



WASHINGTON STATE MARITIME COOPERATIVE

Companion Comment on BAP Workgroup Process and Representations of Consensus

Submitted to: Washington State Department of Ecology

Re: WAC 173-182 and WAC 173-186 Rulemaking — Representation of BAP Workgroup Outputs in the Rulemaking Record

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I. Purpose of This Comment

The Washington State Maritime Cooperative (WSMC) submits this companion comment to accompany its substantive filings on the current WAC 173-182 and WAC 173-186 rulemaking cycle. WSMC's substantive comments address specific rule provisions under consideration: Southern Resident Killer Whale deterrence, Unmanned Aircraft Systems, the draft WAC 173-182-710 drill rule, non-floating oil response, technical manuals, and shoreline cleanup and assessment. Each of those substantive filings is predicated, at least in part, on materials developed through the Department's Best Achievable Protection (BAP) Workgroup process of 2025.

This companion comment addresses the process itself, and specifically the manner in which the Department has characterized BAP Workgroup outputs as representing consensus, unanimous agreement, or collective findings of the regulated community. WSMC formally objects to that characterization and asks that the rulemaking record reflect the process as it actually occurred rather than as the Department has summarized it.

II. The BAP Workgroups Were Discussion Forums, Not Deliberative Bodies

The BAP Workgroups convened during 2025 on the topics of SRKW deterrence, UAS, non-floating oil, technical manuals, shoreline cleanup and assessment, and other subjects were structured as discussion forums. They did not operate under adopted procedures, did not have defined membership with voting rights, did not take formal votes, did not adopt findings as a body, and did not produce participant-signed outputs. Participants attended meetings, contributed comments and perspectives, and responded to facilitator questions. That is the extent of what the workgroup process produced.

The documents circulated under titles such as "Workgroup Recommendation Summary," "BAP Final Report," and similar were drafted by the Department or its consultants. Workgroup participants did not adopt those documents as their own findings. Participants did not vote to endorse them. Participants were not asked to sign them or formally affirm their contents. The documents reflect the Department's synthesis of what was discussed and the Department's judgment as to what the discussion supported. They do not reflect consensus in any formal or procedural sense, because no procedure for reaching consensus existed within the workgroup structure.

This is not a criticism of the workgroup model as a method for gathering stakeholder input. Discussion forums have a legitimate role in the development of regulatory proposals. The problem arises only when workgroup outputs are represented in a rulemaking record as consensus positions of the regulated community. They are not. They are agency records of agency-convened discussions.

III. The Department Has Represented Workgroup Outputs as Consensus Across Multiple Rulemaking Topics

The characterization of workgroup outputs as consensus is not confined to a single rulemaking topic. It appears across the current rulemaking cycle in a consistent pattern.

SRKW Deterrence Workgroup.

The Department's 2025 BAP SRKW Deterrence Workgroup Summary presents its recommendations as though they represent the collective findings of the workgroup. WSMC participated in that workgroup and did not agree with a number of the recommendations. WSMC was not asked to adopt the summary as its own position and did not do so. The summary reflects the Department's characterization of the discussion, not a consensus position endorsed by the regulated community.

UAS Workgroup.

The BAP Final Report of December 2025 attributes to the UAS Workgroup a recommendation that WSMC and other workgroup participants expressly did not make. The Department has cited workgroup discussions as support for UAS rulemaking, when the workgroup record does not support rulemaking. This is not a difference of interpretation. It is a factual misrepresentation of what the workgroup discussed and concluded.

SCAT Workgroup.

The DRAFT BAP SCAT Workgroup Recommendation Summary states that Recommendation 1 (incorporation of SCAT into a Shoreline Response Program) was "unanimously agreed upon by members of the workgroup." The workgroup did not take a formal vote on that recommendation. A meeting in which participants did not object in real time is not the same as a unanimous vote to adopt. The claim of unanimity is a characterization, not a procedural finding.

