



PROPOSED RULE MAKING

CR-102 (June 2004)

(Implements RCW 34.05.320)

Do NOT use for expedited rule making

Agency: Forest Practices Board

- Preproposal Statement of Inquiry was filed as WSR 10-14-038; or
- Expedited Rule Making--Proposed notice was filed as WSR _____; or
- Proposal is exempt under RCW 34.05.310(4).

- Original Notice
- Supplemental Notice to WSR _____
- Continuance of WSR _____

Title of rule and other identifying information: (Describe Subject)

Notice of Forest Practices to Affected Indian Tribes (WAC 222-20-120) and Western Washington riparian management zones (WAC 222-30-021)

Hearing location(s):

Olympia: Natural Resources Building
1111 Washington Street SE, Room 172
360.902.1400

Date: January 3, 2012 Time: 6 p.m.

Ellensburg: Department of Natural Resources
713 E. Bowers
509.925.8510

Date: January 5, 2012 Time: 6 p.m.

Date of intended adoption: February 14 or 15, 2012
(Note: This is **NOT** the **effective** date)

Submit written comments to:

Name: Patricia Anderson, DNR Forest Practices Division
Address: PO Box 47012
Olympia, WA 98504-7012
e-mail forest.practicesboard@dnr.wa.gov
fax (360) 902-1428 by January 6, 2012

Assistance for persons with disabilities: Contact

Forest Practices Division at (360) 902-1400 by December 20, 2011
TTY (360) 902-1125

Purpose of the proposal and its anticipated effects, including any changes in existing rules:

To clarify language and to resolve issues with the rule's landowner-tribe meeting requirement.

Reasons supporting proposal:

This rule language was developed and supported by the Timber/Fish/Wildlife Cultural Resources Roundtable.

Statutory authority for adoption:

RCW 76.09.040

Statute being implemented:

N/A

Is rule necessary because of a:

- Federal Law? Yes No
 - Federal Court Decision? Yes No
 - State Court Decision? Yes No
- If yes, CITATION:

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: September 07, 2011
TIME: 3:13 PM

WSR 11-19-009

DATE

August 10, 2011

NAME (type or print)

Bridget Moran

SIGNATURE

TITLE

Chair

(COMPLETE REVERSE SIDE)

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:

Name of proponent: (person or organization)

Forest Practices Board

- Private
 Public
 Governmental

Name of agency personnel responsible for:

Name	Office Location	Phone
Drafting..... Sherri Felix	1111 Washington Street SE, Olympia	(360) 902-1446
Implementation.... Marc Engel	1111 Washington Street SE, Olympia	(360) 902-1390
Enforcement..... Darin Cramer	1111 Washington Street SE, Olympia	(360) 902-1088

Has a small business economic impact statement been prepared under chapter 19.85 RCW?

Yes. Attach copy of small business economic impact statement.

A copy of the statement may be obtained by contacting:

Name: Patricia Anderson
Address: Department of Natural Resources
P.O. Box 47012
Olympia, WA 98506

phone (360) 902.1413
fax (360)902.1428
e-mail forest.practicesboard@dnr.wa.gov

No. Explain why no statement was prepared.

Is a cost-benefit analysis required under RCW 34.05.328?

Yes A preliminary cost-benefit analysis may be obtained by contacting:

Name: Patricia Anderson
Address: Department of Natural Resources
P.O. Box 47012
Olympia, WA 98506

phone (360) 902.1413
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No: Please explain:

AMENDATORY SECTION (Amending WSR 07-20-044, filed 9/26/07, effective 10/27/07)

WAC 222-20-120 Notice of forest practices that may contain cultural resources to affected Indian tribes. (1) The department shall notify affected Indian tribes of all applications in geographic areas of ((concern to)) interest that have been identified by such tribes, including those ((involving)) areas that may contain cultural resources((, identified by the tribes)).

(2) Where an application ((involves)) is within a tribe's geographic area of interest and contains cultural resources the landowner, at the tribe's discretion, shall meet with the affected tribe(s) prior to the application decision due date with the objective of agreeing on a plan for protecting the archaeological or cultural value. ((The department may condition the application in accordance with the plan.))

(3) ((Affected Indian tribes shall determine whether plans for protection of cultural resources will be forwarded to the department of archaeological and historic preservation (DAHP).)) The department will consider the requirements in subsection (2) of this section complete if prior to the application decision due date:

(a) The landowner meets with the tribe(s) and notifies the department that a meeting took place and whether or not there is agreement on a plan. The department shall confirm the landowner's information with the tribe(s); or

(b) The department receives written notice from the tribe(s) that the tribe(s) is declining a meeting with the landowner; or

(c) The tribe(s) does not respond to the landowner's attempts to meet and the landowner provides to the department:

(i) Written documentation of telephone or e-mail attempts to meet with the tribe's designated cultural resources contact for forest practices; and

(ii) A copy of a certified letter with a signed return receipt addressed to the tribe's cultural resources contact for forest practices requesting a meeting with the tribe; or

(d) The department receives other acceptable documentation.

(4) The department may condition the application in accordance with the plan.

