

Concise Explanatory Statement
In Compliance with RCW 34.05.325(6)
Forest Practices Board

Northern Spotted Owl Habitat Conservation
February 2008

PURPOSE, CONTENT, AND ADOPTION DATE OF RULE

The Forest Practices Board adopted rules in 1996 to protect Northern Spotted Owl habitat. Since that time, there has been a decline in the amount of suitable habitat both outside and inside Spotted Owl Special Emphasis Areas (SOSEAs).

On February 22, 2008 the Board adopted an amendment to the definition of "Northern spotted owl site center" in WAC 222-16-010. The purpose is to ensure that no site center will be decertified until after December 31, 2008 while the Board evaluates future conservation strategies. This is an extension of the moratorium on decertification that began on November 30, 2005 via emergency rule. The subject of this Concise Explanatory Statement is a "permanent" rule which continues the moratorium until December 31, 2008. The rule will be effective on March 29, 2008.

PROPOSED RULE CHANGE

WAC 222-16-010 General definitions.

"Northern spotted owl site center" means:

(1) ~~Until June 30, 2007~~ December 31, 2008, the location of northern spotted owls:

(a) ~~Recorded by the department of fish and wildlife as status 1, 2 or 3 as of November 1, 2005; or~~

(b) ~~Newly discovered, and recorded by the department of fish and wildlife as status 1, 2 or 3 after November 1, 2005.~~

(2) ~~After June 30, 2007~~ December 31, 2008, the location of status 1, 2 or 3 northern spotted owls based on the following definitions:

Status 1: Pair or reproductive - a male and female heard and/or observed in close proximity to each other on the same visit, a female detected on a nest, or one or both adults observed with young.

Status 2: Two birds, pair status unknown - the presence or response of two birds of opposite sex where pair status cannot be determined and where at least one member meets the resident territorial single requirements.

Status 3: Resident territorial single - the presence or response of a single owl within the same general area on three or more occasions within a breeding season with no response by an owl of the opposite sex after a complete survey; or three or more responses over several years (i.e., two responses in year one and one response in year two, for the same general area).

In determining the existence, location, and status of northern spotted owl site centers, the department shall consult with the department of fish and wildlife and use only those sites

documented in substantial compliance with guidelines or protocols and quality control methods established by and available from the department of fish and wildlife.

DIFFERENCES BETWEEN PROPOSED AND FINAL RULE

There is no difference between the proposed rule and the final rule.

SUMMARY OF PUBLIC INVOLVEMENT OPPORTUNITIES FOR PERMANENT RULE

7/5/07	Preproposal Statement of Inquiry (CR-101) published in the Washington State Register.
8/7/07- 9/7/07	Thirty-day review of draft language by counties, WDFW (per RCW 76.09.040(2)), and tribes.
11/15/07	Proposed Rule Making (CR-102) published in Washington State Register.
11/27/07	Distribution of the SEPA checklist and threshold determination
12/12/07	Public hearing, Longview
12/19/07	Public hearing, Port Angeles
1/8/07	Public hearing, Yakima
1/9/07	Due date for public comments

SUMMARY OF PUBLIC COMMENT and RESPONSES BY SUBJECT MATTER

The Board members received all of the comments for review prior to considering rule adoption. 213 oral and written comments were received – 202 in support and 11 in opposition. In addition, two comment letters were received after the due date, one in opposition and one in support, generally mirroring the other comments opposing and supporting the proposal. The remainder of this document is an attempt to characterize the nature of all the comments.

Comments in support of the proposal.

202 citizens sent almost identical comments in support the proposal, adding that the moratorium should not have a sunset date.

The Washington Department of Fish and Wildlife’s comment letter expressed support in extending the moratorium until December 31, 2008 to allow time to evaluate the accuracy of the spotted owl survey protocol, and for the Board to evaluate its current conservation strategy in light of the federal recovery planning effort and current litigation.

Comments in opposition to the proposal.

COMMENT The action can no longer legitimately be considered a temporary moratorium. This penalizes Washington’s private landowners; they must assume the Board won’t allow this moratorium to expire, and cannot plan for future use of their lands.

