WASHINGTON STATE DEPARTMENT OF
Natural Resources

PETER GOLDMARK
Commissioner of Public Lands

January 31, 2012

MEMORANDUM

TO: **Forest Practice Board**

FROM: **Sherri Felix, Policy Analyst, Forest Practices Division**

Marc Engel, Assistant Division Manager for Policy & Services, Forest Practices Division

SUBJECT: **Critical Habitat Rule Making - Request for Adoption**
WAC 222-16-080 *Critical habitats (state) of threatened and endangered species*

On February 14, 2012, we will request the Board adopt for the Critical Habitat rule making the proposed rule language that received public review. This rule adoption will bring the Board's rule into alignment with the federal and state listing status of the bald eagle (*Haliaeetus leucocephalus)* and the peregrine falcon *(Falco peregrinus)*, and recognize the changes in common and scientific names for the Western pond turtle (*Clemmys marmorata)* to Pacific pond turtle *(Actinemys marmorata)*.

At the Board's November 8, 2011 meeting, you approved filing a *Proposed Rule Making* (CR-102) with the Office of the Code Reviser which included the proposed rule language, a preliminary economic analysis, and rule making hearing information. Additionally, the department conducted environmental analysis and review as required by the State Environmental Policy Act (SEPA), chapter 43.21C RCW.

The Board received four comments on its Critical Habitat rule making. All comments were in favor of the rule amendments as proposed. The three written comments are enclosed. The Board received no comments regarding the SEPA analysis and Determination of Nonsignificance.

The Board is not considering new or amended rules to achieve resource objectives. Therefore, the analysis of existing approved long-term applications required by subsection (4) of WAC 222-20-016 *Small forest landowner long-term applications* does not apply.

Enclosed for your review is the proposed rule language with no modifications, the draft Concise Explanatory Statement, the three comment letters, and the final economic analysis. Upon your adoption of this rule, staff will:

- Finalize the Concise Explanatory Statement,
- Complete the rule implementation plan pursuant the Administrative Procedure Act, chapter 34.05 RCW, and

- File a CR-103 *Rule Making Order* with the Office of the Code Reviser that includes the adopted rule language.

Should you have any questions about this rule making before your Board meeting, please feel free to contact us: marc.engel@dnr.wa.gov or 360-902-1390, and sherri.felix@dnr.wa.gov or 360-902-1446.

SF/
Enclosures

Forest Practices Board
Critical Habitat Rule Making for CR103 Filing
February 2012

WAC 222-16-080 Critical habitats (state) of threatened and endangered species.

(1) Critical habitats (state) of threatened or endangered species and specific forest practices designated as Class IV-Special are as follows:

(a) ~~Bald eagle (*Haliaeetus leucocephalus*) - harvesting, road construction, aerial application of pesticides, or site preparation within 0.5 mile of a known active nest site, documented by the department of fish and wildlife, between the dates of January 1 and August 15 or 0.25 mile at other times of the year; and within 0.25 mile of a communal roosting site. Communal roosting sites shall not include refuse or garbage dumping sites.~~

~~(b)~~ Gray wolf (*Canis lupus*) - harvesting, road construction, or site preparation within 1 mile of a known active den site, documented by the department of fish and wildlife, between the dates of March 15 and July 30 or 0.25 mile from the den site at other times of the year.

(~~c~~b) Grizzly bear (*Ursus arctos*) - harvesting, road construction, aerial application of pesticides, or site preparation within 1 mile of a known active den site, documented by the department of fish and wildlife, between the dates of October 1 and May 30 or 0.25 mile at other times of the year.

(~~d~~c) Mountain (woodland) caribou (*Rangifera tarandus*) - harvesting, road construction, aerial application of pesticides, or site preparation within 0.25 mile of a known active breeding area, documented by the department of fish and wildlife.

(~~e~~d) Oregon silverspot butterfly (*Speyeria zerene hippolyta*) - harvesting, road construction, aerial or ground application of pesticides, or site preparation within 0.25 mile of an individual occurrence, documented by the department of fish and wildlife.