AMENDATORY SECTION (Amending WSR 09-18-032, filed 8/25/09, effective 9/25/09)

WAC 222-30-021 *Western Washington riparian management zones.

These rules apply to all typed waters on forest land in Western Washington, except as provided in WAC 222-30-023. RMZs are measured horizontally from the outer edge of the bankfull width or channel migration zone, whichever is greater, and extend to the limits as described in this section. See board manual section 7 for riparian design and layout guidelines.

*(1) **Western Washington RMZs for Type S and F Waters** have three zones: The core zone is nearest to the water, the inner zone is the middle zone, and the outer zone is furthest from the water. (See definitions in WAC 222-16-010.) RMZ dimensions vary depending on the site class of the land, the management harvest option, and the bankfull width of the stream. See tables for management options 1 and 2 below.

None of the limitations on harvest in each of the three zones listed below will preclude or limit the construction and maintenance of roads for the purpose of crossing streams in WAC 222-24-030 and 222-24-050, or the creation and use of yarding corridors in WAC 222-30-060(1).

The shade requirements in WAC 222-30-040 must be met regardless of harvest opportunities provided in the inner zone RMZ rules. See board manual section 1.

(a) **Core zones.** No timber harvest or construction is allowed in the core zone except operations related to forest roads as detailed in subsection (1) of this section. Any trees cut for or damaged by yarding corridors in the core zone must be left on the site. Any trees cut as a result of road construction to cross a stream may be removed from the site, unless used as part of a large woody debris placement strategy or as needed to reach stand requirements.

(b) **Inner zones.** Forest practices in the inner zone must be conducted in such a way as to meet or exceed stand requirements to achieve the goal in WAC 222-30-010(2). The width of the inner zone is determined by site class, bankfull width, and management option. Timber harvest in this zone must be consistent with the stand requirements in order to reach the desired future condition targets.

"Stand requirement" means a number of trees per acre, the basal area and the proportion of conifer in the combined inner zone and adjacent core zone so that the growth of the trees would meet desired future conditions. The following table defines basal area targets when the stand is one hundred forty years old.

Site Class	Desired future condition target basal area per acre (at 140 years)
I	325 sq. ft.
II	325 sq. ft.
III	325 sq. ft.
IV	325 sq. ft.
V	325 sq. ft.

Growth modeling is necessary to calculate whether a particular stand meets stand requirement and is on a trajectory towards these desired future condition basal area target. The appropriate growth model will be based on stand characteristics and will include at a minimum, the following components: The number of trees by diameter class, the percent of conifer and hardwood, and the age of the stand. See board manual section 7.

(i) **Hardwood conversion in the inner zone.** When the existing stands in the combined core and inner zone do not meet stand requirements, no harvest is permitted in the inner zone, except in connection with hardwood conversion.

(A) The landowner may elect to convert hardwood-dominated stands in the **inner zone** to conifer-dominated stands. Harvesting and replanting shall be in accordance with the following limits:

(I) Conversion activities in the **inner zone** of any harvest unit are only allowed where all of the following are present:

- Existing stands in the combined core and inner zone do not meet stand requirements (WAC 222-30-021 (1)(b));
- There are fewer than fifty-seven conifer trees per acre eight inches or larger dbh in the conversion area;
- There are fewer than one hundred conifer trees per acre larger than four inches dbh in the conversion area;
- There is evidence (such as conifer stumps, historical photos, or a conifer understory) that the conversion area can be successfully reforested with conifer and support the development of conifer stands;
- The landowner owns five hundred feet upstream and five hundred feet downstream of the harvest unit;
- The core and inner zones contain no stream adjacent parallel roads;
- Riparian areas contiguous to the proposed harvest unit are owned by the landowner proposing to conduct the conversion activities, and meet shade requirements of WAC 222-30-040 or have a seventy-five foot buffer with trees at least forty feet tall on both sides of the stream for five hundred feet upstream and five hundred feet downstream of the proposed harvest unit (or the length of the stream, if less);
- If the landowner has previously converted hardwood-dominated stands, then post-harvest treatments must have been performed to the satisfaction of the department.

(II) In addition to the conditions set forth above, permitted conversion activities in the **inner zone** of any harvest unit are limited by the following:

- Each continuous conversion area is not more than five

hundred feet in length; two conversion areas will be considered "continuous" unless the no-harvest area separating the two conversion areas is at least half the length of the larger of the two conversion areas.

- Type S and F (Type 1, 2, or 3) Water: Up to fifty percent of the inner zone area of the harvest unit on one side of the stream may be converted provided that:

- ◆ The landowner owns the opposite side of the stream and the landowner's riparian area on the opposite bank meets the shade requirements of WAC 222-30-040 or has a seventy-five foot buffer of trees at least forty feet tall or:

- ◆ The landowner does not own land on the opposite side of the stream but the riparian area on the opposite bank meets the shade requirements of WAC 222-30-040 or has a seventy-five foot buffer of trees at least forty feet tall.

- Not more than twenty-five percent of the inner zone of the harvest unit on both sides of a Type S or F Water may be converted if the landowner owns both sides.

