WASHINGTON STATE DEPARTMENT OF
Natural Resources

PETER GOLDMARK
Commissioner of Public Lands

April 13, 2012

MEMORANDUM

TO: Forest Practices Board

FROM: Gretchen Robinson
Forest Practices Division, Policy and Service Section

Dan Pomerenk
Forest Practices Division, Small Forest Landowner Office

SUBJECT: Rule Making for the Forestry Riparian Easement Program

On May 8, 2012 we will request that you adopt amendments to the Forestry Riparian Easement Program (FREP) rules in chapter 222-21 WAC.

The rules carry out 2011 legislation that reformed the program. Two of the major reforms include eliminating eligibility for "non-profit" entities, and limiting compensation for qualifying timber located on potentially unstable slopes or landforms to $50,000 for any biennial funding period.

At your February 14, 2012 meeting, the Board directed staff to:

- Incorporate language related to landowners' use of FREP easement lands; and
- File the resulting draft rule language with the Code Reviser.

The language was published in the Washington State Register on March 7 and was available for public review and comment until March 30.

Two public hearings were held, one in Spokane on March 27 and one in Centralia on March 29. The Board received one oral comment in support of the rule proposal and one written comment about the Legislature's under-funding of FREP (enclosed).

The Board did not receive any comments suggesting changes to the language; however we do recommend further clarification of two of the definitions, "qualifying small forest landowner" and "qualifying timber." Those changes are described and shown on page 2 of the enclosed draft Concise Explanatory Statement.

Three analyses that are required for some rule making activities but not for this FREP rule activity are:

- Small forest landowner long-term application analysis: WAC 222-20-016 (4) requires DNR, in consultation with affected tribes, the Department of Ecology, and the Department of Fish and Wildlife to analyze small forest landowner long-term applications if the Board considers

changing the rules to achieve resource objectives. The FREP rule proposal does not change any of the forest practices rules that protect public resources, and an analysis is not required.

- SEPA analysis (chapter 43.21C RCW) was not required because the rule does not have the potential to adversely impact the environment.
- A small business economic impact statement (chapter 19.85 RCW) was not required because the rule does not impose costs on businesses.

Enclosed for your consideration are the draft rule changes, a Draft Concise Explanatory Statement, one written comment letter, and the final economic analysis. We look forward to seeing you May 8 and answering any questions as you consider adopting amendments to the Forestry Riparian Easement Program rules.

GR/

Enclosures: Proposed Rule Changes for chapter 222-21 WAC
Draft Concise Explanatory Statement
Written comment letter
Economic Analysis

Forest Practices Board
Proposed Rule Changes for
Chapter 222-21 WAC Small Forest Landowner Forestry Riparian Easement Program
May 2012

WAC 222-21-005 Policy. The legislature has found that further reduction in harvestable timber owned by small forest landowners as a result of the rules adopted under RCW 76.09.055 or 76.09.370 will further erode small landowners' economic viability and willingness or ability to keep the lands in forestry use and, therefore, reduce the amount of habitat available for salmon recovery and conservation of other aquatic resources. The legislature addressed these concerns by establishing a forestry riparian easement program to acquire easements from qualifying small forest landowners along riparian and other areas of value to the state for protection of aquatic resources.

WAC 222-21-010 Definitions.
The following definitions apply to this chapter:

(1) ~~**"Commercially reasonable harvest unit"** means a harvest area that meets the requirements of WAC 222-21-060.~~

~~(2)~~ **"Completion of harvest"** means that the trees within the area under an approved forest practices application have been harvested ~~from an area under an approved forest practices application~~ and ~~that~~ further entry into that area by any type of logging or slash treating equipment or method is not expected.

~~(3)~~ ~~**"Compliance costs"** includes the cost of preparing and recording the easement, and any business and occupation tax and real estate excise tax imposed because of entering into the easement.~~

~~(4)~~ ~~**"Danger tree"** means any qualifying timber reasonably perceived to pose an imminent danger to life or improved property.~~

(~~5~~2) **"Easement premises"** means the geographic area designated in a forestry riparian easement~~,~~ including ~~the~~ areas in which qualifying timber is located. ~~Easement premises may be categorized as follows:~~

~~(a) **Riparian area easement premises** means riparian areas and areas upon which qualifying timber associated with riparian areas are located.~~

~~(b) **Other easement premises** means areas of land required to be left unharvested under rules adopted under RCW 76.09.055 or 76.09.370 including areas upon which other qualifying timber outside riparian areas is located and areas of land upon which uneconomic qualifying timber is located.~~

(~~6~~3) **"Forestry riparian easement"** means ~~an~~ a conservation easement covering qualifying timber granted voluntarily to the state by a qualifying small forest landowner.

(4) **"Forests and fish rules"** means the rules adopted by the Board in accordance with RCW 76.09.055, 76.09.370, and the amendments to those rules.

(~~7~~5) **"Hazardous substances"** ~~means~~ includes but is not limited to hazardous substances as defined in RCW 70.102.010~~(5),~~ and RCW 70.105D.020~~(7)~~, and solid waste as defined in RCW 70.95.030~~(22)~~.

~~(8) **"High impact regulatory threshold"** means the threshold where the value of qualifying timber is greater than 19.1% (for timber in Western Washington) or 12.2% (for timber in Eastern Washington) of the value of the harvested timber and qualifying timber under the approved forest practices application covering the qualifying timber.~~

(~~9~~6) **"Qualifying small forest landowner"** means an owner of forest land with qualifying timber meeting all of the criteria in (a)(i) through (a)(iv) of this subsection as of the date the department receives a forest practices application associated with a proposed forestry riparian easement, and the date the department offers compensation for the easement.

(a) A qualifying small forest landowner:

(i) Is an individual, partnership, corporation, or other nongovernmental for-profit legal entity. If a landowner grants timber rights to another entity for less than five years, the landowner may still be a qualifying small forest landowner under this chapter;

(ii) Has a fee interest in the land and timber or has rights to harvest the timber to be included in the forestry riparian easement that extend at least fifty years from the date the completed forestry riparian easement application is submitted to and received by the small forest landowner office;

(iii) Has no outstanding violations of chapters 76.09 or 76.13 RCW or any associated forest practices rules;

(iv) Has harvested or expects to harvest from his or her forest lands in this state as follows:

(A) No more than the average volume that would qualify the landowner as a "small harvester" under RCW 84.33.035 during the three years prior to the year the department receives a complete forest practices application associated with the easement, and certifies that he or she does not expect to exceed that average timber volume during the ten years following the date of the offer of compensation for the easement; or

(B) If the landowner can establish to the satisfaction of the small forest landowner office that those harvest limits were or will be exceeded to raise funds to pay estate taxes or other equally compelling and unexpected obligations such as court-ordered judgments or extraordinary expenses, the landowner may still be a qualifying small forest landowner.

(b) To be eligible for a forestry riparian easement, a qualifying small forest landowner must have submitted a forest practices application covering qualifying timber to the appropriate region office, and the department must have approved the application or disapproved it because of forests and fish rule restrictions. See WAC 222-21-032 for more information about easement eligibility.

(7) **"Qualifying timber"** means ~~those~~ forest trees that meet criteria (a) through (c) of this subsection:

(a) Are covered by a forest practices application ~~that the small forest landowner is required to leave unharvested under rules adopted under RCW 76.09.055 or 76.09.370 or that are made uneconomic to harvest by those rules, and for which the small forest landowner is willing to grant the state a forestry riparian easement~~. ~~Qualifying timber is timber within or bordering a commercially reasonable harvest unit, or timber for which an approved forest practices application for timber harvest cannot be obtained because of restrictions under these rules. Qualifying timber is categorized as follows:~~

~~(a) **Permanent qualifying timber** includes trees that shall not be harvested or damaged or removed from the easement premises during the term of the easement.~~

~~(i) Where permanent qualifying timber is in areas in which no harvest may take place, the easement shall describe the boundaries of the areas. No harvest of any tree within this area shall take place during the term of the easement.~~

~~(ii) Where permanent qualifying timber is located in areas in which selective harvest may take place, the permanent qualifying timber must be tagged for the duration of the easement.~~

(b) ~~**Reserve qualifying timber** includes trees that may be harvested and removed but only in compliance with the terms of the easement. Reserve qualifying timber shall be identified separately from the permanent qualifying timber.~~ Fit one of the following situations:

(i) The timber is required to be left unharvested because of forests and fish rule restrictions and is within, immediately adjacent to, or physically connected to a commercially reasonable harvest unit under an approved forest practices application; or

(ii) The timber cannot be approved for harvest under a forest practices application because of forests and fish rule restrictions.

(c) **Replacement qualifying timber** includes trees which, in the future, will be substituted for the reserve qualifying timber before the reserve qualifying timber may be harvested or removed from the property. Replacement qualifying timber will be selected from time to time pursuant to the provisions of the easement and will be subject to the terms and protections of the easement. Are located within one or more of the following areas:

(i) Riparian or other sensitive aquatic areas;

(ii) Channel migration zones; or

(iii) Areas of potentially unstable slopes or landforms, verified by the department, that have the potential to deliver sediment or debris to a public resource or threaten public safety and is immediately adjacent to or physically connected to other qualifying timber that is located within riparian or other sensitive aquatic areas.

Qualifying timber may also mean forest trees that do not meet criteria (b) or (c) in this subsection if they are uneconomic to harvest as determined under WAC 222-21-032(6).

(d) **Uneconomic qualifying timber** includes trees made uneconomical to harvest. The trees are considered permanent qualifying timber and may not be harvested or otherwise damaged during the term of the easement.

(e) **Other qualifying timber outside riparian areas** includes trees that may not be harvested under forest practices rules adopted under RCW 76.09.055 or 76.09.370 for reasons other than protection of riparian functions. It includes without limitation trees that are unharvestable because of public safety concerns. The trees are considered permanent qualifying timber and may not be harvested or otherwise damaged during the term of the easement.

(10) **"Reimbursement"** means the repayment that the department shall provide to small forest landowners for the actual costs incurred for laying out the streamside buffers and marking the qualifying timber once a contract has been executed for the forestry riparian easement program.

(11) **"Riparian areas"** include the areas designated in a forestry riparian easement. Riparian areas include without limitation all riparian and other special management zones required by the forest practices rules for protection of aquatic resources and includes associated qualifying timber.

(12) **"Riparian function"** includes bank stability, recruitment of woody debris, leaf litter fall, nutrients, sediment filtering, shade, and other riparian features that are important to both riparian forest and aquatic systems conditions.

