WASHINGTON STATE DEPARTMENT OF
Natural Resources

Washington Department of
FISH and WILDLIFE

June 8, 2011

Dear Stakeholder;

RE: Interim guidance for Forest Practice Application processing for proposals near Bald Eagles

This document serves as program guidance to landowners and other stakeholders from the State of Washington's Department of Natural Resources (DNR) and Department of Fish and Wildlife (WDFW).

The Washington Fish and Wildlife Commission recently approved a rule change for WDFW's WAC 232-12-292 Bald Eagle protection rules. The rule change specifies that rules protecting Bald Eagles are applicable only when the Bald Eagle is listed as a state threatened or endangered species. Since the Bald Eagle is not currently listed, WDFW's rule is not currently applicable. Therefore the exemption provision in DNR's WAC 222-16-080(6)(d) is no longer available for forest practices activities proposed or renewed after May 29, 2011 that contain a Bald Eagle Management Plan from WDFW. This change has an immediate effect on the processing of Forest Practices Application/Notification (FPA) by DNR's region offices. A copy of selected text from the Forest Practices and Bald Eagle rules are attached for your reference.

The following information is provided by DNR
At this time, currently approved FPAs that contain a Bald Eagle Management Plan are still valid.

Below is a summary that describes when a proposal will be processed as a Class IV Special as described in WAC's 222-16-050(1)(b) and 222-16-080. All FPA's that are Class IV Special require an environmental review under the State Environmental Policy Act (SEPA).

1. All harvest, road construction, aerial applications of pesticides or site preparation within 0.5 mile of a nest when operations will take place between Jan 1 and Aug 15 = Class IV Special.

2. All harvest, road construction, aerial applications of pesticides or site preparation within 0.25 mile of a nest when operations will take place at any time of the year = Class IV Special.

3. All harvest, road construction, aerial applications of pesticides or site preparation within 0.25 mile of a communal roosting site when operations will take place at any time of the year = Class IV Special.

4. Site preparation (defined in WAC 222-16-010) noted above includes scarification, slash burning, and activities to remove slash in preparation for tree planting; depending upon the time frame activity occurs, the proposal may be classified as a Class IV Special. See items 1, 2 and 3 above.

5. Applicants cannot renew previously approved FPAs with Bald Eagle Management Plans that have not been through SEPA. The renewal will require a new FPA and a SEPA checklist and will be processed as a Class IV Special.

There are some specific circumstances identified in WAC 222-16-080(6) that provide an exemption from a Class IV Special for critical habitat as identified in WAC 222-16-050(1)(b). These include:

1. A landowner HCP or other conservation agreement that specifically includes Bald Eagles. WAC 222-16-080(6)(a) and (b).

2. A Special Wildlife Management Plan approved by DNR in consultation with WDFW that has been through SEPA. WAC 222-16-080(6)(c)

When submitting an application it is very important to include as much detail about the proposal as possible, such as: planned forest practices, operating periods (time of year) and an illustration or map clearly showing the location of the activity in relationship to the nest or roost site within or adjacent to the FPA to assist in the determination of FPA class.

The following information is provided by WDFW
WDFW is deferring protection of the Bald Eagle to the United States Fish and Wildlife Service (USFWS), unless the species is listed as State Threatened or Endangered. Landowners are encouraged to implement the federal guidelines for the protection of the bald eagle, which can be found at http://www.fws.gov/pacific/eagle. This website also contains information on the Bald and Golden Eagle Protection Act (http://www.fws.gov/pacific/eagle/guidelines/bgepa.html), the encompassing law under which the protection guidelines exist. The law and the guidelines together help landowners protect habitat as well as protect nesting eagles from disturbance.

The current federal guidelines are silent on Bald Eagle communal roost sites identified in WAC 222-16-080(1)(a). Forest landowners considering activities that may affect a communal roost site are encouraged to contact the USFWS. The USFWS provides the following information

relative to communal roost sites:
http://www.fws.gov/pacific/eagle/guidelines/baea_nhstry_snstvty.html

Landowners can find information on location of eagle nest and roost sites at WDFW's new web-based mapping tool 'PHS on the Web' at: http://wdfw.wa.gov/mapping/phs/. Forest landowners are encouraged to use this information as well as the federal information, and contact USFWS relative to appropriate protection for bald eagles.

