WASHINGTON STATE DEPARTMENT OF
Natural Resources

PETER GOLDMARK
Commissioner of Public Lands

July 20, 2011

TO: Forest Practices Board

FROM: Sherri Felix, Policy Analyst, Forest Practices Division

SUBJECT: **Request for Proposed Rule Making on Notice of Forest Practices to Affected Indian Tribes, WAC 222-20-120, and Western Washington Riparian Management Zones, WAC 222-30-021**

On August 9, 2011, staff will request the Board initiate rule making by filing a CR-102 *Proposed Rule Making* with the enclosed proposed rule language and preliminary cost benefit analysis with the Office of the Code Reviser. This process is pursuant to the Administrative Procedure Act, chapter 34.05 RCW.

At the Board's May 10, 2011 meeting, staff received your approval to distribute the draft rule language developed by the Timber/Fish/Wildlife (TFW) Cultural Resources Roundtable for 30-day review by the counties, Washington Department of Fish and Wildlife, and affected Indian tribes. This process is pursuant to RCW 76.09.040(2) of the Forest Practices Act.

The Board received two 30-day comments, from the Confederated Tribes and Bands of the Yakama Nation and the Puyallup Tribe of Indians. The City of Seattle also sent its comments. The Yakama Nation and the City of Seattle commented in favor of the proposed rule language. The Puyallup Tribe proposed numerous modifications to the proposed rule language. These comments are enclosed. Also enclosed are letters exchanged between the Chairmen of the Yakama Nation and the Puyallup Tribe as copied to the Board.

After review of the comments received by the Board, staff and the TFW Cultural Resources Roundtable agreed the proposed 30-day language should move forward to the public review process with one change: a clarification to the title of the WAC. The enclosed proposed rule language includes this recommended change.

Upon your approval to proceed with this rule making, staff will schedule rule making hearings for November or December and file the CR-102 proposed rule language and preliminary economic analysis with the Office of the Code Reviser. This rule making is categorically exempt from SEPA review pursuant to WAC 197-11-800(19).

Should you have any questions about this rule making before your August meeting, please contact Marc Engel at 360-902-1390 or Marc.Engel@dnr.wa.gov .

SF/
Enclosure

Forest Practices Board
Notice of FP to Affected Indian Tribes Rule Making
Proposed Rule for CR-102 Filing
August 2011

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) 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.

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.

. . .

(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 sites or ~~historical~~ historic archaeological resources as defined in RCW 27.53.030;

(VII) Historic sites ~~registered with~~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)(~~g~~f); or

(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.

. . .

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).*

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[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.

Puyallup Tribe of Indians

June 13, 2011

Forest Practices Board Rules Coordinator
Department of Natural Resources
Forest Practices Division
PO Box 47012
Olympia, WA 98504-7012

RE: Comments for WAC 222-20-120

Dear Honorable Board,

The Forest Practices Board notified the Puyallup Tribe of Indians of the Board's intent to revise WAC 222-20-120. The Puyallup Tribe of Indians proposes the following language:

WAC 222-20-120 Notice, Consultation, and Development of an Agreed Plan for forest practices to affected Indian tribes.

(1) The department shall notify affected Indian tribes of all applications for forest practices in geographic areas of interest that have been identified by such tribes, including, but not limited to those that may contain or be related to cultural resources at least fourteen (14) days prior to a decision issued by the department. Each tribe shall designate the contact person(s) for the department to notify in writing, with updates as needed.

(2) Where an application of forest practices involves a known cultural resource, the department shall engage in meaningful government-to-government consultation with the affected tribe(s) at least seven (7) days prior to any decision issued by the department. For areas not containing a known cultural resource, the affected tribe(s) may still request consultation with the department to discuss impacts to cultural or other resources of concern to the Tribe. The department shall comply with the department's manual, policies, and procedures for consultation with a tribe(s).

(3) The landowner shall meet with a tribe(s) within the geographic area of interest within five (5) calendar days of the tribe's request for a meeting. The objective of the meeting is to develop an agreed plan for protecting the cultural and/or archaeological resources and/or natural resources. Failure to meet with the tribe(s) within the designated time frame will delay issuance of a permit for forest practices until after the landowner complies with this requirement.

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(4) Any agreed plan shall be forwarded to the department by the landowner and tribe(s) within two (2) business days. In the event the landowner and tribe(s) do not agree on a plan, the tribe(s) shall notify the department of the failure to reach an agreed plan and the concerns of the tribe within two (2) business days.

