools is needed for some programs.
- Finally, because there is a very limited enforcement capability to handle the growing number of apparent violations, additional resources are needed to increase effectiveness in achieving salmon protection and recovery.

Increased Coordination and Collaboration

Currently Ecology and WDFW carry out their compliance monitoring and enforcement responsibilities independently. Some interaction occurs between the agencies. DNR and WDFW coordinate permit issuance and, to some degree, compliance activities. WDFW occasionally files complaints with Ecology regarding possible water right violations, or regarding the need to protect instream flows by enforcing water right conditions imposed on junior water right holders.

Increased coordination and collaboration among the three regulatory agencies will be carried out by developing and implementing consistent enforcement terminology; agreements to coordinate technical assistance and compliance monitoring and work sharing.

Consistent Enforcement Terminology

Natural resource violations often involve multiple jurisdictional issues regulated by the Departments of Fish and Wildlife, Ecology, and Natural Resources. Each agency has its own enforcement language and uses various enforcement tools differently. Often agency unique terminology and application is confusing to the public and does not aid in appropriate response.

Additionally, when agency representatives are questioned regarding jurisdictional issues outside of their respective program field or agency jurisdiction, misguided opinions and interpretations can result. Ultimately, this lack of consistency and certainty leads to further compliance problems.

Pursuant to the Regulatory Reform Act of 1995, agencies must encourage voluntary compliance by providing agency assistance prior to imposition of civil penalties. Impacts of the Act on resource agencies have been to set up programs to provide technical assistance and provide opportunities for violations to be corrected prior to issuing civil penalties. Compliance is usually gained by employing a variety of remedial enforcement tools. The Act does provide a list of exceptions of violation categories that do not require notice or opportunity to correct a violation prior to issuing a civil penalty.

Table 8 represents the various enforcement tools utilized within four environmental statutes administered by the three natural resource agencies. Although a statute may provide specific language that must be adhered to in some cases, it is within the remedial enforcement steps, prior to civil and or criminal penalties, where standardization of enforcement tools could be improved. Enforcement tools could include standardization names, standard form use, and standard application within intended guidelines.

Consistent with mandates to improve compliance, increase agency efficiency, and consistent with future work sharing, the three main natural resource agencies will develop standard enforcement terminology

(nomenclature) and protocols to improve public understanding, enhance the ability of agency field representatives to respond, interpret, and react consistently statewide.

This standardization will be the responsibility of the three agencies' enforcement coordinators and will be done in conjunction with efforts to increase coordination of technical assistance and compliance monitoring and work sharing among the agencies (see discussion below).

Improved Coordination of Technical Assistance and Compliance Monitoring

Interaction between the agencies does occur but cross agency coordination needs to be significantly enhanced for the following reasons:

- Solutions to the natural resource problems related to the decline of salmon are inherently cross-agency in nature.
- All agencies have limited resources and must prioritize activities.
- Coordinated actions will solve problems more efficiently.

To improve coordination among each other the agencies will implement the following process:

- *Coordinate Salmon-Related activities.* All agencies have broader responsibilities and goals for compliance/enforcement programs. It is not the intent of this proposal to coordinate all the compliance/enforcement work of the three agencies. Only activities related to salmon recovery will be coordinated at this time. The activities to be coordinated include compliance monitoring, data exchange and technical assistance to achieve compliance and enforcement.
- *Implement Geographic scale of coordination.* Activities could be coordinated at a county, WRIA, multi-WRIA, or ESU level. Coordination at the watershed level (e.g. WDFW watershed districts and Ecology watershed management areas) is recommended.
- *Process proposed for coordination.* Strong initial and on-going endorsement by agency directors/commissioners is needed to address:
 - Key problems/limiting factors that could improve compliance with natural resource laws;
 - Options for solving compliance problems, including options on how to avoid, minimize, and/or mitigate the problems generated from non-compliance;
 - Development of a strategy considering education, technical assistance, civil enforcement, criminal enforcement; and
 - Role of each agency in implementing enforcement strategies.
- *Product.*
 - Enforcement strategies will be agreed upon by the agencies and will be built into each agency's work plans.

- Agreements may be drawn among the agencies to share education, technical assistance, compliance monitoring, and enforcement responsibilities.
- Agencies will produce performance reports.

If the process proves to be successful the coordination may be expanded to include tribal and local governments with enforcement responsibilities related to natural resources.

