

FOREST PRACTICES BOARD
Regular Board Meeting – November 13, 2024
Zoom Webinar and Room 172, Natural Resources Building

Members Present:

Lenny Young, Chair, Department of Natural Resources
Ben Serr, Designee for Director, Department of Commerce
Brandon Austin, Designee for Director, Department of Fish and Wildlife
Cody Desautel, General Public Member (9:00 a.m. – 12:00 p.m.)
Frank Chandler, General Public Member/Independent Logging Contractor
Laura Butler, Designee for Director, Department of Agriculture
Jim Peters, General Public Member
Meghan Tuttle, General Public Member
Pene Speaks, General Public Member
Steve Barnowe-Meyer, General Public Member/Small Forest Landowner
David Bowen, Designee for Director, Department of Ecology
Vickie Raines, Elected County Commissioner
Wayne Thompson, Timber Product Union Member

Staff:

Karen Zirkle, Forest Regulation Assistant Division Manager
Patricia Anderson, Rules Coordinator
Saboor Jawad, Forest Regulation Division Manager
Terry Pruit, Senior Counsel

WELCOME AND INTRODUCTIONS

Chair Lenny Young called the Forest Practices Board (Board) meeting to order at 9:00 a.m. Introductions of Board members were made.

Chair Young recognized Board member Cody Desautel for his service on the Board

APPROVAL OF MINUTES

Board member Meghan Tuttle asked to postpone approving the meeting minutes until the February 2025 meeting to allow for additional review time.

RULE MAKING 101

Terry Pruit, Office of the Attorney General, provided a general overview of the rule making process with a focus on the requirements of the Administrative Procedure Act (APA) (Chapter 34.05 RCW).

Highlights included:

- Rulemaking in Washington state by administrative agencies, including the Forest Practices Board, is governed by the APA.
- Additional public process was added in 1995 through regulatory reform, including requirements for significant legislative rules.
- Agencies carry out the authority expressly granted in statute and any additional authority necessarily implied.
- WACs (rules) cannot contradict or amend RCWs (statutes).
- Rules carry the force of law.

The rulemaking process starts with a preproposal notice, the CR-101, filed with the Code Reviser's Office. That form is followed by a notice of proposed rule, the CR-102. Public comment is available at both stages. The agency must consider all the public comment received and respond to those comments in the concise explanatory statement (CES). Following the filing of the CR-102, there must be at least one public hearing where there must be an opportunity for the public to comment orally on the proposed rule. The CR-102 contains the language of the proposed rule and explains why the rule is needed and what the rule does. The CR-102 must be accompanied by the Small Business Economic Impact Statement (SBEIS) or a statement as to why a SBEIS is not prepared. For significant legislative rules, the CR-102 must contain a statement that the preliminary Cost-Benefit Analysis (CBA) is available.

Requirements of the rulemaking hearing are the agency head (chair), or their designee must preside over the hearing and the hearing must be recorded. The agency must consider all the public comments received and respond to the comments in the CES, which is prepared concurrently with the order of adoption of a rule, the CR-103.

When a final rule is adopted, the agency will file a CR103, or Rule Making Order that contains:

- The date the agency adopted the rule.
- A concise statement of the purpose of the rule.
- A reference to all rules repealed, amended, or suspended by the rule.
- A reference to the specific statutory or other authority authorizing adoption of the rule.
- Any findings required by any provision of law as a precondition to adoption or effectiveness of the rule.

The rule becomes effective 30 days after it is filed with the Code Reviser's Office, unless a later date is specified by statute or the Rule Making Order.

Pruit said in addition to requirements in the APA, the Board must consider requirements for rule making under the State Environmental Policy Act (SEPA) and Regulatory Fairness Act (RFA)

Board member Laura Butler asked if the agency is required to post public comments on the website. Pruit said the public comments are public records and it is up to the agency to determine if they want to post those comments for public review or if those comments would be available through a public records request.

Board member Jim Peters asked how long public comments are retained and whether the department is required to notify commenters if a comment was used in the rule.