(5) The department shall condition the application in accordance with an agreed plan and alternatively, the department may condition the application in accordance with a plan proposed by the tribe(s) where agreement could not be reached.

(6) The department shall notify and forward information to the department of archaeological and historic preservation (DAHP) where a known historic site falls within the forest practices area but is not identified as a tribal cultural resource (i.e., logging camps, Anglo-American early settlement sites, etc.).

(7) Failure by landowners to comply with these provisions may result in delays, rejection of the application with no permit issued, monetary penalties imposed by the department, or additional requirements on the pending and/or future applications where the department finds willful disregard of cultural and/or archaeological resources, or the process outlined herein.

Thank you for your time and consideration of the Tribe's comments.

Should you have any questions or concerns, please contact Andrea George in our Legal Department at (253) 573-7874 or Jeff Thomas in our Fisheries Department at (253) 680-5565.

Sincerely,

Herman Dillon, Sr., Chairman
Puyallup Tribal Council

DATE RECEIVED
JUN 1 9 2011
Forest Practices Division

City of Seattle
Seattle Public Utilities

June 9, 2011

Patricia Anderson
Forest Practices Board Rules Coordinator
Department of Natural Resources
Forest Practices Division
P.O. Box 47012
Olympia, WA 98504-7012

Re: Proposed amendments to WAC 222-20-120 and WAC 222-30-021(1)(c)(ii)

Dear Ms. Anderson,

Seattle Public Utilities strongly supports the proposed changes to WAC 222-20-120 to clarify ambiguous terminology and resolve issues with required landowner-tribe meetings. This change will allow Seattle Public Utilities to efficiently manage its 104,000-acres of forest lands, removing the virtually unattainable requirement for verified confirmation of consultation within the application period with seven separate local Tribes. It also removes the burden of a required response from the already strained Tribal cultural resource staff.

The changes proposed to WAC 222-30-021(1)(c)(ii) are consistent with the proposed changes above and SPU also supports these changes.

Sincerely,

Suzanne C. Flagor, Director
Watershed Services Division
Seattle Public Utilities

Watershed Services Division, 19901 Cedar Falls Rd. S.E., North Bend, WA, 98045
Tel: (206) 233-1524, Fax: (206) 233-1527
An equal employment opportunity, affirmative action employer, Accommodations for people with disabilities provided upon request.

Confederated Tribes and Bands
of the Yakama Nation

DATE RECEIVED
MAY 3 1 2011
Forest Practices Division

Established by the
Treaty of June 9, 1855

May 26, 2011

Forest Practices Board Rules Coordinator
Department of Natural Resources
Forest Practices Division
P. O. Box 47012
Olympia, WA 98504-7012

Re: Proposed amendments to WAC 222-20-120

Dear Rules Coordinator:

The Yakama Nation has actively participated in the T/F/W Cultural Resources Roundtable and the development of the language proposed for WAC 222-20-120, concerning Tribal - Landowner meetings. The proposed language has been agreed to by consensus by members of all stakeholders in the T/F/W agreement. The language has been carefully constructed to be fair to landowners while insuring that tribes are provided a reasonable opportunity to comment on cultural resources significant to them.

The Yakama Nation supports the language proposed by the Roundtable and accepted by the Forest Practices Board. We would oppose any further amendments and recommend that the language be adopted as permanent rules.

Sincerely,

Philip Rigdon, Deputy Director
Natural Resources Division

Post Office Box 151, Fort Road, Toppenish, WA 98948 (509) 865-5121

Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

June 29, 2011

Herman Dillon, Sr., Chairman
Puyallup Tribal Council
3009 E. Portland Ave.
Tacoma, WA 98404

RE: Puyallup Tribe's proposed language for WAC 222-20-120

Dear Honorable Chairman Dillon:

Last month the Forest Practices Board sent out language for WAC 222-20-120 concerning Tribal-Landowner meetings developed by the T/F/W Cultural Resources Roundtable (Roundtable). The language was agreed to by consensus by all active members of all stakeholders in the T/F/W agreement. The Yakama Nation has been an active participant of the Roundtable for most of the past 18 years and wrote in support of the proposed language to the Forest Practices Board Rules Coordinator. We oppose any further amendments.

