



October 20, 2014

MEMORANDUM

TO: Forest Practices Board

FROM: Gretchen Robinson 
Forest Practices Division, Policy and Service Section

SUBJECT: Rule Making Related to Unstable Slopes Information in Forest Practices Applications

On November 12, 2014 I will request the Board's approval to file a *CR-102 Proposed Rule Making* with the enclosed draft rule language to:

- Clarify in WAC 222-20-010 that DNR may require additional geologic information prepared by a qualified expert when needed to appropriately classify a Forest Practices Application (FPA); and
- Make minor language clarifications in WAC 222-10-030 and WAC 222-20-010.

Upon the Board's direction at the May 13 meeting, staff filed a *CR-101 Preproposal Statement of Inquiry* on May 21, 2014 indicating that the Board is considering rule making regarding unstable slopes information included in FPAs for classing purposes. Staff developed language during the summer months, and received early comments in September and October from several TFW Policy Committee caucuses. Staff considered all of the comments (enclosed) while drafting rule language for the Board's review. Some of their concerns included:

- Requiring the appropriate level of inquiry when DNR needs more information to determine the FPA classification.
- Ensuring the rule language stays within the Board's stated intent; and
- Using appropriate language in the lead-in sentence of the new subsection (9). The sentence they reviewed was, "Where a potentially unstable slope or landform is in or **around** the area of an application..." which is the terminology used in the CR-101. Two caucuses preferred "adjacent to" and one preferred "near." Staff recommends using the term "around" because DNR screens the areas around the site of the proposed activity to determine if there is any potential for the activity to influence movement of unstable slopes and landforms that exist around the site of the activity.

In addition to drafting language, staff produced the enclosed Preliminary Cost-Benefit Analysis as required under RCW 34.05.328. It concludes that the rule would not impose additional costs on landowners because it is only a clarification of DNR's FPA review process. Staff also concluded that SEPA analysis is not required because the rule fits the exemption for procedural actions under WAC 197-11-800(19): "...rules...(r)elating solely to governmental procedures and containing no substantive standards respecting use or modification of the environment."

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If you direct staff to the file rule language, it will be published in the Washington State Register in December. Staff will schedule a public hearing to take place in early January. Public comments will be received throughout December and early January, upon which staff will analyze comments, prepare a Concise Explanatory Statement per RCW 34.05.325, and prepare a revised draft rule for the Board to consider adopting in February 2015.

I look forward to seeing you on November 12, but you may call me at (360) 902-1705 if you have any questions before the Board meeting.

GR/

Enclosures: Draft Rule Proposal
Preliminary Cost-Benefit Analysis
Policy caucus comments (4)

FOREST PRACTICES BOARD

Rule Proposal for Unstable Slopes Information in Forest Practices Applications November 2014

1 **WAC 222-10-030 *SEPA policies for potentially unstable slopes and landforms.**

2 In addition to SEPA policies established elsewhere in this chapter, the following policies apply to forest
3 practices described in WAC 222-16-050 (1)(d) relating to construction or harvest on potentially unstable
4 slopes or landforms.

5 (1) In order to determine whether such forest practices are likely to have a probable significant
6 adverse impact, and therefore require an environmental impact statement, the applicant must
7 submit the following additional information, prepared by a qualified expert as defined in
8 subsection (5) of this section. The qualified expert must describe the potentially unstable
9 landforms in and around the application site and analyze:

10 (a) The likelihood that the proposed forest practices will cause movement on the potentially
11 unstable slopes or landforms, or contribute to further movement of a potentially unstable
12 slope or landform;

13 (b) The likelihood of delivery of sediment or debris to any public resources, or in a manner
14 that would threaten public safety; and

15 (c) Any possible mitigation for the identified hazards and risks.

16 (2) The department's threshold determination will include an evaluation of whether the proposed
17 forest practices:

18 (a) Are likely to increase the probability of a mass movement on or near the site;

19 (b) Would deliver sediment or debris to a public resource or would deliver sediment or debris
20 in a manner that would threaten public safety; and

21 (c) Such movement and delivery are likely to cause significant adverse impacts.

22 If the department determines that (a), (b) and (c) of this subsection are likely to occur, then the
23 forest practice is likely to have a probable significant adverse impact.

24 (3) The department will evaluate the proposal, using appropriate expertise and in consultation with
25 other affected agencies and Indian tribes.

26 (4) Specific mitigation measures or conditions must be designed to avoid accelerating rates and
27 magnitudes of mass wasting that could deliver sediment or debris to a public resource or could
28 deliver sediment or debris in a manner that would threaten public safety.

29 (5) Qualified expert for the purposes of this section ~~and for~~, reanalysis of watershed analysis mass
30 wasting prescriptions under WAC 222-22-030, and preparation of requested geologic information
31 under WAC 222-20-010(9), means a person licensed under chapter 18.220 RCW as either an
32 engineering geologist or as a hydrogeologist (if the site warrants hydrologist expertise), with at
33 least three years of field experience in the evaluation of relevant problems in forested lands.