(13) **"Small forest landowner"** means:

(a) A forest landowner meeting all of the following characteristics as of the date a forest practices application is received (see WAC 222-20-010 (7)), or the date the landowner provides written notification to the small forest landowner office that the harvest is to begin, for which the forestry riparian easement is associated:

(i) Is an individual, partnership, corporate, or other nongovernmental legal entity. If a landowner grants timber rights to another entity for less than five years, the landowner may still qualify as a small forest landowner under this section;

(ii) Has a fee interest in the land and timber or has rights to harvest the timber to be included in the forestry riparian easement that extend at least fifty years from the date the forest practices application associated with the easement is received;

(iii) Has harvested from its own lands in this state during the three years prior to the year of application an average timber volume that would qualify the forest landowner as a small harvester under RCW 84.33.035(14); and

(iv) Certifies at the time the forest practices application is received that it does not expect to harvest from its own lands more than the volume allowed by RCW 84.33.035(14) during the ten years following receipt of the application.

(b) A forest landowner whose prior three-year average harvest exceeds the limit of RCW 84.33.035(14), or who expects to exceed this limit during the ten years following receipt of the forest practices application, may still qualify as a small forest landowner if that landowner establishes to the small forest landowner office reasonable satisfaction that the harvest limits were or will be exceeded to raise funds to pay estate taxes or equally compelling and unexpected obligations such as court-ordered judgments or extraordinary medical expenses. (Note: The small forest landowner office will establish a board manual governing these exceptions.)

(c) A landowner may still qualify as a small forest landowner if the landowner is unable to obtain an approved forest practices application for timber harvest for any of his or her land because of restrictions under the forest practices rules adopted under RCW 76.09.055 or 76.09.370.

(148) **"Small forest landowner office"** is means an office within the department of natural resources. described in RCW 76.13.110, and it shall beThe office is a resource and focal point for small forest landowner concerns and policies, and shall have has significant expertise regarding the management of small forest holdings and government programs applicable to such holdings, and the. The office manages the forestry riparian easement program.

(15) **"Uneconomic to harvest"** means that a harvest area meets the requirements of WAC 222-21-065.

WAC 222-21-020 Criteria for accepting riparian easement.

(1) All of the following criteria must be met before the small forest landowner office may acquire a forestry riparian easement:

(a) The easements must include qualifying timber within riparian areas and may include other qualifying timber;

(b) The small forest landowner must be willing to sell or donate such easements to the state;

(c) The small forest landowner has a final forest practices application including qualifying timber on the easement premises that has been approved or has been disapproved because of restrictions under the forest practices rules adopted under RCW 76.09.055 or 76.09.370;

(d) The small forest landowner has provided a litigation guarantee or similar report from a title company for the property;

(e) Acceptable documents necessary for creation of the easement have been prepared; and

(f) The easement is not subject to unacceptable liabilities in subsection (3) of this section.

(2) Where more than one person has an interest in property to be covered by a forestry riparian easement, all persons holding rights to control or affect the easement premises, qualifying timber, and the riparian functions provided by the qualifying timber during the term of the easement must execute the easement documents or otherwise subordinate their interest to the easement interest being acquired by the state. This includes tenants in common, joint tenants, holder of reversionary interests, lien holders, and mortgages.

(3) Unacceptable liabilities for the state include, but are not limited to, the following:

(a) Potential liability exposure due to the presence of hazardous substances;

(b) Existing uses of the property that may jeopardize the protection of the easement premises, qualifying timber, and riparian functions;

~~(c) Any other liability where the liability may jeopardize the protection of the easement premises, qualifying timber, and its riparian functions.~~

WAC 222-21-030 ~~Document~~ Documentation and standards.

(1) ~~**Riparian easement.** The riparian easement document must be substantially in the following form, but may be modified by the small forest landowner office wherever necessary to accomplish the purposes of RCW 76.13.120.~~ **Forest practices application.** Prior to submitting a forestry riparian easement application, the landowner must have an approved forest practices application or an application that was disapproved because of forests and fish rule restrictions.

~~(This version assumes ownership of land and trees)~~

~~**FORESTRY RIPARIAN EASEMENT**~~

~~This grant of a forestry riparian easement is made on this _____ day of _____, 20 _____, by [a_____ corporation, limited liability company, partnership, limited partnership, limited liability partnership] [husband and wife] [individual][or others as appropriate] having an address at _____ ("Grantor"), to and in favor of the State of Washington, acting by and through the Department of Natural Resources ("Grantee").~~

~~**1.0 RECITALS AND PURPOSE**~~

~~**1.1** This Easement is intended to implement the goals of the Forest Practices Salmon Recovery Act, ESHB 2091, sections 501 through 504, chapter 4, Laws of 1999 ("Salmon Recovery Act"). The goals include avoiding the further erosion of the small forest landowners' economic viability and willingness or ability to keep the lands in forestry use which would reduce the amount of habitat available for salmon recovery and conservation of other aquatic resources, through the establishment of a forestry riparian easement program to acquire easements from small forest landowners along riparian and other areas of value to the state for protection of aquatic resources.~~

~~**1.2** This Easement is intended to protect the Qualifying Timber and riparian functions associated with the qualifying timber located on the Easement Premises as provided by the terms of this Easement as set forth in Exhibit B while preserving all lawful uses of the Easement Premises by Grantor consistent with the Easement objectives, and to provide Grantee with the ability to enforce the terms thereof.~~

~~**1.3** The Easement Premises and Qualifying Timber are located, as described in Exhibit A; that the encumbrances, if any, are as set forth in **Exhibit A**; that all Exhibits referenced herein and attachments thereto are incorporated into this Easement as part of this Easement; and that the Grantor wishes to execute this Forestry Riparian Easement.~~

~~2.0 CONVEYANCE AND CONSIDERATION~~

~~**2.1** In consideration of the mutual covenants contained herein, including without limitation the monetary consideration set forth in subsection 2.2 below, the Grantor does hereby voluntarily warrant and convey to the Grantee a Forestry Riparian Easement under the Salmon Recovery Act, which Easement shall remain in full force and effect from the date hereof until it expires on (month, date, year) [50 years from the date the complete and accurate forest practices application is submitted], which Easement shall consist of the rights and restrictions expressly set forth herein.~~

~~**2.2** In consideration of this Easement, Grantee shall pay to Grantor the sum of _____dollars ($ ____.00).~~

~~IN WITNESS WHEREOF Grantor and Grantee have executed this instrument on the day and year written.~~

~~GRANTOR:_____ Date: _____~~

~~By:_____~~

~~GRANTEE: _____~~

~~State of Washington~~

~~By and Through the Department of Natural Resources _____~~

~~Date: _____~~

~~(Title) _____~~

~~(insert form of acknowledgement, as appropriate)~~

~~EXHIBIT A~~

~~A1 Description and location of qualifying timber~~

~~The Qualifying Timber includes the following categories of trees located within the Easement Premises:~~

~~*[List the categories relevant to particular Easement, i.e., Permanent, Reserve, Replacement, Uneconomic, or Other Qualifying Timber.]* The Qualifying Timber is located as shown in the documentation attached hereto as Attachment A-1.~~

~~A2 Description and location of easement premises~~

~~The Easement Premises is *[insert description using the standards developed under Section 504(9)(b) of the Salmon Recovery Act including the categories relevant to particular Easement, i.e., Riparian Area and Other Easement Premises]* as shown in the documentation attached hereto as Attachment A-2 and is located in *[insert legal subdivision/lot, etc., in which the Easement Premises exists.]*~~

~~A3 Baseline identification, description and documentation of property, easement premises and qualifying timber~~

~~The parties agree that the current use, condition of the Easement Premises and the condition of the Qualifying Timber are documented in the inventory of their relevant features and identified in Attachment A-3 ("Baseline Documentation"), and that this documentation provides, collectively, an accurate representation at the time of this grant and is intended to serve as an objective information baseline for monitoring compliance with the terms of this grant.~~

~~**EXHIBIT B**~~

~~**FORESTRY RIPARIAN EASEMENT TERMS AND CONDITIONS**~~

~~**B1 Definitions**~~

~~The terms used in this Easement, including without limitation the following, are defined by the forest practices rules incorporated in Attachment B-1 to this Exhibit.~~

~~**"Danger Tree"**~~
~~**"Easement Premises"**~~
~~**"Qualifying Timber"**~~
~~**"Hazard Substances"**~~
~~**"Riparian Areas"**~~
~~**"Riparian Function"**~~

~~**B2 RIGHTS OF GRANTEE** **[Subsection B2.4 should be included only for multiple entry Easements.]**~~

~~To accomplish the purposes of this Easement, the following rights are conveyed to Grantee by this Easement:~~

~~**B2.1** To enforce the terms of this Easement as provided in subsection **B9**.~~

~~**B2.2** To enter upon the Easement Premises, or to allow Grantee's agents or any experts consulted by Grantee in exercising its rights under this Easement to enter upon the Easement Premises in order to evaluate Grantor's compliance with this Easement, and to otherwise enforce the terms of this Easement.~~

~~**B2.3** To convey, assign, or otherwise transfer Grantee's interests herein to another agency of the State of Washington, as provided for and limited by Section 504 of the Salmon Recovery Act.~~

~~**B2.4** Where harvest of Reserve Qualifying Timber is allowed during the term of this Easement, to approve Replacement Qualifying Timber that will be protected by this Easement as provided in subsection **B3.5**.~~

~~**B3 RESTRICTIONS ON GRANTOR** **[Subsection B3.6 should be included only for multiple entry Easements.]**~~

~~**B3.1 Inconsistent Uses of Riparian Easement Premises.** Any use of, or activity on, the Easement Premises inconsistent with the purposes and terms of this Easement, including without limitation converting to a use incompatible with growing timber, is prohibited, and Grantor acknowledges and agrees that it will not conduct, engage in, or permit any such use or activity.~~

~~**B3.2 Property Outside the Easement Premises.** Grantor may change its use of the property on which the Easement lies to any lawful use. Grantor shall provide Grantee sixty (60) days notice prior to changing the use of the property as a courtesy to Grantee.~~

~~**B3.3 Qualifying Timber.** Grantor shall not engage in any activity which would result in the cutting of Qualifying Timber or the removal of that timber from the Easement Premises, except as provided in this Easement. The parties further agree that use, harvest, and treatment of the Qualifying Timber are restricted according to the forest practices rules in Attachment B-1.~~

~~**B3.4 Danger Trees and Salvage.** Grantor may cut a Danger Tree, which shall be left in place within the Easement Premises or moved by Grantor inside the Easement Premises. Grantor shall notify DNR within seven (7) days that a Danger Tree has been felled. Grantor shall not engage in any activities pertaining to salvage of Qualifying Timber including without limitation blowdown except as provided for in the forest practices rules.~~

~~**B3.5 Harvest of Reserve Qualifying Timber and Designation of Replacement Qualifying Timber on Riparian Area Easement Premises**~~