~~(f) Peregrine falcon (*Falco peregrinus*) - harvesting, road construction, aerial application of pesticides, or site preparation within 0.5 mile of a known active nest site, documented by the department of fish and wildlife, between the dates of March 1 and July 30; or harvesting, road construction, or aerial application of pesticides within 0.25 mile of the nest site at other times of the year.~~

(~~g~~e) Sandhill crane (*Grus canadensis*) - harvesting, road construction, aerial application of pesticides, or site preparation within 0.25 mile of a known active nesting area, documented by the department of fish and wildlife.

(~~h~~f) Northern spotted owl (*Strix occidentalis caurina*).

(i) **Within a SOSEA boundary** (see maps in WAC 222-16-086), except as indicated in (h)(ii) of this subsection, harvesting, road construction, or aerial application of pesticides on suitable spotted owl habitat within a median home range circle that is centered within the SOSEA or on adjacent federal lands.

(ii) **Within the Entiat SOSEA**, harvesting, road construction, or aerial application of pesticides within the areas indicated for demographic support (see WAC 222-16-086(2)) on suitable spotted owl habitat located within a median home range circle that is centered within the demographic support area.

(iii) **Outside of a SOSEA**, harvesting, road construction, or aerial application of pesticides, between March 1 and August 31 on the seventy acres of highest quality suitable spotted owl habitat surrounding a northern spotted owl site center located outside a SOSEA. The highest quality suitable habitat shall be determined by the department in cooperation with the department of fish and wildlife. Consideration shall be given to habitat quality, proximity to the activity center and contiguity.

(iv) **Small parcel northern spotted owl exemption.** Forest practices proposed on the lands owned or controlled by a landowner whose forest land ownership within the SOSEA is less than or equal to 500 acres and where the forest practice is not within 0.7 mile of a northern spotted owl site center shall not be considered to be on lands designated as critical habitat (state) for northern spotted owls.

(~~i~~g) ~~Western~~ Pacific pond turtle (~~*Clemmys*~~ *Actinemys* *marmorata*) - harvesting, road construction, aerial application of pesticides, or site preparation within 0.25 mile of a known individual occurrence, documented by the department of wildlife.

(~~j~~h) Marbled murrelet *(Brachyramphus marmoratus).*

(i) Harvesting, other than removal of down trees outside of the critical nesting season, or road construction within an occupied marbled murrelet site.

(ii) Harvesting, other than removal of down trees outside of the critical nesting season, or road construction within suitable marbled murrelet habitat within a marbled murrelet detection area.

(iii) Harvesting, other than removal of down trees outside of the critical nesting season, or road construction within suitable marbled murrelet habitat containing 7 platforms per acre outside a marbled murrelet detection area.

(iv) Harvesting, other than removal of down trees outside of the critical nesting season, or road construction outside a marbled murrelet detection area within a marbled murrelet special landscape and within suitable marbled murrelet habitat with 5 or more platforms per acre.

(v) Harvesting within a 300 foot managed buffer zone adjacent to an occupied marbled murrelet site that results in less than a residual stand stem density of 75 trees per acre greater than 6 inches in dbh; provided that 25 of which shall be greater than 12 inches dbh including 5 trees greater than 20 inches in dbh, where they exist. The primary consideration for the design of managed buffer zone widths and leave tree retention patterns shall be to mediate edge effects. The width of the buffer zone may be reduced in some areas to a minimum of 200 feet and extended to a maximum of 400 feet as long as the average of 300 feet is maintained.

(vi) Except that the following shall not be critical habitat (state):

(A) Where a landowner owns less than 500 acres of forest land within 50 miles of saltwater and the land does not contain an occupied marbled murrelet site; or

(B) Where a protocol survey (see WAC 222-12-090(14)) has been conducted and no murrelets were detected. The landowner is then relieved from further survey requirements. However, if an occupied marbled murrelet site is established, this exemption is void.

(2) The following critical habitats (federal) designated by the United States Secretary of the Interior or Commerce, or specific forest practices within those habitats, have been determined to have the potential for a substantial impact on the environment and therefore are designated as critical habitats (state) of threatened or endangered species.