34 **WAC 222-20-010 Applications and notifications—Policy.**

35 (1) **No Class II, III or IV forest practices** shall be commenced or continued unless the department
36 has received a notification for Class II forest practices, or approved an application for Class III or
37 IV forest practices pursuant to the act. Where the time limit for the department to act on the
38 application has expired, and none of the conditions in WAC 222-20-020(1) exist, the operation
39 may commence. (NOTE: OTHER LAWS AND RULES AND/OR PERMIT REQUIREMENTS
40 MAY APPLY. SEE CHAPTER 222-50 WAC.)
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- 1 (2) **The department shall** prescribe the form and contents of ~~the~~ notification~~s~~ and application~~s~~,
2 ~~which. The department~~ shall specify ~~what the~~ information ~~is needed~~ required for a notification,
3 and the information required for the department to approve or disapprove ~~the an~~ application.
- 4 (3) **Except as provided in subsection (4) of this section, applications and notifications** shall be
5 signed by the landowner, the timber owner, and the operator, ~~or the operator and accompanied by a~~
6 ~~consent form signed by the timber owner and the landowner. A consent form may be another~~
7 ~~document if it is signed by the landowner(s) and it contains a statement acknowledging that~~
8 ~~he/she is familiar with the Forest Practices Act, including the provisions dealing with conversion~~
9 ~~to another use (RCW 76.09.060(3)).~~
- 10 (4) In lieu of a landowner's signature, where the timber rights have been transferred by deed to a
11 perpetual owner who is different from the forest landowner, the owner of perpetual timber rights
12 may sign a forest practices application or notification for operations not converting to another use
13 and the statement of intent not to convert for a set period of time. The holder of perpetual timber
14 rights shall serve the signed forest practices application or notification and the signed statement of
15 intent on the forest landowner. The forest practices application shall not be considered complete
16 until the holder of perpetual timber rights has submitted evidence acceptable to the department
17 that such service has occurred.
- 18 (5) **Where an application** for a conversion is not signed by the landowner ~~or accompanied by a~~
19 ~~consent form, as outlined in subsection (3) of this section~~, the department shall not approve the
20 application. Applications and notifications for the development or maintenance of utility rights of
21 way shall not be considered to be conversions.
- 22 (6) **Transfer of the** approved application or notification to a new landowner, timber owner or
23 operator requires written notice by the former landowner or timber owner to the department and
24 should include the original application or notification number. This written notice shall be in a
25 form acceptable to the department and shall contain an affirmation signed by the new landowner,
26 timber owner, or operator, as applicable, that he/she agrees to be bound by all conditions on the
27 approved application or notification. In the case of a transfer of an application previously
28 approved without the landowner's signature, the new timber owner or operator must submit a
29 bond securing compliance with the requirements of the forest practices rules as determined
30 necessary by the department. If an application or notification indicates that the landowner or
31 timber owner is also the operator, or an operator signed the application, no notice need be given
32 regarding any change in subcontractors or similar independent contractors working under the
33 supervision of the operator of record.
- 34 (7) **The landowner or timber owner must provide notice of hiring or change of operator to the**
35 **department within forty-eight hours of the change. The department shall promptly notify the**
36 **landowner if the operator is subject to a notice of intent to disapprove under WAC 222-46-070.**
37 **Once notified, the landowner will not permit the operator, who is subject to a notice of intent to**
38 **disapprove, to conduct the forest practices specified in the application or notification, or any other**
39 **forest practices until such notice of intent to disapprove is removed by the department.**
- 40 (8) **Applications and notifications**, if complete, will be considered officially received on the date
41 and time shown on any registered or certified mail receipt, or the written receipt given at the time
42 of personal delivery, or at the time of receipt by general mail delivery. The department will
43 immediately provide a dated receipt to the applicant. Applications or notifications that are not

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1 complete, or are inaccurate will not be considered officially received until the applicant furnishes
2 the necessary information to complete the application.

- 3 (a) A review statement from the U.S. Forest Service that evaluates compliance of the forest
4 practices with the Columbia River Gorge National Scenic Area Act (CRGNSA) special
5 management area guidelines is necessary information for an application or notification
6 within the CRGNSA special management area. The review statement requirement shall be
7 waived if the applicant can demonstrate the U.S. Forest Service received a complete plan
8 application and failed to act within forty-five days.
- 9 (b) A complete environmental checklist (WAC 197-11-315) is necessary information for all
10 Class IV applications.
- 11 (c) A local governmental entity clearing and/or grading permit is necessary information for all
12 Class IV applications on lands that will be converted to a use other than commercial
13 timber operations if the local governmental entity has jurisdiction and has an ordinance
14 requiring such permit.
- 15 (d) A checklist road maintenance and abandonment plan is necessary information for all small
16 forest landowners' applications or notifications for timber harvest (including salvage),
17 unless exempt under WAC 222-24-0511, or unless the application is a small forest
18 landowner long-term application which requires a roads assessment.

19 ~~(8) **An operator's name, if known, must be included on any forest practices application or**~~
20 ~~**notification. The landowner or timber owner must provide notice of hiring or change of operator**~~
21 ~~**to the department within forty eight hours. The department shall promptly notify the landowner if**~~
22 ~~**the operator is subject to a notice of intent to disapprove under WAC 222-46-070. Once notified,**~~
23 ~~**the landowner will not permit the operator, who is subject to a notice of intent to disapprove, to**~~
24 ~~**conduct the forest practices specified in the application or notification, or any other forest**~~
25 ~~**practices until such notice of intent to disapprove is removed by the department.**~~

26 (9) **Where potentially unstable slopes or landforms are on or around the area of an application,**
27 **the department may require the landowner to provide additional geologic information prepared by**
28 **a qualified expert in order to classify the application appropriately. The information shall include**
29 **an explanation of how the qualified expert evaluated the proposed harvest or construction**
30 **activities with respect to the potentially unstable slopes or landforms. This information is for**
31 **classification purposes only.**

32 (a) “Qualified expert” is defined in WAC 222-10-030.