The DNR and WDFW will be working cooperatively with stakeholders to make recommendations to the Forest Practices Board to amend the Forest Practices Rules (FP rules) regarding Bald Eagles. The guidance contained in this document will remain in effect for the DNR until updated or until the FP rules are updated.

Questions regarding FP rules should be directed to the DNR region office near you.

Questions regarding WDFW Bald Eagle rules should be directed to David Whipple at 360-902-2847 or Greg Schirato at 360-902-2506.

Questions regarding the federal Bald Eagle protection guidelines should be directed to Colleen Stinson at 360-753-9536 or Jim Michaels at 360-753-7767.

Sincerely,

Darin Cramer
Department of Natural Resources
Forest Practices Division Manager

David Whipple
Department of Fish and Wildlife
Forest Policy Coordinator

Enclosures (2)

Selected portions of the Forest Practices rules
Please refer to http://www.dnr.wa.gov/BusinessPermits/Topics/ForestPracticesRules/Pages/fp_rules.aspx for complete rule text.

WAC 222-16-010 – definition of site preparation:
"Site preparation" means those activities associated with the removal of slash in preparing a site for planting and shall include scarification and/or slash burning.

Selected portions of WAC 222-16-050 Classes of forest practices
There are 4 classes of forest practices created by the act. All forest practices (including those in Classes I and II) must be conducted in accordance with the forest practices rules.

(1) **"Class IV - special."** Except as provided in WAC 222-16-051, application to conduct forest practices involving the following circumstances requires an environmental checklist in compliance with the State Environmental Policy Act (SEPA), and SEPA guidelines, as they have been determined to have potential for a substantial impact on the environment. It may be determined that additional information or a detailed environmental statement is required before these forest practices may be conducted.
*(a) Aerial application of pesticides in a manner identified as having the potential for a substantial impact on the environment under WAC 222-16-070 or ground application of a pesticide within a Type A or B wetland.
(b) Specific forest practices listed in WAC 222-16-080 on lands designated as critical habitat (state) of threatened or endangered species.

Selected portions of 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.
(*section of rule text not shown*)
(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 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) A landowner option plan (LOP) for northern spotted owls developed pursuant to WAC 222-16-100(1);

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

(g) 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) 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.

Selected portions of the Department of Fish and Wildlife Rules

WAC 232-12-292 Bald eagle protection rules.
Rule applicability
1.1 The following rules are only applicable and enforceable when the bald eagle is listed under state law as threatened or endangered.

Purpose
2.1 The purpose of these rules is to protect the habitat and thereby maintain the population of the bald eagle so that the species is not classified as threatened, endangered or sensitive in Washington state. This can best be accomplished by promoting cooperative efforts to manage for eagle habitat needs through a process which is sensitive to the landowner goals as well. The following rules are designed to promote such cooperative management.

Authority
3.1 These rules are promulgated pursuant to RCW 77.12.655.

