

Chapter 222-46 WAC

CONSULTATION AND ENFORCEMENT

WACs in this chapter were in effect 7/2001 except some have been amended since 7/2001. The effective dates of the amended WACs are shown after the WAC headings.

WAC

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WAC 222-46-010 Policy--Enforcement. It is the policy of the act and the board to encourage informal, practical, result-oriented resolution of alleged violations and actions needed to prevent damage to public resources. It is also the policy of the act and the board to provide, consistent with the principles of due process, effective procedures for enforcement. It is the policy of the board to use a progressive approach to enforcement, and civil penalties should be one of the least used enforcement mechanisms; such an approach usually begins with consultation and voluntary efforts to achieve compliance while generally reserving civil penalties to more serious infractions. This part of these regulations provides the following enforcement procedures: Informal conferences; notices to comply; stop work orders; corrective actions by the department; civil penalties; injunctions and other civil judicial relief; and criminal penalties. Civil penalties shall be appropriate to the violation or its potential to damage public resources.

WAC 222-46-012 Representatives on inspections. In connection with any watershed analysis, any review of a pending application by an interdisciplinary team appointed by the department, any compliance studies, any effectiveness monitoring, or other research that has been agreed to by a landowner, the department will invite representatives of other agencies necessary to provide specific expertise to resolve issues that have been raised, tribes, and interest groups to accompany a department representative and, at the landowner's election, the landowner, on any such inspections. Reasonable efforts must be made by the department to notify the landowner of the persons being invited onto the property and the purposes for which they are being invited.

WAC 222-46-015 Enforcement within the CRGNSA special management area. The department shall administer and enforce the forest practices regulations, including the requirement that the CRGNSA guidelines apply to all forest practices in the SMA, in cooperation with the U.S. Forest Service and the Columbia River Gorge commission.

WAC 222-46-020 Informal conferences. *[Effective 12/22/08]*

- (1) **Opportunity mandatory.** The department shall afford the operator and/or a designated representative reasonable opportunities to discuss proposed enforcement actions at an informal conference prior to taking further enforcement action, unless the department determines that there may be imminent damages to the public resource. Informal conferences may be used at any stage in enforcement proceedings, except that the department may refuse to conduct informal conferences with respect to any matter then pending before the appeals board or a court.
- (2) **Reports required.** Department personnel in attendance at informal conferences shall keep written notes of the date and place of the conference, the persons in attendance, the subject matter discussed, and any decisions reached with respect to further enforcement action. Copies of the conference notes shall be forwarded to the landowner and the timber owner.
- (3) **Records available.** Copies of written notes shall be sent to each participant in the conference, be kept in the department files until one year after final action on the application involved, and be open to public inspection.
- (4) **Local governmental entity conditions.** If the proposed enforcement actions involve conditions imposed pursuant to WAC 222-20-040(3), then the local governmental entity shall be involved in the informal conference.

WAC 222-46-030 Notice to comply. *[Effective 12/16/10]*

If a violation, a deviation, material damage or potential for material damage to a public resource has occurred and the department determines that a stop work order is unnecessary, then the department shall issue and serve upon the operator and/or landowner a notice.

- (1) The notice shall clearly set forth:
 - (a) **The specific** nature, extent, and time of failure to comply with the approved application; or identifying the damage or potential damage; and/or
 - (b) The relevant provisions of the Forest Practices Act or of the forest practices rules relating thereto;
 - (c) **The right** of the operator, landowner, or timber owner to a hearing before the department; and
 - (d) **The specific** course of action ordered by the department to be followed by the operator to correct such failure to comply and to prevent, correct and/or compensate for material damage to public resources which resulted from any violation, unauthorized deviation, or willful or negligent disregard for potential damage to a public resource; and/or those courses of action necessary to prevent continuing damage to public resources where the damage is resulting from the forest practice activities but has not resulted from any violation, unauthorized deviation, or negligence.
- (2) **Local governmental entity conditions.** If the notice to comply involves a condition imposed pursuant to WAC 222-20-040(3), then the specific course of action ordered by the department shall include a requirement that the operator obtain approval of the local governmental entity of the action to be taken.
- (3) **The department** shall mail a copy of the notice to comply to the forest landowner and the timber owner at the addresses shown on the application, showing the date of service upon the operator. The department shall also mail a copy to the local governmental entity if a condition imposed pursuant to WAC 222-20-040(3) is involved.
- (4) **Such notice to comply shall become a final order** of the department: Provided, That no direct appeal to the appeals board will be allowed from such final order. Such operator shall undertake the course of action so ordered by the department unless, within fifteen days after

