

As required by
the Administrative Procedure Act
Chapter 34.05 RCW

CONCISE EXPLANATORY STATEMENT
AND
RESPONSIVENESS SUMMARY
FOR THE ADOPTION OF
Amendments to chapters 222-10 and 222-20 WAC
Rules Related to Unstable Slopes Information in Forest Practices Applications

Prepared by: Gretchen Robinson
February 2015

1. Introduction

The Forest Practices Board’s “Unstable Slopes Information in Forest Practices Applications” rules amend WAC 222-10-030 and WAC 222-20-010. The purpose is to inform prospective applicants that the Department of Natural Resources (DNR) will require specific geologic information, including information prepared by a qualified expert, if DNR needs it to appropriately classify Forest Practices Applications (FPAs) per WAC 222-16-050. This applies to FPAs that include proposals where potentially unstable slopes or landforms are on or around the area of an FPA.

The Board added this clarification to ensure applicants understand that DNR may require geologic information if the information initially provided in an FPA is not sufficient for DNR to determine the appropriate classification of the FPA.

The Board adopted the rule on February 10, 2015.

2. Describe Differences Between Proposed and Final Rule

Proposed rules were published in the Washington State Register on December 3, 2014 for public review and comment. Differences between the proposed and final rules follow; additional details can be found in the Responsiveness Summary below.

WAC 222-10-030(5)

Change from “...preparation of requested geologic information...” to “...preparation of **required** geologic information...” for consistency with the use of “required” in new subsection (7) in WAC 222-20-010.

WAC 222-20-010(2)

Added, "...the operator is known at the time the application is submitted" to account for situations where the landowner or landowner/timber owner does not, at the time the application is submitted, know who the operator will be.

WAC 222-20-010(9)

- Changed first sentence.
From: "...Where potentially unstable slopes or landforms are **on** or around the area of an application..."
To: "...Where potentially unstable slopes or landforms are **in** or around the area of an application..."

See Comments 3a and 3b and Response 3a and 3b.

- Added a sentence: "Nothing in this subsection is intended to require a geotechnical report if the geologic information provided is sufficient to appropriately classify the application."

See Comment 7 and Response 7.

- Eliminated a sentence: "This information is for classification purposes only."

See Comment 6 and Response 6.

3. Responsiveness Summary

The Board received comments from seven individuals on the rule proposal. Log numbers accompany each comment. The commenters and their assigned log numbers are:

Log #	Received From
15-01	Howard S. Wilson, Grays Harbor Chapter, Washington Farm Forestry Association (WFFA)
15-02	Ken Miller, WFFA
15-03	Elaine Oneil, WFFA
15-04	Stephen Bernath, Washington Department of Ecology
15-05	Karen Terwilleger, Washington Forest Protection Association (WFPA)
15-06	Forests and Fish Conservation Caucus
15-07	Don Lentz

WAC 222-20-010(2)

Comment 1: Add the following or similar sentence to WAC 222-20-010(2) to memorialize the current public policy intent to increase transparency and accountability around its decision making: *The department will ensure that information upon which it relies to appropriately classify and approve or disapprove an application is adequately documented.* (Log #15-06)

Response 1: Transparency is provided via the ability for stakeholders to review pending applications via the Forest Practices Application Review System (FPARS). Challenges to DNR’s permitting decisions occur at the Pollution Control Hearings Board (PCHB), a separate quasi-judicial agency (RCW 76.09.020(2) and RCW 76.09.205). The PCHB’s decisions may be further reviewed in the court system. Thus, DNR is already accountable for its decisions by law, and therefore, this change is unnecessary.

WAC 222-20-010(7)

Comment 2: Add the following sentence to the end of WAC 222-20-010(7) to relieve operators of record or landowner/operators from notifying DNR if subcontractors are changed: *If an application or notification indicates that the landowner or timber owner is also the operator, or an operator signed the application, no notice need be given regarding any change in subcontractors or similar independent contractors working under the supervision of the operator of record.* (Log #15-05)

Response 2: The recommended sentence is not added to WAC 222-20-010(7). Notice of a change in subcontractor is not required under current rule. The recommendation would not change the ability for landowners to hire or transfer subcontractors without notifying DNR per subsection (6). Subsection (7) addresses the timing requirement to notify DNR of the hiring or change in the operator of record, separate from the subcontractor, so DNR can verify that the operator is not subject to a notice of intent to disapprove (NOID) issued under RCW 76.09.140(1) and WAC 222-46-070.