33 (b) “Potentially unstable slopes or landforms” are those listed in WAC 222-16-
34 050(1)(d)(i)(A) through (E).

35 (10) **Financial assurances** may be required by the department prior to the approval of any future
36 forest practices application or notification to an operator or landowner under the provisions of
37 WAC 222-46-090.

PRELIMINARY COST-BENEFIT ANALYSIS
Pursuant to RCW 34.05.328
Forest Practices Board
Unstable Slopes Information in Forest Practices Applications
Department of Natural Resources
October 2014

Introduction

The Forest Practices Board is proposing rule amendments related to geologic information in forest practices applications (FPAs). The Administrative Procedure Act (chapter 34.05 RCW) requires agencies to make certain determinations before adopting rules. This document is structured generally to fulfill agency requirements listed in [RCW 34.05.328\(1\)\(a\) through \(e\)](#), and small business impact per [chapter 19.85 RCW](#). In addition, parenthetical information that may interest readers is provided in endnotes at the end of the document.

Goal and Need

Before adopting rules, agencies are required to determine that rules are needed to achieve the general goals and specific objectives of the statute the rules implement.¹ In this case, the statute being implemented is RCW 76.09.060(1): *The department shall prescribe the form and contents of the notification and application. ...The information required may include, but is not limited to...Soil, geological, and hydrological data with respect to forest practices.* This statute establishes DNR's authority to receive sufficient information to make regulatory decisions (approvals, disapprovals, and classification decisions) on FPAs.

The Board's Preproposal Statement of Inquiry (CR-101) indicates that the proposed rule "...may be needed to clarify applicant expectations that DNR may require additional geotechnical information where unstable slopes and landforms exist in and around the areas of the FPA."² The goal of the rule proposal, then, is to clarify applicant expectations related to the possibility of DNR requiring geotechnical information.

Although both statute and rule (RCW 76.09.060(1) and WAC 222-20-010(2)) state that DNR "...shall prescribe the form and contents of the notification and application...", the Board determined there is a need to include specific language in rule to clarify that DNR may require additional geologic information related to unstable slopes and landforms prepared by a qualified expertⁱ, if DNR determines such information is needed to appropriately class an FPA.

Rule Proposal

The rule proposal amends WAC 222-10-030 and WAC 222-20-010. The substantive content is in a new subsection (9) in WAC 222-20-010; the remaining amendments are minor editorial language clarifications which are not analyzed in this document. New subsection (9) explains that DNR may require additional information prepared by a qualified expert if necessary to appropriately classify an FPA:

¹ RCW 34.05.328(1)(b).

² CR-101 *Preproposal Statement of Inquiry*, filed May 21, 2014 and published in WSR 14-11-103.

- (9) **Where potentially unstable slopes or landforms are on or around the area of an application**, the department may require the landowner to provide additional geologic information prepared by a qualified expert in order to classify the application appropriately. The information shall include an explanation of how the qualified expert evaluated the proposed harvest or construction activities with respect to the potentially unstable slopes or landforms. This information is for classification purposes only.
- (a) "Qualified expert" is defined in WAC 222-10-030.
- (b) "Potentially unstable slopes or landforms" are those listed in WAC 222-16-050(1)(d)(i)(A) through (E).

Alternatives to Rule Making, Consequences of Not Adopting a Rule, and Least Burdensome Alternative

Agencies must analyze alternatives to rule making and the consequences of not adopting a rule³, and must determine, after considering alternatives, that the rule being adopted is the least burdensome alternative for those required to comply with it.⁴ The Board is not considering alternative versions of the proposed rule, but there may be alternative ways to accomplish the Board's goal, "clarifying applicants' expectations." Alternatives that may be considered are as follows:

Alternative 1: Adopt the proposed rule.

Alternative 2: Do not adopt the proposed rule.

Alternative 3: Do not adopt the proposed rule but accomplish the goal using another method.

Alternative 4: Adopt the proposed rule and accomplish the goal by another method.

- Alternative 1 would accomplish the goal.
- Alternative 2 would not accomplish the goal.
- Alternative 3 could accomplish the goal to some extent without adopting a rule because clarification language could be added to the FPA instructionsⁱⁱ which could direct the information specifically to potentially affected applicants.
- Alternative 4 would accomplish the goal to a greater extent than either Alternatives 1 or Alternative 3.

Alternative 4 may be the most effective method because it would reach prospective applicants who rely on the rules for their information, and also applicants who rely on the FPA instructions for their information.

In regard to the consequence of not adopting the rule, the rule is not needed to allow DNR to require information from landowners. DNR is currently authorized to require additional information per RCW 76.09.060(1) and WAC 222-20-010(2). However, the goal of the rule is not to establish authority but to clarify applicants' expectations. If the Board were not to adopt the rule (Alternative 2), the goal to clarify expectations could still possibly be accomplished by adding the clarifying language to the FPA instructions.

As for a "least burdensome" alternative, none of the listed alternatives would be more burdensome for applicants than DNR's current FPA review process.

³ RCW 34.05.328(1)(b).

⁴ RCW 34.05.328(1)(e).

Benefit and Cost of the Rule

Before adopting rules, agencies must 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.⁵

Neither the benefits nor the costs of the rule proposal can be evaluated quantitatively because it is a clarification of DNR's FPA review process and does not change requirements for those required to comply with it.