Work Sharing

Natural resource laws and regulations have typically been monitored and enforced by the agency designated in the authorizing statute. As higher compliance levels with regulations are required to solve natural resource problems, it is important to take a more “global” look at how regulations can best be monitored and enforced. This is necessary for three reasons:

- Enforcement of natural resource laws should be as *efficient* as possible to maximize use of state resources.
- The unique aspects of each agency’s enforcement program should be considered to develop the most *effective* overall program.
- Since new resources are being considered for enforcement programs, *now is the time* to consider where to place the resources and what enforcement powers to confer.

The initiative to implement work sharing among the three natural resource management agencies is as follows:

(1) Expand the role of WDFW Enforcement Officers in environmental enforcement;

Fish and Wildlife officers are geographically deployed statewide. They are professional, highly trained natural resource oriented law enforcement officers. The WDFW enforcement program operates under a philosophy of striving for voluntary compliance through comprehensive interaction and problem solving by local Fish and Wildlife officers at the community level.

* The WDFW enforcement program could be easily adapted to other natural resources law enforcement needs.

* WDFW has an existing law enforcement infrastructure, which would maximize the efficient use of state resources. Their involvement can significantly improve compliance with existing laws and restoration of Federal listed and proposed to be listed fish species.

WDFW enforcement officers could, for example, conduct systematic and routine field monitoring to determine compliance with regulations and permits, prepare a detailed case report to document violations, and participate with Ecology in a jointly developed strategy to resolve significant violations.

Given the limited current effort on compliance and enforcement within the water resources and water quality programs in Ecology, options for long-term work sharing will be first explored between Ecology and WDFW. Future interagency agreements, possibly including DNR, will be considered as progress is monitored.

Activities considered for work sharing relate to protecting/restoring habitat under the Statewide Strategy to Recover Salmon. For Ecology these activities are conducted by the Water Quality Program, the Water Resources Program, and the Shorelands and Environmental Assistance Program.

(2) Options for Work sharing

All options considered call for Fish and Wildlife Officers to play an enhanced role in Department of Ecology habitat protection responsibilities. Four different “levels of involvement” for fish and Wildlife Officers are considered related to Ecology’s key habitat related statutes. They are as follows:

- *Level 1: Education*
Act as educational liaisons, informing local constituencies of the need for and benefits of compliance with habitat related regulations.
- *Level 2: Compliance Monitoring*
Conduct systematic and routine field monitoring and tracking to determine compliance with regulations and permits. Report instances of non-compliance to Ecology for necessary follow-up.
- *Level 3: Compliance Monitoring with Case Report*
Conduct Level 2 compliance monitoring plus, based on guidance from Ecology, prepare a detailed case report to be used to document a formal enforcement action. Possible role as expert witness if action is appealed.
- *Level 4: Coordinated Enforcement*
Conduct compliance monitoring plus participate in a jointly developed strategy to resolve significant non-compliance. This can include Fish and Wildlife officers directly enforcing habitat-related laws and regulations, if their statutory authority were expanded by the Legislature.

(3) Recommendations for work sharing between Ecology and Fish and Wildlife

Preliminary discussions between WDFW and Ecology have already taken place regarding sharing enforcement work. A pilot project was conducted recently in which Department of Fish and Wildlife officers conducted some compliance monitoring for diversion screens and simultaneously checked whether the water diversions had a water right.

For each environmental law (water quality, water resources, and shoreline) a different level of involvement is proposed based on the unique aspects of the law, the degree of overlap with Fish and Wildlife officers’ current duties and the level and effectiveness of the current compliance enforcement program at Ecology.

Statutory changes and additional resources are needed to expand the role of WDFW enforcement officers beyond just providing education (level 1), and general compliance tracking and monitoring activities (level 2). So at this time we are recommending that work sharing be limited to levels 1 and 2.

Prioritizing and Targeting Enforcement

Given the limited resources available, it is critical to prioritize compliance and enforcement programs to improve the least effective enforcement programs (e.g. water resources) and build credibility. Also enforcement must be targeted to geographical areas with ESA listing and potential listings and where very limited effort is being made to comply with existing laws or where performance measures are not being met after a reasonable period of time.

State efforts to enforcement nonpoint will focus in areas targeted by the implementation of the “Agricultural Strategy”. The Forestry Module process is focusing on compliance of Forest Practices. The Land Use chapter addresses compliance related to land use decisions. WDFW has developed an “Enforcement Program Strategic Plan” to address violations of HPA, fishing regulations, and other compliance issues/strategies.