Definitions
4.1 "Communal roost site" means all of the physical features surrounding trees used for night roosting that are important to the suitability of the roost for eagle use. These features include flight corridors, sources of disturbance, trees in which eagles spend the night, trees used for perching during arrival or departure and other trees or physical features, such as hills, ridges, or cliffs that provide wind protection.
4.2 "Cultural activities" means activities conducted to foster the growth of agricultural plants and animals.
4.3 "Department" means department of fish and wildlife.
4.4 "Endangered" means a species which is seriously threatened with extirpation throughout all or a significant portion of its range within Washington.
4.5 "Government entities" means all agencies of federal, state and local governments.
4.6 "Landowner" means any individual, private, partnership, nonprofit, municipal, corporate, city, county, or state agency or entity which exercises control over a bald eagle habitat whether such control is based on legal or equitable title, or which manages or holds in trust land in Washington state.
4.7 "Nest tree" means any tree that contains a bald eagle nest or has contained a nest.
4.8 "Nest site" means all of the physical features surrounding bald eagle nests that are important to normal breeding behavior. These features include alternate and potential nest trees, perch trees, vegetative screening, foraging area, frequently used flight paths, and sources of disturbance. This site is also referred to as the territory defended by a breeding pair of eagles.
4.9 "Perch tree" means a tree that is consistently used by eagles. It is often close to a nest or feeding site and is used for resting, hunting, consumption of prey, mating display and as a sentry post to defend the nest.
4.10 "Predacides" means chemicals used to kill or control problem wildlife.
4.11 "Region" means an ecological/geographic area that forms a unit with respect to eagles, e.g., Hood Canal, lower Columbia River, outer coast and south Puget Sound.
4.12 "Sensitive" means any wildlife species native to the state of Washington that is vulnerable or declining and is likely to become endangered or threatened in a significant portion of its range within the state without cooperative management or removal of threats.
4.13 "Site management plan" means a legal agreement between the department and the landowner for management of a bald eagle nest or roost site. This plan may be a list of conditions on a permit or a more detailed, site-specific plan.
4.14 "Threatened" means a species that could become endangered within Washington without active management or removal of threats.

Applicability and operation
5.1 The department shall make available to other governmental entities, interest groups, landowners and individuals information regarding the location and use pattern of eagle nests and communal roosts.
5.2 The department shall itself and through cooperative efforts (such as memoranda of understandings pursuant to chapter 39.34 RCW) work with other government agencies and organizations to improve the data base for nest and communal roost site activity and productivity and to protect eagle habitats through site management plans.
5.3 The department's goal shall be to identify, catalog and prioritize eagle nest or communal roost sites. The department shall notify permitting agencies of nesting or roost site locations.
5.4 When a landowner applies for a permit for a land-use activity that involves land containing or adjacent to an eagle nest or communal roost site, the permitting agency shall notify the department.

If the department determines that the proposed activity would adversely impact eagle habitat, a site management plan shall be required. The department, a permitting agency, or wildlife biologist may work with the landowner to develop a plan. The department has final approval authority on all plans.

5.5 It is recognized that normal on-going agricultural activities of land preparation, cultivating, planting, harvesting, other cultural activities, grazing and animal-rearing activities in existing facilities do not have significant adverse consequences for eagles and therefore do not require a site management plan. New building construction, conversion of lands from agriculture to other uses, application of predacides and aerial pesticide spraying, may, following a conference with the department, be subject to the site management planning process described in these rules.
5.6 Emergency situations, such as insect infestation of crops, requires immediate action on the site management plan or special permission to address the impending crisis by the department.

Site management plan for bald eagle habitat protection
6.1 The purpose of the site management plan is to provide for the protection of specific bald eagle habitat in such a way as to recognize the special characteristics of the site and the landowner's property rights, goals and pertinent options. To this end, every land owner shall have fair access to the process including available incentives and benefits. Any relevant factor may be considered, including, but not limited to, the following:
6.1.1 The status of the eagle population in the region.
6.1.2 The useful life of the nest or communal roost trees and condition of the surrounding forest; the topography; accessibility and visibility; and existing and alternative flight paths, perch trees, snags and potential alternative nest and communal roost trees.
6.1.3 Eagle behavior and historical use patterns, available food sources, and vulnerability to disturbance.
6.1.4 The surrounding land-use conditions, including degree of development and human use.
6.1.5 Land ownership, landowner ability to manage, and flexibility of available landowner options.
6.1.6 Appropriate and acceptable incentive mechanisms such as conservation easements, transfer or purchase of development rights, leases, mutual covenants, or land trade or purchase.
6.1.7 Published recommendations for eagle habitat protection of other government entities such as the U.S. Fish and Wildlife Service.
6.2 The site management plan may provide for
6.2.1 Tailoring the timing, duration or physical extent of activities to minimize disturbance to the existing eagle habitat and, where appropriate, identifying and taking steps to encourage and create alternative eagle habitat; and
6.2.2 Establishing a periodic review of the plan to monitor whether:
a) The plan requires amendment in response to changing eagle and landowner circumstances
b) The terms of the plan comply with applicable laws and regulations,
c) The parties to the plan are complying with its terms.
6.3 The site management plan may also provide for implementing landowner incentive and compensation mechanisms through which the existing eagle habitat can be maintained or enhanced.