~~Grantor shall not, during the term of this Easement, harvest or remove any Reserve Qualifying Timber except as permitted under the applicable forest practices rules. Grantor shall give Grantee at least thirty (30) days written notice prior to harvest or removal of Reserve Qualifying Timber, except that where a permit or approval is required from any governmental entity, such notice shall be given thirty (30) days before submission of the application for such permit or approval. Grantor shall mark Reserve Qualifying Timber and Replacement Qualifying Timber, where Replacement Qualifying Timber is required, for review by Grantee. Grantor's thirty (30) days written notice to Grantee is effective only after both Reserve Qualifying Timber and Replacement Qualifying Timber (if required) are marked. If Grantee does not object by giving Grantor written notice within thirty (30) days of receipt of Grantor's notice, Grantor may proceed to harvest and remove the Reserve Qualifying Timber. If Grantee does object and gives Grantor written notice thereof within thirty (30) days of receipt of Grantor's notice, Grantor shall not harvest or remove Reserve Qualifying Timber until the objection is resolved. If Reserve Qualifying Timber is to be removed but Replacement Qualifying Timber is required to be left standing for the balance of the term of this Easement, then Grantor shall mark the Replacement Qualifying Timber and, if approved by Grantee, such Timber shall be considered Qualifying Timber under this Easement. A new Exhibit A shall be prepared along with a supplement to this Easement, executed by Grantor and Grantee, and recorded.~~

~~**B3.6 Multiple Entry Easements.** Grantor shall not, during the term of this Easement, make multiple entry harvests except as permitted under the applicable forest practices rules. Grantor shall give Grantee at least thirty (30) days written notice prior to harvest or removal of timber, except that where a permit or approval is required from any government entity, such notice shall be given thirty (30) days before submission of the application for such permit or approval. Grantor shall mark timber to be removed for review by Grantee. Grantor's thirty (30) day written notice to Grantee is effective only after the timber to be removed is marked. If Grantee does not object by giving Grantor written notice within thirty (30) days of receipt of Grantor's notice, Grantor may proceed to harvest. If Grantee does object and gives Grantor notice thereof within thirty (30) days of receipt of Grantor's notice, Grantor shall not harvest until the objection is resolved.~~

~~**B4 RESERVED RIGHTS.** Other than specifically provided herein, Grantor is not restricted in its use of the Easement Premises.~~

~~**B5 PUBLIC ACCESS.** No right of public access to or across, or any public use of, the Easement Premises or the property on which it lies is conveyed by this Easement.~~

~~**B6 COSTS, LIABILITIES, TAXES, AND INDEMNIFICATION**~~

~~**B6.1 Costs, Legal Requirements, and General Liabilities.** Except as is expressly placed on Grantee herein, Grantor retains full responsibility for the Qualifying Timber and Easement Premises. Grantor shall keep the Qualifying Timber and Easement Premises free of any liens arising out of any work performed for, materials furnished to, or obligations incurred by Grantor. Grantor remains responsible for obtaining all permits required by law.~~

~~**B6.2 Taxes and Obligations.** Grantor shall remain responsible for payment of taxes or other assessments imposed on the Easement Premises or the Qualifying Timber. Grantor shall furnish Grantee with satisfactory evidence of payment upon request.~~

~~B6.3 Hold Harmless~~

~~B6.3.a Grantor.~~ ~~To the extent permitted by law, Grantor hereby releases and agrees to hold harmless, indemnify, and defend Grantee and its employees, agents, and assigns from and against all liabilities, penalties, costs, charges, losses, damages, expenses, causes of action, claims, demands, orders, judgments, or administrative actions, including without limitation reasonable attorneys' fees arising from or in any way connected with: (a) Injury or death of any person or any physical damage to property resulting from any act or omission, or other matter occurring on or relating to the Easement Premises or Qualifying Timber, caused solely by Grantor; (b) a breach by Grantor of its obligations under subsection B3; (c) the violation or alleged violation of, or other failure to comply with, any state, federal, or local law or requirement by Grantor in any way affecting, involving, or relating to the Easement Premises or the Qualifying Timber; (d) the release or threatened release onto the Easement Premises of any substance now or hereinafter classified by state or federal law as a hazardous substance or material caused solely by Grantor.~~

~~B6.3.b Grantee.~~ ~~To the extent permitted by law, Grantee hereby releases and agrees to hold harmless, indemnify and defend Grantor and its employees, agents, and assigns from and against all liabilities, penalties, costs, charges, losses, damages, expenses, causes of action, claims, demands, orders, judgments or administrative actions, including without limitation reasonable attorneys' fees arising from or in any way connected with: (a) Injury or death of any person or any physical damage to property resulting from any act or omission, or other matter occurring on or relating to the Easement Premises or Qualifying Timber, caused solely by Grantee; or (b) the release or threatened release onto the Easement Premises of any substance now or hereinafter classified by state or federal law as a hazardous substance or material caused solely by Grantee.~~

~~B7 SUBSEQUENT TRANSFERS~~

~~B7.1 Grantee.~~ ~~Grantee may assign, convey, or otherwise transfer its interest as evidenced in this Easement, but only to another agency of the State of Washington under any circumstances in which it determines, in its sole discretion, that such transfer is in the best interests of the state. Grantee shall give written notice to Grantor of the same within thirty (30) days of such conveyance, assignment, or transfer (provided that failure to give such notice shall not affect the validity of the assignment, conveyance, or transfer).~~

~~**B7.2 Grantor.** Grantor may assign, convey, or otherwise transfer without restriction its interest in the Easement Premises or the Qualifying Timber identified in Exhibit A hereto. Grantor agrees to incorporate the restrictions of the Easement in any deed or other legal instrument by which Grantor divests itself of all or a portion of its interests in the Easement Premises or Qualifying Timber. Grantor shall give written notice to the Grantee of the assignment, conveyance, or other transfer of all or a portion of its interest in the Easement Premises or the Qualifying Timber within thirty (30) days of such conveyance, assignment, or transfer (provided that failure to give such notice shall not affect the validity of the assignment, conveyance, or transfer).~~

~~**B7.3 Termination of Grantor's Rights and Obligations.** The Grantor's personal rights and obligations under this Easement terminate upon transfer of the Grantor's interest in the property on which the Easement lies or the Qualifying Timber, except that liability under the Easement for acts or omissions occurring prior to transfer shall survive transfer.~~

~~**B8 DISPUTE RESOLUTION**~~

~~The parties may at any time by mutual agreement use any nonbinding alternative dispute resolution mechanism with a qualified third party acceptable to Grantor and Grantee. Grantor and Grantee shall share equally the costs charged by the third party. The existence of a dispute between the parties with respect to this Easement, including without limitation the belief by one party that the other party is in breach of its obligations hereunder, shall not excuse either party from continuing to fully perform its obligations under this Easement. The dispute resolution provided for in this subsection is optional, not obligatory, and shall not be required as a condition precedent to any remedies for enforcement of this Easement.~~

~~**B9 ENFORCEMENT**~~

~~**B9.1 Remedies.** Either party may bring any action in law or in equity in the superior court for the county in which the Easement Premises are located or in Thurston County (subject to venue change under law) to enforce any provision of this Easement, including without limitation, injunctive relief (permanent, temporary, or ex parte, as appropriate) to prohibit a breach of this Easement, enforce the rights and obligations of this Easement, restore Qualifying Timber cut or removed in violation of this Easement or for damages. Grantee may elect to pursue some or all of the remedies provided herein.~~

~~**B9.1.a Damages and Restoration.** If Grantor cuts or removes (or causes another to cut or remove) Qualifying Timber from the Easement Premises in violation of this Easement, Grantee shall be entitled to damages, or restoration. Damages for the cutting of Qualifying Timber or the removal of Qualifying Timber from the Easement Premises in violation of the terms of this Easement may be up to triple stumpage value times the proportion of the original compensation. The maximum amount of damages shall be calculated according to the following formula:~~

~~Where:~~
~~Sv = The stumpage value of the Qualifying Timber that is cut or removed from the Easement Premises at the time the damage was done;~~
~~C = The compensation paid by the state to the Grantor at the time the Easement became effective;~~
~~Vq = The original value of Qualifying Timber at the time the Easement became effective as calculated in WAC 222-21-050.~~

~~Maximum Damages = 3*Sv*(C/Vq)~~

~~In addition the Grantor shall pay interest on the amount of the damages at the maximum interest rate allowable by law.~~

~~Grantee's rights to damages under this section shall survive termination. Restoration of Qualifying Timber may include either replanting or replacing trees or both, as determined by Grantee, in its sole discretion, to be appropriate. Replanting shall be by nursery transplant seedlings approved by Grantee with subsequent silvicultural treatment including without limitation weed control and fertilization approved by Grantee. Replacing trees shall be accomplished by designation of replacement trees of the size and species acceptable to Grantee. If replacement trees are designated to replace the Qualifying Timber cut or removed in violation of the terms of this Easement, the designated trees shall be thereafter treated as Qualifying Timber under this Easement.~~

~~**B9.1.b Injunctive Relief.** Grantor agrees that Grantee's remedies at law for any violation of the terms of this Easement may be inadequate and that Grantee may be entitled to injunctive relief, both prohibitive and mandatory, in addition to other relief to which Grantee may be entitled, including specific performance of the terms of this Easement, without the necessity of providing either actual damages or the inadequacy of otherwise available legal remedies.~~

~~**B9.1.c Relationship to Remedies in Other Laws.** The remedies provided for in this section are in addition to whatever other remedies the state may have under other laws including without limitation the Forest Practices Act. Nothing in this Easement shall be construed to enlarge, diminish or otherwise alter the authority of the state to administer state law.~~

~~**B9.2 Costs of Enforcement.** The costs, including reasonable attorneys' fees, of enforcing this Easement shall be borne by Grantee unless Grantee prevails in a judicial action to enforce the terms of this Easement, in which case costs shall be borne by Grantor, provided that nothing herein shall make Grantor liable for costs incurred by Grantee in taking enforcement actions pursuant to other state laws.~~

~~**B9.3 Forbearance/Waiver.** Enforcement of this Easement against the Grantor is at the sole discretion of the Grantee, and vice versa. Any forbearance by either party to exercise its rights hereunder in the event of a breach by the other party shall not be deemed a waiver by the forbearing party of the term being breached or of a subsequent breach of that term or any other term or of any other of the forbearing party's rights under this Easement.~~

~~**B9.4 Waiver of Certain Defenses.** Grantor hereby waives any defense of laches, estoppel, or prescription.~~

~~**B9.5 Acts Beyond Grantor's Control.** Nothing herein shall be construed to entitle Grantee to bring any action or claim against Grantor on account of any change in the condition of the Easement Premises or of the Qualifying Timber that was not within Grantor's control, including without limitation fire, flood, storms, insect and disease outbreaks, earth movement, or acts of trespassers, that Grantor could not reasonably have anticipated and prevented, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Easement Premises or Qualifying Timber resulting from such causes. In the event the terms of this Easement are violated by acts of trespassers that Grantor could not reasonably have anticipated or prevented, Grantor agrees, at Grantee's option, to join in any suit, to assign its right of action to Grantee, or to appoint Grantee its attorney in fact, for the purpose of pursuing enforcement action against the responsible parties.~~

