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Testimony by Elaine Oneil to the Washington State Forest Practices Board on November 13, 2019 on WFFA Riparian Template

Chairman Bernath and members of the Forest Practices Board, I am Elaine Oneil, Executive Director of the Washington Farm Forestry Association. It has been 4 years and 9 months since our WFFA Westside Riparian Template was accepted by the FPB for review. At that February 2015 board meeting "Joe Stohr moved the Forest Practices Board accept Washington Farm Forestry Association's Alternate Plan Proposal Initiation. He further moved the Board direct the TFW Policy Committee to review the proposal sufficiently to provide to the Board at their May 2015 meeting a timeline along with identified tasks needed to fully evaluate the proposal."

In May of 2015, the then AMPA, Hans Berge, recommended a three step strategy which would include a "policy track" and a "science track" to move this proposal through the adaptive management process. The 3 steps were that: TFW Policy Committee were to determine whether the alternate plan template proposal meets the criteria for AP and consider different strategies for moving forward; initiate a literature synthesis to evaluate forest practices functions of the riparian zone; and provide a recommendation of next steps to complete the evaluation of the proposal at the May 2016 Board meeting. This recommendation passed unanimously. In the past 4.75 years you have been receiving regular updates about progress on the WFFA template work. Nothing was hidden.

Which is why it was such a complete and utter shock to hear at the October 31 TFW Policy meeting that since the 'science track' did not go through CMER, that Policy would not be evaluating any of the science that was included in our proposal initiation. Instead they would only vote on the first of the 3 directives in that May 2015 board motion. Remember – nothing was hidden - that so called "process foul" was a byproduct of decisions made by the former AMPA –with full awareness of TFW Policy - and despite the Small Landowner caucus querying whether or not this approach would result in such a process foul.

The science is the very basis of this proposal – and is in fact the reason why we received more than one comment about it being the most complete proposal initiation ever brought before the FPB. So not evaluating the science, as well as being a kick in the face, makes the whole effort a complete waste of 5+ years (because it took a year to put it together) and a lot of money – both WFFA money, and AMP funds that paid for the external review of our science by Cramer Fish Sciences and the ISPR review of the review of our science. It is worth noting that somewhere in the past 4 years a decision was made by TFW Policy that the path forward was to review the science in our proposal with that review including the relevant scientific literature from the list produced by TFW Policy from the failed literature synthesis. As the literature

synthesis wasn't going to speak directly to our template science, it makes intuitive sense that this approach was taken for this particular work product.

Since the former AMPA made the decision to conduct the review outside of CMER, with the concurrence of TFW Policy since no one over the past 4 years has objected, I believe that TFW Policy should include the science in their evaluation of the board motion as if it had gone through the CMER process. After all, the exact same steps occurred in the TFW Policy Workgroup as would have occurred in CMER. Those include the development of a contract to evaluate WFFA research, a review of that work product by the TFW Policy Subgroup, with consensus questions from workgroup members, responses to those questions, and an Independent Science Peer Review. That workgroup included all caucuses, except for those not currently present at the full policy table: namely Eastside Tribes, Federal, and only recently Ecology when Mark Hicks made the transition to DNR AMPA.

Why is this not a process foul? Consider that CMER does not typically evaluate science that is already completed. Rather they 1) develop the questions to study, 2) hire the people to do the study, 3) evaluate the results of the study, 4) recommend questions for consideration in the ISPR process, and then forward the agreed upon science over to TFW Policy for decision making. In this case, steps 1) and 2) were completed by WFFA prior to the proposal initiation as part of our due diligence before bringing something this important before the board, step 3) was the Cramer Fish Science evaluation of science behind our proposal and step 4) was completed on both Cramer Fish Science and WFFA science through the ISPR process. So, my question to you is: What exactly would CMER do, that has not already been done, consistent with the decisions of the former AMPA and apparently with the support (or at least no dissent) from TFW Policy?

The 7 additional SFLO that took time out of their day to come to that meeting on October 31, and the 12 SFLO that took time out of their day to write all of you a letter for this FPB meeting are not thinking that this bodes all that well for it being 'cool to be a treefarmer', something that I was hopeful of the last time I was in front of you talking about the reinvigoration of Forests and Fish. Whether it was intended that way or not, allowing the current situation to stand as a "process foul" that effectively kills our proposal indicates a bad faith effort on the part of all TFW Policy Caucuses – something I would call the complete antithesis of the Spirit of Timber Fish and Wildlife and the Forests and Fish Agreement.

My understanding is that a fix may be forthcoming in TFW Policy. If it does not, expect a petition from us at the February FPB meeting.



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November 6, 2019

Sent by e-mail

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Re: Clean Water Act Assurances: Milestones, Science, and Policy

Dear Chair Bernath, Director Bellon, and Board Members:

At the Board's August 14, 2019 meeting, Ecology Director Maia Bellon indicated Ecology's intent to renew CWA Assurances for two years at the Board's November 13, 2019 meeting, based on the formation of a Type N workgroup (developed by consensus in TFW Policy). Over the last two years, the Forest Practices Board (Board) has heard five presentations from Ecology staff regarding the Forest Practices Board's compliance with the Clean Water Act Milestones identified by former Ecology Director Jay Manning in 2009.¹ The Washington Forest Protection Association (WFPA) supports the renewal of CWA Assurances, and submits this letter to assist Director Bellon and the Board members in understanding the Adaptive Management Program's (AMP) progress in completing the milestones over the last decade, the status of the science related to water quality and forest practices, and to explain why an extension of the CWA Assurances for the remainder of the Forest Practices HCP term in 2021 is consistent with the legal and management framework. WFPA is a party to the 1987 TFW Agreement,² 1999 Forests & Fish Report,³ the 2012 Settlement Agreement for implementation of the Forest Practices HCP,⁴ and is an active caucus member on Timber Fish and Wildlife Policy Committee (TFW Policy),⁵ and co-chair of the Cooperative Monitoring, Evaluation, and Research Committee (CMER).⁶ On behalf of its members, WFPA has an interest in ensuring the Board continues to comply with the Forest Practices HCP, Forests & Fish Report's contractual commitments, and its statutory authority.⁷

¹ November 8, 2017; February 13, 2018; August 8, 2018; May 9, 2019; and August 14, 2019:
<https://www.dnr.wa.gov/about/boards-and-councils/forest-practices-board>

² http://www.dnr.wa.gov/Publications/fp_tfw_agreement_intro.pdf

³ https://www.dnr.wa.gov/publications/fp_hcp_18appb.pdf?2vc546s

⁴ <https://www.dnr.wa.gov/programs-and-services/forest-practices/forest-practices-habitat-conservation-plan>

⁵ <https://www.dnr.wa.gov/about/boards-and-councils/forest-practices-board/tfw-policy-committee>; WAC 222-12-045(2)(b)(ii)

⁶ <https://www.dnr.wa.gov/about/boards-and-councils/forest-practices-board/cooperative-monitoring-evaluation-and-research>; WAC 222-12-045(2)(b)(i)

⁷ RCW Chp. 76.09

A. Adaptive Management Completed 29 Milestones Between 2009-2019 In Order to Receive CWA Assurances in 2019

In 2009, Ecology’s Director conditionally extended the CWA Assurances by 10 years.¹ Those extensions were based on the Board’s compliance with “milestones” prepared by Ecology staff. *See* July 2009, “2009 Clean Water Act Assurances Review of Washington’s Forest Practices Program: Examining the effectiveness of Washington’s forest practices program in bringing [sic] waters into compliance with state water quality standards and the federal Clean Water Act”, Ecology Publication 09-10-101 (“2009 Review”).² Ecology’s 2009 Review identified 22 “process” milestones and 20 unique CMER projects.

The process milestones were organized into six categories with milestones associated with each category. The 2009 Review also contained seven supplemental recommendations, and an appendix with four goals, six objectives, and 16 tasks. The categories included:

- I. Establish rules and funding to implement the Forests & Fish Report (7 milestones)
- II. An Adaptive Management program to update rules and guidance (5 milestones)
- III. Consistent compliance and enforcement of the forest practices rules (7 milestones)
- IV. Programs to bring roads up to design and maintenance standards (3 milestones)
- V. Landowners to share data (no milestones, “currently met”)
- VI. Training and technical assistance to improve implementation (no milestones, “currently met”)

Ecology also identified the need for continued progress on scientific research related to the Forest Practices Rules’ achievement of water quality standards, through the AMP’s CMER studies. The 2009 Review identified 20 unique projects, with some of the projects divided into multiple project stages, such as scope, study design, implement, and complete. Because Ecology’s update to the Board³ at its May 2019 meeting does not present the projects in the same order they are identified in the 2009 Report, to facilitate the Board’s review of CMER Project status, WFPA has prepared a table summarizing the projects by 2009 goal deadlines and 2019 status.

Over the last decade, Ecology staff have regularly provided updates to the Board on progress towards completion of the 2009 Review “milestones”. Although Ecology has focused its attention on the process milestones and CMER projects that have not met the 2009 Review’s aspirational deadlines, the completion rate for the milestones and projects exceeds 78%. According to Ecology’s May 2019 presentation, 17 of the 22 process milestones have been completed (77%), and 12 of 15 CMER projects are complete (80%).⁴ Given the recession that occurred after the creation of the 2009 Review, which resulted in significant staffing cutbacks, a massive reduction in legislative funding for the AMP and CMER projects, a competing priority list in 2012, several changes in the AMP (the key

¹ Director Manning’s October 9, 2009 letter to the Forest Practices Board Members attaching Ecology’s July 2009 Review:

https://www.dnr.wa.gov/publications/bc_fp_materials_20091110_07_cwaassurances.pdf?hkhyxx

² The 2009 Review is also available on Ecology’s webpage at:

<https://fortress.wa.gov/ecy/publications/SummaryPages/0910101.html>

³ Ecology’s April 22, 2019 report to the Forest Practices Board is available on pages 8-18 of the May 9, 2019 Forest Practices Board meeting materials:

https://www.dnr.wa.gov/publications/bc_fpb_mtgmaterial_20190509.pdf?i5ji656

⁴ There are 20 unique CMER projects identified in the 2009 Review, but only 15 of those projects are identified in the May 2019 update to the Board. Five new projects are identified in the 2019 update; all of which are completed or underway. Only three of the 15 projects are not complete: one is underway (#15 – “First Cycle of Extensive Temperature Monitoring”), one is off track (#19 – “Watershed Scale Assessment of Cumulative Effects”), and one is not progressing (#20 – “Roads Sub-basin Effectiveness”). CMER has chosen not to proceed with these three projects to avoid inefficiencies in its limited science budget; two cannot begin until other projects are completed, and one is no longer considered necessary.

staff for coordination of the Board, TFW Policy, and CMER), the Oso tragedy and subsequent reprioritization of projects, and the inherent uncertainty associated with accurately estimating the time needed for science projects, WFPA believes that the AMP has substantially complied with Ecology's 2009 milestones, and those successes should be recognized and applauded by the Board and Ecology.

B. The Scientific Research Completed Between 2009-2019 Has Found Forest Practices Rules are Working to Protect and Improve Water Quality in the Forested Environment

Within the complex forest practices management framework, state agencies are limited by their explicit and implied authority, case precedent, and contractual commitments. In 2012, following a threat of litigation from the conservation caucus challenging the Forest Practices HCP, the State agreed to prioritize 44 science projects. The project prioritization was not identical to Ecology's 2009 Review, and the Forest Practices Board received updates on implementation of the Settlement Agreement at its meetings on August 14, 2012 (pg. 4), November 13, 2012 (pgs. 2-3), and February 12, 2013 (pg. 5), as well as regular updates on the work priorities of both TFW Policy and CMER over the last decade. Ecology has been a member of the Forest Practices Board since it was formed, and actively participates on the Board, at TFW Policy, and at CMER.

Ecology has publicly recognized that the forest practices rules are meeting water quality standards. In 2015, Ecology published "Washington's Water Quality Management Plan to Control Nonpoint Sources of Pollution." July 2015, Publication no. 15-10-015. This publication provides Ecology's position on forest practices as the statewide management plan to control nonpoint sources of pollution in the forested environment. The publication states that the forest practices "rules will be relied upon to ensure streams in the forested environment meet the state WQ Standards." *Id.* at pg. 45. After describing the history of the forest practices rules and the administration framework, the publication summarizes CWA Assurances. In 2015, Ecology concluded that the AMP and CMER program were successful in meeting the milestones and satisfying CWA Assurances by completing more than 28 peer-reviewed monitoring and effectiveness studies, with 17 studies underway and "several" studies being scoped. *Id.* at pgs. 51, 103 (\$5.9 million/biennium for science supported by Forests & Fish caucuses). WFPA is unaware of any subsequent Ecology publication or significant change in the AMP process or CMER reports that warrant a change in the position Ecology publicly took in 2015. Moreover, Ecology took this same position in September 2011, stating that so long as forest practices rules were followed, CWA standards were met. Ecology Publication No. 11-10-073, pgs. 5-6 ("Water Quality Program Guidance Manual: Supplemental Guidance on Implementing Tier II Antidegradation").

