January 10, 2011

MEMORANDUM

TO: Forest Practices Board

FROM: Gretchen Robinson, Natural Resource Specialist
Forest Practices Division, Policy and Services Section

SUBJECT: Forest Biomass Rule Making – Action Requested

On February 8, 2011, I will request the Board's approval to proceed with the Forest Biomass rule making by filing a CR-102 *Proposed Rule Making* with the enclosed rule language. The proposal amends the definition of "forest practice" in WAC 222-16-010 by inserting "or forest biomass" into the lead-in sentence of that definition. The purpose is to make it clear that forest biomass harvest is subject to the same resource protection measures as timber harvest in the forest practices rules.

On November 9, 2010, the Board directed staff to distribute the rule proposal to the Department of Fish and Wildlife, counties and tribes for review and comment. (This is a Forest Practices Act requirement for permanent rule making in RCW 76.09.040(2)). The review took place between November 10 and December 13, and the Board received two comment letters in support of the proposal from the Department of Fish and Wildlife and the Lummi Indian Business Council. Those letters are enclosed.

In the meantime, DNR staff completed a preliminary cost-benefit analysis and a small business economic impact statement (SBEIS) which are combined in the enclosed document entitled "Preliminary Economic Analysis." The SBEIS is filed with the CR-102 and the entire analysis will be available for public review upon request. Staff is also conducting the required SEPA analysis in anticipation of the Board's direction to proceed. The Board will consider the conclusions of these analyses when considering whether to adopt the rule.

If the Board approves filing the CR-102, staff will schedule public hearings to take place in three areas of the state in the spring. There is an opportunity to combine this rule proposal and the Riparian Open Space and Watershed Analysis rule makings in the hearings if the Board approves of staff proceeding with all three rule makings on February 8.

I look forward to seeing you on February 8 and answering any questions you may have.

GR/
Enclosures

FOREST PRACTICES BOARD
February 2010
Forest Biomass Rule Proposal

WAC 222-16-010 Definitions

. . .

"Forest practice" means any activity conducted on or directly pertaining to forest land and relating to growing, harvesting, or processing timber or forest biomass, including but not limited to:

Road and trail construction;
Harvesting, final and intermediate;
Precommercial thinning;
Reforestation;
Fertilization;
Prevention and suppression of diseases and insects;
Salvage of trees; and
Brush control.

""Forest practice" shall not include: Forest species seed orchard operations and intensive forest nursery operations; or preparatory work such as tree marking, surveying and road flagging; or removal or harvest of incidental vegetation from forest lands such as berries, ferns, greenery, mistletoe, herbs, mushrooms, and other products which cannot normally be expected to result in damage to forest soils, timber or public resources.

. . .

State of Washington
Department of Fish and Wildlife

Mailing Address: 600 Capitol Way N, Olympia WA 98501-1091, (360) 902-2200, TDD (360) 902-2207
Main Office Location: Natural Resources Building, 1111 Washington Street SE, Olympia WA

December 13, 2010

Forest Practices Board Rules Coordinator
Department of Natural Resources
Forest Practices Division
P.O. Box 47012
Olympia, WA 98504-7012

SUBJECT: 30-Day Comments on Proposed Biomass Rule

Dear Ms. Anderson:

The Washington Department of Fish and Wildlife (WDFW) has reviewed the proposed rule changes that would add forest biomass to the definition of a forest practice.

We appreciate the stakeholder meetings held by the Department of Natural Resources (DNR). The meetings revealed a very large amount of interest in the removal of forest biomass, both in terms of this particular rule making effort, as well as a keen interest in understanding the larger sustainability issues.

We are supportive of the proposed rule language as a way to ensure the current Forest Practices Rules are followed and complied, and are pleased to know that DNR will add forest biomass removal to the Forest Practices Application. This will provide applicants an appropriate avenue to provide necessary information relative to their operations, and will also allow DNR and stakeholders to review the applications and operations for any public resource protection issues.

WDFW is very interested to participate in the larger ecological sustainability discussions surrounding biomass removal on both sides of the Cascades (i.e. "Phase 2"). In eastern Washington, biomass removal represents an opportunity to provide the necessary components (e.g. economics and industry infrastructure) that could enable forest health issues to be addressed and fish and wildlife habitats to be restored, as well as enhancing rural economies. We look forward to these discussions at the appropriate time, and urge the Forest Practices Board and DNR to closely track forest biomass operations and the growing industry, and to work with stakeholders to identify the appropriate time to initiate "Phase 2" discussions. Related to this, we are very appreciative of Commissioner Goldmark's offer of leadership to start discussions about specific elements to examine and address relative to sustainable biomass removal, and we look forward to the progress report at the February Forest Practices Board meeting.