(III) Where conversion is allowed in the **inner zone**, trees within the conversion area may be harvested except that:

- Conifer trees larger than twenty inches dbh shall not be harvested;

- Not more than ten percent of the conifer stems greater than eight inches dbh, exclusive of the conifer noted above, within the conversion area may be harvested; and

- The landowner must exercise reasonable care in the conduct of harvest activities to minimize damage to all residual conifer trees within the conversion area including conifer trees less than eight inches dbh.

(IV) Following harvest in conversion areas, the landowner must:

- Reforest the conversion area with **conifer** tree species suitable to the site in accordance with the requirements of WAC 222-34-010; and

- Conduct post-harvest treatment of the site until the conifer trees necessary to meet acceptable stocking levels in WAC 222-34-010(2) have crowns above the brush or until the conversion area contains a minimum of one hundred fifty conifer trees greater than eight inches dbh per acre.

- Notify the department in writing within three years of the approval of the forest practices application for hardwood conversion, if the hardwood conversion has been completed.

(V) **Tracking hardwood conversion.** The purpose of tracking hardwood conversion is to determine if hardwood conversion is resulting in adequate enhancement of riparian functions toward the desired future condition while minimizing the short term impacts on functions. The department will use existing or updated data bases developed in cooperation with the Washington Hardwoods Commission to identify watershed administrative units (WAUs) with a high percentage of hardwood-dominated riparian areas and, thus have the potential for excessive hardwood conversion under these rules. The department will track the rate of conversion of hardwoods in the

riparian zone: (1) Through the application process on an annual basis; and (2) at a WAU scale on a biennial basis as per WAC 222-30-120 through the adaptive management process which will develop thresholds of impact for hardwood conversion at the watershed scale.

(ii) **Harvest options.**

(A) No inner zone management. When the existing stands in the combined core and inner zone do not meet stand requirements, no harvest is permitted in the inner zone. When no harvest is permitted in the inner zone or the landowner chooses not to enter the inner zone, the width of core, inner and outer zones are as provided in the following table:

No inner zone management RMZ widths for Western Washington

Site Class	RMZ width	Core zone width (measured from outer edge of bankfull width or outer edge of CMZ of water)	Inner zone width (measured from outer edge of core zone)		Outer zone width (measured from outer edge of inner zone)	
			stream width ≤10'	stream width >10'	stream width ≤10'	stream width >10'
			I	200'	50'	83'
II	170'	50'	63'	78'	57'	42'
III	140'	50'	43'	55'	47'	35'
IV	110'	50'	23'	33'	37'	27'
V	90'	50'	10'	18'	30'	22'

(B) Inner zone management. If trees can be harvested and removed from the inner zone because of surplus basal area consistent with the stand requirement, the harvest and removal of the trees must be undertaken consistent with one of two options:

(I) **Option 1. Thinning from below.** The objective of thinning is to distribute stand requirement trees in such a way as to shorten the time required to meet large wood, fish habitat and water quality needs. This is achieved by increasing the potential for leave trees to grow larger than they otherwise would without thinning. Thinning harvest under option 1 must comply with the following:

- Residual trees left in the combined core and inner zones must meet stand requirements necessary to be on a trajectory to desired future condition. See board manual section 7 for guidelines.

- Thinning must be from below, meaning the smallest dbh trees are selected for harvest first, then progressing to successively larger diameters.

- Thinning cannot decrease the proportion of conifer in the stand.

- Shade retention to meet the shade rule must be confirmed by the landowner for any harvest inside of seventy-five feet from the outer edge of bankfull width or outer edge of CMZ, whichever is greater.

- The number of residual conifer trees per acre in the inner zone will equal or exceed fifty-seven.

Option 1. Thinning from below.

Site class	RMZ width	Core zone width (measured from outer edge of bankfull width or outer edge of CMZ of water)	Inner zone width (measured from outer edge of core zone)		Outer zone width (measured from outer edge of inner zone)	
			stream width ≤10'	stream width >10'	stream width ≤10'	stream width >10'
I	200'	50'	83'	100'	67'	50'
II	170'	50'	63'	78'	57'	42'
III	140'	50'	43'	55'	47'	35'
IV	110'	50'	23'	33'	37'	27'
V	90'	50'	10'	18'	30'	22'

(II) **Option 2. Leaving trees closest to the water.**

Management option 2 applies only to riparian management zones for site class I, II, and III on streams that are less than or equal to ten feet wide and RMZs in site class I and II for streams greater than ten feet wide. Harvest must comply with the following:

- Harvest is not permitted within thirty feet of the core zone for streams less than or equal to ten feet wide and harvest is not permitted within fifty feet of the core zone for streams greater than ten feet wide;

- Residual leave trees in the combined core and inner zone must meet stand requirements necessary to be on a trajectory to desired future condition. See board manual section 7 for calculating stand requirements;

- A minimum of twenty conifers per acre, with a minimum twelve inch dbh, will be retained in any portion of the inner zone where even-age harvest occurs. These riparian leave trees will be counted towards meeting applicable stand requirements. The number of riparian leave trees cannot be reduced below twenty for any reason.