The 17 CMER projects completed in the last decade have not identified significant inadequacies in the forest practices rules related to water quality standards. The Forests & Fish Report and Ecology's recent publications focused on water quality identify five areas of emphasis for forest practices: sediment, habitat degradation, flow, turbidity, and temperature.¹ Forest practices rules are meeting or improving water quality for sediment, habitat, flow, and turbidity, and, in most cases, temperature. One of the first shade and temperature effectiveness studies completed by CMER (Bull Trout Overlay shade/ temperature study in Eastern Washington) indicated no significant difference between the all available shade rule, the standard rule, and reference sites on Type F streams. This study was completed more than five years ago, and despite the positive findings, there was no consensus AMP

¹ Schedule M-2 at ¶11, pg. 170; *but see* Ecology Publication no. 15-10-015, pg. 45 (five key riparian functions are shade, stream bank stability, woody debris, sediment filtering, and nutrient and leaf litter); Ecology Publication no. 11-10-073, pg. 5 (state water quality standards for forest practices include narrative and numeric water quality standards (temperature, dissolved oxygen, bacteria, pH, turbidity, and toxics) and antidegradation).

response to this study. More recently, some stakeholders have been very concerned about the temperature results from the Hard Rock study, enough so to suggest emergency rulemaking. The Hard Rock study found exceedances of the 0.3°C antidegradation standard at several study sites, including the three Forest Practices Rule treatment sites. The streams in this study were Np streams, meaning they are considered Non-fish, and thus, had no fish present. Despite the 0.3°C exceedance, the highest July - August maximum 7-day average daily maximum temperature remained below the core summer salmonid habitat temperature criteria at the three Forest Practices Rule buffer treatment sites.

In approving Ecology's 2003 revisions to the state's water quality standards, EPA indicated a temperature increase of 0.3°C is insignificant regarding impacts on designated uses. Further, studies on temperature effects on salmonids are generally based on change increments of 1°C or more.¹ This feedback pertained to point source discharges to water bodies naturally warmer than the designated use criteria. EPA did not act on Ecology's 2003 antidegradation proposal for nonpoint source discharges to water bodies naturally cooler than the designated use criteria since it is not a water quality standard under Section 303(c) of the Clean Water Act (CWA).

The Hard Rock study presentation provided to the Forest Practices Board in May 2019 by Ecology staff indicated the temperature response at the three Forest Practices Rule and four continuous buffer treatment sites was 1.2°C.² Pooling the temperature results from all sites in a treatment block and averaging is one way to interpret results. However, given there are only three Forest Practices Rule treatment sites, more consideration of individual responses is warranted. For example, the July-August mean monthly temperature (MMTR) responses of 0.4°C, 0.5°C, and 1.8°C indicates a skewed distribution where one site disproportionately influences the average finding. The report indicates that the latter site was impacted by blowdown from the December 2007 storm, suggesting the blowdown may have been one of the mechanisms driving the temperature response at this site. WFPA encouraged the AMP to further investigate this as part of the recommended response, thus far that has not happened.

Preliminary results from extended temperature monitoring at the Hard Rock study sites (three through nine years post-harvest) provide more context for considering temperature response associated with forest management. The continuous buffer and no buffer treatment sites responded similarly, in that trends in temperature response consistently declined and were at or near recovery by nine years post-harvest. Those temperature conditions should fall below the designated use criteria for the remainder of the timber growth cycle, generally a period of 40-60 years, assuming no significant natural disturbance event. The Forest Practices Rule treatment sites appear more complicated, not following a clear pattern, yet still remaining under the designated use temperature criteria. This may suggest there are other mechanisms than the buffer affecting water temperature. It is important to keep in mind these results are preliminary as the Hard Rock extended monitoring report has not completed all the scientific peer review steps. Given the fact that Hard Rock lithology makes up 29% of the forested landscape and the study focused only on basins meeting certain study-specific criteria, including presence of stream-associated amphibians, the spatial scope of inference is limited. In addition, there are at least five additional CMER studies which are relevant to this topic. Therefore, it was prudent for TFW Policy to recommend the Type N technical workgroup as an appropriate AMP response because rule changes must be based on science. RCW 76.09.370(6).

¹ February 1, 2008 letter from Michael Gearheard, Director of Office of Water & Watersheds, to David Peeler, Water Quality Program Manager, Ecology

² May 8, 2019 presentation to the FPB -

https://www.dnr.wa.gov/publications/bc_fpb_hardrockstudy_20190508.pdf?7878xxj

In the interest of further informing the Board, caucus participants, and the Type N technical workgroup process, WFPA has initiated research into alternative buffer methods for Type Np streams. This study will identify whether changes to the location and design of Np stream riparian buffers can meet or exceed effective shade provided by standard Np stream riparian buffers, and therefore minimize temperature response by providing shade where it has the most potential to influence water temperature. We have established a pool of more than 20 sites on WFPA member lands, and collected initial shade, stream channel, and summer temperature data. In order to efficiently and cost effectively implement this study, WFPA plans to propose a pilot rule study to formally test the approach, potentially as early as February 2020. We have had initial discussions about this project with several TFW stakeholders and will continue to do so.

C. In 2021, Ecology Should Grant CWA Assurances for the Remaining Term of the Forest Practices HCP

In 1999, the signatory parties to the seminal Forests & Fish Report anticipated that a new paradigm for forest practices would include both Endangered Species Act assurances (through federal approval of a Forest Practices HCP¹ and Section 10 ITP), and Clean Water Act Assurances. At the time, in exchange for the State's commitment to obtain these assurances, industrial landowners voluntarily agreed to significant changes in forest practices in exchange for regulatory certainty during the 50-year term of the Forest Practices HCP. Twenty years later, the next generation of the signatory parties continue to work collaboratively in the AMP framework created by those commitments.

The intent for forest practices to equate to CWA Assurances was codified in RCW 77.85.180(2) in 1999:

The legislature further finds that [the forest practices act] constitute[s] a comprehensive and coordinated program to provide substantial and sufficient contributions to salmon recovery and water quality enhancement in areas impacted by forest practices and are intended to fully satisfy the ... clean water act (33 U.S.C. Sec. 1251 et seq.) with respect to nonpoint source pollution attributable to forest practices.

(emphasis added); *see also* RCW 77.85.180(1) (“The legislature finds that the forests and fish report ... was developed through extensive negotiations with the federal agencies responsible for administering ... the clean water act.”), 90.48.420(1) (“[C]ompliance with such forest practice[s] rules will achieve compliance with water pollution control laws.”) (emphasis added), 90.48.420(3) (“[N]o permit system pertaining to nonpoint sources of pollution arising from forest practices shall be authorized, and no civil or criminal penalties shall be imposed with respect to any forest practices conducted in full compliance with the applicable provisions of RCW 76.09.010 through 76.09.280, forest practices rules, and any approvals or directives of” DNR), 90.48.425 (“The forest practices act, chapter 76.09 RCW, and the forest practices regulations adopted thereunder relating to water quality protection shall be utilized to satisfy the planning and program requirements of sections 208, 209, and 305 of the federal Water Pollution Control Act, as regards silvicultural activities, unless it is determined by the department of ecology that extraordinary conditions exist which make forest practices regulations unsuitable to satisfy such federal requirements.”) (adopted in 1975, no amendments).

¹ The Forest Practices HCP incorporates the Forests & Fish Report, as well as the legislation expressing CWA commitments, the Forest Practices Act, Forest Practices Board Manual, CMER work plan and Schedule L-1, and the TFW Agreement. HCP at Appendices B, C, D, E, F, H, L, and N: <https://www.dnr.wa.gov/programs-and-services/forest-practices/forest-practices-habitat-conservation-plan>.

The State's commitment to regulatory certainty was memorialized in RCW 77.85.190, passed in 1999 as 75.46.350, recodified in 2000, and amended in 2002. That statute defines the narrow situations which would constitute a "failure of assurances" under both the ESA and CWA. A failure of assurances under the CWA were defined as one of only two scenarios: (1) either EPA or Ecology fail to provide the "assurances described in appendix M to the forests and fish report" or (2) issuance of legislation or a judicial decision. RCW 77.85.190(2)(e), (f). No changes in legislation or judicial decisions have occurred since 2009 that would affect CWA assurances, and the EPA has not failed to provide assurances.

The Forests & Fish Report describes the CWA Assurances in both Appendix M and Schedule M-2.¹ Section M.3 addresses "Assurances related to the Clean Water Act" and reads, in full:

EPA's and DOE's assurances are contained in the attached Schedule M-2. Each of EPA and DOE agree for the benefit of the other authors of this Report^[2] to fully perform their obligations under Schedule M-2.

Schedule M-2 defines the narrow range of circumstances which can lead to withdrawal or modification of the CWA Assurances: (1) new water quality standards not anticipated in the Forests & Fish Report; (2) failure to implement the Forests & Fish Report through loss of funding, lack of enforcement, landowner non-compliance with forest practices regulations on a broad scale, or lack of regulations consistent with the Forests & Fish Report; (3) reduction in regulatory protection in statute or rule; (4) failure to update regulations or guidance identified by adaptive management; or (5) CWA changes, court orders, or other state or federal regulatory changes. *Id.* at pg. 172. Although Ecology's recent focus has been on the 4th circumstance, Ecology and EPA's intent in 1999 was identified as "failure to develop agreed upon resource objectives, research priorities, and compliance monitoring programs." Since the Forests and Fish Rules were adopted in 2001, the AMP has worked vigorously to adopt resource objectives, identify research priorities, implement multiple complex research projects, make many process improvements, and assist DNR in its compliance monitoring program. Most importantly, the AMP has substantially reduced scientific uncertainty associated with the Forests and Fish Rules, which is an important measure of success for any adaptive management program. As identified above, in 2015, Ecology concluded the AMP process satisfied CWA Assurances.

These commitments are significant because the 1999 agreement made by the signatory parties to the Forests & Fish Report and the 2006 Forest Practices HCP contract specifically recognize that "meeting the [water quality] standards in some cases will take many years"; EPA and Ecology's goal in 1999 was "steady progress in improving water quality trends." Forests & Fish Report, Schedule M-2, pg. 167 (emphasis added); *see also* pg. 169 (Ecology and EPA "acknowledge uncertainty exists as to when water quality standards will be met. This is understandable given the scale of the Report ... and the long-time frame necessary for natural processes to recover."). More specifically, the objective of the Forests & Fish Report was *improved* water quality in the short term and *meeting* water quality standards in the longer term. *Id.* at pg. 168. The science has indicated that the short-term goal has been met, and the long-term goal is likely on track for the remainder of the 50-year term of the Forest

¹ The Forests & Fish Report is Appendix B to the Forest Practices HCP. Appendix M to the Forests & Fish Report is at pages 83-86 of Appendix B, and Schedule M-2 is at pages 167-73.
https://www.dnr.wa.gov/publications/fp_hcp_18appb.pdf?vo07wtu

² The "other authors" of the Forests & Fish Report are USFWS, NOAA/NMFS, EPA Region 10, Governor's Office, DNR, WDFW, Ecology, Colville Confederated Tribes, WSAC, WFPA, and WFFA. Forests & Fish Report at ¶A (pg. 2).

Practices HCP. However, most AMP research projects are focusing on site scale, short term results. We do not have a long term, landscape scale status/trend monitoring program established. The final CMER report for the first, and only, effort at establishing baseline temperature conditions on forestland subject to the Forest Practices Rules in Western Washington was just recently transmitted (October 2019) to TFW Policy for consideration. The actual monitoring associated with the report occurred in 2008-09. Since 2009, landscape scale status/trend monitoring has been deprioritized by the AMP, which is counter to the original vision for the AMP monitoring program,¹ and constrains our ability to answer some of the key questions posed in the Forests & Fish Report.

Many stakeholders have focused on a 10-year period to “meet” water quality standards. This reliance is misplaced and misunderstands the history and management framework. The 1999 Forests & Fish Report identified a 10-year “reasonable minimum time frame” to set priorities. That 10-year period was established as “time to test the assumptions underlying the proposed regulatory provisions and the effectiveness for adaptive management.” It was identified as “a reasonable time frame to determine some **initial** water quality trends resulting from the changes to forest practices.” It was not a time frame to *meet* all water quality standards in the long-term (50+ year) lifespan of the HCP. *See id.* at pg. 168 (emphasis added).

In 1999, Ecology anticipated its role would be to: “review[] and concur[] on rule changes with the Forest Practices Board, assu[r]e compliance with the forest practices regulations with DNR, monitor[] compliance with water quality standards, pursu[e] necessary changes through adaptive management, and participat[e] in water quality research on forest practices.” Ecology’s staff participation in TFW Policy and its updates to the Board *exceed* these commitments. Ecology’s 2009 decision to add an additional obligation to “renew” its assurances further expanded its commitments in Schedule M-2, creating additional complexity and regulatory uncertainty in the AMP process, threatening the stability and integrity of the Forest Practices HCP.

Absent renegotiation of the Forest Practices HCP, Ecology has met and exceeded its obligations under the Forests & Fish Report related to the forest practices rules commitment to improve water quality standards. WFPA encourages the Board to acknowledge the significant progress made in forest practices under the voluntary efforts of DNR’s stakeholders over the preceding 20 years, the dedication to the AMP process shown by the commitment of staff and resources of all caucuses over the preceding decade, and the continued commitment to improve functionality of the forest practices rules based on science.

We appreciate Ecology’s close look at the CWA Assurances, and its commitment to extend those assurances for two years. We look forward to continuing to work collaboratively with our AMP partners over the next two years to identify an approach that will allow Ecology in 2021 to renew its CWA Assurances for the remainder of the term of the Forest Practices HCP.