Thank you very much for the opportunity to provide input to the rule proposal.

Sincerely,

David Whipple
Forest Policy Coordinator

LUMMI INDIAN BUSINESS COUNCIL

2616 KWINA ROAD · BELLINGHAM, WASHINGTON 98226 · (360)384-1489

DEPARTMENT_____ DIRECT NO. _____

DATE RECEIVED
DEC 16 2010
Forest Practices Division

Lummi Natural Resources Department
Office of the Director
2616 Kwina Road
Bellingham, WA 98226-9291

December 12, 2010

Patricia Anderson
Forest Practices Board Rules Coordinator
Washington State Department of Natural Resources
Forest Practices Division
P.O. Box 47012
Olympia, WA 98504-7012
Fax: (360) 902.1428
Email: forest.practicesboard@dnr.wa.gov

Dear Ms. Anderson:

Through this letter, we are responding to your request for comments to three separate sets of proposed amendments to the Forest Practice Rules.

Proposal 1: Amendment of the Rules to include forest biomass in the definition of Forest Practices. We see this addition to the definition of forest practices as a positive step in maintaining the DNR's ability to permit and regulate activities on lands under the state's jurisdiction.

Proposal 2: Amendment of the Rules to Extend the Forest Road Work Completion Date. We have grave reservations over extending the forest road completion date beyond the current date of July 1, 2016. While there are some positive aspects to this proposal, such as the continuing provision for tribal review and input into the RMAP process (with improvements in its implementation), correction of all remaining fish passage barriers by the original completion date, and similar corrections of other worst first conditions, we see merely extending the completion date through amendment of the current rules without additional monitoring and enforcement of existing rules as a serious misstep in resource protection.

To begin with, the concept of even flow throughout the performance period is part of the existing rules, yet the findings in the May, 2010 report from the Staff Work Group to the Road Policy Work Group demonstrate that this concept has not been fully implemented on the ground. In the Northwest region alone, the Staff Work Group reported that over 50% of the Large Forest Land Owners (LFLOs) are significantly behind in completing

the road-related work in their respective Road Maintenance and Abandonment Plans (RMAP).

Furthermore, the legal mechanism for correcting non-compliance with the RMAP work schedules is part of the current rules; however, such provisions are clearly not being enforced, as is evidenced by the current lack of compliance. We do not consider the continuance of this pattern on non-compliance as being acceptable in any way under the current date for completion, much less under an extended one.

Finally, if extensions are going to be granted, then DNR must have the resources and will to monitor compliance with, and enforce, the existing laws and the terms of any extensions to the fullest extent provided. Failing this, no extensions should be granted.

Proposal 3: Amendment of the Rules to provide for Watershed Re-Analysis
Prescriptions developed through Watershed Analysis must never allow less-protective measures for typed waters or other public resources than those provided under the Forest Practice Rules. Further, changes in Forest Practice Rules that subsequently increase protective measures must always supersede any prescriptions whose adoption would otherwise allow the use of lesser measures. At the same time, we recognize that harvest opportunities which would otherwise not exist under the standard rules may still be available through the use of alternate plans. These plans should not supersede prescriptions in cases where the protective measures afforded by prescriptions exceed those in the standard rules.

We hope that these comments are helpful in the formulating the final wording of these proposals and in planning for DNR's future efforts in compliance monitoring, and enforcement. If you have questions or need further information, please contact Gregg Dunphy of my staff. He may be reach via telephone at 360-410-1743, via s-mail at our address, above, or via e-mail at greggd@lummi-nsn.gov. Thank you for soliciting and accepting our input. We look forward to continuing to work together in using and protecting our natural resources.

Sincerely,

Merle B. Jefferson, Director
Lummi Natural Resources Department

PRELIMINARY ECONOMIC ANALYSIS
Forest Practices Board
Rule Making Affecting Forest Biomass Harvest

By Craig Calhoon, Economist
Department of Natural Resources
January 10, 2011

OBJECTIVES

The Forest Practices Board is considering a rule change to make clear and reinforce that harvest of forest biomass is considered to be a forest practice under the Washington forest practices statute, chapter 76.09 RCW, and the forest practices rules in Title 222 WAC.

The Forest Practices Board and the Department of Natural Resources already consider that forest biomass harvest is a forest practice that falls under the authority of the state's forest practices law and regulation. The proposed rule change will ensure that other affected parties will have the same understanding.