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

WAC 222-46-040 Stop work orders. *[Effective 12/16/10]*

- (1) **The department** shall have the authority to serve upon an operator a stop work order which shall be a final order of the department if:
 - (a) There is any violation of the provisions of the Forest Practices Act or these rules; or
 - (b) There is a deviation from the approved application; or
 - (c) Immediate action is necessary to prevent continuation of or to avoid material damage to a public resource.
- (2) **The stop work order** shall set forth:
 - (a) The specific nature, extent, and time of the violation, deviation, damage, or potential damage;
 - (b) An order to stop all work connected with the violation, deviation, damage, or potential damage;
 - (c) The specific course of action needed to correct such violation or deviation or to prevent damage and to correct and/or compensate for damage to public resources which has resulted from any violation, unauthorized deviation, or willful or negligent disregard for potential damage to a public resource. The stop work order shall also set forth those courses of action necessary to prevent continuing damage to public resources where the damage is resulting from the forest practices activities but has not resulted from any violation, unauthorized deviation, or negligence. If the stop work order involves a condition imposed pursuant to WAC 222-20-040(3), then the specific course of action ordered by the department shall include a requirement that the operator obtain approval of the local governmental entity of the action to be taken.
 - (d) The stop work order shall also set forth the right of the operator to a hearing before the appeals board.
- (3) The department shall immediately file a copy of such order with the appeals board and mail a copy thereof to the timber owner and forest landowner at the addresses shown on the application. The department shall also mail a copy to the local governmental entity if a condition imposed pursuant to WAC 222-20-040(3) is involved.
- (4) The operator, timber owner, or forest landowner may commence an appeal to the appeals

board within thirty days from the date of receipt of the order by the operator. If such appeal is commenced, a hearing shall be held not more than twenty days after copies of the notice of appeal were filed with the appeals board. Such proceeding shall be a contested case within the meaning of chapter 34.05 RCW.

- (5) The operator shall comply with the order of the department immediately upon being served, but the appeals board if requested shall have authority to continue or discontinue in whole or in part the order of the department under such conditions as it may impose pending the outcome of the proceeding.

WAC 222-46-050 Corrective action.

(1) **Normal time schedule.**

- (a) **Written notice.** If an operator fails to undertake and complete any course of action with respect to a forest practice, as required by a final order of the department or a final decision of the appeals board or any court pursuant to RCW 76.09.080 and 76.09.090 of the Forest Practices Act, the department may determine the cost thereof and give written notice of such cost to the operator, the timber owner and the owner of the forest land upon or in connection with which such forest practice was being conducted.
- (b) **Failure to act.** If such operator, timber owner, or forest landowner fails within 30 days after such notice is given to undertake such course of action, or having undertaken such course of action fails to complete it within a reasonable time as set forth by the department, the department may expend any funds available to undertake and complete such course of action and such operator, timber owner, and forest landowner shall be jointly and severally liable for the actual, direct cost thereof, but in no case more than the amount set forth in the notice from the department.
- (c) **Failure to pay.** If not paid within 60 days after the department completes such course of action and notifies such forest landowner in writing of the amount due, such amount shall become a lien on such forest land and the department may collect such amount in the same manner provided in chapter 60.04 RCW for mechanics' liens.

- (2) **Immediate corrective action.** When the operator has failed to obey a stop work order issued under the provisions of RCW 76.09.080, the department may take immediate action to prevent continuation of or avoid material damage to public resources. If a final order or decision fixes liability with the operator, timber owner, or forest landowner, they shall be jointly and severally liable for such emergency costs which may be collected in the manner provided for in RCW 76.09.120.

WAC 222-46-060 Civil penalties. *[Effective 12/16/10]*

- (1) **Amount of penalty.** Every person who violates any provisions of RCW 76.09.010 through 76.09.280 or of the forest practices rules adopted pursuant thereto, or who converts forest land to a use other than commercial timber operation within three years after completion of the forest practice without the consent of the county, city, or town, shall be subject to a penalty in an amount of not more than ten thousand dollars for each such violation. Each and every such violation shall be a separate and distinct violation. In case of a failure to comply with a stop work order, every day's continuance thereafter shall be a separate and distinct violation.
- (2) **Penalty assessments** shall consider the following:
 - (a) Repairability of the adverse effect from the violation;
 - (b) Whether the violation of the act or rules was intentional;
 - (c) Cooperation with the department;