Pruit said that the CES becomes part of the rulemaking file and ultimately public comments as part of the CES are permanently retained. There is not a requirement under the APA for agencies to provide notification if a rule is modified to incorporate a particular comment.

Board member Jim Peters asked how the rulemaking file retains records on past rulemaking efforts that were not completed for one reason or another. Pruitt responded that there is no timeline in the APA for completing the rulemaking process. If there were decisions made previously that influence adoption of the rule, it is important that those decisions become part of the rulemaking file. It is

important to document past decisions to provide the full picture of what the agency relied on in adopting the rule.

Chair Young asked if the HEAL Act creates new requirements for Board rule making. Pruitt answered it does not because the Board is not subject to the HEAL Act.

SEPA THRESHOLD DETERMINATION ON THE WATER TYPING SYSTEM RULE MAKING

Karen Zirkle, DNR, presented an overview of the environmental impact analysis and described the process moving forward if the Board chooses to initiate rule making.

Zirkle said SEPA requires a threshold determination, and that determination is made by the agency's responsible official (RO). The Board's Chair serves as the RO for the Board. The RO determines the environmental impacts and their significance. In making that determination the RO must consider whether the proposal is likely to result in probable, significant, adverse environmental impact.

A SEPA environmental checklist and non-project review form have been completed. The non-project review form is included to inform the checklist. She said if the Board approves the draft rule language to move forward, Chair Young has indicated he will make a Determination of Non-Significance (DNS) based on the current rule language and sign.

The signed DNS along with the following will be posted to the SEPA Register.

- The SEPA Checklist
- Non-Project Review Form
- Draft rule language

Posting to the SEPA Register will start a 14-day public comment period.

The CR-102 rulemaking documents are posted to the Washington State Register through the Code Reviser's Office and the SEPA Register is through the Department of Ecology. DNR staff will run them concurrently and the agency will respond to comments under two different processes.

Board member Pene Speaks asked why a 14-day comment period versus 30 days or longer? Zirkle responded because the result is currently indicated to be a DNS, 14 days is the required comment period. DNR has used longer comment periods for SEPA in the past, but with the comment process under APA anticipating potentially five public hearings, we will be out for approximately two months collecting comments. There is opportunity in the redundant comment periods, one can reference the other.

PRELIMINARY COST BENEFIT ANALYSIS OF THE WATER TYPING SYSTEM RULE MAKING

Maura Flight, Industrial Economics, Inc. (IEc), presented the preliminary cost benefit analysis required as part of the APA rulemaking. Flight noted that in the process of developing preliminary findings and preliminary cost benefit analysis of the proposed water typing system rule, IEc collaborated with fish biologists at Haley and Aldrich.

The objectives of the proposed rule:

- Codify a consistent process for determining Type F waters across Washington state, including clarifying the process for implementing protocol surveys; and
- Reduce the use of electrofishing in implementing stream typing.

The objectives of a Cost-Benefit Analysis (CBA) under the APA (RCW 34.05.328):

- Determine do the probable benefits outweigh probable costs? Considering both qualitative quantitative benefits and costs as well as the specific directives of the statute that is being implemented through the rulemaking.

Objectives of a Small Business Economic Impact Analysis (SBEIS) under RCW 19.85.040:

- More than minor costs? If yes:
- Are costs disproportionately incurred by small businesses?
- What are steps taken to reduce the costs of the rule to small businesses?

Flight described the analysis framework as ensuring the CBA meets the legal standard of identifying and comparing the probable costs and benefits of the rule. Important to the analysis framework is focus on incremental effects.

The baseline reflects the current interim rule under which water typing is currently implemented. This includes the use of default physical characteristics and protocol surveys. She said the proposed rule as written doesn't change the option to use default physical characteristics. To permanently type streams, IEC understands that the rule would codify the process for implementing protocol surveys, but not change how that looks on the ground.

Flight described the findings from the October 2024 preliminary CBA. Flight said that the scope of the rule as proposed and the regulatory alternatives that were evaluated when IEC presented back in August are significantly different, which leads to significantly different findings of the preliminary CBA relative to the preliminary findings presented in August.