The proposed rule change explicitly clarifies that forest biomass harvests are forest practices. It implements RCW 76.09.040 which states, "Where necessary to accomplish the purposes and policies stated in RCW 76.09.010 . . . the board shall adopt forest practices rules ... that ... establish minimum standards for forest practices." Among the purposes and policies stated in Chapter 76.09 RCW is "... that it is in the public interest for public and private commercial forest lands to be managed consistent with sound policies of natural resource protection ..." The intent of the proposed rule change is to ensure that forest biomass harvest is conducted with all the public resource protections (i.e., for soils, water, fish, wildlife, and capital improvements) afforded in chapter 76.09 RCW and Title 222 WAC.

The Board's objective in adding "or forest biomass" to the definition of "forest practice" is to ensure the public's understanding that activities related to forest biomass harvesting and on-site processing are forest practices activities and therefore subject to all of the protections and standards provided through Title 222 WAC.

CONTEXT

The Forest Practices Board is considering this rule change because of the greatly increased interest over the last several years in the use of forest biomass as an alternative energy source. The slash composed of residual branches, needles, and treetops left over from timber harvest operations, once regarded as a waste product, is now being considered a renewable resource for energy production and a new economic opportunity. There has been an increase in the removal of biomass from Washington's forests for energy generating projects as well as for pre-commercial thinning, forest health, and wildfire fuel reduction purposes. There are new players in the emerging forest biomass field who are not part of the forestry industry and who may not be well informed on forestry issues and forest practices laws and regulations. There may also be

parties in the forest industry, including landowners, who are not aware that forest biomass removal is considered to be a forest practice like timber harvest and related forest management activities and as such is subject to the same public resource protections.

Department of Natural Resources (DNR) forest practices staff members have observed an increase in forest biomass removed from Washington's forests. Most landowners and operators are identifying and documenting these activities in their forest practices applications (FPAs), mostly in conjunction with other timber harvest activities. However, DNR field staff members are noting that some forest biomass removal activities are going on unreported and without FPA regulatory review and approval, especially stand-alone operations not conducted along with other forest practices activities.

This could be due to the rules not being clear that activities related to forest biomass harvest and removal are forest practices the same as activities related to timber harvest. The risk under the status quo is that forest landowners and operators will not be aware that the same permitting requirements and natural resource protections apply to these activities as they do activities related to timber harvest.

When a landowner or operator proposes forest practices activities, including forest biomass removal, all of the associated activities must be noted on the FPA. This gives DNR the opportunity to condition applications prior to the activities taking place, and ensure that public resources are protected during and after operations.

PROPOSED RULE

The proposal is to add the words "or forest biomass" to the definition of "forest practice" in WAC 222-16-010 as shown below.

> *WAC 222-16-010 *General definitions*
>
> . . .
>
> ***"Forest practice"*** *means any activity conducted on or directly pertaining to forest land and relating to growing, harvesting, or processing timber* <u>or forest biomass</u>*, including but not limited to:*
>
> *Road and trail construction;*
> *Harvesting, final and intermediate;*
> *Precommercial thinning;*
> *Reforestation;*
> *Fertilization;*
> *Prevention and suppression of diseases and insects;*
> *Salvage of trees; and*
> *Brush control.*
>
> *"Forest practice" shall not include: Forest species seed orchard operations and intensive forest nursery operations; or preparatory work such as tree marking, surveying and road flagging; or removal or harvest of incidental vegetation from forest lands such as berries, ferns, greenery, mistletoe, herbs, mushrooms, and*

other products which cannot normally be expected to result in damage to forest soils, timber or public resources.

. . .

The proposed rule clarifies that activities associated with forest biomass harvest are forest practices activities and as such are required to be included on FPAs.

ASSUMPTIONS

The following assumptions are made in the cost-benefit analysis and the small business impact analysis:

1. There is some level of forest biomass harvest occurring in Washington's forests that is not being reported on FPAs and is therefore being done without FPA review and approval by DNR.
2. There is an increased likelihood and degree of negative impact on public resources resulting from forest biomass harvest activities that occur without DNR forest practices review and approval.
3. Forest biomass harvest is already subject to forest practices regulation, although some forest landowners and operators may not be aware that it is.
4. To the extent the proposed rule change increases awareness, it will increase the amount of information required in FPAs for timber harvest that also include activities associated with forest biomass harvest, and it is likely to increase the number of FPAs for stand-alone forest biomass harvest projects.

COST-BENEFIT ANALYSIS

According to the Administrative Procedure Act (RCW 34.05.328), before adopting rules agencies must complete a cost-benefit analysis to:

- Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented; and
- Determine, after considering alternative versions of the rule, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives of the statute that the rule implements.