- (d) Previous violation history;
 - (e) Severity of the impact or the potential for material damage to public resources; and
 - (f) The extent to which a penalty to be imposed on a forest landowner for a forest practices violation committed by another should be reduced because the owner was unaware of the violation and did not receive substantial economic benefits from the violation.
- (3) **Calculation of penalty.** The department shall evaluate any violation to determine if a civil penalty is warranted. When penalties are to be assessed they shall be calculated using the following process:
- (a) Determine the base penalty; see WAC 222-46-065.
 - (b) The penalty may be adjusted using factors specific to the incident and the site. The following additional factors will be independently considered and added to the base penalty to calculate the civil penalty:
 - (i) **Repairability:**
Repairability shall be based on the length of time natural restoration or implementation of a restoration plan will take and whether repair can be achieved. The penalty will be substantially increased when natural restoration will not occur within three years and the damage cannot be effectively corrected. For this factor, up to double the base penalty may be added to the penalty.
 - (ii) **Intention:**
In making a determination of intent, the department shall consider, but not be limited to, the following considerations: The foreseeability of the violation; whether precautions were taken to avoid the violation; whether an informal conference or enforcement action was served on the violator prior to the violation. For this factor, up to double the base penalty may be added to the penalty.
 - (iii) **Cooperation:**
The department shall consider whether the violator did or did not make any attempt to correct the problem. Timeliness of action(s) and/or ignoring or evading agency contacts or directives shall determine if the penalty shall be increased. For this factor, up to double the base penalty may be added to the penalty.
 - (iv) **Previous violation(s):**
The department shall consider whether the violator has previous violations of a forest practices rule or regulation as documented in an enforcement action. The department may consider company organizations and assignment of operational responsibilities when evaluating previous violations. A history of violations with adverse impacts or potential for adverse impacts or that shows a pattern of ignoring the rules or the act, shall result in a substantially larger penalty.
Enforcement actions for the purposes of this section shall include notices to comply, stop work orders, civil penalties, and criminal citations when those enforcement actions are associated with forest practices violations. For this factor, up to quadruple the base penalty may be added to the penalty.
 - (v) **Severity:**
The department shall adjust the penalty based on the extent and magnitude of the damage or potential damage to public resources. For this factor, up to quadruple the base penalty may be added to the penalty.
 - (vi) **Landowner involvement:**
If in the opinion of the department, the landowner exercised reasonable prudence in the development of timber sale contracts or supervision of the forest practices

- operations, was unaware of the forest practices violation, and the landowner received no substantial economic benefit from the violation, then the landowner generally would not be assessed a civil penalty.
- (c) In accordance with RCW 76.09.170, the penalty may not exceed ten thousand dollars for each and every violation.
- (d) The department shall determine whether all or a portion of the penalty should be assessed against the operator, landowner, and/or timber owner. The department should consider the responsible party, the degree of control, the sophistication of the party and whether different parties conducted different violations.
- (4) **Other participants.** Every person who through an act of commission or omission procures, aids or abets in the violation shall be considered to have violated the provisions of this section and shall be subject to the penalty provided for in this section.
- (5) **Government employees.** No penalty shall be imposed under this section upon any governmental official, an employee of any governmental department, agency, or entity, or a member of any board created by the act for any act or omission in his/her duties in the administration of the act or of these rules.
- (6) **Written notice.** The penalty shall be imposed by a notice in writing, either by certified mail with return receipt requested or by personal service, to the person incurring the same from the department describing the violation with reasonable particularity.
- (7) **Remission or mitigation.** Within fifteen days after the notice is received, the person incurring the penalty may apply in writing to the supervisor of the department or his or her designee for the remission or mitigation of such penalty. Upon receipt of the application, the department may remit or mitigate the penalty upon whatever terms the department in its discretion deems proper: Provided, That the department deems such remission or mitigation to be in the best interests of carrying out the purposes of the act. The department shall have authority to ascertain the facts regarding all such applications in such reasonable manner and under such rules as they may deem proper. The reviewer may reduce, dismiss or not change the civil penalty.
- (8) **Right of appeal.** Any person incurring any penalty hereunder may appeal the same to the appeals board. Such appeals shall be filed within thirty days after the date of receipt of the penalty unless an application for remission or mitigation is made to the department. When such an application for remission or mitigation is made, such appeals shall be filed within thirty days of receipt of notice from the department setting forth the disposition of the application for remission or mitigation. Concurrently with the filing of any appeal to the appeals board as provided in this section, the appellant shall file a copy of the appeal with the department region from which the penalty was issued and a copy with the office of the attorney general.
- (9) **Penalties due.** The penalty imposed under this section shall become due and payable thirty days after receipt of a notice imposing the same unless application for remission or mitigation is made or an appeal is filed. When such an application for remission or mitigation is made, any penalty incurred under this section shall become due and payable thirty days after receipt of notice setting forth the disposition of such application unless an appeal is filed from such disposition. Whenever an appeal of the penalty incurred is filed, the penalty shall become due and payable only upon completion of all administrative and judicial review proceedings and the issuance of a final order or decision confirming the penalty in whole or in part.
- (10) **Enforcement.** If the amount of any penalty is not paid to the department within thirty days after it becomes due and payable, the attorney general, upon the request of the department,

