MEMORANDUM

TO: Forest Practices Board

FROM: Gretchen Robinson, Natural Resource Specialist

DATE: April 16, 2010

SUBJECT: Rule Making Proposal: Administrative Appeals

On May 11th, I will request the Board's approval to commence expedited rule making to incorporate provisions of Substitute House Bill (SHB) 2935, 2010 session, and Second Substitute Senate Bill (2SSB) 5883, 2007 session.

SHB 2935 streamlined environmental and land use administrative appeals, eliminating the Forest Practices Appeals Board (FPAB) and transferring its workload to the Pollution Control Hearings Board (PCHB). It also standardized several appeal timelines to 30 days, including appeals of decisions by the Department of Natural Resources, with a few minor exceptions. SHB 2935 also made the defined term "date of receipt" the trigger for most appeal timelines.

In addition, staff recommends adding a new definition in rule for the "notice of a conversion to a nonforestry use" and adding a new subsection to WAC 222-20-050. This is to create consistency with provisions of 2SSB 5883 which provided DNR the authority to issue that notice in certain situations described in RCW 76.09.060(3)(b). There is currently nothing in the forest practices rules that informs people that this appealable notice exists. With the passage of SHB 2935, a general appeal process to the PCHB is now available which can be applied to any "notice of a conversion to a nonforestry use" issued by DNR.

The Administrative Procedure Act authorizes expedited rule making if it meets one of several criteria including incorporating statutes (RCW 34.05.353(1)(d)). In expedited rule making an agency is not required to publish a CR-101 *Preproposal Statement of Inquiry*, conduct the cost-benefit and small business economic analyses, or conduct hearings.

However, for forest practices rules, rule proposals are distributed early in the rule making process to Washington Department of Fish and Wildlife (WDFW), the counties, and (by practice) the tribes pursuant to RCW 76.09.040(2). Therefore, on May 11th I will request your approval to proceed with that step for a 30-day review and comment period. Then, prior to your August meeting, we will send you a summary of comments from this process, and communicate the next step in rule making.

Enclosed is a chart from http://governor.wa.gov/priorities/reform/natural_resources/nr_admin_appeals.pdf which illustrates the appeals process changes established in SHB 2935.

I look forward to seeing you on May 11th.

Enclosures: Proposed rule language
Chart showing appeals process changes

Forest Practices Board
Proposed Amendments to Title 222 WAC
May 2010

WAC 222-12-070 Enforcement policy. Procedures for enforcement of these rules by the department are provided in chapter 222-46http://apps.leg.wa.gov/wac/default.aspx?cite=222-46 WAC. Where the department of ecology determines that a person has failed to comply with the forest practices rules relating to water quality protection, and that the department of natural resources has not issued a stop work order or notice to comply, the department of ecology shall inform the department thereof in writing. If the department of natural resources fails to take authorized enforcement action within 24 hours, under RCW 76.09.080, 76.09.090, 76.09.120, or 76.09.130, the department of ecology may petition ~~to~~ the ~~chairman of the~~ appeals board, which~~who~~ shall, within 48 hours, either deny the petition or direct the department of natural resources to immediately issue a stop work order or a notice to comply or impose a penalty. No civil or criminal penalties shall be imposed for past actions or omissions if such actions or omissions were conducted pursuant to an approval or directive of the department of natural resources.

WAC 222-12-080 Administrative and judicial appeals.

(1) Certain decisions of the department may be appealed to the ~~forest practices~~ appeals board under chapter 76.09 RCW except that notices to comply may not be appealed to the ~~forest practices~~ appeals board unless first appealed to the department under RCW 76.09.090. Proceedings at the ~~forest practices~~ appeals board are governed by the Administrative Procedure Act, chapter 34.05 RCW, and ~~Title 223~~chapter 371-08 WAC.

~~(2) Forest practices applications and notifications related to qualifying projects under chapter 43.21L RCW may be appealed to the environmental and land use hearings board. Proceedings at the environmental and land use hearings board are governed by chapter 43.21l RCW and chapter 199-08 WAC.~~

~~(3)~~(2) A petition for judicial review of a decision of the appeals boards may be filed in accordance with the Administrative Procedure Act, chapter 34.05 RCW. ~~In addition, RCW 43.21l.140 governs judicial review of a final decision of the environmental and land use hearings board.~~

WAC 222-16-010 *General definitions.

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"Appeals board" means the ~~forest practices appeals~~pollution control hearings board established in ~~the act~~ RCW 43.21B.010.

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"Date of receipt", as that term is defined in RCW 43.21B.001, means:

(a) Five business days after the date of mailing; or

(b) The date of actual receipt, when the actual receipt date can be proven by a preponderance of the evidence. The recipient's sworn affidavit or declaration indicating the date of receipt, which is unchallenged by the department, shall constitute sufficient evidence of actual receipt. The date of actual receipt, however, may not exceed forty-five days from the date of mailing.

…

"Notice of a conversion to a nonforestry use" means a notice issued by the department pursuant to RCW 76.09.060(3)(b) of the act. A landowner who receives such notice is subject to the actions and requirements described in RCW 76.09.460 and RCW 76.09.470.

WAC 222-20-050 Conversion to nonforest use.

(1) If an application to harvest signed by the landowner indicates that within three years after completion, the forest land will be converted to a specified active use which is incompatible with timber growing, the reforestation requirements of these rules shall not apply and the information relating to reforestation on the application form need not be supplied. However, if such specified active use is not initiated within three years after such harvest is completed, the reforestation requirements (see chapter 222-34 WAC) shall apply and such reforestation shall be completed within one additional year.