The Board could consider combining the contents of (6) and (7) in a future rulemaking.

WAC 222-20-010(9)

Comment 3a: Change “on or around” to “on or adjacent to”: for consistency with the Board Manual and the Forest Practices Application Slope Stability Form; and to clarify DNR’s authority to request additional necessary information for decision making about classification, including “geologic information prepared by a qualified expert.” (Log #15-05)

Comment 3b: Change “on or around” to “on or near” because “on or near” encompasses the very real possibility that a forest practice could influence a potentially unstable landform that is not strictly “adjacent” to the harvest unit, but is nonetheless possibly within the zone of influence of that landform. (Log #15-06)

Response 3a and 3b:

- We have changed this to “in or around.” The language refers to whether a potentially unstable slope or landform is **in** the application site, and what lands must be considered. DNR expects applicants, forest practices foresters, and qualified experts, to evaluate the lands **around** the application site to assess possible effects from an activity proposed to take place within the application site. The same approach is used in WAC 222-10-030(1).
- Board Manual Section 16, approved by the Board on November 12, 2014, defines “around” in this context: ... *potentially unstable slopes and landforms that exist “around” a proposed timber harvest or construction activity are those that could possibly be influenced by, or be caused to move due to, the harvest or construction activity.*¹
- DNR will review all application forms and Board Manual Section 16 for inconsistencies and make changes accordingly.

Comment 4: Add “including but not limited to.” This would clarify DNR’s authority to request any necessary information for decision making about classification, **including but not limited to** geologic information prepared by a qualified expert. (Log #15-04, Log #15-05)

Response 4: We have modified the language to ensure understanding that DNR can request any additional information, and it may require geologic information prepared by a qualified expert, if DNR needs it to classify an application appropriately. These modifications conform to DNR’s

¹ Forest Practices Board Manual Section 16, page 32, footnote 40.

existing authority to specify the form and contents for forest practices applications and determine their completeness upon submittal.

Comment 5a: Do not include the sentence regarding "...an explanation of how the qualified expert evaluated the proposed harvest or construction activities..." It is unclear what information will be required in the qualified expert's explanatory statement. (Log #15-05)

Comment 5b: It is important to include a statement regarding how the qualified expert evaluated the proposed harvest or construction activities with respect to potentially unstable slopes or landforms in order to determine the adequacy of this information and if better quality information is needed to classify the FPA properly. (Log #15-06)

Response 5a and 5b: We have retained the sentence, but clarified that DNR **may** request that the qualified expert explain **the methods** the qualified expert used to evaluate the proposed activity. DNR would communicate the need for such information to the applicant.

Comment 6: There is no need to re-state that the additional information is for classification purposes only. (Log #15-06)

Response 6: Agreed.

Comment 7: Add the following sentence to WAC 222-20-010(9) to clarify that information may be provided in a variety of ways, and that a geotechnical report is not required if another form of information satisfies DNR's needs: *Depending on the extent and type of information requested, documentation may be provided by memo, letter, field verification, geotechnical report or other form. Nothing in this section is intended to require preparation of a geologic report if the department determines that other forms of information are sufficient to appropriately classify an application.* (Log #15-05)

Response 7: DNR does accept geologic information from a qualified expert in a variety of formats for applications that are not Class IV-special applications. To clarify that point, we decided to add a sentence similar to the second sentence of the commenter's recommendation.

Comment 8: The average cost of a geotechnical report is closer to \$10,000 per report, rather than up to \$5,000 as is stated in the Preliminary Cost-Benefit Analysis. (Log #15-05)

Response 8: We added the Washington Forest Protection Association's estimate to the endnote in the cost-benefit analysis.

Comment 9: How will the rule change impact operations under existing small forest landowner long-term permits that were approved but not yet harvested? (Log #15-03)

Response 9: The rule change will not impact operations under existing approved small forest landowner long-term applications. Protections for unstable slopes and landforms are not changing.

Comment 10: I understand the Board must consider public safety in making regulations but should not make forestry activity physically and financially impossible. (Log #15-07)

Response 10: The rule is a clarification of DNR's existing process when reviewing applications; it does not change the required protection measures related to unstable slopes and landforms. Public safety has always been a factor in DNR's application review.