(3) For the purpose of identifying forest practices which have the potential for a substantial impact on the environment with regard to threatened or endangered species newly listed by the Washington fish and wildlife commission and/or the United States Secretary of the Interior or Commerce, the department shall after consultation with the department of fish and wildlife, prepare and submit to the board a proposed list of critical habitats (state) of threatened or endangered species. This list shall be submitted to the board within 30 days of the listing of the species. The department shall, at a minimum, consider potential impacts of forest practices on habitats essential to meeting the life requisites for each species listed as threatened or endangered. Those critical habitats (state) adopted by the board shall be added to the list in subsection (1) of this section. See WAC 222-16-050 (1)(b).

(4) For the purpose of identifying any areas and/or forest practices within critical habitats (federal) designated by the United States Secretary of the Interior or Commerce which have the potential for a substantial impact on the environment, the department shall, after consultation with the department of fish and wildlife, submit to the board a proposed list of any forest practices and/or areas proposed for inclusion in Class IV - Special forest practices. The department shall submit the list to the board within 30 days of the date the United States Secretary of the Interior or Commerce publishes a final rule designating critical habitat (federal) in the Federal Register. Those critical habitats included by the board in Class IV - Special shall be added to the list in subsection (2) of this section. See WAC 222-16-050 (1)(b).

(5) (a) ~~Except for bald eagles under subsection (1)(a) of this section, the~~ The critical habitats (state) of threatened and endangered species and specific forest practices designated in subsections (1) and (2) of this section are intended to be interim. These interim designations shall expire for a given species on the earliest of:

(i) The effective date of a regulatory system for wildlife protection referred to in (b) of this subsection or of substantive rules on the species.

(ii) The delisting of a threatened or endangered species by the Washington fish and wildlife commission and by the United States Secretary of Interior or Commerce.

(b) The board shall examine current wildlife protection and department authority to protect wildlife and develop and recommend a regulatory system, including baseline rules for wildlife protection. To the extent possible, this system shall:

(i) Use the best science and management advice available;

(ii) Use a landscape approach to wildlife protection;

(iii) Be designed to avoid the potential for substantial impact to the environment;

(iv) Protect known populations of threatened and endangered species of wildlife from negative effects of forest practices consistent with RCW 76.09.010; and

(v) Consider and be consistent with recovery plans adopted by the department of fish and wildlife pursuant to RCW 77.12.020(6) or habitat conservation plans or 16 U.S.C. 1533(d) rule changes of the Endangered Species Act.

(6) Regardless of any other provision in this section, forest practices applications shall not be classified as Class IV-Special based on critical habitat (state) (WAC 222-16-080 and 222-16-050 (1)(b)) for a species, if the forest practices are consistent with one or more of the following:

(a) Documents addressing the needs of the affected species provided such documents have received environmental review with an opportunity for public comment under the National Environmental Policy Act, 42 U.S.C. section 4321 et seq.:

(i) A habitat conservation plan and incidental take permit; or an incidental take statement covering such species approved by the Secretary of the Interior or Commerce pursuant to 16 U.S.C. § 1536 (b) or 1539 (a); or

(ii) An "unlisted species agreement" covering such species approved by the U.S. Fish and Wildlife Service or National Marine Fisheries Service; or

(iii) Other conservation agreement entered into with a federal agency pursuant to its statutory authority for fish and wildlife protection that addresses the needs of the affected species; or

(iv) A rule adopted by the U.S. Fish and Wildlife Service or the National Marine Fisheries Service for the conservation of an affected species pursuant to 16 U.S.C. section 1533(d); or

(b) Documents addressing the needs of the affected species so long as they have been reviewed under the State Environmental Policy Act;

(i) A landscape management plan; or

(ii) Another cooperative or conservation agreement entered into with a state resource agency pursuant to its statutory authority for fish and wildlife protection;

(c) A special wildlife management plan (SWMP) developed by the landowner and approved by the department in consultation with the department of fish and wildlife;

(d) ~~A bald eagle management plan approved under WAC 232-12-292;~~

(~~e~~d) A landowner option plan (LOP) for northern spotted owls developed pursuant to WAC 222-16-100(1);

(~~f~~e) A cooperative habitat enhancement agreement (CHEA) developed pursuant to WAC 222-16-105; or

(~~g~~f) A take avoidance plan issued by the U.S. Fish and Wildlife Service or the National Marine Fisheries Service prior to March 20, 2000.

