WASHINGTON STATE DEPARTMENT OF
Natural Resources
Peter Goldmark - Commissioner of Public Lands

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April 25, 2011

TO: Forest Practices Board

FROM: Sherri Felix, Policy Analyst SF
Forest Practices Division

SUBJECT: WAC 222-20-120 Notice of Forest Practices to Affected Indian Tribes - Request for 30-Day Review

The Timber/Fish/Wildlife (TFW) Cultural Resources Committee (Committee) has reached consensus on draft rule language for WAC 222-20-120, Notice of Forest Practices to Affected Indian Tribes. Therefore, I will request approval at your May 10 meeting to advance this rule making to 30-day review by the counties, the Washington Department of Fish and Wildlife, and the tribes.

At the Board's May 2010 meeting, staff was directed to begin the rule making process by filing a *Preproposal Statement of Inquiry* (CR-101) with the Office of the Code Reviser. That action notified the public of a possible rule making on this rule, as required by the Administrative Procedure Act. Thirty day review is required by the Forest Practices Act pursuant to RCW 76.09.040(2).

The Committee's recommended draft language is intended to clarify ambiguous terminology and resolve issues with the required landowner-tribe meetings. The Committee worked through a number of concerns by tribes, landowners, and the department. To reach this consensus language, the Committee utilized concepts from the Cultural Resources Protection and Management Plan, forest practices application processing situations shared by those inside and outside the regular Committee participant group, and processes used by other organizations.

Also, the department recommends a correction to WAC 222-30-021 (1)(c)(ii), western Washington riparian management zone clumping strategy, to reflect the Board's 2008 historic sites rulemaking. Clumping strategies for cultural resources are based on the Class IV-special rule for cultural resources. This correction simply replaces old Class IV-special language with the Class IV-special language adopted in 2008.

Please note: In your Board packet is background on WAC 222-20-120 provided by the Committee co-chairs, Jeffrey Thomas and Peter Heide. This background is a snapshot of the history of this rule from the TFW Agreement to the present.

I look forward to discussing the draft language at your May 10 meeting. Should you have any questions in the meantime, please contact me at 360-902-1446 or sherri.felix@dnr.wa.gov .

SF/
Attachment

Forest Practices Board
Notice of FP to Affected Indian Tribes Rule Making
Proposed Rule for 30-day Review
May 2011

WAC 222-20-120 Notice of forest practices to affected Indian tribes.

(1) The department shall notify affected Indian tribes of all applications in geographic areas of ~~concern to~~interest that have been identified by such tribes, including those ~~involving~~ areas that may contain cultural resources~~, identified by the tribes~~.

(2) Where an application ~~involves~~ is within a tribe's geographic area of interest and contains cultural resources the landowner, at the tribe's discretion, shall meet with the affected tribe(s) prior to the application decision due date with the objective of agreeing on a plan for protecting the archaeological or cultural value. ~~The department may condition the application in accordance with the plan.~~

(3) ~~Affected Indian tribes shall determine whether plans for protection of cultural resources will be forwarded to the department of archaeological and historic preservation (DAHP).~~ The department will consider the requirements in subsection (2) complete if prior to the application decision due date:

(a) The landowner meets with the tribe(s) and notifies the department that a meeting took place and whether or not there is agreement on a plan. The department shall confirm the landowner's information with the tribe(s); or

(b) The department receives written notice from the tribe(s) that the tribe(s) is declining a meeting with the landowner; or

(c) The tribe(s) does not respond to the landowner's attempts to meet and the landowner provides to the department:

(i) written documentation of telephone or e-mail attempts to meet with the tribe's designated cultural resources contact for forest practices, and

(ii) a copy of a certified letter with a signed return receipt addressed to the tribe's cultural resources contact for forest practices requesting a meeting with the tribe; or

(d) The department receives other acceptable documentation.

(4) The department may condition the application in accordance with the plan.

WAC 222-30-021 *Western Washington riparian management zones.

These rules apply to all typed waters on forest land in Western Washington, except as provided in WAC 222-30-023. RMZs are measured horizontally from the outer edge of the bankfull width or channel migration zone, whichever is greater, and extend to the limits as described in this section. See board manual section 7 for riparian design and layout guidelines.

*(1) **Western Washington RMZs for Type S and F Waters** have three zones: The core zone is nearest to the water, the inner zone is the middle zone, and the outer zone is furthest from the water. (See definitions in WAC 222-16-010.) RMZ dimensions vary depending on the site class of the land, the management harvest option, and the bankfull width of the stream. See tables for management options 1 and 2 below.

None of the limitations on harvest in each of the three zones listed below will preclude or limit the construction and maintenance of roads for the purpose of crossing streams in WAC 222-24-030 and 222-24-050, or the creation and use of yarding corridors in WAC 222-30-060(1).

The shade requirements in WAC 222-30-040 must be met regardless of harvest opportunities provided in the inner zone RMZ rules. See board manual section 1.