- Trees are selected for harvest starting from the outer most portion of the inner zone first then progressively closer to the stream.

- If (II) of this subsection results in surplus basal area per the stand requirement, the landowner may take credit for the surplus by harvesting additional riparian leave trees required to be left in the adjacent outer zone on a basal area-for-basal area basis. The number of leave trees in the outer zone can be reduced only to a minimum of ten trees per acre.

Option 2. Leaving trees closest to water.

Site class	RMZ width	Core zone width (measured from outer edge of bankfull width or outer edge of CMZ of water)	Inner zone width				Outer zone width (measured from outer edge of inner zone)	
			stream width ≤10'	stream width ≤10'	stream width >10'	stream width >10'	stream width ≤10'	stream width >10'
				minimum floor distance		minimum floor distance		
			(measured from outer edge of core zone)	(measured from outer edge of core zone)	(measured from outer edge of core zone)	(measured from outer edge of core zone)		
I	200'	50'	84'	30'	84'	50'	66'	66'
II	170'	50'	64'	30'	70'	50'	56'	50'
III	140'	50'	44'	30'	**	**	46'	**

**Option 2 for site class III on streams >10' is not permitted because of the minimum floor (100') constraint.

(iii) **Where the basal area components of the stand requirement cannot be met** within the sum of the areas in the inner and core zone due to the presence of a stream-adjacent parallel road in the inner or core zone, a determination must be made of the approximate basal area that would have been present in the inner and core zones if the road was not occupying space in the core or inner zone and the shortfall in the basal area component of the stand requirement. See definition of "stream-adjacent parallel road" in WAC 222-16-010.

(A) Trees containing basal area equal to the amount determined in (iii) of this subsection will be left elsewhere in the inner or outer zone, or if the zones contain insufficient riparian leave trees, substitute riparian leave trees will be left within the RMZ width of other Type S or F Waters in the same unit or along Type Np or Ns Waters in the same unit in addition to all other RMZ requirements on those same Type S, F, Np or Ns Waters.

(B) When the stream-adjacent road basal area calculated in (iii) of this subsection results in an excess in basal area (above stand requirement) then the landowner may receive credit for such excess which can be applied on a basal area-by-basal area basis against the landowner's obligation to leave trees in the outer zone of the RMZ of such stream or other waters within the same unit, provided that the number of trees per acre in the outer zone is not reduced to less than ten trees per acre.

(C) When the basal area requirement cannot be met, as explained in (iii) of this subsection, the shortfall may be reduced through the implementation of an acceptable large woody debris placement plan. See board manual section 26 for guidelines.

(iv) If a harvest operation includes both yarding and harvest activities within the RMZ, all calculations of basal area for stand requirements will be determined as if the yarding corridors were constructed prior to any other harvest activities. If trees cut or damaged by yarding are taken from excess basal area, these trees may be removed from the inner zone. Trees cut or damaged by

yarding in a unit which does not meet the basal area target of the stand requirements cannot be removed from the inner zone. Any trees cut or damaged by yarding in the core zone may not be removed.

(c) **Outer zones.** Timber harvest in the outer zone must leave twenty riparian leave trees per acre after harvest. "**Outer zone riparian leave trees**" are trees that must be left after harvest in the outer zone in Western Washington. Riparian leave trees must be left uncut throughout all future harvests:

Outer zone riparian leave tree requirements

Application	Leave tree spacing	Tree species	Minimum dbh required
Outer zone	Dispersed	Conifer	12" dbh or greater
Outer zone	Clumped	Conifer	12" dbh or greater
Protection of sensitive features	Clumped	Trees representative of the overstory including both hardwood and conifer	8" dbh or greater

The twenty riparian leave trees to be left can be reduced in number under the circumstances delineated in (c)(iv) of this subsection. The riparian leave trees must be left on the landscape according to one of the following two strategies. A third strategy is available to landowners who agree to a LWD placement plan.

(i) **Dispersal strategy.** Riparian leave trees, which means conifer species with a diameter measured at breast height (dbh) of twelve inches or greater, must be left dispersed approximately evenly throughout the outer zone. If riparian leave trees of twelve inches dbh or greater are not available, then the next largest conifers must be left. If conifers are not present, riparian leave trees must be left according to the clumping strategy in subsection (ii) below.

(ii) **Clumping strategy.** Riparian leave trees must be left clumped in the following way:

(A) Clump trees in or around one or more of the following **sensitive features** to the extent available within the outer zone. When clumping around sensitive features, riparian leave trees must be eight inches dbh or greater and representative of the overstory canopy trees in or around the sensitive feature and may include both hardwood and conifer species. Sensitive features are:

- (I) Seeps and springs;
- (II) Forested wetlands;
- (III) Topographic locations (and orientation) from which leave trees currently on the site will be delivered to the water;
- (IV) Areas where riparian leave trees may provide windthrow protection;
- (V) Small unstable, or potentially unstable, slopes not of sufficient area to be detected by other site evaluations. See WAC 222-16-050 (1)(d).