The focus in this section is on water resources. This is due to: (1) lack of water availability which is a significant cause for declining salmon habitat and population in many basins (e.g. over-appropriated basins), (2) in most hydrologic settings, instream flows for fish (often already depressed) are taking the brunt of illegal/unauthorized withdrawals, and (3) the absence of any significant enforcement resources to address existing violations and prevent future violations. (See Chapter IV. A. 5. Ensuring Adequate Water in Streams for Fish.)

Ecology has authority to issue a regulatory order to a person violating or about to violate a state water law or regulation. Use of water without a water right is clearly a violation of the water code which requires that any new surface water use initiated after 1917 and any ground water use initiated after 1945 must be under a permit issued by Ecology. The law is also clear that the parameters on a water right relating to quantity, place of use, purpose of use, point of diversion of withdrawal, maximum acreage irrigated, and special conditions specified in the water right are all legal limits on the use of water. Failure to comply with such limits is a violation.

Some areas of the state have a significant amount of water being used (1) without authorization from Ecology, (2) in excess of the quantities allowed under a water right, (3) in excess of the acreage allowed to be irrigated, and/or (4) outside the authorized place of use. Ecology has found these forms of illegal activity to some degree in most areas of the state that it has investigated.

Much water use in the state occurs under water right claims rather than under state issued rights. One problem is that many claims are erroneous, clearly invalid, or claim a right for future use. A general adjudication of water rights can determine the validity and quantification of all claims in the basin. Until claims are adjudicated, they remain a major uncertainty.

Ecology believes that it can under the law make a tentative determination as to the validity and quantification of a claim for purposes of determining whether the use is illegal or excessive. However, the state Supreme Court has disallowed Ecology from making such a determination for purposes of regulating among conflicting uses. Only the Superior Court in a general adjudication of water rights can make such a determination. (*Rettkowski v. Ecology*) This casts some uncertainty over whether Ecology truly can regulate illegal or excessive uses when those uses are based on a claim (whether legitimate or not) until after those claims have been adjudicated. (See section E on Enhancement of Authorities.)

A major problem for regaining control over illegal and excessive use is also the lack of compliance resources within Ecology's Water Resources Program. Major budget cuts in 1994 caused the near elimination of the water rights compliance program. It is recommended elsewhere in this chapter that new resources be provided to allow for coordinated enforcement employing WDFW enforcement officers.

Strategic enforcement against illegal uses will be taken in prioritized and targeted areas starting first in the "highest priority basins" for protection and restoration of instream flows listed in Chapter IV. A. 5. Ensuring Adequate Water in Streams for Fish.

Recommendations to Address Lack of Compliance

For each basin with ESA listing or likely listing and with known illegal activities, an action plan will be developed and fully implemented according to the schedule outlined in the chapter on Ensuring Adequate Water in Streams for Fish. This could be part of watershed planning under Chapter 90.80 RCW. These plans will address all or some of the following items. For more details refer to chapter on Ensuring Adequate Water in Stream for Fish, especially the section on baseline actions and immediate actions.

- Requirements for installation of meters, measuring and reporting water use.
- Restriction of quantity and timing of water use, and requirement of all water supply utilities (e.g. irrigation districts and municipal suppliers) to develop a water conservation plan and identify the potential for saved water.
- Identifying alternative water sources such as use of reclaimed water.
- Enforcement of standards for beneficial use and waste.
- Enforcement actions to be taken by the state to stop any further withdrawal of water.
- Assigning "water masters" or "stream patrollers" to deter future violations.
- Increasing geographically dispersed enforcement presence – e.g. contracting with uniformed Fish and Wildlife Officers.
- Linking funding and financial assistance to compliance.
- Coordinating enforcement activities and consolidating field compliance monitoring to ensure consistency by state, federal, tribal, and local governments.
- Public education and involvement in watershed planning and restoration.
- Providing additional enforcement resources for local enforcement.

Role of the General Public

The ultimate success of salmon recovery will rest on the hidden dimension - the human element. It would be a great mistake to suppose the paper documents that will comprise the mode and form of salmon recovery will automatically lead to successful actions. Success will depend more upon the human interactions and behaviors among the diverse groups that have a stake in salmon recovery. To that end, agencies need to design programs to inform, and involve the public in salmon recovery.