Differences include:

- Under the proposed rule as written, IEC does not identify that there is likely to be a change in extent of Type F streams resulting from the rule.
- Without the prescriptive definitions of anadromous fish habitat (AFF) and PHBs, we generally expect current practice and current understanding of extent of habitat that drive outcomes of the locations of the F/N habitat breaks to continue.
- Overall, IEC does not identify a change in land use or management in riparian areas that would result from the proposed rule as written.

Flight said that FHAM is very close to how current protocol surveys are implemented under the baseline, and thus IEC does not expect an incremental cost in conducting the surveys. Also, the general definition of the AFF is unlikely to change the extent of stream that is permanently typed using protocol surveys and is unlikely to change our understanding of what constitutes anadromous fish habitat in the state. So, overall, that leads to no change in incremental costs associated with the water typing process.

On the incremental benefit side, IEC noted that the rule provides regulatory certainty, so it reduces any uncertainty surrounding what constitutes a compliance protocol survey for typing streams.

IEc does not have reason to believe that there will be a change in the location of F/N breakpoints identified under the proposed rule relative to baseline practices.

With respect to the AFF, surveys currently use the best available information regarding the end of known fish habitat and therefore we expect the AFF will closely mirror that location.

In weighing probable benefits and probable costs, generally the benefits do exceed the probable costs because there were no identifiable probable costs resulting from the rule. Since the proposed rule doesn't result in more than minor costs to businesses, completion of a SBEIS is not required. The preliminary CBA does include additional analysis demonstrating this finding and providing more insight into the scope of small businesses affected.

Board member Peters said that the current risk to fish isn't going to increase. The situation of missing where fish are utilizing habitat because they may not be in the area when protocol surveys are done will continue.

Board member Speaks said that by removing and moving the AFF and the PHB components to the board manual, fish protections have not increased at all. She said she does not see this as the best outcome.

WATER TYPING SYSTEM RULE MAKING

Saboor Jawad, DNR, presented the Water Typing System Rulemaking for the Board's consideration. Jawad said in 2013 the Board directed the TFW Policy Committee (TFW Policy) to initiate work on a permanent water typing system rule. At that time the Board clarified that the intent was to better address the Forests and Fish Report's foundational goals which are to protect accessible fish habitat, develop a field applied method for reliably identifying accessible fish habitat in an objective and repeatable manner, and to maintain all essential elements of the methodology in rule and add longstanding board guidance into rules where appropriate.

In 2015, the Board directed TFW Policy to evaluate all other aspects of the rule and directed TFW Policy to use existing information to develop a method for addressing streams not on the DNR hydro layer, make methods as accurate as possible, balance error, minimize electrofishing, improve the water-type map over time, and develop methods to locate stream breakpoints on the ground and ensure that the methods address small forest landowners.

On November 28, 2022, the Board acknowledged the objectives for the rule again and acknowledged receiving these products. The Board reiterated those objectives, including consistency with fish habitat as defined in rule.

Additionally at the November 28, 2022, meeting, the Board passed a motion on an anadromous fish floor (AFF) providing a definition of what the AFF would look like. The Board said the AFF is measurable physical stream characteristics downstream from which anadromous fish habitat is presumed; and there is agreement that the AFF would establish the location upstream of which fish protocol surveys may begin under the fish habitat assessment methodology.

In the August 2024 meeting, the Board decided to move the PHBs into board manual guidance as well as the AFF. Those changes are reflected in the draft rule language presented today.

Staff have been working with a stakeholder workgroup to develop board manual guidance which will include guidance on PHBs, AFF, and how to apply FHAM. This board manual section will be completed by the Board's May 2025 meeting. He said the guidance also includes language to address when to do surveys and flow seasonality.

Board member Speaks said the proposed rule language introduces the AFF without a definition of what that means. She suggested to put the two paragraphs that mention the AFF together so there is no gap.

