Forest Practices Board Stream-Related Rulemaking and Board Manual Development

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June 30, 2022

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Introduction

This report provides requested information to the Washington State Legislature regarding the status of Forest Practices Board (Board) consideration of administrative rules and associated technical guidance related to streams and waterbodies under its jurisdiction.

The report was required through a proviso in the 2021-23 biennial operating budget (2021 Engrossed Substitute Senate Bill 5092 Section 310 (25)), which states:

> Within amounts appropriated in this section, the department, acting in its capacity as the agency responsible for implementing Washington state's section 10 permit under the endangered species act for aquatic species, and for ensuring maintenance of clean water act assurances granted by the department of ecology, must report to the legislature by no later than June 30, 2022, on the status of forest practices board activities related to: (a) Permanent water typing rulemaking and associated board manual development and (b) rulemaking and associated board manual development regarding the protection of type N streams.

Summary

This report describes the status of two major Forest Practices Board efforts. The first is *consideration of adoption of a permanent water type system rule that includes establishing division points between segments of watercourses that provide fish habitat and those that do not.* This work is well underway. The Board has received a recommendation from the Water Typing System Board Committee (Committee) on alternatives to address the single remaining unresolved component of the proposed rule: the characteristics of an "anadromous fish floor" (AFF). The AFF is the point in a stream below which anadromous fish (fish that migrate to and from salt water, such as salmon) are presumed to be present and, therefore, where use of electrofishing would be minimized. That recommendation is scheduled to be discussed by the Board in a workshop in late June, and considered for action by the Board at its August 2022 meeting. From the time the Board acts on the AFF recommendation, approximately twenty months will be required to complete the series of rulemaking steps necessary before a new permanent rule could take effect.

The second major Board effort is receiving the findings of, and taking appropriate action on, a number of research studies that *evaluate the effectiveness of existing rules that establish the width and other characteristics of riparian management zone buffers (buffers) required adjacent to perennial watercourses that are not fish habitat (*Np waters*)*. In 2018, the Board decided that action was warranted due to the findings of a research study that showed temperature increases in Type Np streams protected by current rule-required buffers. The Board directed the Timber Fish and Wildlife Policy Committee (Policy) to develop a Type Np buffer recommendation for the Board to minimize or prevent temperature increases in streams protected by rule-required riparian buffers. That recommendation is to be delivered to the Board during August 2022. If the Board accepts the recommendation and decides that rulemaking is warranted, Board staff will need twenty-six months to complete the series of rulemaking steps necessary before a new permanent rule can be put into effect.

Background

The Role of the Forest Practices Board

The Forest Practices Board (Board) is an independent state agency chaired by the Commissioner of Public Lands or designee. The Board was established by the 1974 Forest Practices Act and the rules it adopts are implemented and enforced by the Department of Natural Resources (DNR) Forest Regulation program. The Board's responsibilities include:

- Adopting rules that set standards for forest practices such as timber harvests, pre-commercial thinning, road construction and forest chemical applications.
- Providing a Forest Practices Board Manual as a technical supplement to the rules.

DNR's Forest Regulation Division provides staff support to the Board, including leading development of potential rules and technical guidance.

The Salmon Recovery Act of 1999 (ESHB 2091) directed the Board to adopt rules consistent with the 1999 Forests and Fish Report (FFR), including those for a scientifically-based Adaptive Management Program (AMP) used "… for evaluating the impacts of forest practices on aquatic resources." Revised forest practices rules consistent with ESHB 2091 and the FFR, including the AMP, were adopted by the Board in 2001 (WAC 222-12-045). In support of the AMP, the Board established the Cooperative Monitoring, Evaluation and Research (CMER) Committee to oversee scientific research necessary to determine the effectiveness of current forest practice rules in meeting aquatic and riparian resource targets.

