



November 20, 2025

Letter No. 281
BY-CRE-04055

Evelyn Pao, P.E., Project Director
Washington State Department of Transportation
I-405/SR 167Program
18911 N Creek Pkwy S, Suite 150
Bothell, WA 98011

Project: I-405/Brickyard to SR 527 – Improvement Project
Contract No.: 009727

**Subject: Notice of Protest – Issue 0186 - Juanita Creek - Temp Stream Diversion
Plan Angular Rock Replacement**

Dear Ms. Pao:

Skanska has received the following WSDOT written determination per WSDOT SL No. 9727-192 dated November 6, 2025:

RFP Section 2.8.4.2.2.6 Temporary Stream Diversion Plan builds upon RFP Section 2.8.1 with the following requirement:

“The Design-Builder shall note that the Hydraulic Project Approval (HPA) (Appendix P) requires a WDFW biologist or their designee to inspect and approve the new channel prior to wetting the new channel.”

Skanska believes WSDOT’s interpretation is incorrect. Skanska respectfully disagrees with WSDOT’s interpretation of the Hydraulic Project Approval. This signed written Notice of Protest of the Engineer’s Written Determination is provided in accordance with General Provisions section 1-04.5. Skanska will supplement the written protest within 14 Calendar Days in accordance with General Provisions 1-04.5.

If you have any questions or concerns, please feel free to contact me.

Regards,

Patrick Prendergast, Vice President

Skanska USA Civil
18911 N Creek Parkway S, Suite 300
Bothell, WA 98011

Attachments:

Brickyard to SR 527_Atlas Letter Of Protest_2025-11-20



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Evelyn Pao, P.E., Project Director
Washington State Department of Transportation
18911 N Creek Pkwy S, Suite 150
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PROJECT: Contract No.: 9727, I-405, Brickyard to SR 527 Improvement Project
SUBJECT: Use of RESP Class C Angular Rock at Juanita Creek Temporary Bypass - Request for Owner-Initiated Change (OIC) and Retraction of the Non-Conformance Issue (NCI)

Dear Evelyn,

Atlas Technical Consultants, on behalf of Skanska, provides the following response to WSDOT's November 6, 2025, letter (SL No. 9727-192) regarding the use of angular rock at Juanita Creek. After review of WSDOT's positions, the Design-Builder maintains that the work was performed in full compliance with the governing Contract Documents and the applicable Hydraulic Project Approval (HPA). The conclusions in SL No. 9727-192 are based on the application of a permitting provision that does not apply to Juanita Creek, resulting in an incorrect determination of non-compliance. Atlas protests the Engineer's determination.

Misapplication of "Inspect and Approve" Requirement

WSDOT asserts that Skanska "disregards WDFW's right to inspect and approve the temporary stream diversion channel prior to implementation," citing RFP Section 2.8.4.2.2.6 and referencing an HPA requirement. The cited provision, however, does not originate from the **Brickyard HPA**¹, which governs all work at Juanita Creek. Instead, it appears nearly verbatim in the **SR 522 to SR 527 HPA**² which governs another location of the contract (Provisions 3 and 135):

"The Habitat Biologist...must inspect and approve the new channel before the stream is diverted into the channel."

No such requirement exists in the Brickyard HPA. The governing permit contains no provision requiring on-site inspection and approval prior to wetting the new stream or temporary diversion channel.

The closest procedural requirement is Provision 66, which states:

"...updated design drawings and streambed mix specifications must be reviewed by the Washington Department of Fish and Wildlife area habitat biologist and authorized through an HPA modification prior to construction."

¹ WDFW (Washington Department of Fish and Wildlife). 2025. Hydraulic Project Approval. I-405, Brickyard Inline Transit Station Project. Permit Number 2021-4-857+01. Application ID: 26582. Issued 2021. Reissued 2025.

² WDFW, (Washington Department of Fish and Wildlife). 2021. Hydraulic Project Approval. I 405, SR 522 Vicinity to SR 527 Express Toll Lanes Improvement Project. Permit Number 2021-4-6+06. Application ID: 0045501. Issued 2021.



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The Design-Builder followed this pathway exactly. WDFW reviewed, authorized, and formally approved the updated design through the July 7, 2025, HPA modification.

Further, RFP Section 2.8.4.2.2.6 instructs the Design-Builder only to “note” the referenced HPA language. The use of “note” is informational in nature; it does not impose conditions from an unrelated HPA. As such, WSDOT cannot impose the inspection and approval requirement from the SR 522 to 527 HPA on the Juanita Creek work.