Board member Peters said it would be good to see some of these small systems when the Board has a field tour to look at how adult fish move around, particularly certain fish species at high tide, and particularly where Department of Transportation has cleared the ditches out.

PUBLIC COMMENT ON INITIATING RULE MAKING

Darin Cramer, Washington Forest Protection Association (WFPA), said that WFPA is supportive of starting the formal public review and comment process. WFPA is not supportive of entertaining substantive changes to the proposed rule language at this stage and do support initiating rule making.

Rob Purser, Suquamish Tribe, thanked DNR for including tribal technical staff to participate in the Board Manual Section 23 writing process. After reviewing the proposed rule language, the Westside Tribes discuss recommended changes to the language with DNR. Westside Tribes believe these changes to rule language are needed to bring it in alignment with intent of the AFF. It is in everyone's interest to develop easy, interpretable, and implementable language so that the foresters and stakeholders, reviewing these rules in the field, will have fewer points of disagreement in complex situations.

Jaime Glasgow, Wild Fish Conservancy, said that he disagrees that addressing protocol survey timing in the board manual will address misclassification of Type F streams as Type N. These issues should be addressed by codifying specific AFF and PHB criteria in rule.

WATER TYPING SYSTEM RULE MAKING

MOTION: Meghan Tuttle moved the Forest Practices Board approve the Water Typing System amended rules and request staff to file a CR102 Proposed Rule Making to initiate the public review process. Rules amended in this rulemaking are WACs 222-12-090, 222-16-030, 222-24-040, 222-30-021, adding new section and repealing 222-16-031.

SECONDED: Steve Barnowe-Meyer

Board Discussion:

Board Member Bowen said Department of Ecology (Ecology) supports this rulemaking moving forward to the public review process.

ACTION: Motion passed unanimously.

TYPE Np RULE MAKING UPDATE

Saboor Jawad, DNR, said the rule making process is progressing and the next steps include the preliminary results of the cost benefit analysis (CBA). He said the request to delay the decision to initiation rule making until the May 2025 Board meeting will allow staff time to facilitate the public hearings and review the comments associated with the Water Typing System rule making.

Chair Young requested a field tour prior to the May 2025 meeting to discuss the details of this rulemaking.

Board Member Jim Peters requested this timeline be maintained to avoid more delays. Jawad said that the delay is to ensure the process is done correctly and thoroughly.

Board member Bowen reiterates the importance of this rulemaking to Ecology. He said he understands the challenge of working on rules and supports the timeframe adjustment and the request by Board member Peters to stay on track.

Board member Speaks asked if this rule making will have a similar delayed effective date as the Water Typing System rulemaking to allow for training. Jawad said the training for Type Np is less complicated and will not likely be delayed for training purposes.

COMPLIANCE MONITORING BIENNIAL REPORT

Mary Murdock, DNR, presented the Compliance Monitoring Biennial Report for 2022-2023. Murdock summarized the format of the report that includes introductions, study design, and periodic sampling of FPAs for potentially unstable slopes and aerial spray. Highlights of the report included:

- The highest rates of rule compliance were found in non-forested wetlands (97.3%), roads (99.5%), and non-fish perennial stream (98.4%) prescriptions.
- The highest rates of Forest Practices Applications compliance were non-forested wetlands (99.1%), non-fish seasonal streams (100%), and roads (100%).
- Trend analysis found evidence of increasing compliance trends for Desired Future Condition 1, Desired Future Condition 2, and No Harvest Inner Zone (NIZH) prescriptions.

Murdock explained the results inform various aspects of the Forest Practices program. The results may lead to recommendations for rule language clarification, board manual language clarification, or supplemental information to assist with better implementation of the rules.

Board member Peters asked if there are regional differences in compliance. Murdock said staff does not separate the report out on a regional level. He also asked if there is any earlier data and Murdock responded that there is data from 2006-2009 but has not been integrated to interpret trend analysis yet.

Board member Brandon Austin asked if there are plans to incorporate Forest Practices Hydraulic Permits and Murdock said yes.