The Yakama Nation has received a copy of the Puyallup Tribe's proposed language for WAC 222-20-120 that you sent to the Forest Practices Board Rules Coordinator on June 13, 2011. The Puyallup proposal completely rewrites the language and proposes a new title for WAC 222-20-120. The new language fails to correct the two issues the Roundtable originally sought to address: tribal sovereignty and lack of tribal response to a landowner. In fact the Puyallup language proposes additional language in the Forest Practices Rules requiring tribes to designate a contact person in writing, engage in government-to-government consultation on forest practices, notify the Department of Natural Resources when a plan is not agreed to and submit plans to the Department of Archaeology and Historic Preservation. All of these requirements violate tribal sovereignty. The state has no business dictating what a sovereign Nation shall do. The Puyallup language would require formal government-to-government consultation on forest practice applications rather than the review process that has been in place since the 1987 T/F/W agreement. Government-to-government consultation is negotiations with the elected government of the Nation and is not warranted for the review of each timber harvest application.

The Puyallup Tribe has had an active representative on the Roundtable for even longer than the Yakama Nation, Jeffrey Thomas, who is one of the co-chairs. Mr. Thomas agreed to the

Post Office Box 151, Fort Road, Toppenish, WA 98948 (509) 865-5121

proposed language through consensus and testified in support of the language at the Forest Practices Board Meeting May 10, 2011. The Puyallup Tribe's completely new proposal is puzzling. The language is unacceptable, violates sovereignty and fails to address lack of tribal response to a landowner. The Yakama Nation must oppose the Puyallup Tribe's proposal.

Respectfully,

Harry Smiskin, Chairman
Tribal Council

cc: Patricia Anderson, Forest Practices Board Rules Coordinator

Enclosures

FILE COPY

Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

May 26, 2011

Forest Practices Board Rules Coordinator
Department of Natural Resources
Forest Practices Division
P. O. Box 47012
Olympia, WA 98504-7012

Re: Proposed amendments to WAC 222-20-120

Dear Rules Coordinator:

The Yakama Nation has actively participated in the T/F/W Cultural Resources Roundtable and the development of the language proposed for WAC 222-20-120, concerning Tribal - Landowner meetings. The proposed language has been agreed to by consensus by members of all stakeholders in the T/F/W agreement. The language has been carefully constructed to be fair to landowners while insuring that tribes are provided a reasonable opportunity to comment on cultural resources significant to them.

The Yakama Nation supports the language proposed by the Roundtable and accepted by the Forest Practices Board. We would oppose any further amendments and recommend that the language be adopted as permanent rules.

Sincerely,

Philip Rigdon, Deputy Director
Natural Resources Division

Post Office Box 151, Fort Road, Toppenish, WA 98948 (509) 865-5121

Puyallup Tribe of Indians

June 13, 2011

Forest Practices Board Rules Coordinator
Department of Natural Resources
Forest Practices Division
PO Box 47012
Olympia, WA 98504-7012

RE: Comments for WAC 222-20-120

Dear Honorable Board,

The Forest Practices Board notified the Puyallup Tribe of Indians of the Board's intent to revise WAC 222-20-120. The Puyallup Tribe of Indians proposes the following language:

WAC 222-20-120 Notice, Consultation, and Development of an Agreed Plan for forest practices to affected Indian tribes.

(1) The department shall notify affected Indian tribes of all applications for forest practices in geographic areas of interest that have been identified by such tribes, including, but not limited to those that may contain or be related to cultural resources at least fourteen (14) days prior to a decision issued by the department. Each tribe shall designate the contact person(s) for the department to notify in writing, with updates as needed.

(2) Where an application of forest practices involves a known cultural resource, the department shall engage in meaningful government-to-government consultation with the affected tribe(s) at least seven (7) days prior to any decision issued by the department. For areas not containing a known cultural resource, the affected tribe(s) may still request consultation with the department to discuss impacts to cultural or other resources of concern to the Tribe. The department shall comply with the department's manual, policies, and procedures for consultation with a tribe(s).

(3) The landowner shall meet with a tribe(s) within the geographic area of interest within five (5) calendar days of the tribe's request for a meeting. The objective of the meeting is to develop an agreed plan for protecting the cultural and/or archaeological resources and/or natural resources. Failure to meet with the tribe(s) within the designated time frame will delay issuance of a permit for forest practices until after the landowner complies with this requirement.