~~**B10 CONSTRUCTION AND INTERPRETATION**~~

~~**B10.1 Controlling Law.** Interpretation and performance of this Easement shall be governed by the laws of the State of Washington.~~

~~**B10.2 Liberal Construction.** Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of the grant to effect the purposes of this Easement. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purposes of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid. The parties acknowledge that each has had an opportunity to have this Easement reviewed by an attorney and agree that the terms shall not be presumptively construed against either party.~~

~~**B10.3 Captions.** The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction or interpretation.~~

~~**B11 AMENDMENT**~~

~~This Easement may be jointly amended. The amendments shall be in writing and signed by authorized representatives. Grantee shall record any such amendments in a timely fashion in the official records of County, Washington. All amendments shall be consistent with the purposes of this Easement.~~

~~**B12 TERMINATION**~~

~~Grantee may unilaterally terminate this Easement if it determines, in its sole discretion, that termination is in the best interest of the State of Washington. Grantee shall provide thirty (30) days written notice to Grantor of such termination.~~

~~**B13 EXTINGUISHMENT**~~

~~If circumstances arise that render the purpose of this Easement impossible to accomplish, this Easement can only be extinguished, in whole or in part, by mutual agreement of the parties or through judicial proceedings brought by one of the parties. Grantee shall be entitled to the value of the Easement as such value is determined pursuant to forest practices rules governing extinguishment or eminent domain, if no rule for extinguishment exists.~~

~~**B14 CONDEMNATION**~~

~~If the Easement is taken, in whole or in part, by exercise of the power of eminent domain, or acquired by purchase in lieu of condemnation, Grantee shall be entitled to compensation in accordance with the forest practices rules.~~

~~B15 NOTICE~~

~~Notices given pursuant or in relation to this Easement shall be in writing and delivered personally or by first class mail (postage pre-paid), addressed as follows:~~

~~(a) If to Grantor: _____~~

~~_____~~

~~_____~~

~~_____~~

~~(b) If to Grantee: Washington State Department of Natural Resources~~
~~Small Forest Landowner Office~~
~~DNR-Forest Practices Division~~
~~P.O. Box 47012~~
~~Olympia, WA 98504-7012~~

~~If either party's address changes during the term of this Easement, that party shall notify the other party of the change.~~

~~Any notice required to be given hereunder is considered as being received: (i) If delivery in person, upon personal receipt by the person to whom it is being given; or (ii) if delivered by first class U.S. mail and properly addressed, three (3) days after deposit into the U.S. mail; or (iii) if sent by U.S. mail registered or certified, upon the date receipt is acknowledged by the recipient.~~

~~B16 RECORDATION~~

~~Grantee shall record this instrument in timely fashion in the official records of _____County, Washington and may re-record it at any time as may be required to preserve its rights in this Easement.~~

~~B17 GENERAL PROVISIONS~~

~~B17.1 Severability.~~ ~~If any provision in this Easement, or the application hereof to any person or circumstance, is found to be invalid, the remainder of this Easement, or the application hereof to other persons or circumstances shall not be affected thereby and shall remain in full force and effect.~~

~~B17.2 Entire Agreement.~~ ~~This instrument sets forth the entire agreement of the parties with respect to the Easement. This instrument supersedes all other and prior discussions, negotiations, understandings, or agreements of the parties. No alteration or variation of this instrument shall be binding unless set forth in an amendment to this instrument consistent with subsection~~ **~~B11.~~**

~~**B17.3 Successors and Assigns.** The covenants, terms, conditions, and restrictions of this Easement shall be binding upon and inure to the benefit of the Grantor, Grantee, and their respective successors and assigns and shall continue as a servitude running with the property on which the Easement lies for the term of this Easement set forth in subsection **2.1.**~~

~~**B17.4 No Forfeiture.** Nothing contained herein will result in a forfeiture or reversion of Grantor's title in any respect.~~

~~**B17.5 Counterparts.** The parties may execute this instrument in two or more counterparts which shall, in the aggregate, be signed by both parties. Each counterpart shall be deemed an original as against the party that has signed it. In the event of any disparity between counterparts produced, the recorded counterpart shall be controlling.~~

~~**B17.6 References to Statutes and Rules.** Except as otherwise specifically provided, any references in this Easement to any statute or rule shall be deemed to be a reference to such statute or rule in existence at the time the action is taken or the event occurs.~~

~~**B17.7 Adherence to Applicable Law.**~~

~~Any activity pertaining to or use of the Easement Premises or Qualifying Timber shall be consistent with applicable federal, state, or local law including chapter 76.09 RCW, the Forest Practices Act, chapter 36.70A RCW, the Growth Management Act, chapter 90.58 RCW, the Shoreline Management Act, chapter 77.55 RCW, Construction Projects in State Waters Act ("Hydraulics Code"), the Endangered Species Act (16 U.S.C. Sec. 1531, et seq.), and the Clean Water Act (33 U.S.C. Sec. 1251, et seq.), and rules adopted pursuant to these statutes (including all rules adopted under Section 4(d) of the Endangered Species Act).~~

(2) **Forestry riparian easement application.** The landowner will provide the following ~~items are required for~~information in a ~~complete~~ forestry riparian easement application:

(a) ~~A certification by the small forest landowner that he or she meets the qualifications of a small forest landowner~~County tax parcel numbers of the property in the proposed easement premises;

(b) ~~All~~ A list of all forest practices application numbers ~~for the commercially reasonable harvest units and the associated qualifying timber on the property~~of approved and/or disapproved forest practices applications;

(c) The ~~dates and areas of all planned future harvest entries on the easement premises~~landowner's signature certifying that the landowner meets the criteria of a qualifying small forest landowner and documenting that the landowner is willing to sell or donate such easements to the state; and

(d) ~~A preliminary litigation guarantee or similar report from a title company for the tax parcels that contain the easement premises;~~ Documentation that qualifying timber is harvested, cannot be harvested because of forests and fish rule restrictions, or is uneconomic to harvest because of forests and fish rule restrictions. See WAC 222-21-032 for additional information about these categories.

The small forest landowner office may require additional information from the applicant to process the application and evaluate the eligibility of the proposed easement premises and the landowner.

~~(e) A description of past and current uses of the easement premises;~~

~~(f) Any information not specifically listed that the small forest landowner office needs to evaluate the easement and eligibility of the small forest landowner.~~

(3) **Baseline documentation.** The small forest landowner office will gather baseline documentation ~~must~~ that will describe the features and current uses on the proposed forestry riparian easement premises and the qualifying timber. The ~~information provided by the small forest landowner in subsection (2) of this section is considered part of the baseline~~ documentation will include but not be limited to~~.~~ : ~~In addition, the department will provide documentation that includes, but is not limited to:~~

(a) ~~Cruise~~ A summary of cruise information consistent with the standards and methods in WAC 222-21-040; and

(b) An assessment to determine site condition and potential liabilities associated with the proposed riparian easement ~~(see the board manual section 17 for procedures for conducting assessment); and~~premises.

~~(c) A description of the easement consistent with WAC 222-21-035.~~

(4) **Forestry riparian easement contract.** The forestry riparian easement contract will identify the parties, describe the land, locate the easement, state the terms and conditions, and provide a statement of consideration. The contract will include language consistent with RCW 76.13.120 (5) concerning the preservation of all lawful uses of the easement premises by the landowner. The easement will be for a term of 50 years from the date the completed forestry riparian easement application is submitted to and received by the small forest landowner office.

(5) **Land description standards.**

(a) The forestry riparian easement contract will include a description of the easement premises using a land survey provided by the department unless the cost of securing the survey would be unreasonable in relation to the value of the easement conveyed.

(b) When the small forest landowner office determines a land survey is not required, the department will prepare a written description that suitably and accurately depicts the location of the easement conveyed, or the department may consider other methods, such as producing a map, to accurately describe the easement premises.

~~**WAC 222-21-035 Description of easement.**~~

~~The easement premises and qualifying timber must be described as follows:~~

~~(1) Range, township, section, and parcel number;~~

~~(2) Forest practice base map of proposed harvest, other forest practices activities and easement;~~

~~(3) 1:400 map of the easement premises indexed either to one legal land survey point or two geopositional system points; and~~

~~(4) Traverse of the easement premises tied to subsection (3) of this section. (See the board manual section 17 for standards of traverse.)~~

~~(5) Where the department does not have satisfactory access to the easement premises, the landowner must designate the access route on the forest practices application base map.~~

NEW SECTION

WAC 222-21-031 Forestry riparian easement application review and processing.

After the small forest landowner office makes a preliminary determination of eligibility:

(1) The department will verify the timber harvest associated with the easement is complete.

(2) The department will submit the list of eligible projects to the state legislature for budget approval.

(3) The landowner or the landowner's representative will mark the boundary of the area containing the qualifying timber.

(4) The department will verify eligibility of qualifying timber.

(5) The department will perform a timber cruise on the qualifying timber to establish the compensation value.

(6) The department will inform the landowner in writing of the easement value. All compensation and reimbursement is subject to available funding.

(7) If an application is ineligible, the department will notify the landowner in writing the reasons why. The department will return ineligible applications to landowners.

NEW SECTION

WAC 222-21-032 Eligibility criteria.

(1) Qualifying small forest landowners must complete a timber harvest to be eligible for a forestry riparian easement, unless a commercially reasonable harvest is not possible according to (5) of this subsection or the only timber available to harvest meets the criteria of uneconomic to harvest according to (6) of this subsection.

(2) The easement premises cannot contain unacceptable liabilities as determined by the small forest landowner office. Unacceptable liabilities include but are not limited to the presence of hazardous substances on the land or other conditions that may create a liability to the department, any existing uses of the property that may jeopardize the protection of the easement premises and qualifying timber, and situations in which the applicant is unwilling or unable to provide reasonable protection against financial loss to the state.

(3) Where more than one person has an interest in property to be covered by a forestry riparian easement, all persons holding rights to control or affect the easement premises and qualifying timber must execute the easement documents or otherwise subordinate their interest to the easement being acquired by the state. This includes tenants in common, joint tenants, holders of reversionary interests, lien holders, and mortgages.

(4) **Commercially reasonable harvest.** The small forest landowner office will consider the following criteria to determine if an area covered by a forest practices application involves a commercially reasonable harvest. The proposed harvest must meet all five of the following requirements:

(a) The harvest unit is immediately adjacent to or physically connected to qualifying timber;

(b) The application is for a forest practice involving a timber harvest and the harvest would not result in a conversion to a use other than commercial timber operation;

(c) The landowner is not eligible for the 20 acre exemption under WAC 222-30-023;

(d) The value of the timber in the harvest unit, excluding qualifying timber, equals or exceeds $1000, which is the minimum required by department of revenue for taxing purposes; and

(e) The value of the taxable harvest equals or exceeds the value of the qualifying timber established under WAC 222-21-045 unless otherwise approved by the small forest landowner office.