ESHB 2091 also directed the state to seek "federal assurances" from the Environmental Protection Agency (EPA), National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) that the revised rules, including the AMP, were adequate to meet federal Endangered Species Act (ESA) and Clean Water Act (CWA) requirements. The DNR submitted the programmatic Forest Practices Habitat Conservation Plan (FP HCP) in late 2005, and received approval in the form of incidental take permits (ITPs) from NMFS and USFWS in June 2006. Similarly, the Washington Department of Ecology (Ecology), through authority delegated to it by EPA, provided "CWA assurances" upon adoption of the 1999 Salmon Recovery Act by the Legislature. That action was taken with the presumption the revised rules would either meet state water quality standards or put impaired water bodies on a trajectory to meet standards, and it is a key factor for providing landowners with regulatory predictability in the forest practices working environment.

In May 2012, the DNR, Ecology, Forests and Fish Conservation Caucus, and Washington Forest Protection Association reached a settlement to avert litigation over the state's Forest Practices HCP before the statute of limitations ran out to challenge the HCP under the National Environmental Protection Act. The issues addressed in the settlement revolved primarily around covenants not to sue in exchange for clarification of a

minimum program funding level and clearer enforcement language in federal agreements, firm commitments to a schedule of science and adaptive management projects, and an improved collaborative process in evaluating science for implementation (known as the 2012 Settlement Agreement[1]).

The Board approved the CMER Master Project Schedule (MPS) to implement research projects as a result of the 2012 Settlement Agreement. The schedule contains a comprehensive list of projects with budgets and timelines for completion. It is designed to carry out a long-term research plan developed by CMER, as prioritized through recommendations from Policy to the Board. Following public input, the schedule was reviewed and adopted by the Board in May 2015. It has been updated annually since then.

The specific areas ("rule groups") of research included in the MPS are:

- Fish habitat modeling to explore enhancing how the regulatory break between fish- (Type F) and non-fish (Type N) waters is established;
- Effectiveness of stream Type F and stream Type N riparian prescriptions;
- Monitoring to evaluate status and trends for resource conditions across lands covered by the FP HCP;
- Evaluation of landforms regulated as unstable slopes;
- Effectiveness of road best management prescriptions to reduce surface erosion; and
- Timber harvest effects on forested wetlands, remote mapping of wetlands, and effectiveness of wetland buffers.

Status of Permanent Water Typing Rulemaking

One of the Board's primary areas of focus has been the development of a permanent water typing system rule (and associated Board Manual technical guidance) that establishes the dividing point between segments of streams that provide fish habitat and those that do not. This rulemaking effort is directed at addressing the Forests and Fish Report foundational goal for protecting fish habitat. The goal is to reduce reliance on electrofishing to identify the presence of fish, and establish an objective dividing point between fish- and non-fish habitats. Doing this supports the statutory objectives endorsed in the Forests and Fish Report, the Forest Practices Act, and the FP HCP.

Background and Status

In 2016, the Board accepted several Policy consensus recommendations for key elements to be included in the rule language, and directed DNR to file a Pre-Proposal Statement of Inquiry (CR-101). In 2017, the Board agreed to include in the rule additional water delineation methods and a new field protocol– the fish habitat assessment methodology (FHAM) – for delineating the upper extent of fish habitat while reducing electrofishing. The Board also decided that the remaining elements of the water typing system rule would be developed under the Board's direct guidance (rather than through the Board's CMER and Policy committees).

[1] See 2012 Forest Practices Habitat Conservation Plan Annual Report - Appendix 6: the 2012 Settlement Agreement (beginning on page 21).

In early 2018, the Board approved three Potential Habitat Break (PHB) alternatives and two Anadromous Fish Floor (AFF) alternatives for analysis and possible inclusion in the water typing system rule. Later that year, recognizing numerous challenges to making progress on these items, the Board formed a water typing rule sub-committee (Committee) to lead discussions to resolve PHB metrics issues and develop a refined and, ideally, consensus-based AFF alternative. Between 2018 and October 2021, all outstanding issues *other than the AFF alternative* were resolved.