(VI) Archaeological ((or historical)) sites ((registered with)) or historic archaeological resources as defined in RCW

27.53.030;

(VII) Historic sites eligible for listing on the National Register of Historic Places or the Washington Heritage Register as determined by the Washington state department of archaeology and historic preservation. See WAC 222-16-050 (1) ~~((f))~~ (f); or

~~((VII))~~ (VIII) Sites containing evidence of Native American cairns, graves or glyptic records as provided for in chapters 27.44 and 27.53 RCW. See WAC 222-16-050 (1)(f).

(B) If sensitive features are not present, then clumps must be well distributed throughout the outer zone and the leave trees must be of conifer species with a dbh of twelve inches or greater. When placing clumps, the applicant will consider operational and biological concerns. Tree counts must be satisfied regardless of the presence of stream-adjacent parallel roads in the outer zone.

(iii) **Large woody debris in-channel placement strategy.** A landowner may design a LWD placement plan in cooperation with the department of fish and wildlife. The plan must be consistent with guidelines in board manual section 26. The landowner may reduce the number of trees required to be left in the outer zone to the extent provided in the approved LWD placement plan. Reduction of trees in the outer zone must not go below a minimum of ten trees per acre. If this strategy is chosen, a complete forest practices application must include a copy of the WDFW approved hydraulics project approval (HPA) permit.

(iv) **Twenty riparian leave trees must be left after harvest** with the exception of the following:

(A) If a landowner agrees to implement a placement strategy, see (iii) of this subsection.

(B) If trees are left in an associated channel migration zone, the landowner may reduce the number of trees required to be left according to the following:

(I) Offsets will be measured on a basal area-for-basal area basis.

(II) Conifer in a CMZ equal to or greater than six inches dbh will offset conifer in the outer zone at a one-to-one ratio.

(III) Hardwood in a CMZ equal to or greater than ten inches dbh will offset hardwood in the outer zone at a one-to-one ratio.

(IV) Hardwood in a CMZ equal to or greater than ten inches dbh will offset conifer in the outer zone at a three-to-one ratio.

*** (2) Western Washington protection for Type Np and Ns Waters.**

(a) An **equipment limitation zone** is a thirty-foot wide zone measured horizontally from the outer edge of the bankfull width of a Type Np or Ns Water where equipment use and other forest practices that are specifically limited by these rules. It applies to all perennial and seasonal streams.

(i) On-site mitigation is required if any of the following activities exposes the soil on more than ten percent of the surface area of the zone:

(A) Ground based equipment;

(B) Skid trails;

(C) Stream crossings (other than existing roads); or

(D) Cabled logs that are partially suspended.

(ii) Mitigation must be designed to replace the equivalent of lost functions especially prevention of sediment delivery. Examples include water bars, grass seeding, mulching, etc.

(iii) Nothing in this subsection (2) reduces or eliminates the department's authority to prevent actual or potential material damage to public resources under WAC 222-46-030 or 222-46-040 or any related authority to condition forest practices notifications or applications.

(b) **Sensitive site and RMZs protection along Type Np Waters.** Forest practices must be conducted to protect Type Np RMZs and sensitive sites as detailed below:

(i) A fifty-foot, no-harvest buffer, measured horizontally from the outer edge of bankfull width, will be established along each side of the Type Np Water as follows:

Required no-harvest, 50-foot buffers on Type Np Waters.

Length of Type Np Water from the confluence of Type S or F Water	Length of 50' buffer required on Type Np Water (starting at the confluence of the Type Np and connecting water)
Greater than 1000'	500'
Greater than 300' but less than 1000'	Distance of the greater of 300' or 50% of the entire length of the Type Np Water
Less than or equal to 300'	The entire length of Type Np Water

(ii) No timber harvest is permitted in an area within fifty feet of the outer perimeter of a soil zone perennially saturated from a headwall seep.

(iii) No timber harvest is permitted in an area within fifty feet of the outer perimeter of a soil zone perennially saturated from a side-slope seep.

(iv) No timber harvest is permitted within a fifty-six foot radius buffer patch centered on the point of intersection of two or more Type Np Waters.

(v) No timber harvest is permitted within a fifty-six foot radius buffer patch centered on a headwater spring or, in the absence of a headwater spring, on a point at the upper most extent of a Type Np Water as defined in WAC 222-16-030(3) and 222-16-031.

(vi) No timber harvest is permitted within an alluvial fan.

(vii) At least fifty percent of a Type Np Waters' length must be protected by buffers on both sides of the stream (2-sided buffers). Buffered segments must be a minimum of one hundred feet in length. If an operating area is located more than five hundred feet upstream from the confluence of a Type S or F Water and the Type Np Water is more than one thousand feet in length, then buffer the Type Np Water according to the following table. If the

percentage is not met by protecting sensitive sites listed in (b)(i) through (vii) of this subsection, then additional buffers are required on the Type Np Water to meet the requirements listed in the table.