(4) Any agreed plan shall be forwarded to the department by the landowner and tribe(s) within two (2) business days. In the event the landowner and tribe(s) do not agree on a plan, the tribe(s) shall notify the department of the failure to reach an agreed plan and the concerns of the tribe within two (2) business days.

(5) The department shall condition the application in accordance with an agreed plan and alternatively, the department may condition the application in accordance with a plan proposed by the tribe(s) where agreement could not be reached.

(6) The department shall notify and forward information to the department of archaeological and historic preservation (DAHP) where a known historic site falls within the forest practices area but is not identified as a tribal cultural resource (i.e., logging camps, Anglo-American early settlement sites, etc.).

(7) Failure by landowners to comply with these provisions may result in delays, rejection of the application with no permit issued, monetary penalties imposed by the department, or additional requirements on the pending and/or future applications where the department finds willful disregard of cultural and/or archaeological resources, or the process outlined herein.

Thank you for your time and consideration of the Tribe's comments.

Should you have any questions or concerns, please contact Andrea George in our Legal Department at (253) 573-7874 or Jeff Thomas in our Fisheries Department at (253) 680-5565.

Sincerely,

Herman Dillon, Sr., Chairman
Puyallup Tribal Council

June 13, 2011

To: Note to File

From: Jeffrey Thomas, Puyallup Tribal Fisheries

Andrea George, Attorney, Puyallup Tribe of Indians

Lisa Brautigam, Attorney, Puyallup Tribe of Indians

RE: Summary of Recommendations From Puyallup Tribe Regarding WAC 222-20-120 Rule Change Proposal

The Puyallup Tribe submitted suggested language today for updating WAC 222-20-120, the WAC section that is entitled Notice of Forest Practices to Affected Indian Tribes. Although the Chairman signed the official letter, this memo to the file serves as documentation of the rationale behind the suggested changes. After reviewing the proposed language, we offer the following recommendations and accompanying rationale.

Recommendations/Rationale:

1. **Rename title of this section to "222-20-120 Notice, consultation, and development of an agreed plan for forest practices to affected Indian tribes".**

   Title should reflect the broader intent of this section which is to recognize that the Department has an obligation to consult with tribal governments regarding forest practices and that creating a plan agreeable to the Tribe and landowner is preferred and encouraged.

2. **Specify notification process is "not limited to" applications affiliated with cultural resources.**

   Expands the scope to include not only cultural resources but natural and other environmental resources as well.

3. **Specify notification will occur at least 14 days before departmental decisions are made.**

   Reassures Tribe(s) they will be provided a reasonable amount of time to review/comment upon an application, if needed.

4. **Specify the Tribe will designate the contact person(s) whom will receive notifications from the Department.**

   Clarifies that Tribe(s) are responsible for designating their tribal contact person(s), ensures that the appropriate tribal official receives notice, and places the burden of updating tribal contact information upon the Tribe(s).

5. **Specify Department will consult with Tribe regarding applications having known cultural resources** (at least 7 days before decisions made).

   Recognizes that Department consultation shall occur at least a week prior to a decision where known cultural resources are present in the affected area (thereby providing a higher threshold when known cultural resources are present than just occurs via a notice, which is appropriate for geographic areas of interest to the Tribe).

6. **Specify Tribe may request consultation with Department regarding applications that have unknown cultural and/or other resources of concern to the Tribe.**

   Recognizes a Tribe can initiate government-to-government consultation to address the adverse impacts of forest practices on any project. This concept is currently lacking and the Department's responsibility to consult should be reiterated, regardless of the area involved.

7. **Specify Department must comply with the policies/procedures for conducting consultation with Tribes.**

   Recognizes the Department will adhere to established consultation policies/procedures and ensures that protocols have been established before consultation is initiated.

8. **Specify landowner must meet with Tribe within 5 days of tribal request to meet.**

   Reassures Tribe(s) that a landowner will meet with Tribe(s) within a prudent amount of time (upon request).

9. **Specify meeting objective is to develop an agreed plan for protecting cultural, archaeological and/or natural resources.**

   Clarifies expectation that the Tribal-landowner meeting should result in an agreed plan for protecting resources, or at least start out with that objective.

10. **Specify that failure to meet with the Tribe delays permit issuance until landowner complies.**

    Specifies landowner failure to meet with Tribe(s) regarding cultural or other concerns will delay the issuance of their forest practices permit.