Board member Bowen said that Ecology staff have reported positively on this program and appreciates the trend of landowner compliance going up.

Board member Ben Serr asked how much noise is involved in the sites and results. Murdock explained that the samples are randomly selected and that they are a good representation.

GENERAL PUBLIC COMMENT

Dr. Elaine Oneil, Washington Farm Forestry Association, provided input on the Type Np rule making cost benefit analysis (CBA), specifically on the assumptions around carbon benefit of leaving buffer trees. She said the current proposed benefit presented in the CBA is a cost; it's a loss to the landowner. Doing a carbon analysis is a non-trivial effort; however, if it is going to be part of the

CBA it should be done right. Oneil also said the small business economic impact statement (SBEIS) needs serious effort to get it right. She said it is not clear how benefits can exceed costs from a regulation that is unlikely to have measurable, definable, and beneficial use.

BOARD MANUAL SECTION 17 FORESTRY RIPARIAN EASEMENT PROGRAM (FREP)

Maggie Franquemont, DNR, presented Board Manual Section 17 FREP for the Board’s approval. Franquemont said beginning in May 2024, DNR staff, including staff from the Small Forest Landowner Office and the Forest Regulation Policy team, drafted the language. In July, the drafted language was presented to the Small Forest Landowner Advisory Committee; several meetings were held with a workgroup of members to discuss and improve the draft language. In September, the draft was ready for stakeholder engagement and DNR staff convened a stakeholder group that consisted of active small forest landowners who had engaged in the FREP process, a FREP forester, the FREP team that developed the original draft, and a Forest Practices forester from a region that contains many FREP easements.

Board member Austin recognized the great work done in a short amount of time.

PUBLIC COMMENT ON BOARD MANUAL SECTION 17

Ken Miller, Washington Farm Forestry Association, said small landowners are relieved that this section is complete and supports the Board’s approval of Board Manual Section 17.

BOARD MANUAL SECTION 17 FORESTRY RIPARIAN EASEMENT PROGRAM

MOTION: Steve Barnowe-Meyer moved the Forest Practices Board approve Board Manual Section 17 Forestry Riparian Easement Program. He further moved to allow staff to correct any grammatical/spelling errors or broken web links, if necessary, prior to distribution.

SECONDED: Wayne Thompson

Board Discussion:

Board member Meghan Tuttle said the second sentence is not necessary. She would like staff to have that permission for all board manual sections and not need Board approval. Chair Young acknowledged the suggestion for future conversation.

ACTION: Motion passed unanimously. (Cody Desautel not available for the vote.)

NORTHERN SPOTTED OWL (NSO) CONSERVATION ADVISORY GROUP

Karen Zirkle, DNR, said the Board is required to annually determine whether the Northern Spotted Owl Conservation Advisory Group continues to be needed for spotted owl conservation per WAC 222-16-010. This group is convened when the Washington Department of Fish and Wildlife (WDFW) approves a northern spotted owl protocol survey demonstrating the absence of owl detections within the habitat supporting an owl site center. There was no northern spotted owl surveys submitted to WDFW for review and approval during the past year; and so, the group was not convened.

The three-person advisory group contains designees with working knowledge of northern spotted owl habitat relationships and factors affecting owl conservation – a representative from Washington's forest products industry, Washington conservation organization, and the Forest Practices Program. Currently the group is vacant of any representatives.

Zirkle recommended Lenny Young to serve on this group when necessary and requested the Board maintain the advisory group.

Chair Young asked how staff will solicit participation in this group. Zirkle said she will reach out to the respective organizations for input.

Chair Young requested that the remaining designees be approved at the February 2025 Board meeting.

PUBLIC COMMENT ON THE NSO CONSERVATION ADVISORY GROUP

None.

NSO CONSERVATION ADVISORY GROUP

MOTION: Steve Barnowe-Meyer moved the Forest Practices Board maintain the Northern Spotted Owl Conservation Advisory Group for another year. I further move the Board approve Lenny Young to serve on the group to represent the Forest Regulation Program.