Benefit: WAC 222-20-010(2) states generally that, "The department shall prescribe the form and contents of the notification and application..." The rule proposal points out that for certain types of applications, those that contain activities where potentially unstable slopes or landforms are on or around the area of an application, DNR may require information prepared by a qualified expert. This specificity is expected to benefit prospective applicants because it will put them on notice that if DNR cannot conclusively determine the class of an FPA with the information initially provided in the FPA, DNR will require additional geologic information prepared by a qualified expert to make the classification decision. It is important that applicants understand this possibility because of the potential cost to produce the information.ⁱⁱⁱ

Cost: Because DNR already requires the geologic information needed to appropriately classify an FPA, it is not expected that landowners will bear any additional costs due to the rule clarification itself.

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 if the rules will impose more than minor costs on businesses in an industry.⁶ 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 "Costs", the rule is not expected to impose additional costs on forest landowners because it is a clarification of existing rule and does not change DNR's FPA review process. Therefore, the proposed rule does not meet the threshold of imposing more than minor costs on businesses, and an SBEIS is not required.

Summary

Goal of the rule proposal

The Board's goal in adopting the rule proposal is to: "...clarify applicant expectations that DNR may require additional geotechnical information where unstable slopes and landforms exist in or around the areas of the FPA."⁷ The proposed rule language supplements the existing language in WAC 222-20-010(2) by specifying that DNR may require additional geologic information prepared by a qualified expert in order to classify the FPA appropriately.

Alternatives to rule making and consequence of not adopting a rule

⁵ RCW 34.05.328(1)(d).

⁶ RCW 19.85.030.

⁷ CR-101 *Preproposal Statement of Inquiry*, filed May 21, 2014 and published in WSR 14-11-103.

An alternative method to accomplish the Board’s goal, “clarifying applicants’ expectations” could be to add similar clarification language to FPA instructions and perhaps also on forest practices web pages. This would direct the information to the subset of applicants it would most likely affect. However, some prospective applicants may rely on more rules for their information than on FPA instructions. For that reason, the consequence of not adopting the rule may be that this subset of prospective applicants will not be adequately informed. The most effective way to reach the targeted audience, therefore, may be to both adopt the proposed rule and to add the information to the FPA instructions to assure that as many applicants as possible receive the information.

Benefit and cost of the rule proposal

It is expected that adding specific clarifying language to WAC 222-20-010 regarding geologic information will be beneficial for prospective applicants. It would put landowners on notice that they may be required to supply additional geologic information prepared by a qualified expert if DNR cannot conclusively determine the class of an FPA with the information initially provided in the FPA.

It is not expected that landowners will bear additional costs due to the rule clarification itself because DNR’s application review process already allows for requiring the geologic information it needs to appropriately class an FPA.

ⁱ “Qualified expert” is defined in WAC 222-10-030(5): *Qualified expert...means a person licensed under chapter 18.220 RCW as either an engineering geologist or as a hydrogeologist (if the site warrants hydrogeologist expertise), with at least three years of field expertise in the evaluation of relevant problems in forest lands.*

ⁱⁱ Current Forest Practices Application and Notification Instructions can be found on DNR’s website at http://www.dnr.wa.gov/BusinessPermits/Topics/ForestPracticesApplications/Pages/fp_forms.aspx

ⁱⁱⁱ According to DNR staff, the cost of information prepared by a qualified expert ranges from \$500 to \$1000 for memoranda or letters (in which the qualified expert explains how the proposal avoids impacts), to \$2000 to \$5000 for full geotechnical analyses. DNR estimates that it requires such additional information on less than three percent of FPAs that include timber harvest and construction where potentially unstable slopes exist, and that are not initially submitted with geologic information prepared by a qualified expert.

ANDERSON, PATRICIA (DNR)

From: Bernath, Stephen (ECY)
Sent: Friday, October 03, 2014 11:26 AM
To: ENGEL, MARC (DNR); RATCLIFF, MARC (DNR); ROBINSON, GRETCHEN (DNR);
HANLON-MEYER, CHRIS (DNR)
Cc: Hicks, Mark (ECY)
Subject: comments on the proposed unstable slopes rule

Marc, here is a suggestion for resolving the issue we identified during the stakeholder meeting this week. Please let me know if you have questions. Sb.

WAC 222-20-010(9)(a) This geologic information shall document how it was determined that the proposed forest practices will be on or near a potentially unstable slope or landform that has the potential to deliver sediment or debris to a public resource or that has the potential to threaten public safety. ~~not cause or contribute to movement of the potentially unstable 31 slope or landform.~~

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ANDERSON, PATRICIA (DNR)

From: Millersoils <millersoils@comcast.net>
Sent: Saturday, October 04, 2014 7:13 AM
To: RATCLIFF, MARC (DNR)
Cc: ENGEL, MARC (DNR); ROBINSON, GRETCHEN (DNR); Oneil, Elaine
Subject: Re: Comments about draft rule for Unstable slopes

Marc and others: I apologize for erroneously commenting on SEPA (non-red text of the proposed rule changes).

Please consider my other stated requests for more and coordinated help for SFLOs. Yes, the SLO will need a bigger budget.

About the red text of WAC 222-20-10, please consider:

(3)... " and the operator".... : insert a provision for when an operator has not yet been selected .

(9)...in or " around" ... seems vague. how far away?. How about adjacent to ?

(c) (1) vs. (2)... " 70 vs 65 % ". Seems unrealistically precise for measurements in the field ! Change to a single %, although I suspect this change will require CMER / policy endorsement!

(10) " Financial assurances". Be specific, please. Bonding ? with or by whom?