RESPONSE *This proposal extends the moratorium only through December 31, 2008; it is not a permanent moratorium.*

COMMENT In the Hoh/Clearwater SOSEA federal scientists have identified sites as unlikely to support spotted owls. By changing the rules on decertification, the Board is locking in historical records of circles that ceased to be occupied and are unlikely to become occupied in the future. Private landowners should at the very least be allowed to survey the sites and determine

occupancy before regulatory restriction impacts their forest management. We ask that the Board return to protocol and decertification procedures that allow decertification.

RESPONSE This is the type of information that the Board will be evaluating over the next 10 months, to determine whether and under what circumstances decertification is appropriate. In arriving at these decisions, the Board will consider guidance in the federal northern spotted owl recovery plan as well as new information about the reliability of survey methods.

COMMENT There is no legitimate reason to extend the moratorium, since the Board does not have a factual or legal basis for subjecting the forest practices to SEPA review based on their impact on unoccupied owl habitat.

RESPONSE All spotted owl site centers that trigger SEPA review were, at one time, documented to be occupied by spotted owls, according to standards developed by U.S. Fish & Wildlife Service (USFWS) and the Washington State Department of Fish and Wildlife (WDFW).

COMMENT Under what authority does DNR have to restrict harvest and other activities in areas where there is no recent documentation of spotted owl presence? Landowners should be compensated by the State if land management activities are restricted in an area where there are not any spotted owls present.

RESPONSE DNR administers the rules the Board adopts under RCW 76.09.040(1): "... the board shall adopt forest practices rules [to] establish minimum standards for forest practices . . . forest practices rules shall be administered and enforced by either the department or the local governmental entity . . ." With the sole exception of the Forestry Riparian Easement Program, neither the Board nor DNR has the authority to compensate landowners for economic impacts of any forest practices rule.

COMMENT The federal draft recovery plan should not govern the Board's conduct. The plan doesn't indicate that any spotted owl historic sites (unoccupied habitat) are important for the recovery of the owl.

RESPONSE The federal recovery plan does not govern the Board's conduct. However, there are several conservation questions for which the Board has sought guidance from the recovery plan. The Board will make its own decisions, but feels that those decisions should be made with an awareness of the larger context of recovering the species.

COMMENT It is difficult to see how the Board can justify the burden of a continuing moratorium when recent federal decision documents do not support the Board's decision to treat vacant owl circles as if they were critical for spotted owl recovery.

RESPONSE The draft federal recovery plan emphasizes the importance of habitat within SOSEAs in contributing to the species' recovery. As for outside of SOSEAs, part of the Board's rationale for extending the moratorium on decertification is the concerns that survey methods used to decertify sites may not be reliable. The Board expects to receive new information during the next 10 months that will assist it in determining whether and under what circumstances decertification is appropriate.

COMMENT The proposed extension has questionable return. Instead the Board should concentrate on the effects of the Barred Owl, poor forest health, and the re-introduction of the fisher to the Olympic National Park as impacting the survival of the spotted owl.

RESPONSE The Board will consider all of these factors during the next 10 months in determining whether and under what circumstances decertification is appropriate, and in determining whether any other changes to the forest practices rules should be made.

COMMENT The Board's assertion that a moratorium is needed because of fewer than expected landscape plans, ignores the fact that 2.1 million acres of state and private lands in Washington are now managed under federally approved HCPs. Landscape plans are voluntary and were never intended to operate as a required forest practices permit. Any anticipation of a higher number of such voluntary plans is unreasonable. HCPs take several years and often millions of dollars to obtain. And there is no disciplined process at all for developing a landowner option plan (LOP). Using this as one of the reasons for imposing a moratorium on decertification is effectively punishing private landowners that don't have one in place.

RESPONSE The Board will consider these factors during the next 10 months in determining whether and under what circumstances decertification is appropriate, and in determining whether any other changes to the forest practices rules should be made.

COMMENT The spotted owl habitat on the eastside of the Cascades is the result of past timber harvest and/or fire suppression. It is not historical habitat and is not sustainable. Forest health problems are ravaging these forests and many are prime candidates for catastrophic fires. By depriving landowners of the ability to decertify and subsequently manage certain stands, the effort to preserve unoccupied circles through the moratorium is actually resulting in the destruction of these trees. The Board's SEPA analysis should include the potential adverse effects due to these problems.

