Recommendations to the Washington Forest Practices Board at its February 12, 2014 Meeting For Providing Further Direction to the Policy Committee on Next-steps in Adoption of Permanent Water Typing Rule

Proposed by the Conservation Caucus

December 23, 2013

PROBLEM STATEMENT:

In 2005, the Forest Practices Board did not adopt as rule the FFR-proposed fish-habitat model (from which existing DNR hydro-layer maps are derived) to determine whether a water body is Type F (fish-bearing) or Type N (non fish-bearing). Instead, the Board decided to maintain reliance on the interim water typing rule (WAC 222-16-031) that prescribes physical channel characteristics to presume fish use and a Type F designation and allows the routine use of "electrofishing" to establish presently unoccupied stream reaches as Type N. Additionally, since the Board did not adopt the Model as "rule", the Board directed Policy to define the break between Type F and Type N waters. Policy has not yet agreed to meet this goal.

The status quo interim water typing rule, however, is not biologically adequate and the Board has a duty to adopt a permanent rule for various reasons, including: (1) on its face, the interim rule does not protect off-channel habitat; (2) the interim rule permits levels of "electrofishing" to exclude presently unoccupied fish habitat at levels that are unacceptable to the USFWS and NOAA Fisheries; (3) the interim rule does not consider as present-day fish habitat that habitat which is likely to be occupied by fish outside the spring/summer electrofishing window; and (4) the interim rule does not consider as habitat stream reaches that are likely to be restored as habitat resulting from improved riparian conditions provided by the FP HCP Type F buffers.

Policy was unable to agree on a goal for a permanent stream typing rule and associated guidance within the timelines provided by the dispute resolution process. The Conservation Caucus believes that while Caucus stakeholders achieved a greater understanding of each other's respective positions on water typing, the slow rate of progress in finding "workarounds" for fundamental differences in perspectives between parties does not merit further investment of time and resources in dispute resolution without clarifying guidance from the Board. To that end, the Policy Committee exhausted all options outlined in their dispute resolution process. Accordingly, the Conservation Caucus respectfully requests the Board's affirmative vote on the following five recommendations.

RECOMMENDATION 1:

> *The Board should direct Policy to develop a permanent water typing rule that identifies fish habitat which is used by fish at any life stage at any time of the year to meet the Stream Typing Resource Objective established*

by TFW and the HCP and promised by the originally-intended permanent water typing rule regardless of whether a model is adopted as rule, i.e., a permanent rule that meets the intent of WAC 222-16-030 to protect all in-channel and off-channel habitat likely to be used by fish.

An *affirmative* vote in support of this Recommendation is required because, on its face, the interim rule does not protect physically connected "off-channel habitat" for smaller streams and rivers (Type 3 Waters) and does not provide the equivalent protection for habitat likely to be used by fish as does WAC 222-16-030, the permanent rule that was never adopted.[1] This Recommendation is consistent with the Board's prior direction to Policy (2006) to define the break between Type F and Type N waters. Doing nothing is not an option.

RECOMMENDATION 2:

The Board should direct Policy to develop a permanent water typing rule whose objective is to identify fish habitat accurately for the purpose of providing "Type F buffers" to fish habitat as defined in WAC 222-16-010 consistent with the concept of "shared risk."[2]

The existing forest practice rules (WAC 222-16-010) define "fish habitat" as "habitat which is used by fish at any life stage at any time of the year including potential habitat likely to be used by fish, which could be recovered by restoration or management and includes off-channel habitat." The FP HCP also defines "fish habitat" in this manner. (See e.g., Schedule L-2). We are asking the Board to clarify that any water typing forest practice regulation, whether model-based or not, must achieve the level of protection set forth in WAC 222-16-010.