Sincerely,



Mark Doumit
Executive Director

¹ Monitoring Design for the Forestry Module of the Governor’s Salmon Recovery Plan, 2002
more

• Page 8 Washington Forest Protection Association

cc: Governor Jay Inslee

Commissioner Hilary Franz, DNR

Director Kelly Susewind, WDFW

Laura Watson, Division Chief, AGO - Ecology

Patricia O'Brien, Division Chief, AGO - Natural Resources

Daniel Opalski, Director, Office of Water & Watersheds, EPA Region 10,

Attach: Table of CMER Projects

1999 Forests & Fish Report: Appendix M, Schedule M-2

CMER Project	2009 Report Goals	April 22, 2019 FPB Status Report
1. Hardwood Conversion – Temperature Case Study	2009 Complete	Completed June 2010
2. Wetland Mitigation Effectiveness	2009 Study Design 2010 Implement Pilot 2012 Complete	Completed October 2010 <i>Not listed</i> <i>Not listed</i>
3. Testing the Accuracy of Unstable Landform Identif.	2009 Study Design 2012 Implement	<i>Not listed</i> <i>Not listed</i>
4. Mass Wasting Prescription-Scale Monitoring	2010 Complete	Completed June 2012
5. Amphibians in Intermittent Streams (Phase III)	2010 Study Design 2011 Implement 2012 Complete	Not progressing (Scope) ¹ Off Track <i>Not listed</i> <i>Not listed</i>
6. Type N Experimental in Incompetent Lithology	2010 Study Design 2011 Implement 2016 Complete	Completed August 2011 Completed October 2017 On Track
7. Mass Wasting Landscape-Scale Effectiveness	2010 Scope 2011 Study Design	Milestone Eliminated Milestone Eliminated
8. Eastside Type N Effectiveness (new study needed)	2010 Scope 2011 Implement 2017 Complete	Completed November 2013 Underway Completed March 2018 (Study Design) ² Earlier Stage Underway
9. Bull Trout Overlay Temperature	2011 Complete	Completed May 2014
10. Solar Radiation/Effective Shade	2011 Complete	Completed June 2012
11. Wetland Management Zone Effectiveness Monitoring	2011 Scope	<i>Not listed</i>
12. Type N Experimental in Basalt Lithology	2012 Complete	Completed August 2017
13. Buffer Integrity-Shade Effectiveness	2012 Complete	Completed November 2018
14. Wetland/Stream Water Temperature Interactions	2012 Scope	<i>Not listed</i>
15. First Cycle of Extensive Temperature Monitoring	2013 Complete	Underway

¹ There is no "Scope" phase in the 2009 Report.

² There is no "Study Design" phase in the 2009 Report.

CMER Project	2009 Report Goals	April 22, 2019 FPB Status Report
16. Effectiveness of RMAP Fixes	2013 Scope 2014 Study Design	<i>Not listed</i> <i>Not listed</i>
17. Wetland Hydrologic Connectivity	2013 Scope	<i>Not listed</i>
18. Type F Experimental Buffer Treatment	2014 Scope	Complete December 2015
19. Watershed Scale Assess. Of Cumulative Effects	2016 Scope 2017 Study Design 2018 Implement	Off Track Off Track Off Track
20. Roads Sub-basin Effectiveness	2018 Complete	Not Progressing
Projects in April 2019 Report to FPB That Were Not Included in July 2009 Report		
a. Literature Synthesis: Forested Wetlands Literature Synthesis	N/A	Completed January 2015
b. Scoping: Examine the effectiveness of the RILs in representing slopes at risk of mass wasting Study Design Implementation	N/A	Completed April 2017 Underway Earlier Stage Underway
c. Scoping: Forested Wetlands Effectiveness Study Study Design	N/A	Completed December 2016 Underway
d. Wetlands Program Research Strategy	N/A	Completed January 2015
e. Scope: Road Prescription-Scale Effectiveness Monitoring Study Design	N/A	Completed March 2016 Completed February 2017

Schedule M-2

Clean Water Act Section 303 Assurances

Background:

Forest practices on private and state-owned lands in the State of Washington are regulated by the Forest Practices Board. The Department of Ecology (Ecology) and the Forest Practices Board (FPB) jointly adopt rules, and enforcement is performed by the Department of Natural Resources (DNR). For over a decade, an advisory group known as Timber, Fish, and Wildlife (TFW) attempted to resolve disputes and put forward a consensus position which would avoid prolonged litigation and protect resources. TFW's recommendations are advisory only.

In 1997 there was a recognition that present and future listings of salmonids under the Endangered Species Act (ESA) required a new look at forest practices. TFW resolved to negotiate a new set of forest practices, and invited a federal caucus consisting of the Environmental Protection Agency (EPA), the US Fish and Wildlife Service (USFW), US Forest Service (USFS) and National Marine Fisheries Service (NMFS) to the table. The goals of TFW were to meet the Clean Water Act (CWA), the ESA, and return salmon to harvestable levels.

TFW is made up of six caucuses:

- The forest products industry, including small landowners
- Counties
- Selected state agencies
- Tribes
- Environmental groups
- Federal agencies

Negotiations continued for over a year, at which time the environmental caucus withdrew from the negotiations and insisted that if negotiations were to continue the process could not be termed TFW. The negotiations then became known as the Forestry Module.

EPA Region 10 and Ecology are co-stewards of the Clean Water Act. As an agreement appears to be feasible, EPA and Ecology are putting forward what have been come to be known as the CWA assurances. These assurances spell out the terms and conditions of how Section 303(d) will be applied to lands subject to the Report and its recommendations. EPA and Ecology make no assurances regarding Tribal lands or jurisdiction.

Attainment of water quality standards remains the goal of the agencies, and we will expect steady progress in improving water quality trends while acknowledging that meeting the standards in some cases will take many years. It is also an objective of all agencies that the

CWA and the ESA can and should act in concert. To that end, we believe that the assurances offered here are or can be made to be consistent with the ESA.

Ecology and EPA agree that forest practices in the State of Washington need considerable improvement to meet CWA concerns. The comprehensive and largely consensus-based Forests and Fish Report will result in substantial improvement in forest practices affecting water quality, and particularly salmon habitat protection. However, even if all forested lands meet water quality standards, there would still remain a large number of water bodies impaired by urban pollution, agricultural practices, hydro-power, mining, and some point source contribution. Our support of the Report addressing forest practices signals other sectors that we hold similar expectations for them and will provide similar assurances if our expectations are met.

These assurances are made with the knowledge that EPA's national Total Maximum Daily Load (TMDL) regulations are being revised and that we cannot prejudge the public process and what those regulations may say. These assurance are also made with the knowledge that many future decisions need to be made in state and federal CWA programs that are subject to notice and comment processes called for in the Administrative Procedures Act.

Structure:

These assurances are a stand-alone document and an appendix to the Forests and Fish Report which will be submitted to the Forest Practices Board for consideration. The Report referred to here is the document, approved by the authors, known as the Forests and Fish Report. This Report contains numerous appendices including the riparian strategy, roads, enforcement, adaptive management, assurances and other components.

Basis for Assurances:

EPA and Ecology acknowledge that the Report, when implemented, will significantly advance forest practices in the State of Washington, will improve water quality in the short term, and is anticipated to meet water quality standards in the longer term. The urgency of developing TMDLs for water bodies impaired by current forest practices will be reduced significantly by this Report. The Report anticipates a package of state regulations, guidance, funding, and restoration programs, plus the anticipated federal ESA 4(d) rule for aquatic species listed in the Report leading to an HCP. The State forest practice regulations when promulgated and the authority for ESA sanctions, taken together provide a basis of reasonable assurance of implementation of this Report and its recommendations.

Ten years is a reasonable minimum time frame for this initial exercise of priority-setting discretion (described below) based on the overall protectiveness of the Report, and is consistent with the schedule for TMDLs which is part of the Washington TMDL settlement agreement. Ten years will provide time to test the assumptions underlying the proposed regulatory provisions and the effectiveness of adaptive management. Ten years should be a reasonable time frame to determine some initial water quality trends resulting from the changes to forest practices.

We base this judgement on an analysis of the Report and its recommendations, and highlight the following provisions:

Monitoring and Adaptive Management: The Report's monitoring and adaptive management plan offers a significant improvement over the current program. This plan promises to provide both effectiveness and trend monitoring, and to inform a rigorous and reliable adaptive management process.

Baseline rules: New baseline rules will significantly improve riparian buffers for both fish habitat and non-fish habitat streams. Restrictions on steep and unstable slope harvest, road building maintenance and abandonment standards, and other regulations offer both enforceability and water quality improvement.

Enforcement: With the staffing requested in the funding package, and enforcement provisions contained in the Report, the baseline rules will be more effective. Nonetheless, a visible and measurable enforcement presence is necessary to maintain these assurances.

Regulatory and voluntary programs: The Forest Practices Regulations and their enforceability by DNR and Ecology, combined with the take authority provided in an enforceable ESA 4(d) rule, and eventual enforceable HCP, is a strength of the Report. Landowner incentives should complement regulatory elements, but the Report is predominately a regulatory approach rather than voluntary.

Adaptive management: We acknowledge uncertainty exists as to when water quality standards will be met. This is understandable given the scale of the Report (state and private forest lands in the State of Washington) and the long time frame necessary for natural processes to recover. We rely on monitoring and adaptive management to inform us whether the buffers and other practices are adequate and will be fully protective of functions and water quality standards. EPA and Ecology will evaluate the effectiveness of baseline rules and adaptive management for the life of the assurances.

Implementation: The Report assures implementation and as such it offers early water quality protection that precedes any TMDL or potential TMDL alternative that would be produced at a later date, should that become necessary. These early actions offer substantial environmental benefit, and these early actions should not wait for the preparation of a TMDL or potential TMDL alternative.

Assurances and Contingencies:

The assurances are contingent on:

1. The final Forests and Fish Report;
2. Passage of State legislation (if necessary), adoption of emergency or final regulations by the FPB, and appropriations for the funding package pursuant to the Report; and

3. Landowners will share water quality data collected in cooperative research, and adaptive management, and TMDL development. Landowners are further encouraged to share all pertinent water quality data to assist in water quality planning efforts.

EPA and Ecology offer these assurances:

1. EPA and Ecology have confidence that the Report, when signed and implemented, provides the quickest and most efficient means for achieving environmental goals and State of Washington water quality standards. Accordingly, TMDLs for waters impaired by sediment, habitat degradation, flow, turbidity or temperature caused by forest practices covered in the Report and recommendations (private and state lands subject to Board regulation) affecting a current or future 303(d) listed water body, become a lower priority for EPA and Ecology. Therefore, these TMDLs need not be prepared prior to July 1, 2009 (note exceptions below). Ecology will submit its year 2000 section 303(d) list and priorities consistent with this provision. EPA will review and approve the priorities as expressed here subject to notice and comment. EPA and Ecology will not add new TMDL CWA requirements to current or future 303(d) listed water bodies subject to the FPB regulations prior to 2009, except through the agreed upon adaptive management program set out in the Report, or made necessary by changes to the CWA or CWA implementing regulations.
2. If new regulations promulgated by EPA support alternatives to TMDL's, EPA and Ecology will make every reasonable effort to exercise these TMDL alternatives on a time frame consistent with the development of a Habitat Conservation Plan approved by NMFS and USFWS for this Report.
3. If new regulations do not support alternatives to TMDLs, EPA and Ecology, with voluntary participation of landowners at their option, will develop TMDLs on an appropriate scale beginning in 2009 and completed by 2013. Landowners may request a TMDL from Ecology for their holdings prior to 2009. Where EPA and Ecology have approved a TMDL for forested lands subject to the FPB regulations, and the prescriptions in the TMDL implementation plan differ from FPB regulations, for the purposes of the Clean Water Act, the prescriptions should qualify as an alternate plan.
4. Allocations or water quality targets in the TMDLs or TMDL alternatives may be expressed using measures appropriate to the characteristics of the water body and pollutants being addressed. Habitat surrogates for example, that are quantitatively linked to the attainment of water quality standards, can be used to help develop TMDLs and evaluate progress toward attaining water quality standards, especially narrative criteria.
5. TMDLs produced prior to 2009 in mixed use watersheds:
 - a. For mixed use watersheds with water bodies impaired by forest practices and the activities of other landowners, we expect that the landowners subject to the Forest Practices Board regulations will participate in watershed planning and restoration efforts. Consistent with the intent of the Report and these assurances, EPA and Ecology will not require more stringent forest practices in a mixed-use watershed-

based TMDL before July 1, 2009 except through adaptive management and subject to reopeners. Assurances for forested landowners in mixed use and single use watersheds will be the same, and subject to the same conditions.

- b. If a TMDL is produced in mixed use watersheds, and if achievement of the TMDL load allocations cannot be met through the forest practices regulations, the adjustment of those management practices will be through adaptive management as contained in the Adaptive Management appendix of the Report. Over the long term, failure of adaptive management to meet CWA goals is a potential cause for withdrawal of the assurance. Forest landowners are encouraged to participate in broader cooperative watershed planning and restoration efforts to improve water quality impaired by land uses other than regulated forest practices. Examples of this involvement include:
 - i. Attending watershed planning meeting to describe new protection measures contained in the Forests & Fish Report.
 - ii. Sharing watershed assessment data cooperatively collected as appropriate to assist in characterizing the watershed.
 - iii. Sharing data and modeling information cooperatively collected related to expected improvements in water quality in forested riparian habitat due to implementation of the Forestry Module baseline rule package.
 - iv. Collaboratively working with other watershed planning participants to prioritize restoration opportunities on forested sections of watersheds.
6. EPA and Ecology will make every effort to integrate the CWA in coordination with the Endangered Species Act. Specifically, EPA and Ecology will work with NMFS and USFWS to coordinate progress reviews, with the goal of having at least one federal-tribal-state-public review every five years.
7. EPA is developing new regulations concerning section 303(d). For the purposes of discussion, we assume that water bodies listed as impaired under 303(d) will remain listed until water quality standards are met, consistent with the recommendations of the CWA 303(d) FACA. No assertions to the contrary have been made in negotiations.
8. Landowners with individual Habitat Conservation Plans wishing CWA assurances may petition EPA and Ecology for such assurances. Landowners should expect to demonstrate in writing to the agencies that the HCP, on balance, meets or exceeds the functions provided by the prescriptions contained in the Report and will result in meeting water quality standards in a reasonable time frame. Landowners providing such a demonstration would receive the same assurances contained in this Appendix.