Benefits

The intent of the proposed rule is to ensure understanding by the regulated community that activities related to forest biomass harvest are forest practices activities. To the extent the rule increases awareness, it will increase the likelihood that the standards and resource protections provided through forest practices regulation are applied when biomass harvest activities are conducted in the forest environment.

It is not possible to quantify how much biomass harvest is occurring in Washington's forests without approved FPAs. If it is near zero, then the proposed rule change will have little benefit. If it is a significant amount, the rule change will increase resource protection proportionately.

Costs

The subset of the rule-complying community affected by the proposed rule is composed of those parties who are removing forest biomass from Washington's forests without approved FPAs covering this activity. The affected parties do not incur any new costs and are not impacted negatively by the rule change because they are already required to go through FPA approval; they just may not be aware of the legal requirement.

The affected parties may realize a benefit of reduced costs by avoiding enforcement actions and penalties DNR may impose on unreported and unpermitted forest biomass harvest projects.

Comparison of Benefits and Costs

To the extent that there are a significant number of forest biomass harvest operations that are not going through the approval process, and because there are no new costs to the affected parties, there can only be a net benefit from the proposed rule as these activities will now be more likely to come under forest practices review and approval and be afforded the resource protections provided in Washington forest practices laws and rules.

Alternatives to Rule Making and Consequences of Not Adopting the Rule.

The only alternative considered to this rule making is not adopting the rule. Not adopting the proposed rule change could perpetuate any misunderstanding that activities associated with forest biomass harvest are not forest practices and therefore not subject to the protections and standards provided under Title 222 WAC. This could result in harm to forest soils and public resources protected by the Forest Practices Act and rules.

The Board recognizes that there may be a need to further define forest biomass in the forest practices rules and to set standards for what activities related to biomass harvest are acceptable in the forest environment. The Board is considering a subsequent stage of rule making to more specifically address forest biomass harvest, but this is beyond the scope of the proposed rule change.

Least Burdensome Alternative

The Administrative Procedure Act states that agencies shall determine after considering alternative versions of the rule, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives of the statute that the rule implements (RCW 34.05.328(1)(e)).

The Forest Practices Act indicates that, coincident with maintenance of a viable forest products industry, it is important to afford protection to a variety of public resources (RCW 76.09.010).

Not adopting the proposed rule change is not a viable alternative because that would not achieve the general goals and specific objectives of the statute that the rule implements (i.e., public resource protection). Because of its limited scope and because it imposes no new costs on affected parties, it is less burdensome than other potential alternatives, such as creating a new subset of forest practices rules that more specifically address forest biomass harvest.

SMALL BUSINESS IMPACTS

A small business economic impact statement is required by the Regulatory Fairness Act (chapter 19.85 RCW) to consider the impacts on small businesses of administrative rules adopted by state agencies. The statute defines small businesses as those with 50 or fewer employees. To determine whether the proposed rule will have a disproportionate cost impact on small businesses, the impact statement compares the cost of compliance for small business with the cost of compliance for the ten percent of businesses that are the largest businesses required to comply with the proposed rule.

Small Business Analysis

Since there are no new or additional requirements or costs imposed on any members of the regulated community by the proposed rule change, there is no disproportionate cost impact on small businesses.

Reducing Costs for Small Businesses

RCWs 19.85.030 and .040 address an agency's responsibility in rule making to consider how costs may be reduced for small businesses, based on the extent of disproportionate impact on the small businesses. Since there is no impact on costs for any businesses, large or small, there is no disproportionate impact on small businesses.

Estimated Number of Jobs Created or Lost

RCW 19.85.040 (2)(d) requires that the economic analysis include "(a)n estimate of the number of jobs that will be created or lost as the result of compliance with the proposed rule." There is no change in the number of jobs resulting from adopting the proposed rule change because it doesn't affect the level of forest biomass harvest activity.

CONCLUSIONS

The expected benefit of this rule is additional protection for public resources in Washington's forests. There is no cost impact on those who are required to comply with the rule. Therefore it is reasonable to conclude that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative benefits and costs of the proposed rule.

Not adopting the rule is not a viable alternative because that would not achieve the general goals and specific objectives of the statute that the rule implements (i.e., protecting public resources in the forest environment).

The proposed rule is the only alternative considered by the Board. Because of its limited scope and because it imposes no new costs on affected parties, it is less burdensome than other potential alternatives, such as creating a new subset of forest practices rules that more specifically address forest biomass harvest.

A comparison of the estimated potential impact to small businesses and the ten percent of the largest businesses that are required to comply with the rule shows that there is no impact on any businesses and therefore the rule would not disproportionally impact small businesses.

The analysis concludes that the rule will have no impact on overall employment.