(~~h~~g) Surveys demonstrating the absence of northern spotted owls at a northern spotted owl site center have been reviewed and approved by the department of fish and wildlife and all three of the following criteria have been met:

(i) The site has been evaluated by the spotted owl conservation advisory group, and

(ii) As part of the spotted owl conservation advisory group's evaluation, the department's representative has consulted with the department of fish and wildlife, and

(iii) The spotted owl conservation advisory group has reached consensus that the site need not be maintained while the board completes its evaluation of rules affecting the northern spotted owl. The spotted owl conservation advisory group shall communicate its findings to the department in writing within sixty days of the department of fish and wildlife's approval of surveys demonstrating the absence of northern spotted owls.

In those situations where one of the options above has been used, forest practices applications may still be classified as Class IV-Special based upon the presence of one or more of the factors listed in WAC 222-16-050(1), other than critical habitat (state) for the species covered by the existing plan or evaluations.

(7) The department, in consultation with the department of fish and wildlife, shall review each SOSEA to determine whether the goals for that SOSEA are being met through approved plans, permits, statements, letters, or agreements referred to in subsection (6) of this section. Based on the consultation, the department shall recommend to the board the suspension, deletion, modification or reestablishment of the applicable SOSEA from the rules. The department shall conduct a review for a particular SOSEA upon approval of a landowner option plan, a petition from a landowner in the SOSEA, or under its own initiative.

(8) The department, in consultation with the department of fish and wildlife, shall report annually to the board on the status of the northern spotted owl to determine whether circumstances exist that substantially interfere with meeting the goals of the SOSEAs.

ECONOMIC ANALYSIS
Forest Practices Board
Rule Making Affecting WAC 222-16-080 Critical Habitats

By Gretchen Robinson, Natural Resource Specialist
Department of Natural Resources
February 2012

PROPOSAL

The Forest Practices Board (Board) proposes to amend WAC 222-16-080, *Critical habitats (state) of threatened and endangered species*. The amendments include:

- Deleting the bald eagle (*Haliaeetus leucocephalus*) and the peregrine falcon (*Falco peregrinus*) from the list of critical habitats in subsection (1);
- Deleting bald eagle management plans from the list in subsection (6) of federal and state approved plans that can exempt a forest practices application (FPA) from a Class IV-special classification; and
- Changing the name of the species identified in the rule as Western pond turtle (*Clemmys marmorata*) to Pacific pond turtle (*Actinemys marmorata*) as recommended by the Washington Department of Fish and Wildlife.

RULE-COMPLYING COMMUNITY

The rule-complying community for this proposal is forest landowners who propose forest practices within the critical habitats of the bald eagle and the peregrine falcon defined in WAC 222-16-080(1). In this document, the rule complying community is often referred to as "landowners" and "affected landowners."

ANALYSIS REQUIREMENTS

In Washington State, agencies are required to analyze the economic effects of rule proposals for those required to comply with them.

The laws that govern agency rule making are in the Regulatory Fairness Act (chapter 19.85 RCW) and the Administrative Procedure Act (chapter 34.05 RCW). The Regulatory Fairness Act requires agencies to produce a small business economic impact statement explaining the impacts of their rule proposals on small businesses, if the proposed rule will impose more than minor costs on businesses in an industry. The statute defines small businesses as businesses that are independently owned or operated and having 50 or fewer employees. To determine whether the proposed rule will have a disproportionate impact on small businesses, the cost of compliance for small businesses is compared with the costs for the ten percent of businesses that are the largest businesses required to comply with the proposed rule.[1]

[1] See chapter 19.85 RCW *Regulatory fairness act* for a detailed description of small business analysis requirements.

The Administrative Procedure Act requires agencies to complete a cost-benefit analysis before adopting a rule that affects a policy or regulatory program. An agency cannot adopt a rule unless it:

- Determines the rule is needed to achieve the general goals and specific objectives of statute;
- Determines 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
- Determines 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.[2]

This document fulfills those requirements for the portion of the proposal that affects the forest practices regulatory program: eliminating the critical habitat definitions of two species in WAC 222-16-080(1) and eliminating bald eagle management plans from WAC 222-16-080(6)(d). Changing the name of the pond turtle in WAC 222-16-080(1) is not analyzed because it has no material effect on the program or the rule-complying community.