Communication with Interested Citizens - “Community Ombudsman”

Many citizens have questions about compliance with natural resources laws in their neighborhoods; sometimes citizens also have information useful to agencies. Often there are not efficient ways for agency compliance staff and citizens to communicate. Citizen complaints or questions based on poor information about the requirements of environmental laws can lead to wasted time. On the other hand, well-informed citizens can provide valuable information both to agency staff and to other citizens.

Most natural resource regulatory programs experience regular involvement by representatives of key citizen interest groups, who over time become very well informed both about the regulatory requirements of the program and about on-the-ground practices in their areas. Agencies should find ways to make better use of that citizen expertise in the overall compliance effort.

One model that has been successful on a small scale is the *community ombudsman* initiative in the Forest Practices program. DNR compliance staff trained an already knowledgeable and interested community member on Vashon Island to serve as an intermediary between agency staff and island residents about forest practices issues on the island. This individual now fields many citizen questions and complaints that otherwise would have gone to the agency, and also sends on high quality information that can be acted on by agency staff.

This model is now also being followed on Camano Island. Applicability to islands is favorable because of their limited size, discrete boundaries, and limited population. Broader applicability may be feasible, but over a broad area with a large and mobile population and many forest practices, it may be difficult for an ombudsman to credibly buffer between the agency and overall population of interested citizens.

In any case, a heavy up-front investment of training time by agency staff is needed, and a good candidate for this citizen role must have good prior knowledge of the program, be highly motivated, and have time available. Natural resource regulatory agencies have also made less formal use of interested and knowledgeable citizens as occasional intermediaries between the agencies and a concerned public. These efforts can continue and be expanded.

The use of 1-800 information hotlines is another tool that will be explored for greater use, especially if levels of access could be established, such that the most knowledgeable citizens with potentially the most useful information have priority access to the attention of agency staff.

Public Involvement in Monitoring and Tracking- “Grassroots efforts”

Agencies need to generate support and commitment to compliance from a wide variety of interests. Also they need to increase public involvement in environmental and resources management and protection activities. A 1996 survey revealed nearly 160 groups with 12,000 monitors, over 8,000 of these tracking water quantity and quality. It is critical for the agencies to empower the public to take action to improve salmon conditions. The following initiatives are proposed:

- Build collaboration between the agencies and the communities to solve natural resources problems by placing emphasis on community outreach and involvement and on voluntary compliance.
- Facilitate grassroots efforts through volunteer monitoring and tracking. This is a way for the public to help agencies track trends on the health of a watershed and it is a proven path to natural resource stewardship by groups of citizens.
- Develop local stakeholder groups (as discussed above) within watersheds and salmon recovery units.

Stakeholders Groups

Agencies will need to develop salmon recovery stakeholder groups strategy that will reach broad based and diverse constituency groups that actively participate in decision and implementation processes. Based upon legal, fiscal, and geographic demands of salmon recovery, state and local officials will act as the specialists that facilitate formation of stakeholder groups.

Group participants will need to represent a cross section of interest groups including: state, federal, city and county officials, agricultural and industrial organizations, sport and commercial salmon groups, environmental groups, key influential, and other identified stakeholders. Because of the complexity and diversity of recovery issues, formation of unique stakeholder groups within each recovery unit would be beneficial

There are many advantages that stakeholder groups provide. First, they provide a forum for conflict and cooperation. Participants are able to share perspectives and views, thereby increasing understanding. Through this process, bargaining, negotiation, and exchange occur. In short, buy in and agreed-upon advocacy develops. The various interests groups also find security and continuity in decisions and actions. And, perhaps the most important feature that develops out of stakeholder groups is formal forms of influence on legislative processes and public opinion.

Enhancement of Authorities

Generally, agencies have the authority to enforce natural resources laws to protect salmon. However, certain laws may need to be enhanced to improve and streamline compliance and enforcement efforts. The following are changes to existing statutes that are needed (note: bills have been introduced several times in the past five years on several of the changes needed, but none passed):

1. Authority to enforce among competing water rights (Sinking Creek fix). In the Sinking Creek case (Rettkowski v. Ecology) the Supreme Court ruled that Ecology had no authority to determine the validity and relative priority of competing water rights, absent a general water right adjudication. Water users facing impairment are forced to seek relief on their own, in a Superior Court.