(5) **Commercially reasonable harvest is not possible.** The small forest landowner office will consider the following criteria to determine if a forest practices application for harvest may qualify for the forestry riparian easement program because it involves an area where a commercially reasonable harvest is not possible. The proposed harvest must meet all four of the following requirements:

(a) The forest practices application has been disapproved because the area covered by the application cannot be harvested due to forests and fish rule restrictions;

(b) The forest practices application involves a proposed timber harvest and the harvest would not result in a conversion to a use other than commercial timber operation;

(c) The landowner is not eligible for the 20 acre exemption under WAC 222-30-023; and

(d) The value of the qualifying timber equals or exceeds $1000, which is the minimum required by the department of revenue for taxing purposes.

(6) **Uneconomic to harvest.** The small forest landowner office will consider the following criteria to determine whether timber is qualifying timber because the forests and fish rules made it uneconomic to harvest. The proposed harvest must meet all four of the following requirements:

(a) The timber could have been included in a commercially reasonable harvest unit if there were no additional requirements imposed by the forests and fish rules;

(b) The area is not reasonably accessible economically because of requirements imposed by the forests and fish rules;

(c) There is no reasonable unit size alternative which, if used, would make the area economical to harvest; and

(d) The cost to access the harvest unit plus the cost to harvest would equal or exceed 35% of the stumpage value in the portion of the unit considered uneconomic. The small forest landowner office will determine these costs and values consistent with WAC 222-21-045. Costs include harvest, construction of nonpermanent roads and/or water crossing structures, and associated expenses. When using the small harvester tax return method to calculate stumpage values and allowable costs, the landowner may include actual timber appraisal and sale layout costs incurred as part of the cost calculations.

WAC 222-21-040 Timber cruises.

(1) ~~This section is designed to establish methods and standards for cruises of qualifying timber for the proposed forestry riparian easements for purposes of establishing the compensation. It~~This section applies only to timber cruises related to the ~~department, small forest landowners, and the small forest landowner office in connection with the~~ forestry riparian easement program to establish easement compensation.

(2) ~~The following standards will be used for the timber cruises:~~ A timber cruise is required to determine the volume by species and grade to accurately determine the value of the qualifying timber.

(a) ~~The purpose of the timber cruise is to determine the volume by species and grade sufficient to value the qualifying timber.~~

~~(b) Additional trees left voluntarily by the small forest landowner may be noted, but are not included in the cruise volume.~~

~~(c)~~ The cruise method will be a ~~100~~ one hundred percent inventory of qualifying timber on the proposed easement premises. The inventory will include species, diameter class, grade, and any other information necessary to determine ~~valuation of~~a value for the ~~easement~~qualifying timber. ~~(See the board manual for specific cruise standards.)~~

(~~d~~b) A sampling cruise method may be used ~~for easement premises~~ under certain circumstances such as where easement premises are greater than ten acres or where the forest trees are homogeneous. ~~(See the board manual section 17 for standards for sampling cruise method.)~~

(3) Additional trees left voluntarily by the small forest landowner may be noted but will not be included in the cruise volume.

WAC 222-21-045 Valuation.

(1) ~~**This section is designed to establish methods and standards for valuation** of forestry riparian easements for purposes of establishing the compensation. It applies only to the department, small forest landowners, and the small forest landowner office in connection with the forestry riparian easement program.~~

~~(2)~~ **The small forest landowner office will calculate the ~~fair market value~~ of the compensation amount for** forestry riparian easements ~~as of the date of receipt of the forest practices application associated with the qualifying timber, or the date the landowner provides written notification to the small forest landowner office that the harvest is to begin~~by determining a value for the qualifying timber. ~~Data obtained or maintained by the department of revenue under RCW 84.33.074 and 84.33.091 will be used and adjusted to the applicable date. For easements with an approved forest practices application, the small forest landowner must indicate whether valuation will be calculated using method (a) or (b) of this subsection. Only method (a) of this subsection is available for qualifying timber for which an approved application for timber harvest cannot be obtained because of restrictions under the forest practices rules under WAC 222-21-061. In either method (a) or (b) of this subsection, the time adjustment index will be based on log price changes. The small forest landowner office will determine the specific log species and/or sorts and the log price reporting service to use after consultation with the small forest landowner advisory committee established under RCW 76.13.110(4) and the department of revenue. The small forest landowner office will generate an index that reflects the time adjustments using information and data obtained from a log price reporting service determined by the department in consultation with the small forest landowner committee.~~The office will use data gathered from or adjusted to the date the office received the complete forestry riparian easement application. The office will use the stumpage value determination method described in (a) of this subsection for qualifying timber that cannot be harvested because of forests and fish rule restrictions. For qualifying timber approved for harvest, the office will use both the stumpage value determination method and the small harvester tax return method to determine the highest compensation amount for the landowner.

(a) **Stumpage value determination method.** The small forest landowner office will create and maintain value tables to determine stumpage value of the qualifying timber. These tables will be created using a method coordinated with the department of revenue. The values will closely approximate the stumpage value for logs ~~that would be sold in the ordinary course of business for~~on the date ~~of receipt of~~ the office received a complete forestry riparian ~~forest practices~~easement application. The landowner ~~must~~ will provide ~~the small forest landowner office with~~:

(i) The reference for the stumpage value table and any other needed information for use of the table ~~(see the board manual section 17 for details)~~; and

(ii) Any information the ~~small forest~~ landowner would like the ~~department~~ office to consider in its cruise and valuation of the qualifying timber.

(b) **Small harvester tax return method.**

(i) The landowner must provide comprehensive mill or buyer information for each harvest unit associated with the forestry riparian easement including ~~to the department on the sale breakdown. This includes~~:

~~(i) The volume and scaling bureau log grades of each species harvested;~~

~~(ii) The amount received for each species; and~~

~~(iii) The actual harvesting and marketing costs as defined in the department of revenue small harvester instructions.~~

(A) The delivered value by species;

(B) The total volume by species; and

(C) The actual harvesting and marketing costs as defined in the department of revenue small harvester instructions.

This information must be verifiable as proceeds from the timber harvests from documents such as mill receipts and/or forest excise tax returns. If the small forest landowner office does not receive a comprehensive packet of mill or buyer information or is not satisfied with the source of the documentation, the office will determine the qualifying timber value using the stumpage value determination method.

(ii) The office will use a time adjustment index to determine the qualifying timber value based on the date the office received the complete forestry riparian easement application. The office will generate a time adjustment index for each harvest associated with the easement based on log price changes.

(iii) The ~~price received for the timber is~~office will determine the adjusted stumpage value by ~~to the applicable date using the time adjustment index and then~~subtracting the average logging and hauling cost per thousand board feet (MBF) ~~is subtracted to arrive at the stumpage value~~ from the value of the time adjusted mill or buyer information. The office will then determine the value of the qualifying timber ~~is determined~~ by multiplying the time adjusted stumpage value of each species in the harvest unit by the net volume for each corresponding species in the inventory of qualifying timber. ~~A residual value approach is used to determine the value of species in the easement, which are not present in the harvest area. The prices for species not present in the harvest unit are based on the delivered log price report approved by the small forest landowner office that corresponds closest to the date of the forest practices application, minus the average logging and hauling costs.~~

(iv) The timber species that exist in the easement premises will be valued, not the species in the harvest area. The timber species in the easement premises will be valued by multiplying the determined cruise volume by the appropriate stumpage value of those species shown on the appropriate table used for timber harvest excise tax purposes per RCW 84.33.091.

(2) Determining the forestry riparian easement compensation. The small forest landowner office uses a "high impact regulatory threshold" to calculate the compensation offered for a forestry riparian easement. This threshold is determined by multiplying the value of all timber covered under a forest practices application by 19.1 percent for timber in western Washington and 12.2 percent for timber in eastern Washington.

(a) When the percentage of the qualifying timber value to the total value of all timber covered under a forest practices application is equal to or less than the applicable high

impact regulatory threshold (19.1 percent or 12.2 percent), the compensation offered for an easement will be fifty percent of the qualifying timber value.

(b) When the percentage of the qualifying timber value to the total value of all timber covered under a forest practices application exceeds the applicable high impact regulatory threshold (19.1 percent or 12.2 percent), the compensation offered for an easement will be more than fifty percent of the qualifying timber value up to the applicable high impact regulatory threshold, plus full compensation (one hundred percent) for the qualifying timber value that exceeds the high impact regulatory threshold. This is mathematically represented as follows:

Where:

Vq = the value of qualifying timber;

Vh = the value of harvested timber; and

t = the high impact of regulatory threshold (19.1 percent for western Washington, 12.2 percent for eastern Washington);

The compensation for easement = $((Vq/(Vq + Vh)) - t) * (Vq + Vh)) + (t * (Vq + Vh)/2)$.

~~(3) Removal of any qualifying timber before the expiration of the easement must be in accordance with the forest practices rules and the terms of the easement. There shall be no reduction in compensation for reentry.~~

NEW SECTION

WAC 222-21-048 Reimbursement of costs to the small forest landowner.

The state of Washington will reimburse landowners for actual costs incurred toward identifying qualifying timber. Costs can include one or more of the following:

(1) Determining and marking streamside buffers;

(2) Marking the qualifying timber; and

(3) The cost of the portion of a geotechnical report that is applicable to the area determined to contain qualifying timber.

WAC 222-21-050 Payment of compensation and reimbursement to the small forest landowner.

(1) ~~The compensation offered to the small forest landowner will be 50% of the fair market value of the qualifying timber established under the process described in WAC 222-21-045, plus the compliance and reimbursement costs, subject to the following exceptions:~~

~~(a) If the high impact regulatory threshold is exceeded for an area covered by an approved forest practices application, then the compensation offered will be increased to 100% for the value of the qualifying timber where the high impact regulatory threshold is exceeded. Use the following calculation:~~

~~Where:~~

~~Vq = value of qualifying timber;~~

~~Vh = value of harvested timber;~~

~~t = high impact of regulatory threshold (19.1% for Western Washington, 12.2% for Eastern Washington);~~

~~TV = total value of all timber covered under FPA = Vq +Vh; and~~

~~HIO - high impact override = (Vq/TV) t;~~

~~Compensation for easement = (HIO*TV)+~~ $\left(\frac{t * TV}{2}\right)$

~~See Section 17 of board manual for example.~~

~~(b)~~ All compensation and reimbursement to the small forest landowner is subject to available funding.

(2) If funding is not available, the small forest landowner office will maintain a priority list for compensation and reimbursement to the landowner. Priority will be based on ~~(a)~~ the date ~~of receipt of forest practices application and (b) date of receipt of completed harvest status questionnaire~~ the small forest landowner office received the complete forestry riparian easement application. In instances where two easement applications are received on the same date, priority will be based on the date the department received a complete forest practices application associated with the easement.