shall bring an action in the name of the state of Washington in the superior court of Thurston county or of any county in which such violator may do business, to recover such penalty, interest, costs, and attorneys' fees. In all such actions the procedure and rules of evidence shall be the same as an ordinary civil action except as otherwise provided in the Forest Practices Act. In addition to or as an alternative to seeking enforcement of penalties in superior court, the department may bring an action in district court as provided in Title 3 RCW, to collect penalties, interest, costs, and attorneys' fees.

- (11) **Liens.** Penalties imposed under this section for violations associated with a conversion to a use other than commercial timber operation shall be a lien upon the real property of the person assessed the penalty. The department may collect such amounts in the same manner provided in chapter 60.04 RCW for mechanics' liens.
- (12) Any person incurring a penalty is also responsible for the payment of all costs and attorneys' fees incurred with the penalty as well as interest accruing on the unpaid penalty amount.

WAC 222-46-065 Base penalty schedule. All other WAC or RCW violations not specifically mentioned in this list shall have a base penalty of five hundred dollars.

Violations of the following shall have a base penalty of two thousand dollars:

Statute or Rule	Description
WAC 222-20-010 RCW 76.09.050	Operation without an approved forest practices application/notification.
WAC 222-20-010 RCW 76.09.060	Willful misrepresentation of information on the forest practices application/notification.
WAC 222-20-050 RCW 76.09.060	Conversion of land without consent of the county, city or town.
WAC 222-20-040 WAC 222-20-060 RCW 76.09.060	Significant, in the opinion of the department, deviation from an approved forest practices application/notification.

WAC 222-46-070 Injunctions, civil suits, disapprovals. [Effective 12/16/10]

- (1) **The department** may take any necessary action to enforce any final order or final decision.
- (2) (a) The department may disapprove any forest practices application or notification submitted by any person who has failed to comply with a final order or decision as set forth in RCW 76.09.080, 76.09.090, or 76.09.110, or has failed to pay any civil penalties as provided in RCW 76.09.170. This disapproval will last for up to one year from the issuance of a notice of intent to disapprove notifications and applications under this section, or until the violator pays all outstanding civil penalties and complies with all validly issued and outstanding notices to comply and stop work orders, whichever is longer.
- (b) For purposes of this subsection, "validly issued" means a stop work order or notice to comply for which no appeal or request for hearing has been filed; or if appealed, it has not been declared invalid by a final order or decision and all appeals are exhausted.
- (c) The department shall provide written notice of its intent to disapprove future applications or notifications, and shall forward copies of such notice to any affected

landowner, timber owner or operator. The disapproval period shall run from thirty days following the date of actual notice or from the date all appeals, if any, have been exhausted.

- (d) Any person provided notice of intent to disapprove an application or notification may seek review from the appeals board within thirty days of the date of notice.
 - (e) While the notice of intent to disapprove is in effect, the violator(s) may not serve as a person in charge of, be employed by, manage, or otherwise participate to any degree in forest practices.
- (3) **A county** may bring injunctive, declaratory, or other actions for enforcement for forest practices activities within its jurisdiction in the superior court as provided by law against the department, the forest landowner, timber owner or operator to enforce the forest practices regulations or any final order of the department or the appeals board. No civil or criminal penalties shall be imposed for past actions or omissions if such actions or omissions were conducted pursuant to an approval or directive of the department. A county may not commence injunctions, declaratory actions, or other actions for enforcement under this subsection unless the department fails to take appropriate actions after ten days' written notice to the department by the county of a violation of the forest practices rules or final orders of the department or the appeals board.

WAC 222-46-080 Criminal penalty. In addition to the penalties imposed pursuant to RCW 76.09.170 of the act, any person who conducts any forest practice or knowingly aids or abets another in conducting any forest practice in violation of any provisions of RCW 76.09.010 through 76.09.280 or 90.48.420, or these regulations, shall be guilty of a gross misdemeanor and upon conviction thereof shall be punished by a fine of not less than \$100.00 nor more than \$1,000.00, or by imprisonment for a term of not more than 1 year or by both fine and imprisonment for each separate violation. Each day upon which violation occurs shall constitute a separate violation.