Reopeners, Modifications, and Causes of Withdrawal of Assurances

Any one of the following items may cause withdrawal or modification of the assurances:

Statewide:

1. New water quality standards not anticipated in this Report unless those new standards can be accommodated with adaptive management. This Report specifically targeted the State of Washington's numeric sediment and temperature criteria and narrative water quality standards relevant to aquatic habitat including anti-degradation. This Report also anticipated potentially lower temperature standards as needed to protect fish or amphibians covered by this Report.
2. Failure to implement for any reason, including:
 - a. A significant loss of funding or staffing to the state regulatory agencies dedicated to forest practice regulation or monitoring.
 - b. A lack of enforcement of forest practices on the part of state regulatory agencies.
 - c. Broad scale landowner non-compliance with forest practice regulations or the Report.
 - d. Lack of final regulations consistent with the Report.
3. Weakening of enabling State statutes or regulations which affect the Report and its implementation.
4. General failure to upgrade regulations or guidance called for in adaptive management. This includes failure to develop agreed upon resource objectives, research priorities, and compliance monitoring programs.
5. Court orders, changes to the CWA, state or federal regulatory changes that cannot be otherwise addressed.

Prior to withdrawal of these assurances, EPA and Ecology will advise the Forest Practices Board and the cooperators of the concerns. If modification of the Report would preclude the necessity for complete withdrawal of the assurances, a reasonable time period will be allowed for such modifications. Termination of the assurances will be explained in writing.

Individual landowner:

If an individual landowner fails to implement forest management practices or demonstrates a pattern of non-compliance, such as repeated enforcement actions, the assurances may be withdrawn for that landowner. All available enforcement and other options under federal and state law will be considered. This will include, but not be limited to: the requirement for a TMDL; enforcement of water quality standards violations and forest practice laws and regulations.

Role of EPA, Ecology and the Tribes in CWA Assurances

While EPA will primarily look to Ecology and DNR to monitor progress and compliance with the Report, EPA will participate in periodic progress reviews to ensure that the assurances remain appropriate. EPA will pay particular attention to implementation of baseline rules, adaptive management, retention of funding for state regulatory agencies, enforcement, and monitoring results including water quality trends. EPA will invite affected Tribes to participate in these progress reviews.

Ecology will continue in its role of reviewing and concurring on rule changes with the Forest Practices Board, assuring compliance with the forest practice regulations with DNR, monitoring compliance with water quality standards, pursuing necessary changes through adaptive management, and participating in water quality research on forest practices. Ecology will track water bodies affected by the Report in a manner consistent with CWA 303(d) and the settlement agreement.

Department of Ecology

By: _____
Its: _____

Environmental Protection Agency, Region 10

By: _____
Its: _____



November 13, 2019

Re: Water Typing System Rule Recommendations

Washington State Forest Practice Board
P.O. Box 47012
Olympia, WA 98504-7012

Chairman Bernath and members of the Forest Practices Board,

My name is Scott Swanson and I represent the Washington State Association of Counties (WSAC) on the TFW Policy Committee and support our FPB representative -when we have one.

Today, I would like also recognize the strong leadership and collaboration displayed by Water Typing System Board Committee Chair Guenther and each and every member of the Water Typing System committee, as well as DNR staff. Their work during the past few months is a great example of collaboration through an open and candid dialogue (both within the committee and with members of the general public and caucus representatives who attended the committee meetings) and a strong commitment to shared problem solving. Much, much appreciated.

I speak in favor of the majority of the recommendations from the Water Typing System Board committee, especially the need to:

- Clarify the goals and performance targets for the water typing rule
- Have the DNR redo the Potential Habitat Break (PHB) and Anadromous Fish Floor (AFF) spatial analysis while re-engaging the TFW Policy caucus leads.
- Request CMER...develop revised study designs for the PHB validation, physical characteristics, and map based LiDAR model studies.
- Support the on-going efforts of the Anadromous Fish Floor Workgroup and the Committee recommendation for that workgroup.
- And acknowledge that a map based modeled water typing system is still **one of the goals of a permanent water typing system rule**. RCW 76.09.370(1) requires the forest practice rules to be consistent with the Forests & Fish Report (FFR). Within the FFR and the HCP, the boundary between Type F and Type N waters was to be determined by a model-produced map meeting specific landscape scale precision and equitable error allocation criteria. All caucuses agreed to curtail electro-fishing only after a map-based rule was implemented. A number of useful tools and additional data have been developed since 2003 when the FPB decided not to adopt a modeled map-based system. WSAC strongly encourages the Board to retain a map-based model as an element of any permanent water typing rule...then electro-fishing will be extremely limited in its use.

Thank you for your interest in these comments today.

Scott Swanson



WASHINGTON FOREST PROTECTION ASSOCIATION
724 Columbia St NW, Suite 250
Olympia, WA 98501
360-352-1500 Fax: 360-352-4621

November 10, 2019

sent by email

Washington Forest Practices FPB
1111 Washington St SE
PO Box 47012
Olympia, WA 98504-7012
Forest.practicesboard@dnr.wa.gov

Re: Comments on Water Typing Subcommittee Recommendations

Dear Forest Practices Board Members:

Washington Forest Protection Association (WFPA) is a forestry trade association representing large and small forest landowners and managers of nearly four million acres of productive working forests, including timberland located in the coastal and inland regions of the state. Our members support rural and urban communities through the sustainable growth and harvest of timber and other forest products for U. S. and international markets. For more information about WFPA, please visit our website at www.wfpa.org. Thank you for the opportunity to comment. WFPA respectfully submits the following comments on the Water Typing Subcommittee's recommendations.

Water Typic Performance Target

WFPA supports the subcommittee's recommendation to revisit and reaffirm the performance target for the water typing system. We've made this request repeatedly over the last several months as it is one of the biggest impediments to cooperative progress on water typing. According to Forest Practices Board (FPB) meeting minutes, the last time the FPB substantively discussed and provided direction on this topic was in August 2015. A motion from that meeting reads, in part, "...*The FPB generally expects TFW Policy Committee to:*

- *use the existing information,*
- *develop a method for addressing streams not on the hydro layer,*
- *make methods as accurate as possible,*
- *balance error,*
- *minimize electrofishing,*
- *improve map over time,*
- *develop methods to locate the stream break points on the ground, and*
- *ensure the methods address small forest landowners..."*

These were helpful expectations and are generally consistent with past FPB actions on water typing and foundational principles contained within the Forest Practices Habitat Conservation Plan (FP HCP), Incidental Take Permit (ITP) decision documents, the Forests & Fish Report (FFR) and the

Timber, Fish & Wildlife (TFW) Agreement. However, there has been considerable drift from these principles over time, with some caucuses advocating for precautionary approaches based on non-specific and unsubstantiated “concerns” about lack of protection of fish habitat. We consider a precautionary approach counter to prior FPB actions and the accuracy/balance principles foundational to the water typing system. As you know, RCW 76.09.370 and WAC 222-12-045 requires rule changes to be based on the scientifically based adaptive management process. No formal Adaptive Management Program (AMP) work has been completed which suggests fish habitat is not being protected under current practices. In fact, past AMP work on this topic suggests the opposite. If technically sound evidence to the contrary exists, why has it not been submitted to the Adaptive Management Program (AMP) for consideration? Further, the water typing goals and objectives suggested by FPB staff during the rule making update at the August 2019 meeting, which in part read “...better address the Forests and Fish Report foundational goal to protect accessible fish habitat...” are not contained within any of the previously referenced documents or decisions. As stated in past FPB meetings, absent consideration of habitat suitability, consideration of access alone is an incomplete measure of habitat likely to be used by fish.

Nonetheless, WFPA has been faithfully participating in the water typing rule making process to develop a more stable, consistent water typing system. However, we submit that any water typing system, or components thereof, need to retain the foundational criteria of accuracy and balance, sharing the same performance target, and should not be inconsistent with prior FPB direction, the FP HCP, and the FFR. And, it must have a strong scientific basis. Moving any substantive water typing work forward absent re-affirmation of the water typing system performance targets risks additional delays and wasted effort.

Potential Habitat Break and Anadromous Fish Floor Spatial Analysis

WFPA appreciates the department’s commitment to complete a spatial analysis of all the potential habitat break (PHB) and anadromous fish floor (AFF) alternatives. As stated previously, neither the science team nor the department has evaluated all the PHB criteria (width, gradient, obstacles) in an integrated analysis. The existing analysis of AFF gradient thresholds is incomplete and too coarse to support decision making by the FPB. The landowner’s (WFPA/WFFA/WSAC) proposed known anadromous distribution/PHB based AFF alternative has not been analyzed at all.

We are receiving information which indicates the reason WFPA/WFFA/WSAC’s proposed PHB and AFF alternatives have not been analyzed is due to: 1) some not agreeing with how we intend the PHB width criteria to be applied; and 2) the belief that our known distribution/PHB based AFF alternative was not accepted by the FPB. WFPA/WFFA/WSAC’s PHB and AFF alternatives were described in the same document submitted to the FPB in February 2018.¹ It’s unclear why there continues to be confusion about, and resistance to, accepting and analyzing our alternatives. We hope the FPB can move past this superfluous roadblock and analyze the alternatives as submitted. Further, we strongly recommend the FPB take the opportunity to refine PHBs as necessary, including an evaluation of field implement ability, in a cooperative technical forum following the spatial analysis. Finally, in order to avoid a repeat of past problems, we request the department work closely and cooperatively with all caucuses to ensure both analyses are set up and completed in a technically correct and transparent manner.

¹WFPA/WFFA/WSAC Proposed PHB and AFF Alternative

PHB: $\geq 5\%$ gradient change, stream junction ratio of ≥ 0.8 , obstacle ≥ 3 ft. vertical non-deformable, $\geq 20\%$ upstream gradient, elevation change \geq upstream BFW

AFF: Known anadromous core (SWIFDD and/or SteamNet), tributaries to core use PHBs of $\geq 5\%$ gradient change, obstacle ≥ 3 ft. vertical non-deformable, $\geq 20\%$ upstream gradient, elevation change \geq upstream BFW

Eastern Washington Rulemaking

WFPA generally agrees with the subcommittee's recommendation that additional data and analysis are necessary to move forward with rulemaking in Eastern Washington (EWA). However, we're not necessarily supportive of a field validation study being completed first in EWA. There are robust field survey data sets available for EWA, all collected under an experimental design and approved through the CMER science process. Those data collection efforts did not focus on PHBs per se, but did collect uppermost fish, and channel characteristic data. Seasonal/annual variability of uppermost fish was also measured in a manner consistent with the proposed PHB validation study methods. Watersheds used in those studies included both managed and wilderness landscapes to support evaluation of potential forest management influence on fish use of available habitat. These previously established survey sites should be incorporated into any field validation efforts, augmenting as necessary existing data with additional information necessary to support evaluation of any alternatives being considered by the FPB. EWA Tribes may also have relevant data which could be incorporated into the effort.

Any scientific studies should proceed under the formal Adaptive Management Program (AMP) process to ensure compliance with statute (RCW 76.09.370) and avoid procedural defects in rule making. As an interim step, we support the FPB establishing a cooperative workgroup, like the Western Washington (WWA) AFF workgroup being led by the Northwest Indian Fisheries Commission (NWIFC). The EWA workgroup could evaluate available data to determine what, if any, gaps exist and make recommendations for how to revise existing draft study designs to fill those gaps.

Field Validation Studies

WFPA generally supports the subcommittee's recommendation regarding field validation studies. A field validation component for PHBs, the default physical criteria (DPC), LiDAR model, and the AFF is necessary. Of course, completing sufficient science through the AMP process in advance of proposed rule changes is our preference, and a requirement of the FP Act & Rules, the FP HCP, and the FFR. We still encourage the FPB to give this serious consideration. Assuming the FPB stays the course, putting rulemaking in advance of the science process, field studies for PHBs, DPC, and LiDAR model development should be combined into one effort. As stated previously, all these different approaches to water typing need to have single performance target. Further, in order to be time/cost efficient these efforts should make maximum use of existing CMER study sites and other data, established and collected under an experimental design through the CMER science process. Finally, science projects need to be managed through the formal AMP process to ensure compliance with statute (RCW 76.09.370) and avoid procedural defects in rule making.

Map Based Rule

A modeled map-based rule must remain as an alternative for consideration until sufficient science through the AMP determines other alternatives can deliver a higher level of performance in meeting the FFR and FP HCP performance targets. Within the FFR and FP HCP, the boundary between Type F and Type N waters was to be determined by a model produced map meeting specific landscape scale accuracy and error allocation criteria. All caucuses agreed to curtail electro-fishing only after the map-based rule was implemented. In 2001, the FPB agreed the DPC for presumption of fish use would be dropped in favor of a model map which identified fish habitat as soon as those maps were available. There was no expectation the existing DPC would be carried forward in rule indefinitely. The large systematic bias in the current DPC is the single biggest factor influencing the current level of electro-fishing. There are multiple lines of evidence demonstrating the low accuracy and high bias in the current DPC. More accurate and balanced methods for determining the point separating Type F and Type N waters would greatly reduce the need for electro-fishing. Finally, a model produced map

is particularly important for small forest landowners (SFLs), who the cost/benefit analysis for the FFR rules identified as disproportionately impacted, and the FPB has already provided direction to address the needs of the SFL's.