Comment 11: Is the Board going to provide DNR geologists to help with or produce the geology reports so the small forest landowners can manage and harvest on their land? (Log #15-07)

Response 11: The rule is a clarification of DNR's existing process when reviewing applications. DNR employs geologists to analyze proposals for accuracy and make recommendations to DNR's forest practices foresters who make classification and approval/disapproval decisions. DNR geologists will not produce slope stability reports. When necessary, the DNR forest practices forester may request the DNR geologist to review the site. The forest practices foresters will continue, when possible, to assist small forest landowners by helping them identify areas containing potentially unstable slopes and landforms, and providing guidance on completing application forms and other application steps. The Forest Practices program will continue to maintain a current list of qualified experts and post contact information on the Forest Practices web page for small forest landowners to receive further assistance.

Comment 12a: A greater reliance on qualified experts is almost assured under this rule change; the increased cost for affected small forest landowners could absorb all profit. In these cases, they are likely to be disproportionately affected using two or three comparison techniques allowed in a small business economic impact assessment (cost per person, per hour of labor, or per \$100 of sales). Comment 12b: Please clarify whether DNR is planning to use existing mechanisms under RCW 76.13.020(2) and/or WAC 222-21-048(3) to help small forest landowners with the cost of obtaining geologic information. (Log #15-03)

Response 12a: The rule is a clarification of DNR's existing process when reviewing applications, and it does not impose new regulations; DNR's requirements will continue to depend on the quality and completeness of applications received.

Response 12b: DNR uses existing mechanisms under the WAC and RCW cited to help compensate small forest landowners for disproportionate impacts of regulations:

- [WAC 222-21-048\(3\)](#) – Cost reimbursement for geotechnical reports under the Forestry Riparian Easement Program.
- [RCW 76.13.020\(2\)](#) – Technical assistance for small forest landowners including, but not limited to:
 - Help with identifying unstable slopes and landforms on their forest land; and
 - Providing unstable slopes training (taught by DNR's Forest Practices Science Team) two times per year, free of charge.²

Comment 13: Due to the Oso landslide, regulators will require more geotechnical reports, and geotechnical engineers will be extremely cautious. The end result will be more and more timberland deemed not harvestable due to unstable slopes. The \$50,000 Forestry Riparian Easement Program limit for trees not harvestable due to unstable slopes needs to be raised proportionately. (Log #15-01)

Response 13: Raising the \$50,000 limit would require legislative action.

² In addition to the unstable slopes trainings, DNR also provides:

- Foresters to visit small forest landowners' properties, answer questions, offer management advice customized to the landowner's goals, and help landowners create stewardship plans;
- Regular Small Forest Landowner News newsletters;
- Annual Family Forest Field Days in western and eastern Washington.

Also, alternate plan templates, checklist RMAPs, the Forest Riparian Easement, Family Forest Fish Passage, and Riparian and Habitat Open Space programs are all designed to address small forest landowners for costs of complying with regulations.

Additional comments:

- We urge DNR to consider requiring applicants to disclose exactly which methods were used to “bound out” potential steep and unstable landforms from an application, whether or not “further geologic information” from QE is requested. (Log #15-06)
- It is within DNR’s authority to require whatever information is necessary to make a classification decision with high confidence. Where there is high uncertainty, for example around the exact location of a groundwater recharge area for a glacial deep-seated landslide, the department may require the equivalent of a geologic report in order to preserve the option of preserving or reverting to a Class III. This clarification could be part of future rules. (Log #15-06)
- DNR should quantify and take into consideration how uncertainty in the modeling process will impact slope stability determinations when using a relatively new product (LiDAR) as the basis of the determination. There should be some detail in future board manual updates that provides guidance on incorporating model uncertainty into the interpretation of risk factors derived from LiDAR data. (Log #15-03)

4. Summary of public involvement actions.

- | | |
|---------------|--|
| May 13, 2014 | Forest Practices Board meeting: The Board approved filing <i>Preproposal Statement of Inquiry</i> form CR-101. |
| June 11, 2014 | CR-101 published in Washington State Register (WSR 14-11-103, file 5-21-14). |
| Nov. 12, 2014 | Forest Practices Board meeting: The Board approved filing <i>Proposed Rule Making</i> Form CR-102 and the draft rule language for public review and comments. There was a public comment opportunity at the meeting prior to the Board action. |
| Dec. 3, 2014 | CR-102 published in the Washington State Register (WSR 14-23-047, filed 11-14-14). The public comment period took place from 12-3-14 through 1-8-15. |
| Jan. 7, 2015 | Public hearing in Olympia. |