11. **Specify landowner and tribe will forward agreed plans to Department within 2 days.**

    Details process for informing Department of an agreed plan produced via the Tribal-landowner meeting. Obligation falls on both parties to provide information to the Department about any agreed plan, especially where a permit is conditioned to adhere to the agreed plan.

12. **Specify Department shall condition application in accordance with agreed plan, and Department may condition the application on the Tribe's plan if no agreement occurs.**

    Recognizes an application will be conditioned consistent with an agreed plan, and that an application may be conditioned with a Tribal plan when no agreement is reached.

13. **Specify Department will notify DAHP when an FPA contains known historic site, but is not identified as a tribal cultural resource.**

    Requires the Department to notify DAHP when an FPA containing known (non-Indian) historic sites is identified.

14. **Specify failure to comply may result in FPA delays/rejections, penalties, &/or additional requirements.**

    Clarifies that failure to comply with cultural/archaeological resources meeting requirements can have adverse results for the application and/or applicant.

From:	Andrea George
To:	ANDERSON, PATRICIA (DNR)
Cc:	Jeffrey Thomas
Subject:	FW: Legal Department
Date:	Thursday, July 07, 2011 4:23:37 PM
Attachments:	bizhub_C20_110706102902_0001.pdf

Hi Patricia,

You were copied on this letter, so attached is an electronic version. If you would prefer a paper copy, please let me know and I would be happy to put a hard copy in the regular mail. You were copied since the letter from the Yakama Chairman copied you on the initial correspondence triggering this response from the Puyallup Tribal Council (signed yesterday).

If you have any questions, please feel free to contact me or Jeff Thomas. Yakama's representative on the T/F/W Roundtable, David Powell, commented about the letter during yesterday's meeting. However, we did not delve into a discussion about the matter since we believe this is a discussion appropriate between each Tribe's representative body.

Have a wonderful day!

Andrea D. George
Law Office
Puyallup Tribe of Indians
3009 E Portland Ave
Tacoma, WA 98404
(253) 573-7874
Fax: (253) 680-5998
andrea.george@puyalluptribe.com

From: PTOI-Legal [mailto:admin@puyalluptribe.com]
Sent: Wednesday, July 06, 2011 8:29 AM
To: Andrea George
Subject: Legal Department

Puyallup Tribe of Indians

July 1, 2011

Harry Smiskin, Chairman
Yakama Tribal Council
Confederated Tribes and Bands of the Yakama Nation
PO Box 151, Fort Road
Toppenish, WA 98948

Re: Letter dated June 29, 2011 regarding Comments to WAC 222-20-120

Dear Chairman Smiskin and Honorable Council Members:

The Tribe is in receipt of your letter dated June 29, 2011, regarding comments submitted by the Puyallup Tribe for WAC 222-20-120.

Thank you for raising concerns from the Yakama Nation. The Puyallup Tribe welcomes communication with our relations and friends from throughout the northwest, and in particular neighboring tribes in Washington. To date, our tribes have enjoyed a very favorable relationship and worked together many times in the past.

In early May, the Forest Practices Board ("Board" hereafter) invited tribes to comment to the proposed changes to WAC 222-20-120. It is our understanding from your letter that the Yakama Nation supported the proposed changes as presented by the Board (which were developed by the T/F/W Cultural Resources Roundtable Committee). Although the changes proposed by the Board and Committee are a step in the right direction, the Puyallup Tribe saw the invitation from the Board as a valuable opportunity to expand the scope, application and detail of WAC 222-20-120.

As such, the comments proposed by the Puyallup Tribe were more expansive in nature and strengthens the opportunities for tribes to meaningfully participate in development of agreed plans with landowners for harvesting of timber in areas with cultural significance. More importantly, the comments were intended to open the discussion amongst the Committee and possibly encourage the Board and Washington State Department of Natural Resources staff to consider the comments submitted by our Tribe. However, those comments were not intended to abrogate the sovereignty of tribes and by no means did the Tribe seek to offend any other tribe.

3009 Portland Avenue • Tacoma, Washington 98404 • 253/573-7800

If you have any questions or concerns, please feel free to contact the Puyallup Tribal Council at (253) 573-7800.

Sincerely,

Bill Sterud

Herman Dillon, Sr.
Chairman

cc: Patricia Anderson, Forest Practices Board Rules Coordinator