Anadromous Fish Floor Workgroup

WFPA supports the subcommittee's recommendation regarding the AFF workgroup. This cooperative effort, led by the NWIFC, has been making steady progress, approving a charter and communications plan, and is close to finalizing a workplan. The Water Typing Subcommittee has been helpful in clarifying the focus by describing the AFF as "...streams where there is anadromy all the time..." and "streams where there is no need to electro-fish."² WFPA looks forward to continuing cooperative work on the AFF.

Retain Water Typing Subcommittee

WFPA supports the recommendation to retain the subcommittee to assist the FPB in providing oversight to the various efforts described above. While there are still many issues to work through, the subcommittee has made substantial progress in improving understanding and cooperation. Kudos to Chair Guenther and the rest of the subcommittee members for encouraging an atmosphere of cooperative dialogue and problem solving.

Thank you for the opportunity to comment. I can be reached at dcramer@wfpa.org or (360) 280-5425 should you have any questions.

Sincerely,



Darin D. Cramer
Sr. Director of Forest & Environmental Policy



WASHINGTON FOREST PROTECTION ASSOCIATION
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November 8, 2019

Sent by e-mail

Forest Practices Board
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PO Box 47012
Olympia, WA 98504-7012
forest.practicesboard@dnr.wa.gov

Re: North Central Washington Audubon Society Petition Requesting Moratorium on Forest Practices Applications in Eastern Washington SOSEAs

Dear Chair Bernath and Forest Practices Board Members,

The Forest Practices Board will consider North Central Washington Audubon Society's (NCWAS) September 23, 2019 "Petition to the Forest Practices Board Regarding the Spotted Owl in Eastern Washington" at its November 13, 2019 meeting. WFPA encourages the Board to deny the petition because an Attorney General Opinion issued in 2015 concludes that the Board lacks the legal authority to grant the relief requested in the petition.

NCWAS's Petition requests "a moratorium be placed on logging anywhere within SOSEA sites in Eastern Washington". NCWAS bases this request on the successful nesting of a pair of owls in Eastern Washington. The Petition alleges that DNR approved forest practices applications in 2016, although it does not identify the applications. The Petition makes general, albeit incorrect, allegations about the owls to contend WAC 222-10-041(4) is insufficient, flawed, and/or not being adhered to. WAC 222-10-041 governs forest practices subject to SEPA, "if the forest practices may cause adverse impacts to northern spotted owls." The rule does not apply to Class III applications, and the Petition does not allege adverse impacts to the pair of owls, which successfully reproduced in 2016, 2017, and 2018.

After the Northern spotted owl was federally and state listed in Washington, DNR adopted rules governing forest practices in order to protect known owls. *See, e.g.* WAC 222-10-040 ("Class IV-Special threatened and endangered species SEPA policies"); 222-10-041 ("northern spotted owls"); 222-16-010 (definitions); 222-16-080 ("critical habitats (state) of threatened and endangered species"); 222-16-085 ("northern spotted owl habitats"); 222-16-086 ("Northern spotted owl special emphasis areas and goals"); 222-16-100 ("Planning options for the northern spotted owl"); 222-16-105 ("Cooperative habitat enhancement agreements"). Landowners are further restricted by the Northwest Forest Plan, federal Endangered Species Act, and individual Habitat Conservation Plans.

We're managing private forests so they work for all of us. ®

The Board received extensive information to develop the forest practices management framework which ensures that individual forest practices applications do not cause adverse impacts to owls. *See, e.g.* Board meetings on February 14, June 6, July 25, and September 11, 2007 (spotted owl update and rule making); February 8, August 9, May 10, and November 1 2006 (spotted owl update and rule making); August 9, 2005 (Spotted Owl Work Session); June 2-3, 2004 (Field Tour of spotted owl habitat); and December 2, 2003 (wildlife planning workshop).

A. Under RCW 76.09.050, the Board Lacks the Legal Authority to Enact a Moratorium on the Acceptance or Approval of Forest Practices Applications

The primary basis for the Board to deny the Petition is because it lacks the legal authority to grant the relief requested. Petitions to an agency are limited to adoption, repeal, or amendment of a rule. RCW 34.05.330(1); WAC 82-05-010, 82-05-020(1), 82-05-030(1); WAC 222-08-100. NCWAS's Petition asks the Board to place a "moratorium" on approval of forest practices applications in eastern Washington SOSEAs. In 2015, the Attorney General's Office issued a formal Attorney General Opinion (AGO 2015 No. 1) addressing the Board's authority to adopt a moratorium on the acceptance or approval of forest practices applications. Although that question was in the context of unstable slopes, the legal analysis applies to the acceptance or approval of any forest practices application. The Attorney General Opinion concluded that:

Nothing in the Forest Practices Act or elsewhere expressly authorizes the Forest Practices Board to adopt a moratorium on the acceptance or approval of forest practices applications. Moreover, we find it unlikely that such a power should be implied because it would be contrary to statutory directives regarding processing and approval or disapproval of such applications.

AGO 2015 No. 1¹ at *1 (emphasis added) (April 17, 2015); *see also* *5-6 ("A board-imposed moratorium on the Department's acceptance or approval of these [forest practices] applications would appear to conflict with the [Forest Practices] Act's directives regarding these procedures" to approve or disapprove applications. "[A]ny action that contradicts the Act's directives would fall outside the Board's authority, as agencies cannot amend or change legislative enactments. ... For these reasons, we conclude that no statutory authority exists for the Board to enact a moratorium on the acceptance or approval of forest practices applications."); RCW 76.09.050.

As a creature of statute, the Board is constrained by its legislatively-delegated authority, and the relief NCWAS requests in its Petition exceeds that authority and the scope of petitions to agencies under the APA, the Office of Financial Management rules, and the Board's own rule. *See id.* at *5 ("[N]othing in the [Forest Practices] Act provides the Board with any express authority to adopt a general moratorium. The Act also fails to support finding implied authority to adopt a moratorium on [forest practices application] acceptance or approval."). The Board does not have the authority to grant the relief requested in the Petition, and should deny the Petition on that basis.²

¹ AGO 2015 No. 1 is attached to this letter for the Board Members' ease of reference, and is available at: <https://www.atg.wa.gov/ago-opinions/authority-forest-practices-board-adopt-moratorium-forest-practices-applications-due> (last visited November 8, 2019).

² WFPA encourages Board members to contact the Assistant Attorney General who represents the Board with questions about the analysis in AGO 2015 No. 1 or the applicability of the Opinion to this Petition.

B. The Board Has the Discretionary Authority to Prioritize Rule-Making Efforts and Deny Petitions that are Not Consistent with its Existing Priorities

The second basis for the Board to deny the Petition is based on the Board's discretionary authority to identify its rule-making priorities and focus its resources on those priorities. The Court of Appeals recognized agencies' discretion to determine which issues to prioritize in rule-making and how to allocate limited staff resources. *See Squaxin Island Tribe v. Washington State Dep't of Ecology*, 177 Wn.App. 734 (2013) (Ecology properly exercised its authority to deny a petition for rule-making based on limited resources). The Court in *Squaxin* recognized that "Agencies have wide discretion to choose and schedule rule making efforts." *Id.* at 747, ¶ 27 (citation omitted). In *Squaxin*, Ecology's budget concerns, other priorities, and the lack of technical information was an adequate basis for it to deny a petition for rule-making. *Id.* at 739, 741, 745, ¶¶ 7, 14, 23.

The Board is in a similar position. The Board has chosen to dedicate its focus and DNR's staff resources on water typing rule-making for the last few years. It has limited resources and has dedicated extensive effort to an ongoing rule-making effort; reallocating resources would likely slow down and impact that current effort. Choosing to deny the Petition in order to focus its limited resources on its existing rule-making efforts is within the Board's discretion.

C. The Board Should Not Accept a Petition that Does not Raise a State-Wide Issue

The third basis for the Board to deny the Petition is the fact that the Petition does not identify a basis to support a rule change state-wide, but appears to challenge the application of the rules to a single forest practices application that was approved in 2016. The purpose of a petition for rule-making is not to usurp the role of DNR in its enforcement of forest practices or the Pollution Control Hearings Board in its review of DNR's implementation of the forest practices act and rules. *See RCW 76.09* (enforcement authority), 43.21B.110 (PCHB jurisdiction). The forest practices program was designed so that if DNR exceeds its authority in approval or disapproval of a forest practices application, any interested party may file an appeal before the PCHB.

The Board can deny the Petition because it is functionally an untimely appeal of DNR's approval of one forest practices application, not a petition to adopt, amend, or repeal a rule. *See Chuckanut Conservancy v. Washington State Department of Natural Resources*, PCHB 10-115 (Order Granting Summary Judgment) (March 24, 2011) (appeal is dismissed as moot when harvest is complete because the relief sought can no longer be provided); *Friends of the Wild Sky v. Washington State Department of Natural Resources*, PCHB No. 17-044 (Order Granting Motion to Dismiss) (August 16, 2017) (appeal is dismissed as untimely when appeal of approval of forest practices application was not filed within 30 days). Moreover, the rules allow any interested party to submit current, accurate, or specific information to DNR to ensure that decisions are based on the best available information for a site, rather than rely on generic assumptions. WAC 222-10-041(6). Here, NCWAS's Petition inaccurately states the information available from federal, state, and private landowners about owl occupancy and reproduction at and near the site. Although the Petition fails to identify sufficient grounds to support initiation of rule-making, the Board can respond by directing DNR staff to research NCWAS's concerns and provide the Board with additional information in a future meeting. The Board does not need to initiate rule-making to take this action.

//

D. The Petition Fails to Meet the Requirements of the APA, or OFM or the Board's Own Rules

Although DNR staff accepted the Petition, the Board could deny it because it fails to meet the requirements of the Administrative Procedures Act and its own rule governing petitions. RCW 34.05.330 outlines the necessary elements for any petition for adoption, amendment, or repeal of a rule. *See also* WAC 222-08-010. As required by statute, the Office of Financial Management adopted rules that govern the format and procedures for petitions, as well as prepared a generic petition form. WAC Chp. 84-05. OFM and DNR's rules clearly spell out the information that must be included in a petition (WAC 82-05-020), how the petition should be submitted (WAC 82-05-030), and what happens after a petition is submitted. WAC 82-05-040. WAC 222-08-010. NCWAS's Petition does not contain the information required by statute and rule. Procedural compliance serves a vital role in the efficient administration of a state agency that manages a diverse and complex array of legal issues.

E. The Board Can Direct DNR Staff to Review the Concerns Raised in the Petition Without Initiating Rule-Making

Although the Board lacks the legal authority to grant the relief requested in the Petition and has exercised its discretion to dedicate its staff resources to the water typing rule-making, and the Petition fails to identify sufficient facts to support rule adoption, amendment, or repeal, the Board does have existing staff that can review NCWAS's concerns and provide the Board with additional information. Following the resolution of litigation filed in 2006 challenging DNR's authority related to forest practices applications and spotted owls, the Board formed the Northern Spotted Owl Implementation Team (NSOIT) to implement the Northern Spotted Owl Working Group's consensus recommendations. *See* <https://www.dnr.wa.gov/about/boards-and-councils/forest-practices-board/northern-spotted-owl-implementation-team-agendas>. The NSOIT was formed, in part, to facilitate positive collaboration among the stakeholders by recommending voluntary, incentive-based measures. The concerns raised in the Petition are well-suited to review by the NSOIT. This team is composed of stakeholders with expertise in owl biology, forestry, and the complex management framework that governs owls on federal, state, and private lands.

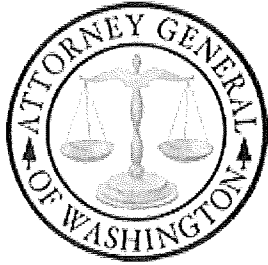
For the above reasons, WFPA encourages the Board to deny NCWAS's Petition. WFPA remains a willing partner to address concerns over spotted owl viability and implementation of the forest practices act and rules, and is willing to work with DNR, NCWAS, and other interested stakeholders to review the concerns raised in the Petition through the NSOIT.

Sincerely,



Martha Wehling
Forest and Environmental Policy Counsel

Attach: AGO 2015 No. 1



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[Home](#) > Authority Of Forest Practices Board To Adopt A Moratorium On Forest Practices Applications Due To Potential Slope Instability

Attorney General Bob Ferguson

FOREST PRACTICES ACT / BOARD—DEPARTMENT OF NATURAL RESOURCES—DEPARTMENT OF ECOLOGY—ADMINISTRATIVE PROCEDURE ACT—RULEMAKING—Authority Of Forest Practices Board To Adopt A Moratorium On Forest Practices Applications Due To Potential Slope Instability

- 1. The Forest Practices Board lacks authority to adopt a moratorium on the acceptance or approval of forest practices applications.**
- 2. The Forest Practices Board could adopt an emergency rule concerning unstable slopes, provided that the emergency rule complies with the Administrative Procedure Act and the Forest Practices Act.**

April 17, 2015

The Honorable Peter Goldmark
Commissioner of Public Lands
1111 Washington Street SE
Olympia, WA 98504-7001

Cite As
AGO 2015 No. 1

Dear Commissioner Goldmark:

By letter previously acknowledged, you requested our opinion on the following questions:

- 1. Does the Forest Practices Board have authority to adopt a moratorium on the acceptance or approval of forest practices applications that pose a threat to public safety due to potential slope instability?**
- 2. If the Forest Practices Board cannot adopt a moratorium, can it accomplish a similar result by adopting an emergency rule, and if so, what procedural steps must the Board follow to adopt an emergency rule concerning unstable slopes?**

BRIEF ANSWERS

1. No. Nothing in the Forest Practices Act or elsewhere expressly authorizes the Forest Practices Board to adopt a moratorium on the acceptance or approval of forest practices applications. Moreover, we find it unlikely that such a power should be implied because it would be contrary to statutory directives regarding processing and approval or disapproval of such applications. This does not mean, however, that the Board lacks authority under its general

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rulemaking power and the Administrative Procedure Act to adopt emergency rules regarding unstable slopes, as explained in response to the next question.