Changes are needed to clarify Ecology's enforcement authority, authorize Ecology or any water right holder or claimant to bring an action in Superior Court, authorize the Superior Courts to make a tentative determination of the validity and quantification of the rights and claims in dispute, or to enable Ecology to regulate the rights. This is important for fish protection because illegal use under water right claims may impinge on adopted instream flows or trust water rights acquired by the state, or otherwise diminish stream flows.

2. Penalty for violations of the Water Code. Currently Ecology is authorized to levy civil penalties of up to \$100 per day for violation of the Water Code. Penalties are too low to deter some violators. Changes are needed to establish a graduated structure with three categories of violations, minor, serious, and major, depending on the severity of the violation.
3. Add requirement for performance bonds for shoreline permits and potentially other permits. Performance bonds will be used as incentive for permit holders to comply with conditions of permits and ensure that environmental protection is implemented on the ground. Changes could be a discretionary requirement for either local or state governments to require permit applicant to post a performance bond to ensure protection and implementation of permit provisions.
4. Expand the appointment of stream patrolmen and water masters. Stream patrolmen and water masters are appointed by Ecology to divide, regulate and control the use of water and prevent excess use of water or illegal uses. Currently stream patrolman can be used only in adjudicated basins. Water masters can be assigned every where in the state, but their appointment is contingent on availability of state funds. Legislative changes are needed to remove barriers to the appointment of stream patrolman.

Funding and Staff Resources

The level of resources devoted to compliance and enforcement efforts among several major regulatory programs related to salmon is highly variable. Some programs carry out a moderate level of compliance and enforcement activities, while other programs with regulatory powers currently do little enforcement.

The 1999-2001 budget recognizes the importance of enhancing enforcement of existing Natural Resources Laws to salmon protection and recovery and provided modest increase in staff and resources to WDFW, Ecology, and DNR. See "early actions" in the implementation plan for information on where the resources will be deployed.

Water Resources Enforcement:

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Statewide Strategy to Recover Salmon – Extinction is not an Option
Enforcement of Existing Laws Related to Salmon

Prior to about 1980, the Department of Ecology employed water masters assigned to various locations around the state to regulate water rights. Gradually, these positions were eliminated or brought into the four regional offices located in Spokane, Yakima, Bellevue and Olympia. Only the Walla Walla water master position remains today and it is only partially devoted to enforcement. A consequence of this retrenchment into the regional offices is a remoteness and isolation from the communities where water is used.

Several years after establishment of instream flows for three WRIs in Ecology's Central Region the water resources program developed an innovative instream flow compliance program. In each basin, a main stem gauging station was equipped with real time monitoring and reporting hardware. This allowed the regional office to remotely determine the status of stream flows in each basin (above or below the adopted flows, increasing or declining, etc.). In addition, the regional office began using stream flow forecasts available each spring to predict whether instream flows were likely to be met or not, and the severity of any predicted shortages.

The regional office established a toll free number for persons with conditioned water rights to call daily to determine whether they were authorized to divert water or not. When a short water season was predicted the office mailed out orders to holders of conditioned rights warning of a probable need to regulate conditioned diversions and requiring them to call into the toll free information number. Field checking was done to determine and assure compliance. This process was successful in protecting instream flows.

In 1992, Ecology received funding for six new water resources enforcement positions. One position was designated the state enforcement coordinator. The positions were assigned to investigate the extent of illegal water use within five areas of the state. However, severe budget reductions in 1994 resulted in elimination of nearly all dedicated enforcement positions in order that Ecology retain a modicum of capability to do permitting. Two enforcement positions were retained. Consequently, the program returned to a low effort compliance-based approach. Even this has now dwindled to the equivalence of perhaps one person spread among several staff.

The program identified a significant need for increased compliance and enforcement including enforcement of metering, flow monitoring and regulation, and implementation of basin immediate and default compliance actions.

IV. Monitoring and Adaptive Management: *Are we making progress?*

Performance measures for compliance and enforcement programs are needed as part of the Statewide Strategy to Recover Salmon and to use in producing the State of the Salmon Report. A combination of measures both quantitative and qualitative, statistical and narrative must be used.