The Board received the Committee's recommendation for an AFF alternative (or alternatives) in May of 2022, and will discuss them at a special meeting in late June 2022. The Board is scheduled to consider taking action at its August 2022 meeting. When the Board does so and reaffirms that all other elements of the water typing system rule are complete, its next step will be to ask DNR to prepare the information packet needed to begin formal rulemaking (through the filing of a Rule Proposal (CR-102)). From the time the Board makes that request, approximately twelve months will be needed to complete the analyses and documents required for the rulemaking packet.[2] After the Board considers the prepared information and votes to file the CR-102, approximately six additional months will be needed for public review and input before a new water typing system rule and associated Board Manual technical guidance could be adopted. During that time, DNR will: conduct public hearings to invite comment on the rule proposal; consider public input and, prepare a concise explanatory statement responding to comments received on the rule proposal. The Board could then take action. Assuming the Board adopts a new rule and files a CR-103, the effective date will be two months later. In summary, the anticipated timeline for completion of the rule is:

- August 2022: Board approves all rule-making elements and directs staff to prepare rulemaking packet;
- August 2023: Board approves a preferred rule alternative and directs staff to file CR-102 to initiate rulemaking;
- February 2024: Board adopts rule;
- April 2024: effective date of the rule.

Status of Rulemaking for Protection of Perennial Non-Fish Watercourses

Another of the Board's top priorities is overseeing completion and then considering of a number of CMER research studies on the MPS that evaluate the effectiveness of riparian management zone buffers rules require be retained adjacent to perennial watercourses that are not fish habitat (Type Np waters). Concerns have been raised that current buffer requirements may not meet federal Clean Water Act standards for temperature. The Board intends to determine whether existing rules need to be adjusted based on the research study results and Policy's recommendation.

[2] The rulemaking packet will include five related documents: draft rule language; draft Board Manual Guidance; Cost/Benefit Analysis; Small Business Economic Analysis; and State Environmental Policy Act analysis.

Background and Status

The 2018 CMER *Type N Experimental Buffer Treatment Project on Hard Rock Lithologies (Phase 1)* (Hard Rock) study demonstrated a slight temperature increase in Type Np waters flowing through forests managed under current forest practices riparian management zone (RMZ) buffers. In May 2019, the Board accepted Policy's recommendation that action was warranted as a result of these findings. It also approved Policy's proposal for developing Type Np RMZ buffer alternatives for inclusion in a new or revised rule, including formation of a Technical Type Np Prescriptions Workgroup (Workgroup) to advise and assist Policy in this effort. The 2019 action plan recognized that five additional CMER Type Np studies needed to be completed to compliment the Hard Rock study and better inform a Type Np buffer rulemaking proposal. Titles and current status of the other studies are:

1. *Buffer Integrity – Shade Effectiveness (Amphibian)*
   This study examined the effects of three levels of shade reduction on stream-associated amphibian density, body condition, and spatial distribution as well as water temperature, primary productivity, literfall and macroinvertebrates. CMER approved the final report in October 2018. Policy, upon receipt of the study in August 2019, recommended that the study findings did not warrant Board action at that time, but that the technical implications and recommendations deserved action by the AMP. Policy also recommended that the study and findings be provided to the Workgroup as a source of information. The Board accepted Policy's recommendations.

2. *Westside Type N Buffer Characteristics, Integrity and Function (BCIF)*
   This project evaluated the effectiveness of the western Washington Type N riparian prescriptions, including survival of buffer leave trees, stand condition and trajectory over time, and changes in riparian functions, including shade, LWD recruitment, and soil disturbance/stream-bank protection. The project's final report was approved by CMER in October 2019 and delivered to Policy. In February 2020, Policy recommended to the Board that the study findings did not warrant action by the Board, but that the findings should be transmitted to the Workgroup for informational purposes. The Board accepted Policy's recommendations at its May 2020 meeting.