WAC 222-46-090 Financial assurances. *[Effective 12/16/10]*

- (1) The purpose in requiring financial assurances is to ensure that the landowner or operator has sufficient resources to cover any penalties and mitigation measures, which might be assessed.
- (2) The department may require financial assurance prior to the conduct of any further forest practices from an operator or landowner who within the preceding three-year period has:
 - (a) Operated without an approved forest practices application, other than an unintentional operation in connection with an approved application outside the approved boundary of such an application;
 - (b) Continued to operate in breach of, or failed to comply with, the terms of an effective stop work order or notice to comply; or
 - (c) Failed to pay any civil or criminal penalty.
- (3) The department must deny any application or notification for failure to submit financial assurances as required.
- (4) In deciding whether to require financial assurances, the department shall consider:
 - (a) The organizational size of the operator or landowner;
 - (b) Whether the violation was self-reported;
 - (c) The cooperation exhibited when the violation was discovered; and
 - (d) Any other factors the department believes indicate that financial assurances are, or are not, warranted.

- (5) When the department determines that a financial assurance is required, a notice will be issued to the landowner or operator with violations listed above. The notice cannot be appealed. The financial assurances will be required with all future forest practices activities submitted within the time frame indicated in the notice. The notice shall include the following:
- (a) A reference to subsection (6) of this section which identifies the criteria for establishing the amount of the financial assurance;
 - (b) The types of financial assurance which can be submitted;
 - (c) The time period during which financial assurances will be required with every future application or notification;
 - (d) A statement that the department must deny any application or notification from a landowner or operator who submits an application or notification without their required financial assurance;
 - (e) A statement that an application or notification can be appealed pursuant to RCW 76.09.205, and the requirement to submit financial assurances may be challenged at that time.
- (6) The amount shall be set by the department within 10 days of receipt of a Class III or IV application, or within 3 days of receipt of a Class II notification. Applicants who have been notified of a financial assurance requirement are encouraged to use the early review process for applications outlined in WAC 222-20-090. In establishing the amount of the financial assurances to be required, the department shall begin with the following base amounts:
- Class II Notifications - \$10,000
 - Class III Applications - \$30,000
 - Class IV General Applications - \$20,000
 - Class IV Special Applications - \$50,000
- The base amounts listed above are **based** on an estimate of the potential for civil penalties, fees and required mitigation that could result from noncompliance with forest practices rules and department directives on forest practices applications **or notifications** of that classification. The base amounts can be increased or decreased depending on application specific factors including, but not limited to, size of the proposed harvest area, miles of new road construction and road maintenance, proximity to water, proximity to unstable soils, proximity to threatened or endangered species, and types of violations committed by the applicant in the past. In addition, the department should consider the risk to the state of the applicant being unable to pay civil penalties or perform required mitigation work. In weighing this risk, the department should consider the applicant's past history of payment to the department, and any other financial information the applicant chooses to submit to the department. The base amount of financial assurance to be required may be increased or decreased depending on the department's assessment of this risk.
- (7) The financial assurance provided shall protect the department and the state from the risk that the landowner or operator may be financially unable to pay civil penalties, fees and/or perform mitigation work required by the department, including mitigation work performed by the department pursuant to RCW 76.09.120, because of violations of the Forest Practices Act or rules. The department may, for any reason, refuse any financial assurance not deemed adequate. The financial assurance provided may be in the following form:
- (a) Bank letter of credit;
 - (b) Cash deposit;
 - (c) Savings account assignment; **or**

- (d) Corporate surety bond executed in favor of the department.
- (8) The department may obtain compensation from a financial assurance whenever the landowner or operator has failed to pay a civil penalty that is due and owing or has failed to complete mitigation as required. Payment for a specific civil penalty or mitigation does not relieve the surety, operator or landowner of financial responsibility for any other civil penalty or mitigation.
- (9) Liability under the financial assurance shall be maintained until all forest practices under the forest practices notification or application issued by the department are completed or until the notification or application expires, and all of the landowner or operator's obligations under the Forest Practices Act and rules are completed to the satisfaction of the department including payment of civil penalties and completion of required mitigation work. Liability under the financial assurance may be released only upon written notification by the department. Notification shall be given upon completion of compliance or acceptance of a substitute financial assurance.
- (10) Financial assurances are estimates only. Nothing in this section shall be construed to limit the department's authority to assess and collect civil penalties and fees and to require mitigation work in amounts that exceed existing financial assurance.