CONTEXT

Forest Practices Act and rules

The rule proposed for amendment is in Title 222 WAC *Forest Practices Board* which contains the rules that regulate forest practices on state managed and privately owned forest lands. These rules implement the Forest Practices Act (chapter 76.09 RCW). Two general goals of the Forest Practices Act are to maintain a viable forest products industry and to ensure forest lands are managed consistent with sound policies of natural resource protection.[3]

The forest practices rules address wildlife habitat protection in a variety of ways. One is requiring the Department of Natural Resources (DNR) to classify certain forest practices applications (FPAs) Class IV-special; this triggers environmental analysis in compliance with the State Environmental Policy Act (SEPA).[4]

Among the circumstances that require the Class IV-special classification are specific forest practices within certain distances and timeframes associated with forest-dependent species listed as “threatened” or “endangered” in Washington.[5] These species and their “critical habitats” are defined in WAC 222-16-080, and the bald eagle and the peregrine falcon are among the species on this list.

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[2] See RCW 34.05.328 *Significant legislative rules* for more information about rule making requirements.
[3] RCW 76.09.010(1).
[4] See RCW 76.09.050 and WAC 222-16-050 for classes of forest practices.
[5] Washington Department of Fish and Wildlife rules contain state lists of species designated as endangered, threatened, and sensitive. See WAC 232-12-011 and WAC 232-12-014.

There is an exception to the Class IV-special classification for forest practices within the critical habitats. If they are consistent with certain approved state or federal conservation plans for a particular species, the FPA is not classified Class IV-special based on critical habitat for that species. These plans are listed in WAC 222-16-080(6). One is a bald eagle management plan between landowners and the Washington Department of Fish and Wildlife (WDFW) under WAC 232-12-292 *Bald eagle protection rules*. However, due to a 2011 change in a WDFW rule, this plan is no longer available to exempt FPAs from the Class IV-special classification.

Washington Fish and Wildlife Commission actions

After the U.S. Fish and Wildlife Service (USFWS) removed the bald eagle and peregrine falcon from federal endangered and threatened wildlife lists in 2007 and 1999 respectively, the Washington Fish and Wildlife Commission (Commission) changed the classifications of the peregrine falcon and bald eagle to a "state sensitive" status. These actions took place in 2002 for the falcon and 2008 for the eagle. According to Washington Department of Fish and Wildlife (WDFW) rule making documents, both species' populations recovered dramatically after the ban on DDT use after 1972 and habitat protection laws were enacted.[6]

Both the eagle and the falcon continue to be protected by state and federal law. At the state level Washington's "state sensitive" species are protected from hunting and fishing. At the federal level both species are protected under the Migratory Bird Treaty Act which protects birds and their nests. The bald eagle is also protected under the federal Bald and Golden Eagle Protection Act which prohibits the disturbance of eagles.[7]

In April 2011, the Commission adopted an amendment to WAC 232-12-292 *Bald eagle protection rules* which added an introductory statement that the "…rules are only applicable and enforceable when the bald eagle is listed under state law as threatened or endangered."[8] In other words, WAC 232-12-292 is no longer in effect until such time as the bald eagle is reclassified under state law as state threatened or endangered.

When in effect, WAC 232-12-292 requires WDFW to make information available to governmental entities, interest groups, and landowners regarding the location and use pattern of eagle nests and communal roosts. It also contains a process for permitting agencies to notify WDFW of proposals in the vicinity of eagle nests or roosts according to existing data. If WDFW determines an activity would adversely impact eagle habitat, the permitting agency, a wildlife biologist, or WDFW could work with the landowner to develop a bald eagle management plan, and WDFW would then approve or disapprove the plan. Now that this rule is not in effect (until such time as the bald eagle is reclassified as state threatened or endangered), WDFW is no longer assisting landowners with or approving these plans.

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[6] See Washington State Registers (WSRs) 02-06-122 and 02-11-069 for the peregrine falcon and WSR 07-21-123 and 08-03-068 for the bald eagle for more information about these actions. The state endangered species list is in WAC 232-12-014 and the lists of threatened and sensitive species are in WAC 232-12-011.

[7] Information about the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act can be seen at http://www.fws.gov/pacific/migratorybirds/mbta.htm.

[8] See Washington State Registers 11-03-088 and 11-10-049 for information about this rule activity.