Minimum percent of length of Type Np Waters to be buffered when more than 500 feet upstream from the confluence of a Type S or F Water

Total length of a Type Np Water upstream from the confluence of a Type S or F Water	Percent of length of Type Np Water that must be protected with a 50 foot no harvest buffer more than 500 feet upstream from the confluence of a Type S or F Water
1000 feet or less	Refer to table in this subsection (i) above
1001 - 1300 feet	19%
1301 - 1600 feet	27%
1601 - 2000 feet	33%
2001 - 2500 feet	38%
2501 - 3500 feet	42%
3501 - 5000 feet	44%
Greater than 5000 feet	45%

The landowner must select the necessary priority areas for additional two-sided buffers according to the following priorities:

(A) Low gradient areas;

(B) Perennial water reaches of nonsedimentary rock with gradients greater than twenty percent in the tailed frog habitat range;

(C) Hyporheic and groundwater influence zones; and

(D) Areas downstream from other buffered areas.

Except for the construction and maintenance of road crossings and the creation and use of yarding corridors, no timber harvest will be allowed in the designated priority areas. Landowners must leave additional acres equal to the number of acres (including partial acres) occupied by an existing stream-adjacent parallel road within a designated priority area buffer.

(c) None of the limitations on harvest in or around Type Np Water RMZs or sensitive sites listed in (b) of this subsection will preclude or limit:

(i) The construction and maintenance of roads for the purpose of crossing streams in WAC 222-24-030 and 222-24-050.

(ii) The creation and use of yarding corridors in WAC 222-30-060(1).

To the extent reasonably practical, the operation will both avoid creating yarding corridors or road crossings through Type Np Water RMZ or sensitive sites and associated buffers, and avoid management activities which would result in soil compaction, the loss of protective vegetation or sedimentation in perennially moist areas.

Where yarding corridors or road crossings through Type Np Water RMZs or sensitive sites and their buffers cannot reasonably be avoided, the buffer area must be expanded to protect the sensitive site by an area equivalent to the disturbed area or by providing comparable functions through other management initiated efforts.

Landowners must leave additional acres equal to the number of acres (including partial acres) occupied by an existing stream-adjacent parallel road within a Type Np Water RMZs or sensitive site buffer.

PRELIMINARY ECONOMIC ANALYSIS
Forest Practices Board
Rule Making Affecting the Notice of Forest Practices to Affected Indian Tribes
By Gretchen Robinson, Natural Resource Specialist
Department of Natural Resources
July 2011

The Forest Practices Board (Board) is proposing to amend WAC 222-20-120, *Notice of forest practices to affected Indian tribes*. The proposed amendments fit the criteria for “significant legislative rules” in the Administrative Procedure Act (RCW 34.05.328).¹ Before adopting significant legislative rules agencies are required, in part, to do the following:

- Determine the rule is needed to achieve the general goals and specific objectives of statute;
- Analyze alternatives to rule making and the consequences of not adopting the rule;
- Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented; and
- Determine that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the goals and objectives.

Those requirements are fulfilled in this preliminary economic analysis.

GOALS AND OBJECTIVES

The goal of amending WAC 222-20-120 is to establish an improved process for forest landowners to meet their obligations related to contacting tribes and planning for cultural resource protection.

The Forest Practices Act (chapter 76.09 RCW) lists policies associated with maintaining a viable forest products industry consistent with public resource protection. The act declares it is in the public interest to create and maintain rules that, among many other goals, “... foster cooperation among managers of public resources, forest landowners, Indian tribes and the citizens of the state ...”²

The proposed rule amendment promotes cooperative relationships between forest landowners and tribes.³ It also clarifies the opportunities that tribes have to work with landowners to protect cultural resources of value to them, and it provides certainty for landowners that their obligations can be met within forest practices application (FPA) time limits.⁴ The rule proposal, therefore, achieves the

¹ The Board is also proposing to correct references to laws pertaining to historic archaeological resources in WAC 222-30-021(1)(c)(ii)(A). Those amendments do not qualify as significant legislative rules because they do not change the effect of that section; they are not, therefore, included in this analysis.

² RCW 76.09.010(2)(i).

³ “Forest landowners” or “landowners” in this document means those persons responsible for the conduct of forest practices activities, including managers of public and private forest lands.

⁴ Application time limits are explained in [WAC 222-20-020](#).

Forest Practices Act policy stated above by helping to maintain the forest products industry while promoting relationships and coordination among forest landowners and tribes.

CONTEXT

The proposal is a recommendation from the Timber/Fish/Wildlife Cultural Resources Roundtable. The Roundtable is a multi-caucus group whose participants are representatives of individual tribes, large and small forest landowners, and state agency staff representing the Department of Archaeology and Historic Preservation (DAHP) and the Department of Natural Resources' (DNR's) Forest Practices Division and Forest Resources and Conservation Division.

Part of the Roundtable's purpose is to provide insight to the Forest Practices Board on cultural resources issues affecting forest practices and provide consensus rule making recommendations for the Board's consideration.⁵ In regard to WAC 222-20-120, in the past couple of years the Roundtable has received input from tribes, landowners, DAHP and DNR that the process in current rule does not provide clear procedures. The Board is now considering the draft rule proposal that DNR staff presented to the Board at its May 10, 2011 meeting on behalf of the Roundtable.⁶

WAC 222-20-120 was first adopted in 1987 to implement measures in the Timber/Fish/Wildlife Agreement to:

*... accommodate tribal concerns [related to cultural resources], while providing landowners with the opportunity to resolve any conflicts in a timely and cooperative manner. These measures will also preserve the anonymity of these designated sites which is a large concern to the affected tribes.*⁷

The intent was, and still is, for landowners to meet with tribes within FPA approval time limits with the objective of agreeing on a plan for protecting cultural resources.⁸ The rule adopted at the time, and as it exists today, is as follows:

WAC 222-20-120 Notice of forest practices to affected Indian tribes.