Because the governing HPA contains no inspection and approval clause, the assertion that Skanska “disregards WDFW’s right to inspect and approve the channel” is factually incorrect and based on a misapplication of a requirement taken from a different, non-governing HPA.

Compliance with the Contract Documents and the Governing HPA

At the time of construction, the Design-Builder satisfied all requirements of the Contract Documents and the Brickyard HPA:

- HPA Provision 3 – Approved Plans: The Design-Builder performed the work in accordance with approved plans uploaded to APPS website.
- HPA Provision 66 – HPA Modification: WDFW reviewed and approved the design, materials, and streambed mix via formal HPA modification issued on July 7, 2025.
- No requirement existed for WDFW inspection and approval of the temporary channel prior to wetting.
- As reflected in prior correspondence related to this matter, the governing HPA contains no prohibition against angular rock in the temporary bypass or stilling basin, and WSDOT’s November 6 letter does not dispute that point.

The Design-Builder therefore met all procedural and substantive requirements in effect at the time of installation.

General Provision 1-03.7 Does Not Apply to Work That Was Compliant When Installed

WSDOT’s conclusion that a “reinterpretation after the fact” constitutes non-compliance based upon General Provision (GP) 1-03.7 mischaracterizes both the question raised in our October 17 letter and the applicable contractual standard. The question raised in our earlier letter was whether WDFW’s changed interpretation, issued after the design had been approved and construction had begun, could retroactively impose a new requirement on already compliant work.

As demonstrated above, the work conformed to the Contract Documents and the HPA modification in effect at the time of construction. A later shift in interpretation does not transform previously compliant work into non-conforming work. GP 1-03.7 applies only when work was non-conforming when installed.

For the work at Juanita Creek, the following facts are known:

- The design met the Contract’s material-selection hierarchy,
- The Design-Builder submitted the TSDP in accordance with RFP Section 2.8.4.2.2.6,
- WDFW authorized the design and materials via an HPA modification, and
- No governing requirement expressly called for WDFW inspection and approval prior to wetting.

The August 19, 2025, WDFW letter introduced a new interpretation after the Design-Builder installed the work. This reinterpretation, and not the Contract Documents, was the basis for WDFW’s (and WSDOT’s) revised position. The Contract establishes compliance based on the requirements in effect at the time the work is performed, not retroactively based on later agency reinterpretations.

Because the work conformed to the Contract Documents at the time of installation, GP 1-03.7 does not apply.



General Provision 1-02.1 Is Similarly Not Applicable

WSDOT also cites GP 1-02.1, which maintains contractor responsibility even if WSDOT approves non-compliant work. This provision applies when a contractor submits work that was never compliant with the Contract Documents.

Here, the design and installation did meet all governing requirements when the Design-Builder performed the work:

- The design met the RFP's hierarchy and requirements.
- WSDOT reviewed the submittal without identifying any conflict.
- WDFW approved the design through permit modification.
- No applicable provision prohibited the material used.
- No applicable provision required WDFW inspection and approval.

GP 1-02.1 does not assign responsibility to the Design-Builder for new or revised agency interpretations issued after installation. GP 1-02.1 does not govern this situation.

The August 19 Determination Cannot Retroactively Render Approved Work Non-Conforming

WDFW's August 19, 2025 interpretation is the first document to assert that angular rock is prohibited. Prior to that date:

- All Contract Documents and permit authorizations indicated conformance.
- WDFW and WSDOT had accepted the design and materials; and
- Construction proceeded under a valid, governing permit.

Retroactive reinterpretation cannot convert previously compliant, approved work into "non-conforming work" for the purposes of GP 1-03.7 or GP 1-02.1.

For these reasons, the Non-Conformance Issue (NCI) raised in SL No. 9727-192 is unsupported by the Contract Documents, the governing HPA, and the project record.

Conclusion

The Design-Builder complied with all requirements of the Brickyard HPA and Contract Documents at the time the temporary diversion channel was constructed. WSDOT's determination relies on a permitting requirement that does not apply to the Juanita Creek work and therefore establishes an incorrect basis for alleging non-compliance. Because the work was conforming when installed, and because the August 19 reinterpretation cannot retroactively change that compliance status, neither GP 1-03.7 nor GP 1-02.1 is triggered.

Considering the above, Atlas protests the Engineer's determination. The Design-Builder respectfully requests that WSDOT withdraw the Non-Conformance Issue (NCI) associated with SL No. 9727-192 and issue an owner-initiated change (OIC) for the rework.

Respectfully,



Mike Foster
Design-Build Environmental Compliance Manager
ATLAS TECHNICAL CONSULTANTS, LLC

CC: P. Prendergast, R. Prescott



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