RESPONSE Owners of forest lands in poor condition that involve spotted owl sites may propose management for those lands that differs from guidance in the forest practices rules, per WAC 222-16-100 (landowner option plans) and WAC 222-16-105 (cooperative habitat enhancement agreements). Through such plans it may be possible to simultaneously address forest health issues, reduce the risk of catastrophic habitat loss due to wildfire, and provide habitat for spotted owls.

COMMENT Rather than imposing a moratorium on decertifying owl circles, the Board should be working with the Washington Department of Fish and Wildlife (WDFW) on strategies that promote active management that improves forest health beneficial for owls in the future.

RESPONSE Such strategies are being developed as part of federal recovery planning. Board staff is engaged in this process.

COMMENT It is wrong for the Board to regulate the use of lands based on information the Board knows to be incorrect or, at best, unreliable. The moratorium perpetuates the errors in the WDFW database, preventing landowners from offering site-specific corrections to its errors. The Board should be calling for a proactive effort to correct deficiencies in WDFW's database so the State would have a valid foundation for its spotted owl habitat regulations.

RESPONSE As previously mentioned, the Board is concerned with the reliability of survey methods used to determine that sites in the WDFW database are no longer occupied by spotted owls. The Board expects to receive new information during the next 10 months that will assist it in determining whether and under what circumstances decertification is appropriate.

COMMENT Many sites surveyed have not been occupied since the mid-1990s. If and when the moratorium is lifted, will such surveys be valid?

RESPONSE Spotted owl sites may be occupied for many years. According to procedures established by USFWS and WDFW, a site surveyed in the mid-1990s is assumed to be occupied until reliable methods have been employed to demonstrate that the site is no longer occupied by spotted owls.

COMMENT The Board has found that suitable habitat within SOSEAs is declining, and thus similar habitat outside the SOSEAs must be maintained. DNR and the Board should examine what can be done to address this problem inside, not outside SOSEAs.

RESPONSE The Board has not found that habitat outside SOSEAs must be maintained. The Board is considering whether any changes to the forest practices rules should be made to conserve spotted owl habitat.

Economic Analysis

COMMENT The economic impact of a moratorium with an indefinite termination date should have been analyzed. That is effectively what the Board has put in place by repeatedly extending the existing moratorium.

RESPONSE The Board's proposal extends the moratorium on decertification from April 1, 2008 to December 31, 2008; that is the action that was analyzed.

COMMENT The economic analysis should consider the economic impact of a three-year moratorium, not a piecemeal assessment of impacts.

RESPONSE The requirements for agencies to analyze the economic impacts of a rule proposal come from the Administrative Procedure Act and the Regulatory Fairness Act. These laws limit the analysis to permanent rule proposals. The economic impacts of the Board's rule establishing a moratorium with a sunset date of June 30, 2007 were analyzed prior to its adoption. The Board's current proposal extends the moratorium on decertification from April 1, 2008 to December 31, 2008; that is the action that was analyzed.

COMMENT The value of protecting owls is based on an old (1993) willingness to pay study, inconsistent with a recent poll among Washington voters which shows they don't believe future harvest will help recover spotted owls.

RESPONSE The 1993 study was the most relevant of any studies that have estimated values for protecting the Northern Spotted Owl or its habitat. But, as the analysis describes, there are factors that may affect applicability of that study to the current rule proposal.

COMMENT Many of the owl circles in the state are not in old-growth, yet the economic analysis uses an old-growth value methodology. The analysis assumes that if the moratorium is continued, the benefit will be an old-growth forest.

RESPONSE The economic analysis does not assume the benefit will be an old growth forest. It acknowledges that the referenced willingness-to-pay study was the most applicable of the few studies available. The economic analysis cautioned that there are a number of factors that could have an effect on its transferability (i.e., over- or under-estimation) to the Board's rule proposal. One of those factors was the difference in habitat valued in the willingness-to-pay study and the varied habitat of the spotted owl in Washington.

COMMENT The economic analysis does not appear to include the additional value of lost timber jobs and services, multiplier jobs, and the lost taxes to local, state and federal agencies.

RESPONSE It did conclude that small business jobs lost statewide from this proposal would be negligible. DNR's standard method is to use landowner costs and revenue statistics in its economic analyses. Secondary impacts such as lost timber jobs are subject to substitution effects, such as acquiring timber from other sources; these are difficult to estimate.