- (1) *The department shall notify affected Indian tribes of all applications of concern to such tribes, including those involving cultural resources, identified by the tribes.*
- (2) *Where an application involves cultural resources the landowner shall meet with the affected tribe(s) with the objective of agreeing on a plan for protecting the archaeological or cultural value. The department may condition the application in accordance with the plan.*
- (3) *Affected Indian tribes shall determine whether plans for protection of cultural resources will be forwarded to the department of archaeological and historic preservation (DAHP).*

⁵ The purpose, membership, and other information about the Timber/Fish/Wildlife Cultural Resources Roundtable can be seen in its charter; go to http://www.dnr.wa.gov/Publications/bc_tfw_crc_charter_final.pdf.

⁶ Background information on the draft rule can be found in the file labeled, "20-120 Rule Making-Felix.pdf" at http://www.dnr.wa.gov/Publications/bc_fp_materials_20110510.pdf.

⁷ Timber/Fish/Wildlife Agreement, 1987, p. 38. http://www.dnr.wa.gov/Publications/fp_tfw_agreement_19870217.pdf

⁸ WAC 222-20-020 describes application time limits.

The major problems with the current rule language are:

- The implication that landowners cannot fulfill the requirement to meet with tribes if communication does not take place; and
- The implication that DNR cannot approve FPAs unless the landowner meets with the tribe.

This has caused difficulty for landowners, tribes, and DNR. There are instances where landowners have contacted tribes as prescribed by the rule and have not received a return communication from a tribe. The tribe may not have any concerns with the proposed activities, but the current rule does not address what landowners should do when there is no response from a tribe. DNR must receive documentation that landowner-tribe communications took place in order to approve the landowner's application.⁹

DNR reports it has disapproved, and landowners have withdrawn, FPAs based on the lack of a response from a tribe, although this has occurred on only a small proportion of FPAs. (Forest Practices Application Review System [FPARS] records show in the years 2005 through 2010, only 343 out of 30,023 FPAs, or 1.1 percent, included proposed activities in the location of a cultural site.¹⁰) But when a disapproval or withdrawal does occur due to the lack of a response from a tribe it can be costly for landowners. This is discussed in the "Cost-Benefit Analysis" to follow.

PROPOSED RULE

The proposed change to WAC 222-20-120 creates a clearer FPA process, clarifies terminology, and eliminates language that imposes requirements on tribes. A clear process is accomplished through a proposed new subsection 3. It offers alternative means by which landowners can fulfill their obligations and DNR will consider that the landowner-tribe meeting requirement is met:

- (3) *The department will consider the requirements in subsection (2) complete if prior to the application decision due date:*
 - (a) *The landowner meets with the tribe(s) and notifies the department that a meeting took place and whether or not there is agreement on a plan. The department shall confirm the landowner's information with the tribe(s); or*
 - (b) *The department receives written notice from the tribe(s) that the tribe(s) is declining a meeting with the landowner; or*
 - (c) *The tribe(s) does not respond to the landowner's attempts to meet and the landowner provides to the department:*
 - (i) *written documentation of telephone or email attempts to meet with the tribe's designated cultural resources contact for forest practices, and*

⁹ Often landowners must contact more than one tribe. This depends on how many tribes have previously selected the geographic area of the landowner's FPA in the Forest Practices Application Review System administered by the Department of Natural Resources. The singular "tribe" is used in this document, but this can also mean more than one tribe depending on the situation.

¹⁰ The percentage of FPAs identified as located in areas with cultural sites varied from a low 0.6 percent of the total number of FPAs in 2005 and 2007, to a high of 2.1 percent in 2010.

- (ii) a copy of a certified letter with a signed return receipt addressed to the tribe's cultural resources contact for forest practices requesting a meeting with the tribe; or*
- (d) The department receives other acceptable documentation.*

In other words, DNR can approve an FPA if one of the alternative means (a) through (d) is carried out, as long as there are no other problems with the FPA.

The proposed rule also:

- Eliminates language imposing requirements on the tribes.
- Adds clarity to two phrases in the current rule. “Applications of concern” is replaced with “applications in geographic areas of interest that have been identified by such tribes”, and “including those involving cultural resources” is replaced with “including those areas that may contain cultural resources.”

COST-BENEFIT ANALYSIS

Description of Costs

The proposed rule would create practically no additional cost, if any, on those required to comply with it. Inherent in both the current and proposed rules are costs for:

- Landowners to contact tribes;
- Both landowners and tribes to communicate if tribes choose to respond to landowners' attempts to do so;
- Both landowners and tribes to create a plan for cultural resource protection if tribes choose to discuss a plan; and
- Landowners to notify DNR that such meetings and planning did or did not take place.