Effect of the Commission's actions on forest practices

The effect of the above described Commission actions for Washington State forest practices is twofold: WAC 222-16-080(1) is now inconsistent with the reclassification of the eagle and the falcon, and bald eagle management plans are not available to exempt FPAs from the Class IV-special classification under WAC 222-16-080(6)(d).

GOALS AND OBJECTIVES OF RULE PROPOSAL

The goal of the rule proposal is to make WAC 222-16-080 consistent with changes in state status of the bald eagle and peregrine falcon. Objectives are to:

- Eliminate the requirement for DNR to classify FPAs Class IV-special for critical habitats of species whose state protection status is no longer "threatened" or "endangered"; and
- Eliminate process burdens on affected landowners caused by the inconsistency between WAC 222-16-080 and the Commission's decision to remove these species from the state endangered and threatened lists in WACs 232-12-011 and -014.

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.

Not changing WAC 222-16-080 *Critical habitats (state) of threatened and endangered species* would continue the burden on affected landowners of an extra step in the FPA process – conducting an environmental analysis in compliance with SEPA for two species that are no longer listed as threatened or endangered. This is contrary to common sense and creates uncertainty for landowners about the FPA process. Process uncertainty and extra process steps are burdensome for those required to comply with the regulations.

Another alternative to the rule as currently proposed would be to add language to the FPA classification rules (WAC 222-160-050) to ensure consistency with federal law and guidelines that protect eagle nests and roosts. To explore this, at the request of the Board, WDFW recently convened a multi-caucus Wildlife Work Group which discussed regulatory and administrative options. The group determined by consensus opinion that additional rules are not needed. This is based on DNR and WDFW performing a set of administrative actions and functions including providing eagle location data and advising affected landowners to contact the USFWS for guidance on bald eagle protection.[9] Had there been a recommendation to the Board for additional rule language, the rule making process may have taken a longer time. The longer it takes to amend WAC 222-16-080 the greater the burden on affected landowners.

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[9] Department of Fish and Wildlife, David Whipple memorandum dated October 19, 2011 to the Forest Practices Board.
http://www.dnr.wa.gov/BusinessPermits/Topics/OtherInteragencyInformation/Pages/bc_fp_agendas_minutes.aspx
11-8-11 Meeting Materials.

In summary, amending the rule as proposed is less burdensome for affected landowners than not amending the rule at all, and the sooner it is amended the less burdensome it will be for those required to comply with it.

BENEFITS AND COSTS

In this analysis, the benefits and costs of the rule proposal are determined by comparing the FPA process for affected landowners under current rule with the FPA process that will take place after the rule is adopted.

Until WAC 222-16-080 is amended to reflect the Commission's actions, DNR is continuing to implement the critical habitat definitions for the eagle and the falcon. FPAs proposing activities within their defined critical habitats are Class IV-special. Conversely, after WAC 222-16-080 is amended DNR will not classify FPAs Class IV-special based on the eagle and falcon critical habitat definitions (which will no longer exist in the forest practices rules) and landowners will not be required to fulfill the SEPA requirement based on the proximity of their proposed activities to eagle and falcon habitat.

Since May 2011, WDFW is deferring protection of the bald eagle to the USFWS. DNR and WDFW are encouraging landowners to implement federal guidelines for the protection of the bald eagle. Landowners who want to ensure their activities will not adversely affect eagles must now work with a new agency, the USFWS, and follow a different process than they are accustomed to. This new process will continue for landowners even after WAC 222-16-080 is amended.

It is beyond the scope of this cost-benefit analysis to predict any changes in timber income or habitat conditions that may result from the changes in status for the bald eagle and the peregrine falcon to "state sensitive." Permitted forest management activities have been, are, and will continue to be determined on a site-by-site basis by the governmental entity with jurisdiction (formerly WDFW and DNR). The agency of jurisdiction for timber operations and forest practices affecting bald eagle and peregrine falcon habitat is now the USFWS, which continues to be responsible for the protection of those species under federal laws. The level of permitted management activity on a given site may or may not change depending on the level considered necessary to protect eagles and falcons under federal laws.