////dick miller

From: "RATCLIFF, MARC" <MARC.RATCLIFF@dnr.wa.gov>
To: "Miller, Dick" <millersoils@comcast.net>
Cc: "engel, marc" <MARC.ENGEL@dnr.wa.gov>, "GRETCHEN ROBINSON (DNR)" <GRETCHEN.ROBINSON@dnr.wa.gov>
Sent: Friday, October 3, 2014 3:55:05 PM
Subject: RE: Comments about draft rule for Unstable slopes

Thanks Dick for the comment.

222-10-030 (1) is existing language and spells out what is required for Class 4 Special applications and when proposing activities on rule identified landforms only. Sub-section (5) is the only section changed in 222-10-030.

The Board's motion directed DNR to develop language for improving what additional information DNR may need to classify an FPA. We added language in 222-10-030 (5) and 222-20-010 (9). Sub-section (9) contains the meat of the new language we are considering. The red text shows added/changed language

Hope that helps
Marc R

From: Millersoils [mailto:millersoils@comcast.net]
Sent: Wednesday, October 01, 2014 4:58 PM

To: ROBINSON, GRETCHEN (DNR)

Cc: ENGEL, MARC (DNR); RATCLIFF, MARC (DNR); MIKETA, TAMARA (DNR)

Subject: Comments about draft rule for Unstable slopes

Hello, Ms Robinson, I am Dick Miller, WFFA's rep to the TFW Policy Committee. I focus my comments on :

WAC 222-10-030 ...

"(1) " In order to determine whether such forest practices are likely to have significant adverse impact, and therefore require an environmental impact statement, the applicant must submit the following additional information, prepared by a **qualified expert as defined in subsection (5) of this section.** "

My following comments represent those of the small landowner caucus:

1. We agree that some regulations and additional management costs are necessary to reduce hazard of unstable slopes and potential consequences for streams, property, and lives.
2. How can this protection be accomplished fairly?
3. Complying with this directive will be costly to LOs . Even for typically small harvest area and volume, a billing of \$5,000 to \$20,000 can be expected. Because of their smaller scale and infrequent harvests, small forest LOs are disproportionately impacted financially by complex and restrictive regulations.
4. **Our suggested solution:** that DNR provide information and guidance BEFORE small LOs actually submit their FPA. For example, that DNR provide existing LiDAR imagery, slope stability assessment maps, pertinent advice contained in Section 16 of the BM , and an on-site visit to educate LOs about the potential issues and optional solutions. **IF** provided with such publically- funded support, LOs could make more rational financial and environmental decisions....and be happier doing so.
5. Please note that these comments about the unstable slope rule also apply to other rules.

" Small forest landowners need technical assistance to help address slope stability, CMZ, and stream shade issues among a myriad of other forest practices processes. Additional staffing in the SFLO to help landowners address these issues would be a great service for landowners". (Aug 2014 minutes of the Small Forest Landowner Advisory Committee).

Thank you for considering our comments.////dick miller

MEMORANDUM

To: Patricia Anderson (forestpracticesboard@dnr.gov)
Marc Engel (marc.engel@dnr.wa.gov)
Fr: Mary Scurlock, Chris Mendoza, and Kara Whittaker for the Forests and Fish
Conservation Caucus
Re: Comments on Rule Language (9/22/14 Draft)
Dt: 3 October 2014

Overview

The Forests and Fish Conservation Caucus strongly supports DNR's assertion of its authority and discretion to ask an applicant for more information, including geologic information generated by a Qualified Expert, where it deems such information necessary to make accurate and well-founded determinations as to the classification of forest practices applications under WAC 222-16-050.

However, we do have some comments and a specific recommendation for improving the proposed rule.

General Comment: Section 9 "Additional Geologic Information" versus Class IV Geotechnical Report

DNR staff has characterized the proposed rule as simply a memorialization of what the agency already does, i.e. ask for additional information it perceives as necessary to classify an application. The rule states the purpose of the additional documentation and incorporates verbatim into the Application and Notification section the current QE (Qualified Expert) and PUS (Potentially Unstable Slopes) definitions from the SEPA guidelines section of the current Forest Practices Rules.

As currently drafted, the proposed rule recognizes an additional documentation step that calls for something less than a full geotechnical report, i.e. "additional geologic information prepared by a qualified expert in order to classify the application appropriately." The implication for FPA review is that this may be something different and possibly less rigorous than the Class IV geotechnical report analysis required by WAC 222-10-030(1)(a)-(c).

It had been our expectation that because the CR 101 referred to "appropriate technological and professional standards" that DNR would clarify its authority to require whatever level of information it deems necessary to classify the application, including the same findings applicable to a Class IV geotechnical report. This expectation was further confirmed by the Chris Hanlon-Meyer memo (May 2014), which states that if an office review of an FPA identifies potentially unstable slopes with public safety considerations in general proximity of the proposed forest practices, then the FPA will be forwarded to the Forest Practices Science Team. If the Science Team Geologist determines the potentially unstable slope has the potential to deliver in a manner that could threaten public safety, then DNR staff will require the applicant to supply a geotechnical report prepared by a Qualified Expert. In our view for some FPAs, it is reasonable

at this juncture to trigger the same level of inquiry associated with a Class IV special in WAC 222-10-030.

It is our goal to increase transparency and accountability around DNR's internal dialogue with applicants by requiring the agency to document each step of its deliberations, including the one this rule is focused on: the point at which DNR asks an applicant for more information via either a QE memo or a full geotechnical report. In our view, there are circumstances under which all the analysis required for a Class IV geotechnical report should be available for consideration during what is currently an informal negotiation process with landowners. We believe that not only should the rule make it clear that DNR is authorized to request a full geotechnical report, but that under certain circumstances – such as where there is high uncertainty around the exact location of the groundwater recharge area for a glacial deep-seated landslide -- such a report should be mandatory in order to preserve the option of the application's remaining or reverting to a Class III when the further information is obtained..