Effectiveness of compliance and enforcement activities will be measured as follows:

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Statewide Strategy to Recover Salmon – *Extinction is not an Option*
Enforcement of Existing Laws Related to Salmon

- The levels of compliance or rates of noncompliance in areas that are inspected, or targeted for special initiatives, or designated as high priority area or sector,
- Improvement by the regulated entities such as amount of water conserved, amount of pollutant reduced, numbers of fish present,
- Responses to significant violations such as average number of days for significant violators to comply, or enter into enforceable plans/agreements, and number of recurring violations,
- General information on number of inspections, responses to complaints, investigations conducted, number of notices of violations issued, civil and criminal enforcement actions initiated and concluded and number of individuals/entities reached through compliance tools, and
- Effective coordination and building capacity such as number of agreement, or delegations order signed, and number of cross agencies training programs.

Table 7 - Compliance Programs Relating to Salmon Recovery

Compliance/ Enforcement	Water Resources	Water Quality Nonpoint	Forest Practices	Surface Mining	Hydraulic Permits, Fish Passage/Screen & Fish Harvest
Actions	<ul style="list-style-type: none"> S Enforce to Protect IF. S Enforce against illegal / unauthorized use. S Enforce against wasteful practices. 	<ul style="list-style-type: none"> S Enforce to protect water quality standards. S Enforce against water quality damage. 	<ul style="list-style-type: none"> S Enforce forest practices permits and take action to prevent damage to public resources and recover cost of damage. 	<ul style="list-style-type: none"> S Enforce surface mining permits and reclamation plans. 	<ul style="list-style-type: none"> S Enforce hydraulic projects and other work, fish passage and screens & illegal take related to harvest
Authorities	<ul style="list-style-type: none"> S Several broad authorities. S Very low penalty \$100/day per violation. S RCW: 90.03, 90.54, 90.22, 43.21A 	<ul style="list-style-type: none"> S Broad authority prohibiting certain activities to protect water quality standards. S Penalties up to \$10,000 per day, jail up to 1 year. S Several nonpoint sources are regulated by local and other agencies. S RCW 90.48, 90.64 S CWA 	<ul style="list-style-type: none"> S Statutory authority generally adequate. S Penalties 10,000 for violations. S RCW 76.09 	<ul style="list-style-type: none"> S Generally adequate civil penalties. S RCW 78.44 	<ul style="list-style-type: none"> S Generally adequate. Violations are misdemeanor or gross misdemeanor (90 day / 1 year - \$1000/5000). Violations under certain conditions could become felony with 20 years jail and \$20,000 S RCW 75 & 77
Effectiveness	<ul style="list-style-type: none"> S Very low effort, some complaints response. No enforcement actions. S Widespread violations S Severe staff resources limitation - less than 2 FTE. S No broad support 	<ul style="list-style-type: none"> S Capability is limited by key barriers; defuse sources, difficult to discover violations. S Resources limited 1.3 FTE=s. S Size of problem is enormous (e.g. over 30,000 farms). S Limited local governments enforcement. S Some complaint response. 	<ul style="list-style-type: none"> S Statutory time limits lead to more office work than field contacts. S 9432 apps, & renewals - 1997. S 106 FTE for program with 40/60 field/office ratio. S Progressive enforcement process with graduated. structure - repeated offenses subject to maximum penalty. 	<ul style="list-style-type: none"> S Total current permits 1250 (100 in flood plain). S Field / office ratio about 2/1. S Reclamation plan required to address riparian issues. S Less than 5% actions requiring enforcement. S Could be more effective if local governments. designate upland mineral sources. 	<ul style="list-style-type: none"> S HPA issued in 1997 - 6,539 with 1,826 field checked. Remainder are spot checked S 12605 citations were issued (205 relate to HPA and screens & illegal harvest) S 142 FTE with 98% field deployed around the state S Limited role in env. habitat protection S Need broad funding base and new

			S Effectiveness could be improved with more field presence.		resources to address ESA take issues.
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Statewide Strategy to Recover Salmon – Extinction is not an Option
 Enforcement of Existing Laws Related to Salmon