2. The Board could use its rulemaking authority to adopt emergency rules concerning unstable slopes. Such rulemaking power, however, is constrained by the Administrative Procedure Act, which limits emergency rules to those that are immediately necessary to preserve the public health, safety, and welfare. Moreover, Board rules are also governed by provisions of the Forest Practices Act. Assuming the Board complies with these laws, it could issue emergency rules that place procedural or substantive limits on forest practices.

BACKGROUND

The Forest Practices Act (Act) declares forest land resources to be “among the most valuable of all resources” in the state. RCW 76.09.010(1). To protect these natural resources and the state’s forest products industry, the legislature enacted a comprehensive system of laws governing forest practices. RCW 76.09.010(2). Codified at RCW 76.09, the Act serves to “manage commercial harvest of public and private commercial forest lands consistent with sound policies of natural resource protection.” *Kettle Range Conserv. Group v. Dep’t of Natural Res.*, 120 Wn. App. 434, 449, 85 P.3d 894 (2003) (internal quotation marks omitted). To fulfill these purposes, the legislature distributed authority and duties under the Act among several government agencies and stakeholders. The Forest Practices Board, which consists of 13 members representing government entities, the timber industry, and the public, serves as the administrative legislative body responsible for promulgating forest practices rules. RCW 76.09.030, .040 (2). [1] Specifically, the legislature authorized the Board to adopt rules that:

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(i) Establish minimum standards for forest practices;

(ii) Provide procedures for the voluntary development of resource management plans which may be adopted as an alternative to the minimum standards in (a)(i) of this subsection if the plan is consistent with the purposes and policies stated in RCW 76.09.010 and the plan meets or exceeds the objectives of the minimum standards;

(iii) Set forth necessary administrative provisions;

(iv) Establish procedures for the collection and administration of forest practice fees as set forth by this chapter; and

(v) Allow for the development of watershed analyses.

RCW 76.09.040(1)(a).

The Act also directs the Board to establish and maintain a Forest Practices Board manual that provides technical guidance for the standards incorporated into the forest practices rules. RCW 76.09.040(3)(c); *see also* WAC 222-12-090. Other provisions of the Act encourage “forest landowners to undertake corrective and remedial action to reduce the impact of mass earth movements and fluvial processes,” and require that the landowners assist in paying for the “costs of review and permitting necessary” for environmental protection. RCW 76.09.010(3), (4).

Finally, the Act directs the Board to establish by rule which forest practices are to be included within legislatively designated classes of forest activities. RCW 76.09.050(1). These classes range from Class I practices, which have no direct potential for damaging a public resource, to Class IV special practices, which have the potential for a substantial impact on the environment. *See* RCW 76.09.050; WAC 222-16-050. Relevant to this opinion, per the Board’s existing rules, certain forest practices on potentially unstable slopes or landforms that have the potential to deliver sediment or debris to a public resource or that have the potential to threaten public safety qualify as Class IV special forest practices. WAC 222-16-050(1). [2]

Before explaining the four classes of forest practices, we must first explain the separate role of the Department of Natural Resources. The Department administers and enforces the Act and regulations adopted under it. RCW 76.09.040(1)(c).[3] In particular, the Department receives, evaluates, and approves or disapproves applications from persons seeking to conduct forest

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practices. RCW 76.09.050(2), (5), .060; WAC 222-20. The Department also determines which classification applies to each forest practices application proposal for purposes of triggering the procedural or substantive requirements that govern that class of forest practice. WAC 222-16-050.

Depending on which class the forest activity falls under, the Act sets specific procedures and requirements for the applications. *See generally* RCW 76.09.050. For instance, Class I activities may be conducted without submitting an application or notification to the Department. RCW 76.09.050(1) (Class I). In contrast, Class IV activities require an evaluation by the Department as to whether an environmental impact statement under the State Environmental Policy Act (SEPA) is required and a Department-approved application prior to commencing such activity. RCW 76.09.050(1) (Class IV). By statute, the Department must approve or disapprove Class IV applications within 30 calendar days of receipt unless a SEPA statement is required. RCW 76.09.050(1) (Class IV). If a SEPA statement is required, the Department must approve or disapprove the application within 60 calendar days from receipt. RCW 76.09.050(1) (Class IV).[4]

The Department also investigates violations or potential violations of the Act. RCW 76.09.080, .090; WAC 222-46-030. The Department's enforcement authority includes issuing a stop work order to immediately stop all work connected with a violation or when "immediate action is necessary to prevent continuation of or to avoid material damage to a public resource." RCW 76.09.080(1)(c); WAC 222-46-040(1)(c). For any of these actions, including disapproval of a forest practices application, the Pollution Control Hearings Board serves as the adjudicative body responsible for hearing appeals of the Department's decisions. RCW 76.09.050(9), .205.

With this general background in mind, we now turn to your specific questions regarding the Board's authority to impose a moratorium on the acceptance or approval of forest practices applications that pose a threat to public safety due to potential slope instability.

ANALYSIS

1. Does the Forest Practices Board have authority to adopt a moratorium on the acceptance or approval of forest practices applications that pose a threat to public safety due to potential slope instability?

As an initial matter, your question requires us to define what we are addressing when considering moratoriums. The Act contains no definition of moratorium, so we use the term's ordinary meaning as explained in the dictionary and as applied in general practice. *See, e.g.,*

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AllianceOne Receivables Mgmt., Inc. v. Lewis, 180 Wn.2d 389, 395, 325 P.3d 904 (2014). "Moratorium" is defined as "**1 a** : a legally authorized period of delay in the performance of a legal obligation or the payment of a debt . . . **b** : waiting period set by some authority : a delay officially required or granted . . . **2** : a suspension of activity : a temporary ban on the use or production of something[.]" *Webster's Third New International Dictionary* 1469 (2002). In practice, moratoriums are used by government entities to temporarily suspend certain activities, such as land use practices, while additional action is undertaken or considered. For instance, they may be used by local governments to delay development while devising growth management or zoning plans. *See, e.g.,* RCW 35A.63.220 (authorizing moratoriums by cities for zoning); RCW 90.58.590 (authorizing local governments to adopt moratoriums as necessary to implement the Shoreline Management Act of 1971). They can also be used to delay the filing of permit applications. *See Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036 (W.D. Wash. 1996) (analyzing RCW 35A.63.220). In light of these definitions and practices, we understand your question regarding moratoriums to concern whether the Board can impose a temporary period during which it would not accept or approve certain forest practices applications based on a public health and safety concern over unstable slopes.

As a state agency, the Board has only those powers expressly granted to it and those powers necessarily implied from its statutory delegation of authority. *See Brown v. Vail*, 169 Wn.2d 318, 237 P.3d 263 (2010). "[I]mplied authority is found where an agency is charged with a specific duty, but the means of accomplishing that duty are not set forth by the Legislature." *Id.* at 330 (alteration in original) (quoting *Tuerk v. Dep't of Licensing*,

123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994)). Here, nothing in the Act provides the Board with any express authority to adopt a general moratorium.[5]

The Act also fails to support finding implied authority to adopt a moratorium on acceptance or approval. The Act expressly charges the Board with establishing forest practices standards and classes, as well as developing necessary administrative provisions to implement the policies and purposes of the Act. RCW 76.09.040(1)(a)(i), (iii), .050(1). The Act then directs the Department to take specific action depending on the forest practice classification. This direction includes specifying when forest practices applications must be submitted and when the Department must act on the applications, including setting forth when the applications must be approved. See RCW 76.09.050, .060. If the Department fails to either approve or disapprove an application within the applicable time limits, the Act specifies the application is deemed approved. RCW 76.09.050(5). A Board-imposed moratorium on the Department's acceptance or

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approval of these applications would appear to conflict with the Act's directives regarding these procedures. And, any action that contradicts the Act's directives would fall outside the Board's authority, as agencies cannot amend or change legislative enactments. See, e.g., *Washington Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003).

For these reasons, we conclude that no statutory authority exists for the Board to enact a moratorium on the acceptance or approval of forest practices applications. This is not meant to suggest that the Board is prohibited from adopting rules through its general rulemaking authority, as discussed in more detail in the next section.

2. If the Forest Practices Board cannot adopt a moratorium, can it accomplish a similar result by adopting an emergency rule, and if so, what procedural steps must the Board follow to adopt an emergency rule concerning unstable slopes?

The Board could use its rulemaking authority under the APA and the Act to adopt an emergency rule based on a threat to public safety. Such a rule could redefine acceptable forest practices so that the Department must disapprove forest practices applications due to potential slope instability for the time period that the rule was in effect. To do so, the Board would have to adhere to the requirements in both the APA and the Act for adopting any rules, including those deemed "emergency." RCW 76.09.040(2)(a), .370(2).

a. The APA's Requirements

The APA permits an agency like the Board to adopt emergency rules or amendments under certain limited circumstances. Specifically, the Board must for good cause find that immediate adoption or amendment of a rule related to unstable slopes "is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest[.]" RCW 34.05.350(1)(a). Such an emergency rule or amendment could take effect upon filing with the code reviser, but may

not remain in effect for longer than 120 days after filing. RCW 34.05.350(2). Further, the Board could not subsequently readopt identical or substantially similar emergency rules unless conditions have changed or the Board has filed a notice of intent to adopt the rule as a permanent rule. RCW 34.05.350(2). In the latter case, the Board must then continue to follow all the normal procedural requirements for rulemaking, including selecting draft language, preparing applicable cost-benefit and small business impact statements, and conducting a SEPA analysis as necessary. *See, e.g.,* RCW 34.05.320, .328; *see also* RCW 43.21C.

b. The Act's Requirements

As described above, the Board's rulemaking authority includes establishing minimum standards for forest practices and designating which forest practices applications fall under the classes of forest practices set forth in the Act. RCW 76.09.040, .050. The Board, therefore, could use its rulemaking powers to change the scope of acceptable forest practices related to unstable

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slopes. Such a rule might limit the time period for operations, establish prerequisites, or prohibit specified practices. Further, such a rule might meet the requirement for an emergency rule if the rule had an expiration date and was being used to limit an objectively defined type of forest practice while the Board considers permanent rules.

The Board might also adopt rules that require additional procedures related to specified practices, such as procedures that facilitate additional environmental or other review. For example, the Board could use its rulemaking powers to redefine when applications fall into the most restrictive class of forest practices, thus subjecting them to SEPA review and possible conditions or denial by the Department. *See, e.g.,* WAC 222-10-010(4) ("An application . . . will be disapproved when the proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under SEPA, and reasonable mitigation measures are insufficient to mitigate the identified impacts and denial is consistent with all provisions of [the Act and SEPA].").

The Board should take note that some rules may require additional procedures under the Act. For example, while the Board has sole authority to adopt such forest practices rules and procedures, any rule "pertaining to water quality protection" may be adopted only after reaching agreement with the Department of Ecology. RCW 76.09.040 (1)(b); WAC 222-12-010. Moreover, rules "covering aquatic resources"[6] may be adopted or amended only if consistent with recommendations resulting from the adaptive management program established by the Board.[7] RCW 76.09.370(6), (7); WAC 222-08-160(2). Thus, if the emergency rules the Board adopted fell into one of these categories, these additional procedures would apply, as the Act contains no exemptions from these requirements for any type of rule, including emergency rules.[8] Because we are not evaluating a specific potential rule, it is difficult to say whether these provisions would come into play.

In sum, we conclude that the Board has authority to adopt an emergency rule that could, in effect, halt the approval of forest practices applications that pose a threat to

public safety due to potential slope instability. Such rulemaking, however, must be conducted in compliance with

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the substantive and procedural requirements of the APA and the Act. Further, while this opinion addresses the Board's rulemaking authority, we offer no opinion on the substance of such a rule, or whether the rule could be successfully challenged under the APA or otherwise.

We trust that the foregoing will be useful to you.

ROBERT W. FERGUSON

Attorney General

CALLIE A. CASTILLO

Deputy Solicitor General

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[1] "Forest practice[s]" are defined in RCW 76.09.020(17) as:

[A]ny activity conducted on or directly pertaining to forest land and relating to growing, harvesting, or processing timber, including but not limited to:

- (a) Road and trail construction, including forest practices hydraulic projects that include water crossing structures, and associated activities and maintenance;
- (b) Harvesting, final and intermediate;
- (c) Precommercial thinning;
- (d) Reforestation;
- (e) Fertilization;
- (f) Prevention and suppression of diseases and insects;
- (g) Salvage of trees; and
- (h) Brush control.

"Forest practice[s]" shall not include preparatory work such as tree marking, surveying and road flagging, and removal or harvesting of incidental vegetation from forest lands such as berries, ferns, greenery, mistletoe, herbs, mushrooms, and other products which cannot normally be expected to result in damage to forest soils, timber, or public resources.

[2] Certain exceptions to this classification exist under the Board's rules if the activity meets certain environmental protections. See WAC 222-16-050(1)(d)(iii), -051.

[3] Under specific circumstances, local government entities, such as counties, may also have similar administrative and enforcement authority to the Department. See, e.g., RCW 76.09.040(1)(c), .240.