(3) ~~Reimbursement costs for easement layout are subject to the work being acceptable to the department. The small forest landowner office shall determine how the reimbursement costs will be calculated. The small forest landowner office will send the small forest landowner a notice of compensation decision within 60 days of completion of the timber cruise.~~ The small forest landowner office will offer compensation for the easement in a purchase and sale agreement.The small forest landowner will accept or reject the conditions of the purchase and sale agreement in writing and submit the written acceptance or rejection to the small forest landowner office.

~~(4) Compensation for a forestry riparian easement associated with an approved forest practices application will not be paid until:~~

~~(a) The department has documented completion of harvest;~~

~~(b) The department has verified that there has been compliance with the rules requiring leave trees in the easement area;~~

~~(c) Any dispute over the amount of compensation or eligibility or other matter involving the forestry riparian easement has been resolved; and~~

~~(d) The forestry riparian easement has been executed and delivered to the department.~~

(~~5~~4) Compensation for ~~a~~ the forestry riparian easement ~~for which an approved forest practices application for timber harvest cannot be obtained because of restrictions under these rules adopted under RCW 76.09.055 or 76.09.370~~and reimbursement of landowner costs will ~~not~~ be paid ~~until~~after:

(a) The department has verified that ~~there has been compliance with~~ the landowner has no outstanding violations under chapters 76.09 or 76.13 RCW or any associated forest practices rules ~~requiring leave trees in the easement area~~; ~~and~~

(b) Any dispute over the amount of compensation or eligibility or other matter involving ~~the forestry riparian~~ easement has been resolved; and

(c) The small forest landowner office has sent a forestry riparian easement ~~has been executed and~~contract to the landowner, the landowner has signed the contract, and the landowner has delivered it to the department.

(5) Compensation for any qualifying timber located on potentially unstable slopes or landforms will not exceed a total of fifty thousand dollars during any biennial funding period.

NEW SECTION

WAC 222-21-055 Reimbursement to the department.

If, within the first ten years after receipt of compensation for a forestry riparian easement, a small forest landowner sells the land on which a forestry riparian easement is located to a landowner that does not meet the criteria for a qualifying small forest landowner, then the selling small forest landowner must reimburse the state for the full compensation received for the easement and the full amount of the costs incurred to identify the qualifying timber.

If the land on which the easement is located consists of multiple land parcels and the selling small forest landowner sells parcels that consist of only a portion of the easement, the small forest landowner office will calculate reimbursement amount. The calculation will be based on the ratio of qualifying

timber volume within the portion of the easement on the land that is sold to the total volume of qualifying timber. The selling small forest landowner must make full payment for this reimbursement within one year of sale of the land the easement occupies. The department will continue to hold, in the name of the state, the forestry riparian easement for the full term of the easement.

~~**WAC 222-21-060 Commercially reasonable harvest.** The small forest landowner office will use the following criteria to determine if an area covered by a forest practices application involves a commercially reasonable harvest. The proposed harvest must meet all of the following requirements:~~

~~(1) The harvest unit includes or borders a riparian area;~~

~~(2) The application is for a Class III or Class IV Special forest practice or a Class II that is a renewal of a Class III or Class IV Special;~~

~~(3) The harvest is not a Class IV General conversion or covered by a conversion option harvest plan;~~

~~(4) The landowner is not eligible for the 20 acre exemption under WAC 222-30-023;~~

~~(5) The value of the timber in the harvest unit, excluding qualifying timber, is equal to or exceeds the minimum required by department of revenue for taxing purposes ($1000); and~~

~~(6) The taxable harvest equals or exceeds the value of the qualifying timber established under WAC 222-21-045, unless otherwise approved by the small forest landowner office. (See the board manual.)~~

~~**WAC 222-21-061 Criteria when commercially reasonable harvest is not possible.** The small forest landowner office will use the following criteria to determine if a forest practices application for harvest may qualify for the forestry riparian easement program because it involves an area where a commercially reasonable harvest is not possible and an approved application for harvest cannot be obtained because of restrictions under the forest practices rules. The proposed harvest must meet all of the following requirements:~~

~~(1) The application has been disapproved based on rules adopted under RCW 76.09.055 or 76.09.370 that require the area covered by the application to be left unharvested; and~~

~~(2) The application is for a Class III or Class IV Special forest practice; and~~

~~(3) The harvest is not a Class IV General conversion or covered by a conversion option harvest plan; and~~

~~(4) The landowner is not eligible for the 20 acre exemption under WAC 222-30-023; and~~

~~(5) The value of the qualifying timber is equal to, or exceeds, the minimum required by the department of revenue for taxing purposes ($1,000).~~

~~**WAC 222-21-065 Uneconomic to harvest.** The small forest landowner office will use the following criteria to determine whether timber is qualifying timber because it is rendered uneconomic to harvest by rules adopted under RCW 76.09.055 or 76.09.370. The proposed harvest must meet all of the following requirements:~~

~~(1) The timber could have been included in a commercially reasonable harvest unit by the small forest landowner if there were no additional requirements imposed by rules adopted under RCW 76.09.055 or 76.09.370.~~

~~(2) The area is not reasonably accessible because of requirements imposed by rules adopted under RCW 76.09.055 or 76.09.370.~~

~~(3) The unit must have no reasonable unit size alternative which if used would make the area economical to harvest.~~

~~(4) The cost to access the harvest unit plus the cost to harvest must equal or exceed 35% of the stumpage value in the portion of the unit considered to be uneconomic. The small forest landowner office will determine costs and values consistent with WAC 222-21-045. Costs include harvest, construction of nonpermanent roads and/or water crossing structures, and~~

~~associated expenses. When using the small harvester method to calculate stumpage values and allowable costs, the landowner may include actual timber appraisal and sale layout costs incurred, as part of the cost calculations.~~

WAC 222-21-070 Blowdown and salvage. After execution of a forestry riparian easement, qualifying timber may not be salvaged~~, including removal of blowdown,~~ without prior written permission from the department. Prior to removal, the small forest landowner office and the ~~small forest~~ landowner must negotiate the terms of removal and reimbursement to the state, if any. Qualifying timber that blows down off the easement premises that presents a nuisance may be moved back onto the easement premises without permission from the department.

WAC 222-21-080 Eminent domain. If a forestry riparian easement is taken~~,~~ in whole or in part~~,~~ by exercise of the power of eminent domain, or acquired by purchase in lieu of condemnation, the state will receive compensation for its remaining interest in the easement based upon the following formula:

Where:

C ~~= Is~~= the compensation to the department for the state's remaining interest in the easement;

O ~~= Is~~= the original compensation for the easement paid to the small forest landowner by the state;

P ~~= Is~~= the proportion of the forestry riparian easement extinguished or terminated;

CPIo ~~= Is~~= the ~~U.S.~~ Consumer Price Index for all ~~urban~~ Urban ~~consumers~~ Consumers as published by the U.S. Bureau of Labor Statistics for the month in which the original compensation was determined;

CPIc ~~= Is~~= the ~~U.S.~~ Consumer Price Index for all ~~urban~~ Urban ~~consumers~~ Consumers as published by the U.S. Bureau of Labor Statistics for the most recent month available at the time the easement is terminated or extinguished;

I ~~= Is~~= the rate of return on 30 year treasury bonds, as reported by the Federal Reserve Statistical Release H15 less the rate of increase in the Consumer Price Index for all Urban Consumers as published by the U.S. Department of Labor Bureau of Labor Statistics for the previous 12 months;

R ~~= Is~~= the number of years remaining on the easement at the time of extinguishment or termination~~.~~;

$C = O*P*(CPIc/CPIo)*(1-(1/(1.+I)^{R}))/(1-1/(1+I)^{50}))$

WAC 222-21-090 Internal department of natural resources review of small forest landowner office ~~compensation~~ decisions. ~~Within 30 days after the date of the notice of compensation decision, the small forest landowner may submit a written request for review to the supervisor of the department or his or her designee. The request for review must identify the issue being raised and provide any supporting documentation. The supervisor will issue a written response within 30 days.~~ Any person who wishes to appeal written decisions of the small forest landowner office pertaining to application eligibility, easement valuation, and related decisions may submit a request for review within thirty days after the date of the small forest landowner office's written decision. The request for review must identify the issue being raised and provide any supporting documentation. The supervisor of the department or designee will issue a written response within thirty days of receipt of the request for review and this response will constitute the department's final decision.

STATE OF WASHINGTON **PO Box 47012**
FOREST PRACTICES BOARD **Olympia, WA 98504-7012**

As required by
the Administrative Procedure Act
Chapter 34.05 RCW

DRAFT
CONCISE EXPLANATORY STATEMENT
AND
RESPONSIVENESS SUMMARY
FOR THE ADOPTION OF
Chapter 222-21 WAC, Forestry Riparian Easement Program

Prepared by: Gretchen Robinson
April 2012

Table of Contents

1. Introduction 1
2. Differences between proposed and final rule 1
3. Summary of Comments 2
4. Rule Making Timeline, Notices, and Opportunities to Participate 3

1. Introduction

The Forestry Riparian Easement Program (FREP) was originally established in 1999 in the Salmon Recovery Act.[1] It was created to compensate small forest landowners for the disproportionate impact imposed on them by the new, more stringent timber harvest requirements in the forest practices rules for riparian areas. Eligible landowners receive at least half of the value of the harvestable timber as compensation for voluntary 50-year easements. Funding is dependent on biennial appropriations from the state legislature.

In 2011 the legislature made changes to chapter 76.13 RCW to reform the program (HB 1509). Two of the major reforms included eliminating eligibility for "non-profit" legal entities and limiting compensation for qualifying timber located on potentially unstable slopes or landforms to $50,000 for any biennial funding period. The Forest Practices Board then adopted changes to chapter 222-21 WAC to implement the legislation and make language clarifications.

2. Differences between proposed and final rule

Two definitions were changed after the proposed rule was published in the Washington State Register.

<u>Difference #1: Definition of "Qualifying small forest landowner"</u>
WAC 222-21-010(6)(b) is changed to clarify that the landowner's disapproved application must have been disapproved because of the forests and fish rule restrictions in riparian areas, and not for

[1] Section 504, chapter 4, Laws of 1999 sp. sess.

other reasons. The underline/strike-out text below shows the differences between the proposed rule and the final rule:

(6) "Qualifying small forest landowner" means …

(b) To be eligible for a forestry riparian easement, a qualifying small forest landowner must have submitted a forest practices application covering qualifying timber to the appropriate region office, and the department must have approved ~~or disapproved~~ the application or disapproved it because of forests and fish rule restrictions. See WAC 222-21-032 for more information about easement eligibility.