RECOMMENDATION 3:

The Board should direct Policy that it need not further define the meaning of "shared risk" beyond that contemplated by the FPHCP[3]*. Policy should develop a permanent stream typing rule that strives to identify as fish-bearing all habitat which is likely to be used by fish with minimal risk of either over- or under- identifying fish habitat, and with approximately equal allocation of this minimal risk. The risk of over- or under-identifying fish habitat and its allocation need not be determined*

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[1] The interim rule (WAC 222-16-031) provides less protection than the permanent rule, WAC 222-16-030, in part because (a) habitat likely to be used by fish in winter may be systematically eliminated through "electrofishing;" (b) no provision is made for potentially-recoverable habitat; (c) habitat above man-made barriers is not protected.

[2] The concept of "shared risk," embraced by the FP HCP, is that no water typing system can be 100% accurate. In identifying whether fish are "likely" to use habitat, the identification of fish habitat may be over-inclusive in some places and under-inclusive in others. *See* "equal error probabilities" language in – NMFS and FWS Biological Opinion and Section 10 Statement of Findings on the Forest Practices HCP at p. 180 (June 5, 2006).

[3].BO on FPHCP at 180.

quantitatively for field-based stream typing methods that do not rely on a statistical model.

The large and small landowners have resisted attempts to define "fish habitat" for purposes of a permanent water typing rule in part because they believe that a site-by-site habitat identification process will over-estimate fish habitat. They evidently prefer a system, such as the Fish Habitat model, which both over- and under-estimates habitat (although, not at 95% accuracy required under WAC 222-16-030) on the grounds that such a system comports with the principle of "shared risk."

The Conservation Caucus subscribes to the concept of "shared risk" to the extent that any method that identifies physical fish habitat must take into account the likelihood of fish occupancy. But we do not believe that the principle of "shared risk" prevents Policy from collaboratively working together to recommend a stream typing system capable of identifying "fish habitat" as it is already defined in rule for purposes of developing a permanent water typing rule.

Because Policy is not clear on this issue, we believe Policy will benefit from the Board's view whether Policy should continue to develop a definition of "fish habitat" or whether the concept of "shared risk" prevents Policy from doing so.

RECOMMENDATION 4:

Direct DNR and Policy to implement further limits or improvements on the use of electrofishing under the current and permanent water typing systems consistent with the recommendations of the U.S. Fish and Wildlife Service and NOAA Fisheries so that WAC 222-16-010 and 222-16-030 are fully implemented.

The Federal Caucus, which issued the Incidental Take Permit, has announced its concerns that the current interim water typing rule permits too much electrofishing. Electrofishing is known to have injurious effects on a large proportion of exposed fish and its application in the spring and summertime is systematically used to designated waters as non-fish bearing Type N waters that meet the physical characteristics of fish habitat in WAC 222-16-031, but which are likely overwintering habitats or habitats recovering from historical degradation. Other caucuses have similarly presented their concerns about the scope of electrofishing. Key reasons for the change toward increased reliance on physical criteria (either current or modified) and use of non-lethal survey methods include:

1) The "take" of either listed or unlisted fish and other aquatic species caused by long-term, widespread use of electrofishing is not covered by the FP HCP;
2) Electrofishing surveys are not appropriate under certain site conditions (degraded habitat and above man-made blockages) and seasons;
3) Electrofishing reflects only spring/summertime fish presence;

4) Current in-channel physical criteria are a more defensible approximation of the extent of fish habitat than electrofishing and can be refined through research.

RECOMMENDATION 5:

Direct DNR staff, in consultation with WDFW, to revise the model-generated stream typing map using a highly detailed hydrography layer constructed from high-resolution LiDAR-derived digital elevation models within a limited geographical area (e.g. WAU – Watershed Administrative Unit) as a pilot study to examine feasibility and outcome of mapping improvements.

There is reason to believe that even if the model-maps are never adopted as a regulatory representation of stream types, that a LIDAR-based model run would provide a substantially better starting point for stream typing efforts as well as other benefits associated with a more accurate depiction of streams as they exist on the ground. This action also addresses FP HCP expectations that the model maps would be regularly updated/revised.