The ultimate goal should be to enable better tracking and oversight of those FPAs that start out looking like they meet the Class IV Special criteria (RIL with potential to directly deliver to public resources or threaten public safety), but later get reclassified as Class III because DNR staff has received adequate information about RIL location and risks, and/or the landowner has agreed to mitigate forest practices impacts via avoidance or other conditions on the FPA.

Issue: the proposed language does not focus on the determination necessary to classify an application.

DNR has indicated that the rule is intended to clarify its authority to engage in what already is a routine practice: to request further information prepared by a qualified expert that it deems necessary to determine whether an application – presumptively a Class III -- should be considered a Class IV action, triggering SEPA. Therefore, the only determinations the information is intended to inform are those related to WAC 222-16-050(d) defining a Class IV special, and the only questions at issue for this stage of the process are: *Is the activity being proposed on a potentially unstable slope or landform and, if so, is there potential to deliver to a public resource or in a manner that threatens public safety?* (If so, and if the landowner elects to proceed, there is no question that the application must go through WAC 222-10-030 and the full set of inquiries necessary to determine whether an EIS is needed).

Recommended fix: we suggest amending Section (9)(a) to read:

- (a) This geologic information shall document how it was determined that the proposed forest practices will not take place on ~~cause of contribute to movement of the a~~ potentially unstable slope or landform **that has the potential to deliver sediment or debris to a public resource or that has the potential to threaten public safety within the meaning of WAC 222-16-050(d). The department may further request documentation by a qualified expert of the rationale for why the proposed forest practices are not likely to increase the probability of movement of a potentially unstable slope or landform, as well as any or all components of the geotechnical analysis required under WAC 222-10-030(1)(a)-(c).**



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October 3, 2014

Gretchen Robinson
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1111 Washington Street S.E.
Olympia, Washington 98501
gretchen.robinson@dnr.wa.gov

Dear Ms. Robinson:

Thank you for this opportunity to comment on the Washington State Department of Natural Resources' ("Department") proposed changes to the administrative rules related to information requests for potentially unstable slope or landforms (dated September 22, 2014). The Washington Forest Protection Association ("WFPA") is a forestry trade association representing large and small forest landowners and managers of nearly 4 million acres of productive working timberland located in the coastal and inland regions of Washington State. Our members support rural and urban communities through the sustainable growth and harvest of timber and other forest products for U. S. and international markets.

We greatly value the work and commitment to this process by Department staff and appreciate your willingness to address our concerns. Please take our comments in the spirit that they are offered – to improve this set of proposals. As the draft rule progresses through the official Administrative Procedures Act process, we will continue to comment on subsequent proposals.

As WFPA understands that the general intent of the rule is to clarify the Department's existing administrative authority to require information in the approval process for a forest practice activity (See, WAC 222-20-010). The rule's intent is specifically outlined in the Preproposal Statement of Inquiry (CR 101; dated May 21, 2014):

- To "clarify applicant expectations about additional geotechnical information on Forest Practices Applications (FPAs) that DNR may require where unstable slopes and landforms exist in and around the areas of the FPA."

- To “ensure that additional geologic information conforms to appropriate technological and professional standards needed to help DNR assess threats to public safety and appropriately classify these FPAs.”

Further, under the Forest Practices Act, rulemaking proposals that address substantive policy or procedural changes to regulations for unstable slopes must follow the adaptive management process. This process requires CMER to submit a report to TFW Policy, for TFW Policy to review the report and make a recommendation to the Forest Practices Board, and ultimately draft the petition for rule-making.

WFPA provides the following suggestions to ensure that the draft rule stays within the stated rule-making intent, does not stray into the jurisdiction of the adaptive management process, and does not result in unintended consequences. The specific language suggestions refer to the attached marked-up version of the draft rule.

Page 2, line 43, after “department.” add the following: “If an application or notification indicates that the landowner or timber owner is also the operator, or an operator signed the application, no notice need be given regarding any change in subcontractors or similar independent contractors working under the supervision of the operator of record.”

Rationale: This change duplicates language from (6) which relieves operators of record or landowner/operators from the notifying the department if subcontractors are changed.

Page 3, line 26, replace “in or around” with “on or adjacent”

Rationale: This language makes the terms consistent for the draft rule, the Board Manual and the Forest Practices Application Slope Stability Form.

Page 3, line 27, expand the sentence to clarify that the Department has the authority to request additional information, including, if necessary, geologic information prepared by a qualified expert, in order to classify an application.

Rationale: Broadens the language allowing the Department to ask for information which may include geologic information. For example, the Department may ask for additional maps which should not be considered geologic information prepared by a qualified expert.

Page 3, line 29, add: “Depending on the extent and type of information requested, documentation may be provided by memo, letter, field verification, geotechnical report or other form. Nothing in this section is intended to require preparation of a geologic report if the department determines that other forms of information are sufficient to appropriately classify an application.”

Rationale: Clarifies that information may be provided in a variety of ways and that geotech reports are not required if another form satisfies the Department’s needs.

Page 3, line 29, add: “Information provided by a landowner in response to a request for information by the department will be used to assist the department in classifying the application; however, a request by the department for additional information shall not be evidence of appropriate classification.”

Rationale: Clarifies that the Department’s action to request information does not result in an automatic classification decision.