Guidelines for acquisition of bald eagle habitat
7.1 Real property interests may be acquired and agreements entered into which could enhance protection of bald eagle habitat. These include fee simple acquisition, land trades, conservation easements, transfer or purchase of development rights, leases, and mutual covenants. Acquisition shall be dependent upon having a willing seller and a willing buyer. Whatever interest or method of protection is preferable will depend on the particular use and ownership characteristics of a site. In discussing conservation objectives with private or public landowners, the department shall explore with the landowner the variety of protection methods which may be appropriate and available.
7.2 The following criteria and priorities shall be considered by the department when it is contemplating acquiring an interest in a bald eagle habitat.
7.2.1 Site considerations:
a) Relative ecological quality, as compared to similar habitats
b) Ecological viability -- the ability of the habitat and eagle use to persist over time
c) Defensibility -- the existence of site conditions adequate to protect the eagle habitat from unnatural encroachments
d) Manageability -- the ability to manage the site to maintain suitable eagle habitat
e) Proximity to food source
f) Proximity to other protected eagle habitat
g) Proximity to department land or other public land
h) Eagle population density and history of eagle use in the area
i) The natural diversity of native species, plant communities, aquatic types, and geologic features on the site.
7.2.2 Other considerations
a) Ownership
b) Degree of threat
c) Availability of funding
d) Existence of willing donor or seller and prior agency interest
e) Cost

In general, priority shall be given to the most threatened high quality eagle habitats with associated natural values which require the least management.

Resolution of site management plan disputes

8.1 The department and the landowner shall attempt to develop a mutually agreeable site management plan within 30 days of the original notice to the department.

8.2 Should agreement not be reached, the landowner may request an informal settlement conference with the department.

8.3 If the landowner chooses not to use the informal settlement conference process or if resolution is not reached, the department shall within 15 days provide a site management plan to the landowner.

8.4 Upon issuance of a final site management plan, the landowner may initiate a formal appeal of the department's decision. The appeal shall be conducted according to the Administrative Procedure Act, chapter 34.05 RCW and the model rules of procedure, chapter 10-08 WAC.

A request for an appeal shall be in writing and shall be received by the department during office hours within thirty days of the issuance of the final site management plan. Requests for appeal shall be mailed to Department of Fish and Wildlife, 600 Capitol Way N., Olympia, Washington 98501-1091, or hand delivered to 1111 Washington Street S.E., Wildlife Program, Fifth floor. If there is no timely request for an appeal, the site management plan shall be unappealable.

The written request for an appeal shall be plainly labeled as "request for formal appeal" and shall contain the following:

(a) The name, address, and phone number of the person requesting the appeal;

(b) The specific site management plan that the person contests;

(c) The date of the issuance of the site management plan;

(d) Specific relief requested; and

(e) The attorney's name, address, and phone number, if the person is represented by legal counsel.

The appeal may be conducted by the director, the director's designee, or by an administrative law judge (ALJ) appointed by the office of administrative hearings. If conducted by an ALJ, the ALJ shall issue an initial order pursuant to RCW 34.05.461. The director or the director's designee shall review the initial order and enter a final order as provided by RCW 34.05.464.

Penalties

9.1 Failure of a landowner to comply with the processes set forth in these rules or with the provisions of a site management plan approved by the department constitutes a misdemeanor as set forth in RCW 77.15.130.

[Statutory Authority: RCW 77.12.047. 11-10-049 (Order 11-78), § 232-12-292, filed 4/28/11, effective 5/29/11. Statutory Authority: RCW 77.12.047, 77.12.655, 77.12.020. 02-02-062 (Order 01-283), § 232-12-292, filed 12/28/01, effective 1/28/02. Statutory Authority: RCW 77.12.655. 86-21-010 (Order 283), § 232-12-292, filed 10/3/86.]