3. *Extensive Riparian Status and Trends Temperature Monitoring – Type N/F (Westside and Eastside)*
   This project is intended to develop unbiased estimates of the frequency distribution of Type F/N stream temperatures across FP HCP lands in western Washington. The final report on baseline status was approved by CMER in 2019. In 2022, Policy requested CMER to scope long-term trends monitoring. This is an ongoing effort, and CMER has started discussions on developing a framework for long-term trends monitoring. This project is also intended to provide continuous monitoring of landscape level trends and indicators. It is not, therefore, an effectiveness study that directly informs rule-making concerning Type N buffers.

4. *Type N Experimental Buffer Treatment in Hard Rock Lithology - Phase II Extended Monitoring*
   The second phase of the Hard Rock field experiment continued to assess the effects of clearcut harvesting on Type N basins under three riparian buffer strategies in comparison to unharvested reference basins. The period of extended monitoring was from 2012-2017. Monitoring focused on up to 12 study response variables including stream temperature, riparian stand structure and stream-associated amphibian density. The final report was approved by CMER and delivered to Policy in January 2022. Policy determined that the report warranted action, and that the findings of the report had been addressed through the Workgroup report that was previously presented to Policy. That report is presently in dispute resolution that is scheduled to be completed in August 2022, after which Policy's recommendations will be presented to the Board.

5. *Type N Experimental Buffer Treatment in Soft Rock Lithologies*
   This was a field experiment analogous to the Hard Rock project described above, but was implemented on erodible (Soft Rock) lithologies. The Soft Rock study tested the effects of forest practices rule riparian buffer treatments. The final report for the extended monitoring phase was approved by CMER in 2021 and delivered to Policy in January 2022. Policy determined that the findings warranted action, and that they had been addressed through the Workgroup report previously transmitted to Policy.

Relying on final results from the first three studies listed above and on preliminary results from the remaining two, the Workgroup delivered its final report to Policy in June 2021. At its November 10, 2021 meeting, the Board voted to direct staff to prepare and file a Preproposal Statement of Inquiry (CR-101) related to buffers on Type Np streams. Staff filed the CR-101 with the Code Reviser's Office on November 30, 2021 and it was published in the Washington State Register on December 15, 2021.

The Board is expected to consider acceptance of the Policy recommendations to incorporate the results of the remaining two Np buffer studies into the Type Np buffer alternatives at its August 2022 meeting. Policy is currently in dispute resolution over the timeline for the development of potential Type Np buffers alternatives, but anticipates delivering a recommendation about a Type Np buffer during a special meeting of the Board in October 2022 with the Board's consideration for approval coming during its November 2022 meeting.

Once the Board approves a Type Np buffer recommendation, it will direct DNR to prepare the rule packet[3] in advance of initiating formal rulemaking. It will take about eighteen months to prepare the rulemaking packet. Then, assuming the Board votes to begin formal rulemaking by filing a CR-102, it will take an additional six months for DNR to conduct public hearings and receive public comment; review and respond to the comments received; and prepare a concise explanatory statement. Following that, the Board could make a decision to adopt or not adopt the rule (and associated Board Manual technical guidance). Assuming the Board adopts a new rule and files a CR-103, the new rule will become effective two months later. In summary, the

[3] The rulemaking packet will include five related documents: draft rule language: draft Board Manual Guidance; Cost/Benefit Analysis; Small Business Economic Analysis; and State Environmental Policy Act analysis.

anticipated timeline for completion of the Type Np Water buffer rule is:

- November 2022: Board approves Type Np buffer alternatives and directs staff to prepare rulemaking packet;
- February 2024: Board approvals a preferred rule alternative and directs staff to file CR-102 to initiate rulemaking;
- August 2024: Board adopts a rule;
- October 2024: effective date of the rule.