SECONDED: Ben Serr

Board Discussion:

None.

ACTION: Motion passed unanimously. (Lenny Young recused himself and Cody Desautel not available for the vote.)

2025 DRAFT WORK PLAN AND REVIEW OF 2024 WORK PLAN

Maggie Franquemont, DNR, reviewed the accomplishments for the Board's 2024 work plan and presented the 2025 draft work plan. She noted the 2025 draft work plan reflects staff's recommendation of initiating rule making for the Type Np rule in May.

MOTION: Ben Serr move the Forest Practices Board approve the 2025 work plan as presented.

SECONDED: Pene Speaks

Board Discussion:

None.

ACTION: Motion passed unanimously. (Cody Desautel not available for the vote.)

STAFF REPORTS

No questions on the following reports.

- Adaptive Management Program Update
- Board Manual Update
- Small Forest Landowner Office Update
- TFW Policy Committee Update
- Upland Wildlife Update
- Taylor's Checkerspot Butterfly Biennial Report (2022 & 2023)

WESTERN GRAY SQUIRREL ANNUAL REPORT

Darrin Masters, WDFW, provided an overview of the status of the Western Gray Squirrel (WGS) which included:

- WGS inhabit transitional forests, ponderosa pine, Douglas fir, and mature Oregon white oak. The habitat is transitional between the pine forest with oak and into the prairie type habitat.
- Three main populations are focused on Okanagan County, Joint Base Lewis-McChord (JBLM) property in the Puget trough, and Klickitat County.
- Summary of the Forest Practices Applications (FPAs) in 2023: 51 FPAs identified as potentially being associated with WGS. Of these, 50 were in Klickitat County and one was in Skamania County. All FPAs were associated with large landowners. Twenty-four of the permits were for even age harvests which total about 1,668 acres; and 27 of the permits were for uneven harvest, with about 3,400 acres affected. Forty-two were looked at in more depth to look for nests and found 15 nests; and subsequently the landowners volunteered to take some conservation measures.

Masters said because of the difficulty in getting an accurate count in a repeatable manner, WDFW opted to consider an occupancy model, which is a useful proxy for looking at the health of any animal population. WDFW started that project in 2018 and by 2021 got the first estimates, the baseline for each of the three population centers.

In 2025, WDFW will begin a second round of the project and set up hair snares and survey stations to get a count. In addition, a new project that WDFW is working on is to develop a spatial habitat prioritization model in Klickitat County which will help focus on targeting landowners that have the best potential for restoration for habitat.

WESTERN GRAY SQUIRREL WORKING GROUP UPDATE

Darrin Masters, WDFW, provided a status on establishing a working group for the WGS.

- May 2024, WDFW reached out to landowners to get an idea of who might be interested in working with the working group.
- April 2024, WDFW met with Lupine, LLC, the Columbia Land Trust, and a few small private landowners. WDFW received a lot of information from landowners on the types of things that they do in their treatments, what concerns them, and ideas that they might have for squirrel conservation.
- July 2024, WDFW again met with landowners and reached out to the Friends of the White Salmon to get their concerns.
- October 2024, WDFW met with Conservation Northwest and visited Okanagan County to get an idea of what squirrel habitat looks like there.
- 25 people have expressed interest in joining the wildlife working group. Of that, WDFW selected 11 with expertise in science, policy, forest operations, and conservation. The constituents include Friends of the White Salmon, Conservation Northwest, and The Conservation Fund, as well as industry – Green Diamond, Skookum, American Forest Management, and WFPA. In addition, we have representatives from the Yakama Nation, DNR, and WDFW. The first meeting is planned for early December 2024.

Board member Steve Barnowe-Meyer said he is available to assist with additional participation from small forest landowners if needed, as a group they represent a large amount of forestland.

Board member Ben Serr asked what kind of incentives we might see. Masters said the workgroup is not at that level, however, that would be considered later in Phase 2.

EXECUTIVE SESSION

None.

Meeting adjourned at 2: 25 p.m.