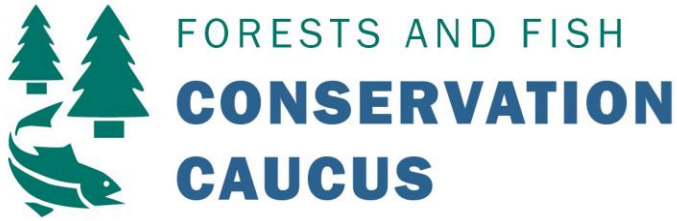
[4] As Commissioner of Public Lands, you may also promulgate a formal order determining that the SEPA process for any particular application cannot be completed within these statutorily designated timeframes. RCW 76.09.050(1) (Class IV (d)).

[5] Prior to 2007, the Act permitted county, city, town, and regional governments to impose moratoriums on building permits on land subject to the Act if the permits did not state that the land was to be converted to nonforestry use. See *Ord v. Kitsap County*, 84 Wn. App. 602, 605, 929 P.2d 1172 (1997) (discussing former version of RCW 76.09.060(3)(b)(i)). This former moratorium authority differs substantially from the type of moratorium raised by your question and, in any event, it was removed during subsequent revisions to the Act. See Laws of 2007, ch. 106, § 1.

[6] The Act defines "aquatic resources" as including "water quality, salmon, other species of the vertebrate classes Cephalaspidomorphi and Osteichthyes identified in the forests and fish report, the Columbia torrent salamander (*Rhyacotriton kezeri*), the Cascade torrent salamander (*Rhyacotriton cascadae*), the Olympic torrent salamander (*Rhyacotriton olympian*), the Dunn's salamander (*Plethodon dunnii*), the Van Dyke's salamander (*Plethodon vandyke*), the tailed frog (*Ascaphus truei*), and their respective habitats." RCW 76.09.020(4).

[7] The adaptive management program must "incorporate the best available science and information, include protocols and standards, regular monitoring, a scientific and peer review process, and provide recommendations to the [B]oard on proposed changes to forest practices rules to meet timber industry viability and salmon recovery." RCW 76.09.370(7); see also WAC 222-12-045 (adaptive management program).

[8] The Act does not have an applicable provision governing emergency rules. While the Act authorized the Board to enact certain specific emergency rules, e.g., to implement the forest and fish report, those provisions had a sunset provision that has since expired. See RCW 76.09.055.



c/o Washington Environmental Council
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1402 Third Ave, Suite 1400
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November 6, 2020

Washington Forest Practices Board
1111 Washington St SE
PO Box 47012
Olympia, WA 98504-7012

RE: Water Typing's Need For Reform

Dear Forest Practices Board Members,

As the work to complete a water typing rule continues, the Conservation Caucus has been concerned by statements that question the necessity of changing the interim rule. In response, the Caucus would like to share with you on the following pages our perspective on why a permanent rule is necessary.

Please do not hesitate to contact me if you have any questions.

Respectfully,

Alec Brown
Conservation Caucus Policy Representative

Executive Summary

Washington State has been operating under an interim water typing rule for the last 24 years. The Conservation Caucus has identified a number of problems with this interim water typing system.

- 1) The interim water typing system relies upon fish presence rather than fish habitat as was the original intent of the Forests and Fish Report (FFR)¹.
- 2) A system based upon fish presence does not adequately protect stream reaches that contain potential or recoverable fish habitat or fish habitat that is unoccupied by fish on the day a survey is performed.
- 3) The Board Manual for the Water Typing system provides guidance on how to find fish, but not how to identify fish habitat.
- 4) In a random sample of 90 approved Water Type Modification Forms (WTMFs) spread evenly across the DNR regions, over 90% were incomplete, thereby, making it impossible to know whether surveys are fully adhering to guidance or rule.

For the past 24 years, these shortcomings have reduced the likelihood that fish habitat has been consistently protected, as agreed to in the FFR and required in the Habitat Conservation Plan (HCP). During this time nearly 1,000 miles of streams have been added annually to the state's permanent water type map. Despite years of work to achieve a permanent rule, one will not be adopted by the 2021 water typing season. For these reasons, it is beyond time to end the current water typing system and implement a rule that protects fish habitat².

Introduction

The typing of streams in Washington State is foundational to the Forest Practices rules designed to protect public resources, including fish populations that are intrinsically important to indigenous peoples and reinforced by treaty rights. Timber harvest prescriptions governed by the rules are applied based upon their adjacency to or the absence of fish habitat. The state requires significantly larger buffers of trees along segments of streams that contain fish habitat than along segments of streams that do not contain fish habitat. The effectiveness of the rules are therefore dependent on the ability to properly identify and type this habitat.

The practice of water typing was adopted by the state legislature with the passage of the Forest Practices Act in 1975. In 1996, the Quinault Indian Nation and the Point-No-Point Treaty Council conducted a systematic review of water type maps and found 72% of the streams typed as non-fish habitat were actually fish habitat streams. At the same time, the federal government was evaluating aquatic species in Washington for listing under the Endangered Species Act. The situation catalyzed stakeholders to update the Forest Practices water typing system. At the November 1996 Board meeting, the Board approved an emergency water typing rule. The rule defined fish waters as those with fish use via observed habitat criteria, stream gradient and width, but also allowed for determination of fish use via fish presence. The Board's stated intention was to establish a permanent rule prior to the August 1997 FPB meeting.

¹ Forests and Fish Report, Background (B) "The Authors of this report have been working to develop biologically sound and economically practical solutions that will improve and protect riparian habitat on non-federal forest lands in the State of Washington....The goals of the forestry module are fourfold: ...(2) to restore and maintain riparian habitat on non-federal forest lands to support a harvestable supply of fish."

² According to the DNR reports, over the last four years 3,786 miles of streams have been typed in Washington State.

Negotiations for establishing fish habitat criteria and water quality standards began in 1997 and culminated with stakeholders, minus the environmental community, agreeing to the Forests and Fish Report (FFR) 1999. The FFR proposed modifications to the Forest Practices rules and the formal establishment of the Adaptive Management Program (AMP). Once adopted by the legislature, the rules recommended in the FFR were to be monitored by the AMP and altered if the science studying the rules determined the rules were inadequate to achieve the four goals of the FFR.

When the emergency water typing system was adopted in 1996, it was more effective at identifying fish habitat than the previous rule, but concerns were raised by landowners that its habitat criteria were overly protective of fish, thereby burdening landowners. To alleviate these concerns, the Forest Practices Board adopted guidance allowing surveyors to use fish presence via electrofishing to identify fish use³. This meant two systems of identifying fish habitat were allowed to move forward, one via physical stream characteristics as a proxy for habitat, and one via fish presence. The intention of the Forests and Fish Report (FFR) was not to protect water bodies in which fish are documented to be present at a given time, on a given day, of a given year. Rather, the requirement was to protect habitat "...used by fish at any life stage at any time of the year including potential habitat likely to be used by fish, which could be recovered by restoration or management and includes off-channel habitat."⁴

Despite concerns that the habitat criteria are overly protective, there is evidence that electrofishing is under protective of fish habitat. Due to the fact the FFR agreed fish habitat includes potentially recoverable fish habitat, a system reliant on fish presence will mistype stream segments that could support fish after restoration. Additionally, stream segments are not static and fish presence within them varies by day, week, month, or even year. A visit by a stream surveyor simply provides a snapshot of fish presence at the time of visit. A recent assessment in a portion of the Snoqualmie watershed reinforced this concern when it found that 30% of stream reaches identified as Type N based on electrofishing were being used by fish several years later⁵.

At adoption of the interim rule in 2001, Forest Practices Board members were assured "protocol" fish presence surveys would be limited, "not the standard technique", and temporary until the permanent rule was adopted. Board Manual 13 would be used to limit where electrofishing occurs⁶. Problematically, the use of fish presence surveys is not limited and the guidance is not clear. Over the years, the Department of Natural Resources (DNR) has issued various memoranda to attempt to clarify the guidance, but mostly DNR defers to the best professional judgment of surveyors and reviewers. As a result, the interim guidance is applied inconsistently across the landscape.

In addition to concerns with a fish-presence system implemented via unclear guidance, the Conservation Caucus has documented inadequate adherence to the guidance in approved WTMFs. A recent review of 90 randomly selected WTMFs, containing over 350 stream segments, found greater than 90% of the approved modification forms were incomplete when compared to the Board Manual guidance as written. Despite the fact these applications do not adhere to the rule or Board Manual guidance these permanent changes to the water-typing map are consistently approved. The acceptance of these incomplete forms further diminishes confidence that this system adequately protects fish habitat.

³ [March 9, 2001 Forest Practices Board Minutes, Page 19, Line 9](#)

⁴ [Forests and Fish Report, Appendix B, B.1 \(e\)](#)

⁵ Wild Fish Conservancy Unpublished Data

⁶ [May 17, 2001, Forest Practices Board Minutes, Page 22, Line 29](#)

While the interim rule has been operating, a number of ill-fated attempts at achieving a permanent rule have occurred. Stakeholders agree the system’s intent was to protect fish habitat, not just fish use, but have been unable to agree to habitat criteria necessary for fish recovery. In 2011, the current attempt to adopt a permanent rule began. Despite years of hard work and substantial investment of resources by state agencies, Tribes, conservation organizations, counties, and the timber industry, the timeline for adopting a final rule that will protect fish habitat remains undetermined.

Fish Presence Issues

When the FFR was agreed to in 1999, stakeholders promoted the development and use of water typing maps that modeled fish habitat across Washington State. Fish habitat was defined in the report as, “...habitat which is likely to be used by fish at any time of the year including potential habitat likely to be used by fish which could be recovered by restoration or management and includes off-channel habitat.” This core definition lives within an augmented definition in the Washington Administrative Code (WAC) today⁷. The stakeholders knew developing the modeled maps would be difficult because fish habitat criteria would need to be approved by the Adaptive Management Program (AMP) participants. Given the definition above, Forest and Fish authors agreed electro-fishing would not be used to identify fish habitat in an interim rule. Per the FFR, if the modeled maps were not developed by the time of rule adoption “...electro-fishing to prove the presence or absence of fish will no longer affect stream type determination from an operational standpoint.”⁸.

Contrary to this agreement, when the FFR rules were adopted, electrofishing to determine fish presence and define fish habitat was allowed to continue while the model was being refined. Proponents of electrofishing argued the interim rule was only temporary, electrofishing would be limited, and the physical habitat criteria contained in the rule over-predicted fish habitat. As the Washington Department of Fish and Wildlife (DFW) Board Member designee said at the 2001 interim rule adoption the best path forward “...is in the interim continue with the current physical criteria for fish bearing waters in the emergency rule and in the cases that it continues to overestimate fish, allow the limited option of electro-shocking recognizing that shocking will be more and more difficult to do.”⁹ Of course, the interim rule is still in operation, shocking is not a limited option nor difficult to do, and there is evidence it under protects fish habitat.

There are three primary issues with electrofishing. First, a system based on presence will certainly miss potential habitat that is recoverable through future restoration. Further, single pass electrofishing occurs on one day of many in the life of a stream. Fish use of a stream is not static. For streams with seasonal flow, seasonal fish use, temporary natural barriers, or depressed fish populations, electrofishing surveys are inappropriate for identifying fish habitat as defined in rule. Finally, electrofishing is an imperfect methodology – capture efficiencies are affected by variables including operator experience, fish abundance, water temperature, water conductivity, streamflow, and habitat complexity, among others.

A recent assessment conducted in a portion of the Snoqualmie watershed illuminated this. In 2016 and 2017, the Snoqualmie Indian Tribe, with Wild Fish Conservancy, used environmental DNA (eDNA) to assess presence of salmonids or sculpins – two common headwater fish families – at 75 Snoqualmie tributary sites. Twenty-nine of the eDNA sites were within stream reaches typed “N” based on approved WTMFs from protocol electrofishing surveys. eDNA results found salmonids were present within nine of those Type N reaches. In the

⁷ WAC 222-16-010 adds the phrase “at any life stage” to the definition.

⁸ [Forests and Fish Report, Appendix B, B.1\(d\)\(C\)](#),

⁹ [May 17, 2001, Forest Practices Board Minutes, Page 22, Line 29](#)

study area, State-sanctioned and approved electrofishing surveys conducted per Section 13 of the Forest Practices Board Manual had misidentified fish habitat nearly 30% of the time.

Water Typing Guidance Ambiguities

The current system is not only based upon fish presence, but also relies on unclear Board Manual guidance. Board Manual Section 13 is inadequate in a number of manners. For example, the Manual's language makes it difficult to differentiate between what is required to complete a WTMF and what is simply suggested. The BM language oscillates between a surveyor "should" and a surveyor "must" complete activities. A collaboratively drafted Board Manual Section 23 will address many of the flaws of Section 13 once adopted. However, the single biggest flaw in the water typing system is the lack of guidance to delineate the boundary between fish and non-fish waters.

As written in BM13, when a survey crew electroshocks a fish, they are to survey a minimum of one quarter mile upstream of the point of encounter or continue surveying until the stream gradient "increases to and remains above 20%." If no additional fish are found after either of those conditions being met, the survey may end. Formally, it should be noted, there is no definition of "increases to and remains above". Surveyors are left to their own judgment to determine at what point the stream reach remains at a gradient above 20%. Therefore, the guidance loosely informs surveyors what effort is needed to document fish presence, and where they may end the electrofishing survey, but it does not assist them in determining the exact location fish habitat becomes non-fish habitat.