Difference #2: Definition of "Qualifying timber"
WAC 222-21-010(7) is changed to clarify the criteria for "qualifying timber." The underline/strike-out text below shows the differences between the proposed rule and the final rule:

(7) "Qualifying timber" means forest trees that ~~are~~meet criteria (a) through (c) of this subsection:

(a) Are ~~C~~covered by a forest practices application. ~~and required to be left unharvested because of forests and fish rule restrictions, or are made uneconomic to harvest because of forests and fish rule restrictions;~~

(b) ~~Within, immediately adjacent to, or physically connected to a commercially reasonable harvest unit, or included in an approved forest practices application for a timber harvest that cannot be obtained because of forests and fish rule restrictions; and~~Fit one of the following situations:

(i) The timber is required to be left unharvested because of forests and fish rule restrictions and is within, immediately adjacent to, or physically connected to a commercially reasonable harvest unit under an approved forest practices application; or

(ii) The timber cannot be approved for harvest under a forest practices application because of forests and fish rule restrictions.

(c) Are ~~L~~located within ~~any~~ one or more of the following ~~categories~~areas:

(i) Riparian or other sensitive aquatic areas;

(ii) Channel migration zones; or

(iii) Areas of potentially unstable slopes or landforms, verified by the department, that have the potential to deliver sediment or debris to a public resource or threaten public safety and ~~is~~are immediately adjacent to or physically connected to other qualifying timber that is located within riparian or other sensitive aquatic areas.

Qualifying timber may also mean forest trees that do not meet criteria (b) or (c) in this subsection if they are uneconomic to harvest as determined under WAC 222-21-032(6).

3. Summary of Comments

The Board received one comment on the proposed rule during the public review period from March 7, 2012 through March 30, 2012. Ken Miller testified at the March 29 hearing in Centralia that he supported the proposed rule changes.

Another comment was received via email during the comment period from Jim Murphy, whose message was related to the legislature's under-funding of the Forestry Riparian Easement Program. He also suggested that the impact of inadequate funding could be partially addressed if the state agencies would develop a workable (alternate plan) template.

4. Rule Making Timeline, Notices, and Opportunities to Participate

8/9/11 Forest Practices Board approved filing *Preproposal Statement of Inquiry* (form CR-101). There was a public comment opportunity at the meeting prior to the Board action.

9/7/11 CR-101 published in the Washington State Register (WSR 11-17-095 filed 08/22/11).

10/8/11 Forest Practices Board approved draft rule language for 30-day review pursuant to Forest Practices Act (RCW 76.09.040(2)). There was a public comment opportunity at the meeting prior to the Board action.

30-day review by Washington Department of Fish and Wildlife, counties, and tribes took place November 14 through December 15.

2/14/12 Forest Practices Board approved filing *Proposed Rule Making* (form CR-102) and the draft rule language for public review and comment. There was a public comment opportunity at the meeting prior to the Board action.

3/7/12 CR-102 published in the Washington State Register (WSR 12-05-094 filed 02/17/1. Public comment period was from 03/7/12 through 03/30/12, including hearings on March 27 and March 29 in Spokane and Centralia.

3/7/12 Notice of Rule Making Activity #12-01 distributed via the Board's list of interested parties, GovDelivery notice, and website at http://www.dnr.wa.gov/BusinessPermits/ForestPractices/Pages/Home.aspx

3/15/12 Hearings notice distributed via GovDelivery notice and website at http://www.dnr.wa.gov/BusinessPermits/ForestPractices/Pages/Home.aspx

3/27/12 Public hearing in Spokane.

3/29/12 Public hearing in Centralia.

5/8/12 Forest Practices Board meeting *(remainder to be completed after rule adoption)*

From:	Jim Murphy
To:	ANDERSON, PATRICIA (DNR)
Subject:	FREP Comments
Date:	Monday, March 12, 2012 10:57:18 AM

Dear Forest Practice Board Members:

As one SFLO who worked tirelessly with the first SFLOAC on developing the FREP contract and procedures I am VERY concerned that we find a permanent method of funding the FREP. If SLO's are being FORCED to honor the Forest and Fish Report endangered species riparian buffers then the Legislature ought to HONOR their PROMISE to partially compensate small landowners for the cost of leaving the buffers for the public good.

It is despicable that the Legislature thinks they can simply ignore funding the FREP. That is akin to STEALING from small forest landowners. How would YOU like to wait 7-8 YEARS for your paycheck or your tax refund??

It would be possible to minimize the FREP expense if the State Agencies could find a way to help develope timber harvest templates as REQUIRED by the Forest and Fish Report. To date we have ONE workable template and no future hope of another.

The Commissioner's template is inadequate and does not allow for forest management in the inner zone as contemplated by the Legislature.

It was envisioned by the Legislature that the FREP would be ONE TOOL available to small forest landowners. It is all the more important when the other promised tools are not available either!!

Jim Murphy, Proprietor
Timber Services, Inc.
"Harvest Green Working Forests"
P.O. Box 891
Chehalis, Washington 98532
360-520-0090 (c)
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ECONOMIC ANALYSIS
Forest Practices Board
Rule Making Affecting Forestry Riparian Easement Program

By Craig Calhoon, Economist, and Gretchen Robinson, Natural Resource Specialist
Department of Natural Resources
April 2012

PROPOSAL

The Forest Practices Board (Board) proposes to amend chapter 222-21 WAC, *Small Forest Landowner Forestry Riparian Easement Program*. The purpose of the proposed rules is to implement 2011 legislation (Engrossed Substitute House Bill 1509) that made changes to the Forestry Riparian Easement Program.

AFFECTED COMMUNITY

The affected community for this proposal is made up of forest landowners who are eligible and wish to participate in the Forestry Riparian Easement Program. These landowners are "small harvesters" as defined in RCW 84.33.035 and in general harvest no more than an annual average of 2 million board feet of timber. In this document, this landowner group is referred to as "landowners", "small forest landowners", or "affected community."

ANALYSIS REQUIREMENTS

The Administrative Procedure Act requires agencies to complete a cost-benefit analysis before adopting a rule that affects a policy or regulatory program. An agency cannot adopt a rule unless it:

- Determines the rule is needed to achieve the general goals and specific objectives of statute;
- Determines 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
- Determines 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.[1]

Agencies are also required to assess impacts of proposed rules on small businesses if the proposed rules will impose more than minor costs on businesses in an industry.[2] In this case, a small business impact analysis is not required because the Forestry Riparian Easement Program (FREP) and the proposed changes to the FREP rules do not impose regulatory requirements or costs on landowners. Rather, the program provides qualifying landowners the opportunity to receive financial compensation for granting a conservation easement to the state of Washington

[1] See RCW 34.05.328 *Significant legislative rules*, for more information about rule making requirements.
[2] See chapter 19.85 RCW, Regulatory Fairness Act, for small business analysis requirements.

for timber that is not legally harvestable. Furthermore, landowners' participation in the program is voluntary.

CONTEXT

The Forestry Riparian Easement Program was originally established in 1999 in the Salmon Recovery Act.[3] It was created to compensate small forest landowners for the disproportionate impact imposed on them by the new, more stringent, timber harvest requirements in riparian buffer areas in the forest practices rules. The legislation directed the Department of Natural Resources' newly created Small Forest Landowner Office to administer the program.

Eligible landowners who wish to participate in FREP are offered at least one-half of the value of "qualifying timber" (as if it were theoretically harvestable) as compensation for 50-year forest riparian easements (a type of conservation easement). Qualifying timber is: 1) timber that is covered by a forest practices application (FPA) located within or bordering a commercially reasonable harvest unit that a landowner is required to leave un-harvested because of forests and fish rule restrictions; 2) timber that a landowner does not harvest because forests and fish rule restrictions make it uneconomic to harvest; or 3) timber for which an approved FPA cannot be obtained because of forests and fish rule restrictions.

FREP compensation is subject to available biennial funding as appropriated by the Legislature. The Legislature has appropriated State Capital funds for six consecutive biennia, from the 2001-2003 Biennium through the current 2011-2013 Biennium.

Table 1 presents a statistical summary of FREP funding and accomplishments by biennium for the first five completed biennia of the program, through the 2009-2011 Biennium. Through June 30, 2011 (the end of the 2009-2011 Biennium) the Department of Natural Resources (DNR) paid compensation totaling $22,782,481 to landowners for 290 FREP easements for an average compensation amount of $78,600 per easement. The FREP easements covered 4,941 acres with an average compensation amount of $4,610 per acre. The average easement covered a land area of 17.0 acres. The total amount of funds appropriated to FREP during the first five biennia was

Table 1. Forest Riparian Easement Program Statistical Summary

Biennium	Amount Appropriated	Number of Applications During Biennium	Total Program Expenditures	Amount Paid to Landowners for Easement Compensation	Number of Easements Purchased	Average Compensation Paid per Easement	Easement Acres Acquired	Average Compensation Paid per Easement Acre	Average Acreage per Easement
2001-03	$3,750,000	72	$3,750,000	$2,781,988	29	$95,900	702	$3,960	24.2
2003-05	$4,000,000	71	$3,347,350	$2,895,190	58	$49,900	779	$3,720	13.4
2005-07	$8,000,000	128	$7,700,000	$7,307,600	74	$98,800	1,459	$5,010	19.7
2007-09	$10,300,000	74	$9,579,000	$9,003,405	117	$77,000	1,853	$4,860	15.8
2009-11	$1,000,000	26	$975,000	$794,298	12	$66,200	148	$5,370	12.3
Total	$27,050,000	371	$25,351,350	$22,782,481	290	$78,600	4,941	$4,610	17.0

$27,050,000. An additional $1 million was appropriated to the program for the current 2011-2013 Biennium.

[3] Section 504, chapter 4, Laws of 1999 sp. sess.

PROPOSED RULE CHANGES AND IMPACTS ON AFFECTED COMMUNITY

In 2011, the Legislature made changes to FREP relating to landowner qualifications, timing of qualifying timber valuation, compensation for qualifying timber on potentially unstable slopes or landforms, sales of lands subject to FREP easements, reimbursable landowner costs, and the start date of the 50 year easement term.

The Board is proposing changes in chapter 222-21 WAC as listed below to assist DNR in implementing the Legislature's changes to FREP and to assist landowners in participating in FREP. The impacts of the changes on landowners are summarized in **Tables 2 and 3**.

Changes in landowner qualifications: Eliminating non-profit organization landowners. Proposed WAC 222-21-010(7)(a)(i) carries out legislation specifying that only "for-profit" legal entities are eligible for compensation under FREP. This eliminates non-profit entities (e.g., churches, land trusts, scouting organizations) that may fit the criteria for average annual harvest limitations but are not for-profit businesses.

TABLE 2. Impact, Benefits, and Costs for Non-Profit Organization Forest Landowners

Affected Community	Rule Change Item	Description of Change/Impact	Benefits of Change (or Reduced Costs)	Costs of Change (or Decreased Benefits)
Non-Profit Organization Forest Landowners	Landowner qualification: "For-profit" entities only	Limits eligibility to "for-profit" landowners	*none*	Non-profit organization landowners no longer eligible to receive compensation

Changes in landowner qualifications: No forest practice violations. A proposed amendment to WAC 222-21-050 carries out legislation requiring DNR to verify a landowner does not have an outstanding forest practices violation before compensating the landowner under FREP.