Table 8 - Enforcement / Compliance Tools

<p>Water Resources</p> <p>Dept. Of Ecology</p>	<p>Technical Advisory Visit</p> <p>Site visits requested or accepted - Notice and opportunity must be provided to correct and to retain option of civil penalty</p>	<p>Verbal/written Warnings</p> <p>- Informal - Request action be taken to prevent or correct violation</p>	<p>Notice of Correction</p> <p>- Informal action although public record - Used to indicate a complaint has been observed during an inspection</p>	<p>Administrative Order</p> <p>- Formal order requiring correction to prevent or correct violation - Require specific actions or solutions - Certified Mail - Appealable to PCHB</p>	<p>Notice of Penalty</p> <p>- A monetary fine for a document violation - Appealable to PCHB</p>	<p>Civil Penalties</p> <p>Authorized civil penalties for violations of any provision of RCW 90.03 and 90.44, any regulations or administrative orders - Appealable to PCHB</p>	<p>Relinquishments of Rights</p> <p>- Non-Beneficial use of water - Water Right reverts to state - Appealable to PCHB</p>	<p>Criminal Penalties</p> <p>- Violations of the Water code or Well Construction Act - misdemeanors</p>
<p>Water Quality</p> <p>Dept. Of Ecology</p> <p><i>*Some violations categorized - act as thresholds for determination of enforcement response</i></p>	<p>Technical Advisory Visit</p> <p>-Site visits requested - Notice and opportunity must be provided to correct - Must be utilized to retain option of civil penalty</p>	<p>Verbal/Written Warnings</p> <p>- Informal - Request action be taken to prevent or correct violation</p>	<p>Notice of Violation (NOV)</p> <p>Formal notice that a specific violation occurred or is about to occur and request of violator (typically within 30 days) steps being taken to correct violation.</p>	<p>Administrative Order</p> <p>-Formal order requiring correction and prevention of violation - Require specific actions or solutions - Certified Mail - Appealable to PCHB</p>	<p>Civil Penalties</p> <p>Authorized civil penalties for violations of any provision of RCW 90.48 and provision of regulations or administrative orders - Appealable to PCHB</p>	<p>Resource Damage Assessments</p> <p>Pollution incident that results in quantifiable damages to natural resources - Appealable to PCHB</p>	<p>Cost Recovery</p> <p>Action taken to recover cost incurred by Ecology to investigate and clean up oil spill</p>	<p>Court Action</p> <p>Formal referral to AG=s office for court action when administrative actions have failed</p>
<p>Hydraulic Permits Fish Passage/ Screens</p>	<p>Technical Advisory Visit</p> <p>- Informal - Initiated by non-enforcement technical staff</p>	<p>Verbal/Written Warnings</p> <p>- Informal - Request action be taken to prevent or mitigate done by non-enforcement technical staff</p>	<p>Verbal Warning</p> <p>- Informal - Initiated by Fish and Wildlife Officer requested by technical staff</p>	<p>Written Warning</p> <p>- Formal enforcement document - Initiated by Fish and Wildlife Officer - May be instrument for innovative settlement/</p>	<p>Civil Penalties</p> <p>- Used infrequently</p>	<p>Criminal Penalties</p> <p>- Used for flagrant violation, repeat offenders, extensive resource damage - May seize and forfeit</p>		

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Statewide Strategy to Recover Salmon – Extinction is not an Option

Enforcement of Existing Laws Related to Salmon

Table 8 - Enforcement / Compliance Tools

Dept. of Fish and Wildlife				mitigation - May be issued as time-line requirement or criminal citation issued		equipment - misdemeanors, or gross misdemeanor felony/ jail		
Forest Practices Dept. of Natural Resources	Informal Conference Notes (ICN) Informal Discussions Prevent Compliance Problems	Technical Advisory Visit (TAV) Landowner/operator request-documented on ICN	Technical Assistance Visit Compliance Notice (TAVCN) Formal enforcement document when violation is discovered during TAV – When stop work order is not necessary - Not final order of Department and not appealable to FPAB	Notice of Correction (NOC) - Not final order of DNR and not subject to review by FPAB - Used when a violation is discovered and other enforcement documents cannot be served. A SWO is not necessary and ICN or TAV failed to produce desired results	Notice to Comply (NTC) Formal enforcement Document - Final order of Department - Subject to review by FPAB Financial assurances repaired.	Stop Work Order (SWO) Formal notice to operator to shut down - Final order of Department and subject to judicial review by FPAB or courts	Civil Penalties Fines Imposed when other enforcement measures have not been effective -Subject to review by Supervisor of DNR then FPAB	Criminal Citations Used when: intentional, reckless act; repeat offender; monetary gain; severe public resource damage

* Table does reflect major enforcement tools utilized by each program. Table is not inclusive nor does it intend to depict all enforcement tools available to each program.