(a) **Core zones.** No timber harvest or construction is allowed in the core zone except operations related to forest roads as detailed in subsection (1) of this section. Any trees cut for or damaged by yarding corridors in the core zone must be left on the site. Any trees cut as a result of road construction to cross a stream may be removed from the site, unless used as part of a large woody debris placement strategy or as needed to reach stand requirements.

(b) **Inner zones.** Forest practices in the inner zone must be conducted in such a way as to meet or exceed stand requirements to achieve the goal in WAC 222-30-010(2). The width of the inner zone is determined by site class, bankfull width, and management option. Timber harvest in this zone must be consistent with the stand requirements in order to reach the desired future condition targets.

. . .

(c) **Outer zones.** Timber harvest in the outer zone must leave twenty riparian leave trees per acre after harvest. **"Outer zone riparian leave trees"** are trees that must be left after harvest in the outer zone in Western Washington. Riparian leave trees must be left uncut throughout all future harvests:

Outer zone riparian leave tree requirements

Application	**Leave tree spacing**	**Tree species**	**Minimum dbh required**
Outer zone	Dispersed	Conifer	12" dbh or greater
Outer zone	Clumped	Conifer	12" dbh or greater
Protection of sensitive Features	Clumped	Trees representative of the overstory including both hardwood and conifer	8" dbh or greater

The twenty riparian leave trees to be left can be reduced in number under the circumstances delineated in (c)(iv) of this subsection. The riparian leave trees must be left on the landscape according to one of the following two strategies. A third strategy is available to landowners who agree to a LWD placement plan.

(i) **Dispersal strategy.** Riparian leave trees, which means conifer species with a diameter measured at breast height (dbh) of twelve inches or greater, must be left dispersed approximately evenly throughout the outer zone. If riparian leave trees of twelve inches dbh or greater are not available, then the next largest conifers must be left. If conifers are not present, riparian leave trees must be left according to the clumping strategy in subsection (ii) below.

(ii) **Clumping strategy.** Riparian leave trees must be left clumped in the following way:

(A) Clump trees in or around one or more of the following **sensitive features** to the extent available within the outer zone. When clumping around sensitive features, riparian leave trees must be eight inches dbh or greater and representative of the overstory canopy trees in or around the sensitive feature and may include both hardwood and conifer species. Sensitive features are:

(I) Seeps and springs;

(II) Forested wetlands;

(III) Topographic locations (and orientation) from which leave trees currently on the site will be delivered to the water;

(IV) Areas where riparian leave trees may provide windthrow protection;

(V) Small unstable, or potentially unstable, slopes not of sufficient area to be detected by other site evaluations. See WAC 222-16-050 (1)(d).

(VI) Archaeological sites or ~~historical~~ historic archaeological resources as defined in RCW 27.53.030;

(VII) Historic sites ~~registered with~~eligible for listing on the National Register of Historic Places or the Washington Heritage Register as determined by the Washington state department of archaeology and historic preservation. See WAC 222-16-050 (1)(~~g~~f); or

(VII~~I~~) Sites containing evidence of Native American cairns, graves or glyptic records as provided for in chapters 27.44 and 27.53 RCW. See WAC 222-16-050 (1)(f).

(B) If sensitive features are not present, then clumps must be well distributed throughout the outer zone and the leave trees must be of conifer species with a dbh of twelve inches or greater. When placing clumps, the applicant will consider operational and biological concerns. Tree counts must be satisfied regardless of the presence of stream-adjacent parallel roads in the outer zone.

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April 15, 2011

MEMORANDUM

To: Forest Practices Board

FROM: Timber/Fish/Wildlife Cultural Resources Committee Co-Chairs

Jeffrey P. Thomas, Puyallup Tribe of Indians

Peter Heide, Washington Forest Protection Association

SUBJECT: WAC 222-20-120 Rule Language Revisions Proposal – Background Document

The Timber/Fish/Wildlife (TFW) Cultural Resources Committee (Committee) is pleased to provide a copy of the document entitled "Background for the proposed changes to WAC 222-20-120 Notification to Tribes" to the Forest Practices Board.

This document is a general document that has been prepared by the Committee as an accompaniment to the "WAC 222-20-120 Notice of forest practices to affected Indian tribes" rule-making proposal that is otherwise being requested through departmental staff as being approved by the Board for 30-day review at the May 10, 2011 Board meeting (as per the requirements of the Forest Practices Act).

We look forward to your May 10, 2011 meeting and answering any questions you may have. In the meantime, please do not hesitate to contact us:

jeffrey.thomas@puyalluptribe.com and (253) 680-5565/office

pheide@wfpa.org and (360)352-1500

Enc.

Background for the proposed changes to WAC 222-20-120 Notification to Tribes
April 19, 2011

WAC 222-20-120 (Notice of forest practices to affected Indian tribes) is a small, obscure paragraph in rule Chapter 20, known as Application and Notification. Its origin is the February 1987 Timber/Fish/Wildlife Agreement Final Report (TFW). In the TFW agreement DNR committed to upgrading the TRAX[1] system with information on archaeological and cultural resources. The tribes agreed, at their option, to provide information to DNR on the general location of cultural resource sites important to the tribe so that cross checking the location of forest practices application with TRAX would alert DNR to make forest practices applicants and affected tribes aware of the potential activity that may impact a site or cultural location.