Page 3, line 30, replace “it was determined that the proposed forest practices will not cause or contribute to movement of” with “the proposed forest practice construction or harvest activities were evaluated in relation to”

Rationale: This language clarifies that the intent of the information request – to understand how the activities were evaluated in light of a potentially unstable slope or landform – without inappropriately incorporating classification criteria. The language also makes this section consistent with 222-10-030 which only relates to construction or harvest activities.

In closing, WFPA looks forward to continued work with you on these draft rules. If you have questions or comments, please do not hesitate to contact me.

Sincerely,



Karen Terwilleger
Senior Director for Forest and Environmental Policy

1 **WAC 222-10-030 *SEPA policies for potentially unstable slopes and landforms.**

2 In addition to SEPA policies established elsewhere in this chapter, the following policies apply to
3 forest practices described in WAC 222-16-050 (1)(d) relating to construction or harvest on
4 potentially unstable slopes or landforms.

- 5 (1) In order to determine whether such forest practices are likely to have a probable
6 significant adverse impact, and therefore require an environmental impact statement,
7 the applicant must submit the following additional information, prepared by a
8 qualified expert as defined in subsection (5) of this section. The qualified expert must
9 describe the potentially unstable landforms in and around the application site, and
10 analyze:
- 11 (a) The likelihood that the proposed forest practices will cause movement on
12 the potentially unstable slopes or landforms, or contribute to further
13 movement of a potentially unstable slope or landform;
 - 14 (b) The likelihood of delivery of sediment or debris to any public resources, or in a
15 manner that would threaten public safety; and
 - 16 (c) Any possible mitigation for the identified hazards and risks.
- 17 (2) The department's threshold determination will include an evaluation of whether the
18 proposed forest practices:
- 19 (a) Are likely to increase the probability of a mass movement on or near the site;
 - 20 (b) Would deliver sediment or debris to a public resource or would deliver
21 sediment or debris in a manner that would threaten public safety; and
 - 22 (c) Such movement and delivery are likely to cause significant adverse impacts.
23 If the department determines that (a), (b) and (c) of this subsection are likely to occur,
24 then the forest practice is likely to have a probable significant adverse impact.
- 25 (3) The department will evaluate the proposal, using appropriate expertise and in
26 consultation with other affected agencies and Indian tribes.
- 27 (4) Specific mitigation measures or conditions must be designed to avoid accelerating rates
28 and magnitudes of mass wasting that could deliver sediment or debris to a public
29 resource or could deliver sediment or debris in a manner that would threaten public
30 safety.
- 31 (5) Qualified expert for the purposes of this section ~~and for~~ reanalysis of watershed
32 analysis mass wasting prescriptions under WAC 222-22-030, and preparation of
33 requested geologic information under WAC 222-20-010(9), means a person licensed
34 under chapter 18.220 RCW as either an engineering geologist or as a hydrogeologist
35 (if the site warrants hydrologist expertise), with at least three years of field experience
36 in the evaluation of relevant problems in forested lands.

37 **WAC 222-20-010 Applications and notifications - Policy.**

- 38 (1) **No Class II, III or IV forest practices** shall be commenced or continued unless the
39 department has received a notification for Class II forest practices, or approved an
40 application for Class III or IV forest practices pursuant to the act. Where the time limit
41 for the department to act on the application has expired, and none of the conditions in
42 WAC 222-20-020(1) exist, the operation may commence. (NOTE: OTHER LAWS
43 AND RULES AND/OR PERMIT REQUIREMENTS MAY APPLY. SEE CHAPTER
44 222-50 WAC.)

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- 1 (2) **The department shall** prescribe the form and contents of ~~the~~ notifications and
2 application ~~s. which~~ The department shall specify ~~what~~ the information ~~is needed~~ required
3 for a notification, and the information required for the department to approve or
4 disapprove ~~the~~ application.
- 5 (3) **Except as provided in subsection (4) of this section, applications and notifications**
6 **shall be signed** by the landowner, the timber owner, and the operator, ~~or the operator and~~
7 ~~accompanied by a consent form signed by the timber owner and the landowner. A~~
8 ~~consent form may be another document if it is signed by the landowner(s) and it contains~~
9 ~~a statement acknowledging that he/she is familiar with the Forest Practices Act, including~~
10 ~~the provisions dealing with conversion to another use (RCW 76.09.060(3)).~~
- 11 (4) In lieu of a landowner's signature, where the timber rights have been transferred by deed
12 to a perpetual owner who is different from the forest landowner, the owner of perpetual
13 timber rights may sign a forest practices application or notification for operations not
14 converting to another use and the statement of intent not to convert for a set period of
15 time. The holder of perpetual timber rights shall serve the signed forest practices
16 application or notification and the signed statement of intent on the forest landowner.
17 The forest practices application shall not be considered complete until the holder of
18 perpetual timber rights has submitted evidence acceptable to the department that such
19 service has occurred.
- 20 (5) **Where an application** for a conversion is not signed by the landowner ~~or accompanied~~
21 ~~by a consent form, as outlined in subsection (3) of this section,~~ the department shall not
22 approve the application. Applications and notifications for the development or
23 maintenance of utility rights of way shall not be considered to be conversions.
- 24 (6) **Transfer of the** approved application or notification to a new landowner, timber owner
25 or operator requires written notice by the former landowner or timber owner to the
26 department and should include the original application or notification number. This
27 written notice shall be in a form acceptable to the department and shall contain an
28 affirmation signed by the new landowner, timber owner, or operator, as applicable, that
29 he/she agrees to be bound by all conditions on the approved application or notification.
30 In the case of a transfer of an application previously approved without the landowner's
31 signature the new timber owner or operator must submit a bond securing compliance with
32 the requirements of the forest practices rules as determined necessary by the department.
33 If an application or notification indicates that the landowner or timber owner is also the
34 operator, or an operator signed the application, no notice need be given regarding any
35 change in subcontractors or similar independent contractors working under the
36 supervision of the operator of record.
- 37 (7) **The landowner or timber owner must provide notice of hiring or change of operator**
38 **to the department within forty-eight hours of the change.** The department shall promptly
39 notify the landowner if the operator is subject to a notice of intent to disapprove under
40 WAC 222-46-070. Once notified, the landowner will not permit the operator, who is
41 subject to a notice of intent to disapprove, to conduct the forest practices specified in the
42 application or notification, or any other forest practices until such notice of intent to
43 disapprove is removed by the department. If an application or notification indicates that the
landowner or timber owner is also the operator, or an operator signed the application, no
notice need be given regarding any change in subcontractors or similar independent
contractors working under the supervision of the operator of record.