(2) For Class II, III, and IV special forest practices, if a landowner wishes to maintain the option for conversion to a use other than commercial timber growing, the landowner may request the appropriate local governmental entity to approve a conversion option harvest plan. This plan, if approved by the local governmental entity and followed by the landowner, shall release the landowner from the six-year moratorium on future development, but does not create any other rights. The conversion option harvest plan shall be attached to the application or notification as a condition. Violation of the conversion option harvest plan will result in the reinstatement of the local governmental entity's right to the six-year moratorium. Reforestation requirements will not be waived in the conversion option harvest plan. Reforestation rules shall apply at the completion of the harvest operation as required in chapter 222-34 WAC. Nothing herein shall preclude the local governmental entity from charging a fee to approve such a plan. (See RCW 76.09.060 (3)(b)(i).)

(3) If the application or notification does not state that any land covered by the application or notification will be or is intended to be converted to a specified active use incompatible with commercial timber growing, or if the forest practice takes place without a required application or notification, then the provisions of RCW 76.09.060 (3)(b)(i) regarding the six-year moratorium apply.

(4) A notice of a conversion to a nonforestry use issued by the department under the provisions of RCW 76.09.060 (3)(b) may be appealed to the appeals board in accordance with RCW 43.21B.110 and RCW 43.21B.230.

WAC 222-46-030 Notice to comply.

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(4) Such notice to comply shall become a final order of the department: Provided, That no direct appeal to the appeals board will be allowed from such final order. Such operator shall undertake the course of action so ordered by the department unless, within fifteen days after the date of service of such notice to comply, the operator, forest landowner, or timber owner, shall request the department in writing to schedule a hearing. If so requested, the department shall schedule a hearing on a date not more than twenty days after receiving such request. The local governmental entity shall participate in the hearing if a condition imposed pursuant to WAC 222-20-040 (3) is involved. Within ten days after such hearing, the department shall issue a final order either withdrawing its notice to comply or clearly setting forth the specific course of action to be followed by such operator. Such operator shall undertake the course of action so ordered by the department unless within thirty days after the date of receipt of such final order, the operator, forest landowner, or timber owner appeals such final order to the appeals board. No person shall be under any obligation under this section to prevent, correct, or compensate for any damage to public resources which occurs more than one year after the date of completion of the forest practices operations involved exclusive of reforestation, unless such forest practices were not conducted in accordance with forest practices rules: Provided, That this provision shall not relieve the forest landowner from any obligation to comply with forest practices rules pertaining to providing continuing road maintenance. No action to recover damages shall be taken under this section more than two years after the date the damage involved occurs.

WAC 222-46-040 Stop work orders.

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(4) The operator, timber owner, or forest landowner may commence an appeal to the appeals board within ~~fifteen~~thirty days ~~after service upon~~from the date of receipt of the order by the operator. If such appeal is commenced, a hearing shall be held not more than twenty days after copies of the notice of appeal were filed with the appeals board. Such proceeding shall be a contested case within the meaning of chapter 34.05 RCW.

WAC 222-46-060 Civil penalties.

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(8) **Right of appeal.** Any person incurring any penalty hereunder may appeal the same to the ~~forest practices~~ appeals board. Such appeals shall be filed within thirty days ~~of~~after the date of receipt of ~~notice imposing any~~the penalty unless an application for remission or mitigation

is made to the department. When such an application for remission or mitigation is made, such appeals shall be filed within thirty days of receipt of notice from the department setting forth the disposition of the application for remission or mitigation. Concurrently with the filing of any appeal to the ~~forest practices~~ appeals board as provided in this section, the appellant shall file a copy of the appeal with the department region from which the penalty was issued and a copy with the office of the attorney general.

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WAC 222-46-070 Injunctions, civil suits, disapprovals.

(1) The department may take any necessary action to enforce any final order or final decision.

(2) …

(d) Any person provided notice of intent to disapprove an application or notification may seek review from the ~~forest practices~~ appeals board within thirty days of the date of notice.

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WAC 222-46-090 Financial assurances.

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(5) When the department determines that a financial assurance is required, a notice will be issued to the landowner or operator with violations listed above. The notice cannot be appealed. The financial assurances will be required with all future forest practices activities submitted within the time frame indicated in the notice. The notice shall include the following:

…

(e) A statement that an application or notification can be appealed pursuant to ~~RCW 76.09.220 (8)(a)~~Laws of 2010, ch. 210, § 24, and the requirement to submit financial assurances may be challenged at that time.

Before Natural Resources Reform: Quasi-Judicial Organization*

LAND USE APPEALS BOARDS

Growth Management Hearings Boards (3 Boards)

- Eastern Washington *3-Member*
- Central Puget Sound *3-Member*
- Western Washington *3-Member*

REGULATORY/PERMITTING APPEALS BOARDS

Environmental Hearings Office Boards (5 Boards)

- **PCHB** *3-Member* (Pollution Control Hearings)
- **SHB** *3 PCHB + 3 (6)* (Shorelines Hearings)
- **HAB** *3-Member* (Hydraulics Appeals)
- **FPAB** *3-Member* **(part-time)** (Forest Practices Appeals)
- **ELUHB** 3 PCHB + 3 (6) (Environmental & Land Use)

After Natural Resources Reform: Single Quasi-Judicial Environmental & Land Use Agency*

1 AGENCY
Environment & Land Use Hearings Office

Land Use Appeals

- Growth Management Hearings Board

Environmental Appeals

- Pollution Control Hearings Board
- Shorelines Hearings Board

*Enactment of SHB 2935 and SSB 6214 on 3/25/2010