Benefits

The probable benefits of the rule change for affected landowners are providing more certainty about FPA procedures and eliminating the extra process step of completing SEPA. We can roughly estimate a cost savings for affected landowners by determining how much they will save when they are not required to conduct a SEPA analysis. Assuming the cost is for completing an environmental checklist (and not an environmental impact statement), DNR estimates each SEPA checklist of this nature would cost roughly $400. This is based on an estimate of 16 hours

to complete the SEPA checklist and conduct the necessary internal review, and at an average of $25 per hour for staff (16 hours x $25 per hour = $400).

From June 2011, the full month after the Board started the rule making process, through September 2011, landowners have attached 46 SEPA checklists to FPAs proposing activities within areas that correspond to the critical habitat definitions of the bald eagle (there were no checklists for the peregrine falcon in that timeframe). This is an average of about 11.5 SEPA checklists per month. It can be estimated, therefore, that affected landowners are collectively spending an average of approximately $4600 per month for this extra process step until the rule is amended ($400 x 11.5 SEPA checklists per month = $4600 per month). In other words, we are estimating that once the rule becomes effective, the proposed rule could result in a cost savings for affected landowners statewide of roughly $4600 per month, or $55,200 per year (12 months x $4600).

Costs

No costs specific to this rule proposal have been identified for affected landowners. Any costs associated with changes in the FPA process are due to the reclassification of the eagle and the falcon by the Washington Fish and Wildlife Commission and the fact that bald eagle management plans are no longer available. Environmental impacts are currently being analyzed by DNR.

SMALL BUSINESS IMPACTS

As explained under "Analysis Requirements", the Regulatory Fairness Act (chapter 19.85 RCW) requires agencies to produce a small business economic impact statement explaining the impacts of their rule proposals on small businesses. When these impacts are identified the agency must try to find ways to reduce the impacts.

No costs specific to this rule proposal have been identified; therefore, the rule proposal does not meet the threshold of imposing more than minor costs on businesses and a Small Business Economic Impact Statement is not required.

SUMMARY

The Forest Practices Board has determined that the proposed rule is needed to achieve consistency with the Washington Fish and Wildlife Commission's reclassification of the peregrine falcon and bald eagle from state "threatened" or "endangered" to "state sensitive" status.

<u>Least burdensome alternative</u>
Application processes can be burdensome for those required to comply with rules. This proposal will alleviate the uncertainty and extra process caused from the bald eagle and peregrine falcon critical habitats remaining in WAC 222-16-080(1). Amending the rule as proposed is less burdensome for affected landowners than not amending the rule at all, and the sooner it is amended the less burdensome it will be for those required to comply with it.

Benefits and costs

The main benefit for affected landowners is that FPAs involving the currently defined critical habitats of the bald eagle and peregrine falcon will no longer be classified Class IV-special based on critical habitat. Consequently, affected landowners will no longer be required to complete the SEPA process step which is only required for state listed threatened or endangered species according to WAC 222-16-080(1) and they will benefit by no longer incurring the associated costs. The proposal is not expected to impose any costs on affected landowners.

Small business impact

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

STATE OF WASHINGTON
FOREST PRACTICES BOARD

PO Box 47012
Olympia, WA 98504-7012

As required by
the Administrative Procedure Act
Chapter 34.05 RCW

DRAFT
CONCISE EXPLANATORY STATEMENT
AND
RESPONSIVENESS SUMMARY

ADOPTION OF AMENDMENT TO THE FORST PRACTICES RULE
WAC 222-16-080 *Critical habitats (state) of threatened and endangered species*

Prepared by: Sherri Felix
January 31, 2012

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Introduction

Washington state agencies are required to provide a concise explanatory statement to any person upon request or from whom the agency receives comments during a rule making (RCW 34.05.325(6)). Before an agency adopts a rule, the agency:

> *…shall prepare a concise explanatory statement of the rule:*
> *(i) Identifying the agency's reasons for adopting the rule;*
> *(ii) Describing differences between the text of the proposed rule, as published in the register and the text of the rule as adopted, other than editing changes, stating the reason for the differences; and*
> *(iii) Summarizing all comments received regarding the proposed rule, and responding to the comments by category or subject matter, indicating how the final rule reflects agency consideration of the comments, or why it fails to do so.*

Content of Rule Amendment and Reasons to Adopt

The Forest Practices Board's Critical Habitat rule making amends WAC 222-16-080 *Critical habitats (state) of threatened and endangered species* in subsections (1), (5) and (6) by removing the bald eagle (*Haliacetus leucocephalus)* and peregrine falcon (*Falco peregrinus)* from the Board's critical habitats list, removing the option to use a bald eagle site management plan, and updating the common and scientific names of the Western pond turtle (*Clemmys marmorata)*.