The only new cost impact from the proposed rule is extremely minor. The scenario in subsection (3)(c) would result in the minor cost of providing a copy of a certified letter requesting a meeting with the tribe and a signed receipt. There would be no change in costs associated with scenarios described in subsections (3)(a) and (3)(b) because they do not represent a change from the current process. The scenario described in subsection (3)(d), “the department receives other acceptable documentation”, cannot be evaluated for new costs to landowners.

Description of Benefits

The benefits of the proposal primarily go to forest landowners whose forest practices proposals are on lands that intersect with cultural resources. The proposal creates a clear pathway for landowners to carry out a good faith effort to solicit a response from tribes and receive an approved FPA from DNR if there is no response. Without this pathway, landowners who do not receive a response from a tribe do not receive an approved FPA and cannot carry out proposed forest practices activities within their scheduled timeframe.

Landowners can lose income when an FPA is disapproved or withdrawn due to the lack of documentation of the landowner-tribe meeting. This loss of income can occur when landowners are

not allowed to sell their timber within a particular window of economic opportunity; stumpage values can change or scheduled operators and equipment may not be available outside the landowner's planned timeframe.

The benefit of the proposed rule for landowners, therefore, is the prevention of lost income that can occur if landowners do not receive a response from tribes in spite of their efforts to do so. The proposed rule provides certainty for landowners that their obligations regarding the landowner-tribe meeting can be met within their FPA time limits and their activities can take place within their scheduled timeframe.

The rule proposal also benefits tribes. Certain tribes have expressed concern that the current rule creates the perception of tribes as regulators, which is not the case. The proposed rule explicitly states that the meeting is at the discretion of the tribes.

Comparison of Benefits and Costs

For this analysis, it is reasonable to conclude that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs.

LEAST BURDENSOME ALTERNATIVE ANALYSIS

RCW 34.05.328(1)(e) requires agencies to determine, after considering alternative versions of the rule, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives of the statute the rule implements.¹¹ Alternatives ways to address the problems with WAC 222-20-120 are listed below. The Board is proposing Alternative 3, which is considered the least burdensome alternative for those required to comply with it.

Alternative 1 – Eliminate WAC 222-20-120.

This is not a viable solution. The rule is needed to promote cooperative relationships between forest landowners and tribes, which is a policy of the Forest Practices Act; it facilitates landowner-tribal communications when forest practices activities intersect with cultural resources.

Alternative 2 - Add the phrase “at the tribe’s discretion” to the meeting requirement sentence in subsection (2).

Subsection (2) of the rule requires the landowner-tribe meeting where an FPA is within a tribe's geographic area of interest and contains cultural resources. Adding language to explicitly state that this meeting is discretionary for tribes would make the rule less burdensome than the current rule. The landowner could receive an approved FPA even if a tribe decides not to meet. If the tribe responds that it does not want to meet, the landowner can receive an approved application. However, this is not the preferred alternative because if the tribe does not respond to the landowner's request to meet, the landowner cannot provide documentation to DNR for the FPA.

¹¹ The related goals are explained under the heading, “Goals and Objectives” in this document.

Alternative 3 – Preferred alternative. Add the phrase “at the tribe’s discretion” to the meeting requirement sentence, and provide alternative means for landowners to fulfill the meeting requirement.

The proposed rule is the least burdensome alternative for forest landowners and tribes, because it includes the concept of tribal discretion and sets in rule a variety of scenarios by which DNR will consider the landowner-tribe meeting requirement completed.

SMALL BUSINESS IMPACTS

The [Regulatory Fairness Act](#) (chapter 19.85 RCW) requires state agencies to prepare a small business economic impact statement (SBEIS) for proposed rules that will impose more than minor costs on businesses. The purpose of the SBEIS is to look at how a rule might impact small businesses. When these impacts are identified the agency must try to find ways to reduce those impacts.

As stated under “Description of Costs”, the only new costs, if any, for landowners resulting from the rule proposal would be extremely minor. The rule does not meet the threshold of imposing more than minor costs on businesses and therefore an SBEIS is not required.

SUMMARY

The benefits of the proposed rule are greater than the costs for those required to comply with it. The proposed rule imposes practically no additional costs, if any, to the costs of complying with the current rule. It benefits both forest landowners and tribes. Landowners are assured closure in their efforts to coordinate with tribes with the objective of agreeing on a plan for protecting cultural resources. Language is revised to be explicit that tribal involvement is discretionary.

The proposed rule is the least burdensome of three alternatives considered for those required to comply with it. Not changing the rule is the most burdensome for landowners and is not acceptable to tribes that are reviewing FPAs. The alternative to only make the meeting with tribes discretionary does not provide a clear pathway for landowners to carry out a good faith effort to solicit a response from tribes. The Forest Practices Board’s preferred alternative provides both the explicit statement that a meeting is at the tribes’ discretion, and a clear pathway for landowners to meet their obligations.

The proposed rule does not meet the threshold of imposing more than minor costs on businesses, and therefore a small business economic impact statement is not required.