The parties to the TFW agreement agreed that landowners submitting an FPA in a location that coincided with a TRAX "hit' for archaeological or cultural resource would be required "to meet with the affected tribe with the objective of developing a plan for protecting the archaeological /cultural values." Other elements of this chapter of the agreement addressed the role of the Office of Archaeology and Historic Preservation[2] and DNR's conditioning responsibility with regard to protection plans prepared by the tribe and the landowner.

In November 1987, after nine public hearings, the Forest Practices Board adopted the TFW rule package placing much of the Timber/Fish/Wildlife agreement into forest practices rules including Section 222-20-120, and soon afterwards the TFW Cultural/Archaeological Steering Committee was initiated to address cultural resources issues.

During the years following the TFW rule adoption, few tribes opted to provide DNR with general locations or any specific information on where in the landscape archaeological or cultural resources of concerns were present. However, using GIS technology, the Yakama Nation developed a predictive spatial model to identify areas that were most likely to contain significant archaeological remains. The model led to a regional process for identifying FPAs that trigger the landowner/tribe meeting requirement of WAC 222-20-120. The Yakama TFW staff, with the help of tribal elders, is also able to use the regional WAC 222-20-120 process to address culturally important sites that are not recorded as public data.

Eventually, DNR Forest Practices Division made the policy decision that tribal interest in cultural resource issues extended to the full area identified by the tribe's representatives in his or her Forest Practices Application Review System (FPARS) profile for forest practices review. These areas can be very large and are usually not specific to cultural or archaeological interests of the tribe.
The WAC 222-20-120 rule came up indirectly in the April 1999 Forests and Fish Report as an agreement by the parties to *"complete a cultural resources plan to address relationships between landowners and affected tribes and resolution of issues when cultural resources concerns arise in the course of forest practices planning or permitting."* In response, the

[1] The TRAX system, now replaced by Forest Practices Application Review System, contains sensitive sites and other information that is important to administering the Washington Forest Practices system.
[2] OAHP is now the Department of Archaeology and Historic Preservation (DAHP)

TFW Cultural Resource Committee developed the Cultural Resources Protection and Management Plan (CRPMP) presented to the Forest Practices Board (Board) in July of 2003. Appendix C of the CRPMP contains a recommendation to DNR for refining the implementation of WAC 222-20-120.

The Forests and Fish Report and subsequent Forests and Fish Rule package adopted in 2001 are the basis for the Forest Practices Habitat Conservation Plan (FPHCP). In 2006, the FPHCP was approved by the U. S. Fish and Wildlife Service and NOAA Fisheries. At the same time the State was granted an ESA listed salmon, steelhead and bull trout Incidental Take Permit (ITP) for forestry practices conducted under the forest practices rules. The FPHCP contains a reporting element associated with Section 106 of the National Historic Preservation Act that specifically includes an annual summary report on "landowner/tribal meeting and process improvement pursuant to WAC 222-20-120." This requirement makes support and maintenance of Section 222-20-120 an important element of FPHCP.

In January of 2009, dAVe burlingame, the cultural resource specialist for the Cowlitz Indian Tribe, brought concerns to the TFW Cultural Resources Committee on the language and administration of WAC 222-20-120. The Cowlitz Tribe had concerns about being perceived as a "regulator" by forest practices applicants confronted by this rule. The Tribe was further concerned about the use of the term "shall" in referring to a meeting between the landowner and an affected tribe. "Shall" implies that a tribe is subject to the state rule; a position that is in conflict with tribal sovereignty. The Tribe's letter also expressed concerns about the cost to landowners of complying with potential tribal requests for cultural resource surveys as part of a potential agreement under 222-20-120. Mr. burlingame provided suggestions for modifying the rule and worked with the Committee in several meetings to help craft a recommendation for the Board.

Because of the number of tribes in western Washington, and the broad geographical area of traditional use, tribal representatives often identify forest practices interest areas that overlap. In March of 2010, Steve Griswold of Plum Creek Timber came to the Committee with a concern about not getting a response for a meeting request from a tribe following several attempts to make contact over a cultural resource issue. In the Plum Creek case, a single FPA in the Green River area triggered the requirement to schedule meetings with seven tribes. Mr. Griswold made repeated phone calls to one tribe without a response. He suggested that the rule needed to be changed to identify a reasonable, good faith effort so the DNR could continue to process an FPA.

The TFW Cultural Resources Committee began discussing the need for changes to WAC 222-20-120 as early as April 2008. The issues regarding the rule brought to the Committee by Mr. burlingame and Mr. Griswold focused the Committee's attention on specific problems. Through an iterative process of Committee proposals and Forest Practices Division staff reviews, the TFW Cultural Resources Committee is able to bring the Forest Practices Board a consensus recommendation for changes to WAC 222-20-120.