The Board raised this concern in February 2002 when Section 13 was adopted. Board Members concerns were dismissed by the DNR Board Chair Designee with a reminder the rule would be temporary. Further, they were told the Board did not have the capacity to address the issue as any discussion of the upper extent of fish waters would necessarily be focused on physical criteria¹⁰. Habitat criteria discussions were complex and were being conducted in model development. In August of that year, DNR attempted to clarify the issue with a guidance memo. DNR's 2002 guidance states that determining the upper extent of fish water "requires the reasonable exercise of professional judgment."¹¹ In other words, if it is reasonable to assume the last fish detected was likely using an upward portion of the stream, the Type 3 water break should be set at the point which represents the upper extent of fish use area. This is not the same as the upward extent of fish habitat. Known as fish plus, this guidance is still in place today. Fish plus, through its design, leads to inconsistent water type designations across the landscape that can underestimate the upper extent of Type F waters because it "is not the same as the upward extent of fish habitat".

Due to the incomplete guidance in Section 13, even WTMFs with relatively complete information can lead sensible people to disagree over the upper extent of fish habitat judgment calls. For example, consider WTMF [NW-05-YY-0078](#). Unlike most others randomly sampled, this survey followed much of the guidance provided in Section 13. It was completed during the BM's suggested survey window, March 1st to July 15th, and included a detailed report of the survey's findings including photographs. The map of stream segments, like most WTMF maps, is difficult to decipher and the streams surveyed were much wider than 5 feet. However, the surveyors did consult with tribal representatives and DFW prior to electrofishing wider streams as is guidance in the Manual advises in streams wider than 5 feet. The surveyors also provided detailed information on the number of

¹⁰ [February 13, 2002 Forest Practices Board Meeting Minutes, Page 12, Line 25](#)

¹¹ Memo from Lenny Young, Forest Practices Division Manager, August 27, 2002 "Type 3 Water Breaks"

pools shocked, and the condition of the stream they surveyed. Surveyors even detailed their rationale for delineating the end of fish habitat.

- 275' in the stream gradient increased to 35% for a distance of 50'.
- 300' to 400' in the stream gradient reduced to between 11% and 16%
- 450' in the slope increased to 32% where a cutthroat trout was found.
- 700' in a six foot log step is found above a 70 foot long 25% cascade
- 1100' survey concludes at 30% gradient with no fish found above 450'

The surveyors determined the six foot log step above the 25% cascade characterized “the end of fish habitat”. The log seemed a logical interpretation of a break. However, the Board Manual indicates natural barriers such as waterfalls greater than 12 feet in vertical height, not six feet, likely block upstream migration of fish. It does indicate long cascades without resting areas may also block upstream migration. This cascade was significant at 25% over 70 feet. Yet, the cutthroat trout found at 450' had already navigated a 32% gradient over 50 feet. Further, this cascade was 12 feet in wetted width and may have included resting areas or alternate (more navigable) flow paths at higher flows.

Recognizing that “channel slope and other habitat characteristics above (the log step) are potentially suitable for fish” the survey continued above another 400 feet and found no fish. As is true below the log, these sections are wide and are less steep than sections already traversed by a fish in this stream. The reviewer admits they could be habitat. Finally, the 6 foot log step would be characterized by some as deformable. If that were the case, it is not a permanent natural barrier, as it will one day move downstream, rot, or otherwise change so as not to impede fish movement. In that circumstance this would not be an appropriate location for the end of a fish stream.

Despite the relative thoroughness of this WTMF, we note the following significant issues that may have resulted in an underestimation of fish habitat within the nine stream reaches impacted by this WTMF.

1. The crew electro-fished just 750ft upstream from the last fish they found, about half the expected $\frac{1}{4}$ mile. The electrofishing survey ended prematurely, despite the “active channel width” averaging 48ft, upstream gradient dropping well below 20%, and the documented presence of cutthroat trout utilizing habitats in excess of 30% gradient within the survey reach.
2. The type F/N break was made at a deformable impediment in a dynamic stream reach.
3. There is no mention of downstream manmade barriers to fish passage that may be affecting fish access to, or fish abundance in, the survey reach.

There were nine stream reaches downgraded above this reach. None of the nine stream reaches permanently downgraded to type N by this approved water type modification were actually surveyed. All nine reaches exist upstream from the one surveyed reach, and the results from the one surveyed reach were presented nine times in the modification forms for the nine downgrades. No descriptions of the physical characteristics of the downgraded stream reaches are provided.

Reasonable people can disagree as to whether the log step was the appropriate location for the end of fish use. The Conservation Caucus does not submit this example to argue its validity. Rather, it is submitted to demonstrate that even a seemingly complete and thorough WTMF that fully follows the Board Manual is subject to scrutiny. In this case, the nine associated modifications were approved by DNR with no other reviewers

responding for comment. In our review, we found few WTMFs elicit responses from reviewers. Had this review received greater concurrence, it would be less vulnerable to criticism. This systemic lack of active concurrence from reviewers only serves to weaken the system. When added to the map this review was permanently placed on DNR's Water Typing map and will be used to justify future timber harvest buffers along these stream reaches.

Even more problematic than the Board Manual's weaknesses, the Conservation Caucus's WTMF sampling exercise documents that the Manual does not need to be followed to secure permanent changes to the state's water typing map. In the review it was apparent the approved forms lack the consistency and critical information necessary to give the layperson confidence the state's waters are being appropriately typed.

Inconsistency in Approved Forms

In the current water typing system, a surveyor is required to determine fish use via the Board Manual guidance, or via the physical characteristics written in WAC 222-16-031(3). The Conservation Caucus reviewed a randomized set of 15 WTMFs within each of DNR's six regions for a total of 90 WTMFs from the state water typing map¹². Due to the manner DNR accepts a packet of WTMFs, most applications include more than one form; the 90 WTMF packets actually contained 355 forms or stream segments¹³. These forms were submitted to and approved by DNR between 1998 and 2019.

Of the 355 forms, 180 were typed via an electrofishing survey, 162 typed via stream characteristics, 7 used unknown methods, and 6 were outliers removed from the analysis.¹⁴ To review these forms, the Caucus compared the information on the forms to the rule, for physical stream characteristics, and Board Manual guidance, for an electrofishing protocol survey.

The stream characteristics that presume fish use in WAC 222-16-31's were adopted with the 1996 emergency rule. Though there are more components to an application, this analysis compared the forms to the following language from the rule:

(3)(i)(A) Stream segments having a defined channel of 2 feet or greater within the bankfull width in Western Washington; or 3 feet or greater in width in Eastern Washington; and having a gradient of 16 percent or less;

(B) Stream segments having a defined channel of 2 feet or greater within the bankfull width in Western Washington; or 3 feet or greater within the bankfull width in Eastern Washington, and having a gradient greater than 16 percent and less than or equal to 20 percent, and having greater than 50 acres in contributing basin size in Western Washington or greater than 175 acres contributing basin size in Eastern Washington, based on hydrographic boundaries.

6(f) "Channel width and gradient" means a measurement over a representative section of at least 500 linear feet with at least 10 evenly spaced measurement points along the normal stream channel but excluding unusually wide areas of negligible gradient such as marshy or swampy areas, beaver ponds and impoundments. Channel gradient may be determined

¹² DNR Regions: Olympic, Pacific Cascade, Southeast, Northeast, Northwest, South Puget Sound

¹³ This was complicated to standardize. Some WTMFs contain many forms on one application and some contain many streams on one form. The reviewers attempted to review all forms and streams with characteristics given.

¹⁴ Outliers included a WDFW inventory, DNR location changes via LIDAR, and the Skagit River.

utilizing stream profiles plotted from United States geological survey topographic maps. (See board manual section 23.)

Primarily, these characteristics rely on the interplay of stream bankfull width (BFW) and gradient to describe fish habitat. However, out of the 162 WTMFs approved via stream characteristics 77 (47%) did not document the bankfull width and 83 (51%) did not document gradient.¹⁵ Per WAC 222-16-031(6)(f), width and gradient are to be measured over, "...at least 500 linear feet with at least 10 evenly spaced measurements along the normal stream channel." Of those that did document BFW or gradient 47 (89%), and 41 (87%) did not indicate the length of stream reach surveyed. When offered, the measurements are presented categorically, most often, in relation to the WAC width and gradient thresholds, rather than presented as the specific characteristics of the stream (e.g. stream < 2ft wide and <20%). Commonly, that is the entirety of stream characteristics in an application.

Similar to the physical characteristics as noted above, accepted WTMFs done via "protocol survey" electrofishing rarely contain complete information in accordance with the written guidelines. Board Manual 13, referenced in WAC 222-16-031, has a number of guidelines to follow when conducting a protocol electrofishing survey to determine fish use. To be clear, the Board Manual is nuanced, making a compliance review difficult. For example, some methods that are discouraged are allowed after consulting the affected tribes and state agencies and such information may not appear on a form. When possible this review attempted to incorporate that nuance. Presented below are the survey effort guidelines in the Board Manual and the level of adherence to them found in these randomly sampled WTMFs.

- *Stream size* - surveys are to be conducted in streams less than 5 feet in width, unless in consultation with DFW and affected tribes.
 - o 17% of the electrofishing surveys occurred in streams wider than 5 feet and 24% of the forms did not clearly indicate the stream size.¹⁶
- *Barriers* – protocol surveys are not to be conducted above human-made blockages to fish passage. The process to determine "...absence or presence..." of barrier is to be documented.
 - o 15% of the surveys noted they took place above a culvert.
 - o 48% of surveys did not indicate the process to find a barrier.
- *Pools* – if fish use is not found, the survey must confirm the effort shocked at least 12 of the highest quality pools 3 feet in surface area and one foot in residual pool depth or larger. If not, the stream characteristics must be documented.
 - o 30% of non-fish stream surveys did not indicate the number of pools shocked, or document the characteristics of the stream.
 - o Of those that did, 2% of non-fish stream surveys did not shock 12 quality pools or document the characteristics of the stream.

¹⁵ The numbers were much higher but the Caucus decided to exclude those forms that removed streams from the map. These forms mostly did not document the condition of the land (e.g. description, photograph). If they were included it would be 109 (67%), 109 forms, did not document bankfull width and 115 (71%), 115 forms, did not document stream gradient.

¹⁶ The BM states after 2002, those wishing to survey streams larger than 5 feet are to consult WDFW and affected tribes. When those prior to 2002 are removed these percentages become, 23% occurred in streams wider than 5 feet and 16% did not clearly indicate the stream size. Additionally, 9 forms were removed that suggested DFW and affected tribes were consulted but it is not definitive.

- *Distance* – The survey must cover ¼ mile past the last encountered fish, unless the gradient increases to and remains above 20%.
 - o 42% did not indicate the length of their survey past the last fish. 86% of those did not document the characteristics of the stream to indicate why the survey ended.
 - o Of the 58% that did indicate the length of the survey past the last fish, 28% did not survey ¼ mile past the last fish. 70% of those did not document the characteristics of the stream to indicate why the survey ended.

Out of the random sample of 349 approved WTMFs we analyzed, only 22 (6%) presented fully complete WTMFs. Of the 180 approved WTMFs that were based on protocol electrofishing surveys, 16 (9%) were complete. Of the 162 approved WTMFs that were based on physical stream characteristics, 6 (4%) were complete. Seven of the forms did not give an indication as to how the stream was typed. This low form completion rate of approved water type modifications can only elicit questions as to the accuracy of the water typing map. The poor reporting rate for Washington’s already questionable system serves to eradicate any trust that the current water typing system is protecting at-risk aquatic species.

Though this analysis is unique, concerns regarding inaccurate water typing are further supported by DNR’s biennial Compliance Monitoring Reports. DNR conducted Compliance Monitoring Reports on water typing harvest applications in 2010-2011, 2012-2013, and 2016-2017. Those reports found that forest landowners submitted FPAs, approved by DNR, that inaccurately depicted streams with Type F physical characteristics as Type Np waters 24%, 12.5%, and 17% of the time, respectively. These streams meeting Type F physical characteristics in rule (WAC 222-16-031) were allowed to be clear-cut to their streambanks up to 50% of their length with the remaining length receiving only a 50 ft. buffer.

Rule Development

For nearly 20 years, the Conservation Caucus has worked with other AMP participants to both improve the current system and help the program design a new rule less dependent on fish presence. Administrative changes to implementation have occurred but a new rule has been out of reach. Despite stakeholder agreement that the water typing system needs to be changed, that agreement is tenuous, and no agreement exists on the urgency with which a new rule must be adopted.

The current effort to adopt a new rule began in 2011 when the Timber, Fish, and Wildlife Policy Committee (Policy) announced that changing the water typing rule was its second highest priority. After years of missed deadlines and deliberations that included two separate dispute resolutions, the Forest Practices Board assumed management of the issues to complete a water typing rule in 2017. Three years after assumption of control, a number of unresolved issues remain. Nearly 1,000 miles of streams¹⁷ are added to the water typing map annually through a flawed process that doesn’t identify fish *habitat*, but does approve incomplete modification forms after sporadic review.

All AMP participants agree a path to a final rule is visible, but based on the previous eight plus years of unforeseen delays, the Conservation Caucus is not optimistic a new rule will be in place by the 2022 stream typing survey field season. That is more than a quarter century after the interim rule was first adopted, and 17 years into the state’s 50 year Habitat Conservation Plan. The current water typing system is not designed to protect fish habitat, and is therefore not achieving the goals of the Program. Furthermore, the water typing

¹⁷ According to DNR reports, over the last four years 3,786 miles of streams have been typed in Washington State.

system does not achieve the lower bar of adequately detecting, and therefore protecting, *currently* occupied fish habitat. It also relies on ambiguous guidance inconsistent implementation. It is time to adopt new protections that will fully protect fish habitat as agreed to in the Forests and Fish Report and DNR's Forest Practices Habitat Conservation Plan.