This rule making brings the Board's critical habitats (state) rule in WAC 222-16-080 into alignment with the following federal, state, and scientific society actions:

- The removal by the United States Fish and Wildlife Service (USFWS) of the bald eagle *(Haliacetus leucocephalus)* and the peregrine falcon *(Falco peregrinus)* from the Federal List of Endangered and Threatened Wildlife.
- The removal by the Washington Fish and Wildlife Commission of the bald eagle and peregrine falcon from the state's threatened and endangered species lists, WAC 232-12-011 and -014.
- The removal by the Washington Fish and Wildlife Commission of the requirement in Department of Fish and Wildlife rules, WAC 232-12-292, for a bald eagle site management plan unless the bald eagle is listed under state law as threatened or endangered.
- The change to the common and scientific names of the Western pond turtle *(Clemmys marmorata)* to the Pacific pond turtle *(Actinemys marmorata) as* recommended by three North American scientific societies that deal with fish, amphibian, and reptile issues: The American Society of Ichthyologists and Herpetologists, the Herpetologist's League, and the Society for the Study of Amphibians and Reptiles.

The bald eagle and the peregrine falcon continue to be protected by the USFWS under the federal Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act, and by the Washington Fish and Wildlife Commission under state laws.

Updating the common and scientific names for this pond turtle does not modify the protection afforded to this turtle under the forest practices rules.

Comments Summary

All comments received on the Critical Habitat rule were in support of the rule as proposed.

The Board conducted two rule making hearings to receive comments at each hearing on the following two rule makings:

- WAC 222-16-080 *Critical habitat (state) of threatened and endangered species*, and
- WAC 222-20-120 *Notice of forest practices to affected Indian tribes*.

At the Olympia hearing, comments on the Critical Habitat rule proposal were received from Longview Timber Corp. (oral and written comments #12-01), Washington Forest Protection Association (oral and written comments #12-03), and Hancock Timber Resource Group (oral comment #12-04). At the Ellensburg hearing, there were no oral or written comments on this rule

proposal. Additionally, the Board received e-mailed comments on the Critical Habitat rule proposal from Rayonier (comment # 12-09).

Differences between Proposed and Final Rule

To be completed upon adoption of final rule.

Adoption Date

The expected adoption date is February 14, 2012 at the Forest Practices Board meeting. If adopted then, the rule would become effective in March 2012. *To be updated upon adoption of final rule.*

Rule MakingTimeline and Opportunities to Participate

08/09/2011	Forest Practices Board meeting: Critical Habitat (A.K.A. Bald Eagle) rule making with opportunity to comment
08-11/2011	Staff works with Department of Fish & Wildlife's Wildlife Work Group on rule proposal
09/07/2011	*Preproposal Statement of Inquiry* (CR-101) published in the Washington State Register (WSR 11-17-096 filed 08/22/2011)
09/08/2011	Forest Practices Rule Making Activity update sent to interested parties on Board's mailing list
09/14-10/14/2011	30-day review of draft rule language by Washington Department of Fish and Wildlife and counties (RCW 76.09.040(2)) and affected Indian tribes
11/08/2011	Forest Practices Board meeting: Critical Habitat rule proposal with opportunity to comment
12/07/2011	*Proposed Rule Making* (CR-102) with hearings information, proposed rule language, and preliminary economic analysis published in Washington State Register (WSR 11-23-105 filed 11/18/2011); public review and comment
12/07/2011	Forest Practices Rule Making Activity update including hearings information sent to interested parties on Board's mailing list
12/07/2011	SEPA checklist and Determination of Nonsignificance distributed for comment
12/16/2011	DNR Media Advisory on Critical Habitat rule making hearings
01/03/2012	Rule making hearing in Olympia
01/05/2012	Rule making hearing in Ellensburg
01/06/2012	Due date for comments on Critical Habitat rule proposal and SEPA analysis