Non-Floating Oil Workgroup.

The NFO Workgroup produced recommendations that WSMC substantially supports, as reflected in WSMC's substantive NFO comments. Even in that case, however, the workgroup output is properly characterized as a set of proposals developed through discussion, not as a unanimous or consensus endorsement by workgroup participants. WSMC's substantive agreement with much of the NFO direction does not convert the NFO workgroup record into a formal consensus document.

Technical Manuals Workshop.

The Department's March 26, 2026 technical manuals workshop identified anticipated rulemaking enhancements. That workshop was described as an information-gathering and input session. It did not produce a consensus recommendation or finding, and it should not be cited in the rulemaking record as such.

The pattern is consistent across the cycle. In each case, the workgroup or workshop was convened, discussed, and produced a Department-authored summary. In each case, the summary has been circulated or cited in a manner that suggests consensus among participants.

In none of these cases did the participants adopt the summary through a defined procedural mechanism that would support such a characterization.

IV. Regulatory Consequence of the Mischaracterization

Rulemaking under the Washington Administrative Procedure Act, RCW 34.05, proceeds from an agency's stated justification for the rule, which becomes part of the rulemaking record subject to later review. When the Department cites BAP workgroup outputs as consensus positions supporting a proposed rule, the citation enters the record as a representation of stakeholder agreement. If that representation is not factually accurate, the record is incomplete. Reviewers of the rule—including the Pollution Control Hearings Board under RCW 43.21B in any subsequent challenge—may reasonably rely on the characterization of workgroup outputs as consensus in evaluating the basis for the rule.

A rulemaking that rests on the characterization of workgroup outputs as consensus when no consensus was actually achieved is a rulemaking that rests on an inaccurate factual premise. WSMC does not assert that the workgroup discussions were without value, or that the topics under consideration do not merit regulatory attention. WSMC asserts only that the workgroup outputs are what they are: records of discussions convened, facilitated, and summarized by the Department. They should be cited in the rulemaking record as such, and no more.

V. Recommendations

WSMC respectfully requests that the Department, in its current and future rulemaking filings and public communications regarding the 2025–2026 WAC 173-182 and WAC 173-186 rulemaking cycle:

First, cease characterizing BAP workgroup outputs as consensus, unanimous agreement, or collective findings of the regulated community. Those characterizations are not supported by the procedural record of the workgroups.

Second, where BAP workgroup outputs are cited in the rulemaking record, identify them accurately as Department-authored summaries of stakeholder discussions. Where individual participants expressed specific positions, cite those positions as attributable to the participant, not to the workgroup as a whole.

Third, for any rulemaking proposal that relies on BAP workgroup outputs as justification, articulate the regulatory basis for the proposal independently of the workgroup characterization. A workgroup discussion that recorded disagreement or unresolved questions is not an adequate record to support rulemaking on the points where disagreement existed.

Fourth, provide workgroup participants with an opportunity to review and formally adopt, decline to adopt, or qualify their agreement with any workgroup summary document before that document is cited in a rulemaking record as reflecting participant views. This is the procedural step that the workgroup process omitted and that would have been necessary to support a representation of consensus.

VI. Conclusion

WSMC participated in the BAP workgroup process in good faith and contributed substantively to the discussions. WSMC's objection is not to having participated, and not to the workgroup model as a method of gathering input. WSMC's objection is to the Department's characterization of those discussions as having produced consensus, when the workgroup structure did not provide any mechanism by which consensus could be formally reached. That

characterization is not supported by the procedural record, and it should not be part of the basis on which the Department proceeds to rulemaking.

This companion comment is incorporated by reference into each of WSMC's substantive rulemaking comments filed in this cycle. To the extent any of those substantive comments addresses a proposed rule provision that traces to a BAP workgroup output, this comment's objection to the characterization of that output as consensus applies to that provision.

Respectfully submitted,

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