Comment [K1]: Duplicates language in (6) clarifying that operators or landowner/operators are not required to report changes in subcontractors.

1 (78) **Applications and notifications**, if complete, will be considered officially received on the
2 date and time shown on any registered or certified mail receipt, or the written receipt
3 given at the time of personal delivery, or at the time of receipt by general mail delivery.
4 The department will immediately provide a dated receipt to the applicant. Applications or
5 notifications that are not complete, or are inaccurate will not be considered officially
6 received until the applicant furnishes the necessary information to complete the
7 application.

- 8 (a) A review statement from the U.S. Forest Service that evaluates compliance of the
9 forest practices with the Columbia River Gorge National Scenic Area Act
10 (CRGNSA) special management area guidelines is necessary information for an
11 application or notification within the CRGNSA special management area. The
12 review statement requirement shall be waived if the applicant can demonstrate the
13 U.S. Forest Service received a complete plan application and failed to act within
14 forty-five days.
- 15 (b) A complete environmental checklist (WAC 197-11-315) is necessary information
16 for all Class IV applications.
- 17 (c) A local governmental entity clearing and/or grading permit is necessary
18 information for all Class IV applications on lands that will be converted to a use
19 other than commercial timber operations if the local governmental entity has
20 jurisdiction and has an ordinance requiring such permit.
- 21 (d) A checklist road maintenance and abandonment plan is necessary information for
22 all small forest landowners' applications or notifications for timber harvest
23 (including salvage), unless exempt under WAC 222-24-0511, or unless the
24 application is a small forest landowner long-term application which requires a
25 roads assessment.

26 **(9) Where a potentially unstable slope or landform is on or adjacent to in or around the
area of an**

27 **application, the department may require the landowner to provide additional information,
including, if necessary, geologic**
28 **information prepared by a qualified expert, in order to classify the application**
29 **appropriately. Depending on the extent and type of information requested, documentation
may be provided by memo, letter, field verification, geotechnical report or other form.
Nothing in this section is intended to require preparation of a geologic report if the
department determines that other forms of information are sufficient to appropriately
classify an application. Information provided by a landowner in response to a request for
information by the department will be used to assist the department in classifying the
application; however, a request by the department for additional information shall not be
evidence of appropriate classification.**

30 **(a) This geologic information shall document how the proposed forest practice
construction or harvest activities were evaluated in relation to it was determined that the
proposed
forest practices will not cause or contribute to movement of the potentially unstable
slope or landform.**

31 (b) "Qualified expert" is defined in WAC 222-10-030.

32 (c) "Potentially unstable slope or landform" means one of the following (see board
33 manual section 16 for descriptions):
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35

Comment [K2]: For consistency, use the phrase from Board Manual and Slope Stability Form.

Comment [K3]: Broadens the statement to clarify that DNR has the authority to ask for additional information which may include geologic information.

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Comment [K4]: Clarifies that information may be provided in a variety of ways and that geotech reports are not required if another form satisfies DNR's needs.

Comment [K5]: Clarifies that DNR action to request information does not imply an automatic classification decision.

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Comment [K6]: Makes this section consistent with 222-10-030 which only relates to construction or harvest.

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- (i) Inner gorges, convergent headwalls, or bedrock hollows with slopes steeper than thirty-five degrees (seventy percent);
- (ii) Toes of deep-seated landslides, with slopes steeper than thirty-three degrees (sixty-five percent);
- (iii) Groundwater recharge areas for glacial deep-seated landslides;
- (iv) Outer edges of meander bends along valley walls or high terraces of an unconfined meandering stream; or
- (v) Any areas containing features indicating the presence of potential slope instability which cumulatively indicate the presence of unstable slopes.

1 ~~(8) An operator's name, if known, must be included on any forest practices application or~~
2 ~~notification. The landowner or timber owner must provide notice of hiring or change of~~
3 ~~operator to the department within forty eight hours. The department shall promptly~~
4 ~~notify the landowner if the operator is subject to a notice of intent to disapprove under~~
5 ~~WAC 222-46-070. Once notified, the landowner will not permit the operator, who is~~
6 ~~subject to a notice of intent to disapprove, to conduct the forest practices specified in the~~
7 ~~application or notification, or any other forest practices until such notice of intent to~~
8 ~~disapprove is removed by the department.~~

9 (910) **Financial assurances** may be required by the department prior to the approval of any
10 future forest practices application or notification to an operator or landowner under the
11 provisions of WAC 222-46-090.
12

DRAFT