Change in the timber value date used to determine easement compensation. Proposed WAC 222-21-045 carries out legislation that changes the timber value date the Small Forest Landowner Office must use to determine easement compensation. Under current rule, the office must use timber data gathered from or adjusted to the date DNR receives the FPA or the date the landowner notifies DNR that harvest is to begin. Under the proposed rule it is the date the office receives a complete FREP application.

Compensation for qualifying timber on unstable slopes. Proposed WAC 222-21-050 carries out legislation that includes timber on potentially unstable slopes or landforms that have the potential to deliver sediment or debris to a public resource. However, compensation for such timber may not exceed $50,000 total for any unstable slope area associated with an easement application, and compensation to any landowner for such timber may not exceed $50,000 during any biennial funding period. This will limit the amount of compensation available for landowners who own forest land with potentially unstable slopes or landforms adjacent to riparian buffers.

TABLE 3. Impact, Benefits, and Costs for Other ("For-Profit") Forest Landowners

Affected Community	Rule Change Item	Description of Change/Impact	Benefits of Change (or Reduced Costs)	Costs of Change (or Decreased Benefits)
"For-Profit" Small Forest Landowners	Landowner qualification: No forest practice violations	Limits eligibility to landowners with no outstanding forest practices violations.	*none*	Landowners with forest practices violations no longer eligible for compensation.
	Timing of qualifying timber valuation	Changes timber value date for determining easement compensation from the date of the forest practices application to the date of easement application.	Some landowners receive higher compensation, based on timber market.	Some landowners receive lower compensation, based on timber market.
	Compensation for qualifying timber on potentially unstable slopes or landforms	Now allows compensation	Landowner receives compensation outside riparian buffers (already done by DNR practice).	*none*
		May not exceed $50,000 total for any unstable slope area, and compensation for any landowner for such timber may not exceed $50,000 during any biennial funding period.	Some landowners (lower on priority list) will get compensation at an earlier date.	Some landowners (higher on priority list) will get smaller amount of compensation.
	Sale of land subject to FREP easement	Requires reimbursement of compensation amount to the state if lands sold to non-qualifying landowner within 10 years.	*none*	Partially limits marketability of property during the first 10 year period of the easement.
	Reimbursable cost: geotechnical report	Now allows reimbursement of some portion of the cost of geotechnical report.	Landowner will be reimbursed for cost.	*none*
	Start date of easement term	Changes from date FPA is submitted to date FREP application is submitted.	*none*	Extends end date of easement term, encumbering property longer.

Sales of lands subject to FREP easements. Proposed new WAC 222-21-055 carries out legislation that requires a landowner to reimburse the state if within 10 years of receipt of compensation for a FREP easement the landowner sells the forestland on which the easement is located to a non-qualifying landowner. In these cases, the state will continue to hold the easement for the full term of the easement. The 10 year reimbursement period is an additional encumbrance on the land subject to a FREP easement that did not exist prior to the 2011 legislation.

Additional reimbursable landowner cost. In addition to the costs of easement layout, new WAC 222-21-048 states that landowners will be reimbursed for the cost of the portion of their geotechnical report that is applicable to the area determined to contain qualifying timber.

Start date of easement term. Proposed WAC 222-21-030(3) carries out legislation that changed the effective start date for the 50-year easement term. Previously, the easement term began when the landowner submitted the associated FPA. Now it begins 50 years from the date DNR receives a completed FREP application.

COST BENEFIT ANALYSIS

Throughout the following discussion of costs and benefits associated with the proposed rule change, please refer to the columns in **Tables 2 and 3** labeled "Benefits of Change (or Reduced Costs)" and "Costs of Change (or Decreased Benefits)".

Costs

Cost for non-profit organizations. Non-profit organizations that own forest land will no longer be eligible to grant a FREP easement and receive compensation under the program. However, the overall impact on the affected community is minimal because the demand by non-profit organizations is very low based on past and present interest in the program. Only six of the current 290 FREP easements (2.0 percent) are to non-profit entities, and at the time the 2011 FREP legislation became law only one (1.2 percent) of the 80 pending valid FREP applications was by a non-profit entity.

Cost for forest practices violators. Landowners with outstanding forest practices violations will no longer be eligible to grant a FREP easement and receive compensation under the program. There is no data available to estimate the level of overall impact, but it is believed to be minimal. Moreover, the violating landowner has a chance to correct the problem and qualify for a FREP easement.

Cost for landowners who sell their land within the first 10 years of the easement. The requirement to reimburse the state if the property is sold to a non-qualifying landowner during the first 10 years of the easement places an encumbrance on the property which may limit its marketability for the first 10 years. However, this potential impact is mitigated because the landowner would elect to enter the easement with the knowledge of this condition.[4] In addition,

[4] The requirement to reimburse the state if the property is sold to a non-qualifying landowner during the first 10 years of the easement does not apply retroactively to existing easements.

there would be a significantly large pool of potential purchasers who would be qualifying landowners.

Cost for landowners from changing the start date of the easement. There is no change to the easement term of 50 years; however, the start date of the easement changes from the date of the FPA to the date DNR receives a completed forestry riparian easement application. In the majority of cases, this will extend the easement period because most riparian easement applicants are able to harvest some portion of the timber on their property associated with the qualifying timber and, according to the Small Forest Landowner Office, these harvests on average are completed about one year after the FPA application date. Once a harvest is complete the landowner may submit a forestry riparian easement application. Therefore, in most cases this will extend the end date of the easement by about one year, thus encumbering the property for about one additional year.

Offsetting Costs and Benefits

Two of the proposed rule changes may have a positive impact for some individual "for-profit" forest landowners and have a negative impact for others. In this sense the net impact is neutral across members of the affected community:

- Changing the timber value date from the date of the forest practices application to the date of easement application will affect the value of the qualifying timber because of price fluctuations in the timber market. Because timber values will continue to fluctuate through time, some landowners may get a larger compensation amount under the rule change and some may get a smaller compensation amount.

- Throughout the first ten years of FREP implementation, DNR by practice compensated landowners for qualifying timber that was required to be left on potentially unstable slopes or landforms with potential to deliver sediment to a public resource or threaten public safety. There was no limit to the compensation amount that was offered for timber in this category.

  Limiting the amount of compensation for qualifying timber on potentially unstable slopes or landforms to $50,000 for each landowner will result in a smaller compensation amount for some landowners. The marginal amount of funding that would no longer be paid to landowners who are higher on the list of applicants and who have more than $50,000 in qualifying timber value located on unstable slopes or landforms would be available to trickle down to landowners lower on the priority list who would not otherwise receive funding in a particular biennium. This is because the amount of funding available each biennium is smaller than the amount needed to compensate all of the applicants in a particular biennium.

Benefits

Landowner benefit: additional reimbursable cost. A reimbursable cost is added for landowners with qualifying timber on potentially unstable slopes or landforms. In addition to the cost of easement layout, i.e., marking streamside buffers and qualifying timber, the proposed rule states

landowners will be reimbursed for the cost of the portion of a geotechnical report that is applicable to the area determined to contain qualifying timber. The cost of a full geotechnical report is estimated to range from $2000 to $5000, or $3500 on average.

Environmental benefits from changing the easement start date. As explained in the costs section, changing the start date of the easement from the date of the FPA to the date DNR receives a completed easement application will, in the majority of cases, extend the end date of the easement for about one year. This theoretically provides additional habitat conservation benefit, for example in the event that forest practices riparian buffer regulations would become more lenient in the future (most unlikely) or if the property is converted to higher and better use (e.g., residential) and/or is subdivided into less than forty acre parcels. However, any theoretical benefit from the additional year under easement is limited because the easement protects timber which most likely cannot ever be legally harvested and because it only applies to the approximately one additional year at the end of the 50 year easement term.

Comparison of Costs and Benefits

Non-profit organizations are no longer eligible to receive compensation under FREP. However, the negative impact on the affected community as a whole is minimal as evidenced by non-profits' past and present level of interest in the program, which reflects the proportion of forestland which is actually owned by formerly qualifying non-profits. Only 2.0 percent of the current FREP easements are to non-profit entities and only one of the valid FREP applications pending at the time of the legislation was by a non-profit entity.

For most members of the affected community, the majority of the costs and benefits are of minor or no impact. Some costs and benefits offset each other across all landowners and some costs and benefits will affect some landowners more than others. On balance, the net impact is slightly beneficial for the "for-profit" forest landowners because of the new provision allowing DNR to reimburse some portion of the landowner's cost of a geotechnical report (estimated to be $3500 on average).

In addition, because conveying a FREP easement and receiving compensation is voluntary on the landowner's part, it is implicit in a landowner's decision to proceed that the total benefits (quantitative and qualitative) exceed the total costs (quantitative and qualitative) for that landowner on that particular parcel of land.

Finally, there is theoretically a small potential benefit of additional habitat protection due to the change in the start date of the 50 year easement period extending the end date of the FREP easement about one additional year.

Taking into account both the qualitative and quantitative benefits and costs and the specific directives of the legislation being implemented, it is therefore reasonable to conclude that the probable benefits of the rule are greater than its probable 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. In this case, it should be emphasized that the FREP program is voluntary. Only those who wish to participate in and benefit from the program need refer to the rules.

Alternative 1 – No rule change. This is not a viable alternative. As indicated in the summary of the rule changes, the majority of the changes are to bring existing rules into conformance with the FREP statute as amended by ESHB 1509, 2011. The statute directs the Board to adopt rules to implement the program.[5] If the proposed rules are not adopted, the FREP rules will be out of conformance with the statute.

Alternative 2 – Adopt only rules that conform to the statute amendments. This is not a preferred alternative. The proposal contains rule changes beyond those dictated by statute in order to help increase rule users' understanding of FREP. One is the change related to the reimbursable landowner costs of a portion of a geotechnical report (explained in the benefits section). Because the Legislature added in law that forest trees located on potentially unstable slopes or landforms can qualify for inclusion in a FREP easement, it is reasonable that the pertinent portion of the cost of the landowner's geotechnical report should be reimbursed, and it is appropriate to make that clear in the rule.

Also, there are a number of proposed amendments that are included only to provide more clarity for rule users. These were not discussed in this analysis because they do not create cost or benefit impacts. Not including these clarifications is a conceivable alternative to the proposed rules, but not preferable for rule users.

Alternative 3 – Adopt rules that conform to the statute amendments and add clarity to the FREP rules. This is the least burdensome alternative for landowners who rely on the rules to understand and participate in FREP. The additional proposed clarifications are not mandatory for program implementation but will help make the rules less "burdensome" for rule users to the extent they are more understandable.

[5] RCW 76.13.120(9)