

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

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

Those requirements are fulfilled in this preliminary economic analysis.

GOALS AND OBJECTIVES

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

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

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

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

² RCW 76.09.010(2)(i).

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

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

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

CONTEXT

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

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

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

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

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

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

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

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

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

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

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

The major problems with the current rule language are:

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

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

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

PROPOSED RULE

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

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

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

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

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

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

The proposed rule also:

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

COST-BENEFIT ANALYSIS

Description of Costs

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

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

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

Description of Benefits

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

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

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

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

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

Comparison of Benefits and Costs

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

LEAST BURDENSOME ALTERNATIVE ANALYSIS

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

Alternative 1 – Eliminate WAC 222-20-120.

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

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

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

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

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

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

SMALL BUSINESS IMPACTS

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

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

SUMMARY

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

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

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