January 19, 2011

TO: Forest Practices Board

FROM: Dan Pomerenk, Natural Resource Specialist
Forest Practices Division

SUBJECT: Rule Making Proposal for the Rivers and Habitat Open Space Program

On February 8th I will request the Board's approval to file a CR-102, *Proposed Rule Making*, with the enclosed draft rule language. This will initiate public review of the Rivers and Habitat Open Space Program rule proposal.

In August the Board directed staff to distribute rule language for review by the counties, WDFW, and tribes pursuant to RCW 76.09.040(2). In September the Board received one comment letter from WDFW in support of the proposal. A copy of that letter is enclosed.

The Department has completed a preliminary cost-benefit analysis and a small business economic impact statement. These analyses are combined in the "Preliminary Economic Analysis" document enclosed for your consideration. Staff will not conduct a SEPA analysis on this rule because it meets the categorical exemption of a procedural action and contains no substantive standards respecting the use or modification of the environment (WAC 197-11-800(19)).

I have made a few mostly minor changes to the language we last sent you in August. The more substantive changes are:

1. Inserted a clearer definition to replace an unclear phrase in the definition of "Unacceptable liabilities" found in WAC 222-23-010(2)(c).
2. Replaced an awkward sentence with one that is clearer regarding compensation calculation procedures found in WAC 222-23-020(4).
3. Added a new subsection in WAC 222-23-030 that establishes an appeal procedure specifically for this program.

If the Board approves proceeding with public review of this rule proposal, staff will file the language with the small business economic impact statement and hold public hearings in late March and early April.

The Forest Practice Board Manual Section 18 that shall include guidelines for the modified Rivers and Habitat Open Space Program is currently under development. A Board Manual stakeholder group has been formed and has had several successful meetings. It is anticipated the Board Manual Section 18 will be ready for Board approval when the rule is ready for adoption.

I look forward to answering your questions at the Board meeting on February 8th.

DP/

Enclosures: Rule language proposal for public review
Economic analysis
Comment letter

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

September 13, 2010

Patricia Anderson
Forest Practices Board Rules Coordinator
Department of Natural Resources
Post Office Box 47012
Olympia, Washington 98504-7012

SUBJECT: 30-day Comments for "Riparian Open Space Program" Rule Proposal

Dear Ms. Anderson:

The Washington Department of Fish and Wildlife (WDFW) has reviewed the rule proposal relative to the Riparian Open Space Program. The rule revisions would implement 2009 legislation, expanding the current program to include more channel migration zones as well as Forest Practices Board designated critical habitat for listed wildlife species.

The department is supportive of the rule proposal to expand the applicability of the Riparian Open Space Program. WDFW recognizes the value of protecting important fish and wildlife habitat, particularly for threatened or endangered species, via mechanisms such as conservation easements. These programs can be an effective conservation tool, especially when combined with or when leveraging other conservation efforts and funding mechanisms. They may also provide an incentive for landowners to provide or maintain important habitat.

The department understands this rule proposal will be accompanied by a Forest Practices Board Manual that will outline the prioritization process as well as other program elements. We look forward to assisting with the development of this important program implementation tool.

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

Sincerely,

David Whipple
Forest Policy Coordinator

Forest Practices Board
Riparian Open Space Rule Making
February 2011

WAC 222-10-125 Exemption from RCW 43.21C.030 (2)(c). Decisions pertaining to the following are not subject to any procedural requirements implementing RCW 43.21C.030 (2)(c): Approval of forest road maintenance and abandonment plans, approval of future timber harvest schedules involving east-side clear cuts, acquisitions of conservation easements pertaining to forest lands in the ~~riparian~~ rivers and habitat open space program; and acquisitions of conservation easements pertaining to forest lands in riparian zones under the forest riparian easement program.

WAC 222-12-010 Authority. These forest practices rules are adopted pursuant to chapter 76.09 RCW, RCW 76.13.100 through 76.13.130, and RCW 77.85.180 through 77.85.190. Where necessary to accomplish the purposes and policies stated in the act, the board is authorized to promulgate forest practices rules pursuant to chapter 34.05 RCW and in accordance with the procedures enumerated in the act. These rules establish minimum standards for forest practices, provide procedures for the voluntary development of resource management plans, set forth necessary administrative provisions, establish procedures for the collection and administration of forest practices fees, allow for the development of watershed analyses, foster cooperative relationships and agreements with affected tribes, and establish the ~~riparian~~ rivers and habitat open space program. The board also establishes which forest practices will be included within each class and is authorized to adopt rules under RCW 76.09.055, 76.09.370, and 76.13.120(9).

Promulgation of all forest practices rules shall be accomplished so that compliance with such forest practices rules will achieve compliance with the water quality laws.

Those rules marked with an asterisk (.*) pertain to water quality protection; pursuant to RCW 76.09.040 they can be amended only by agreement between the board and the department of ecology.

Forest practices rules shall be administered and enforced by the department except as otherwise provided in the act. Such rules shall be administered so as to give consideration to all purposes and policies set forth in RCW 76.09.010.

WAC 222-12-090 Forest practices board manual. When approved by the board the manual serves as an advisory technical supplement to these forest practices rules. The department, in cooperation with the departments of fish and wildlife, agriculture, ecology, and such other agencies, affected Indian tribes, or interested parties as may have appropriate expertise, is directed to prepare, and submit to the board for approval, revisions to the forest practices board manual. The manual shall include:

(1) **Method for determination of adequate shade requirements on streams** needed for use with WAC 222-30-040.

(2) Standards for identifying channel migration zones and bankfull channel features.

(3) **Guidelines** for forest roads.

(4) **Guidelines** for clearing slash and debris from Type Np and Ns Waters.

(5) **Guidelines** for landing location and construction.

(6) **Guidelines** for determining acceptable stocking levels.

(7) **Guidelines** for riparian management zones.

(8) **Guidelines** for wetland delineation.

(9) **Guidelines** for wetland replacement or substitution.

(10) A list of nonnative wetland plant species.

(11) The standard methodology for conducting watershed analysis shall specify the quantitative methods, indices of resource conditions, and definitions, for conducting watershed analysis under chapter 222-22 WAC. The methodology shall also include a cultural resource module that shall specify the quantitative and qualitative methods, indices of resource conditions, and guidelines for developing voluntary management strategies for cultural resources. Except for cultural resources, the department, in consultation with Timber/Fish/Wildlife's Cooperative Monitoring, Evaluation and Research Committee (CMER), may make minor modifications to the version of the standard methodology approved by the board. Substantial amendments to the standard methodology requires approval by the board.

(12) **Guidelines** for forest chemicals.

(a) A list of special concerns related to aerial application of pesticides developed under WAC 222-16-070(3).

(b) Guidelines for aerial applications of pesticides and other forest chemicals under chapter 222-38 WAC.

(13) **Guidelines** for determining fish use for the purpose of typing waters under WAC 222-16-031.

(14) **Survey protocol for marbled murrelets.** The Pacific Seabird [Group] survey protocol dated January 6, 2003, and formally [titled] [filed on] *on Methods for Surveying Marbled Murrelets in Forests: A Revised Protocal for Land Management and Research*, shall be used when surveying for marbled murrelets in a stand. Surveys are valid if they were conducted in compliance with the board[-]recognized Pacific Seabird Group survey protocols in effect at the beginning of the season in which the surveys were conducted.

(15) The department shall, in consultation with the department of fish and wildlife, develop **platform protocols** for use by applicants in estimating the number of platforms, and by the department in reviewing and classifying forest practices under WAC 222-16-050. These protocols shall include:

(a) A sampling method to determine platforms per acre in the field;

(b) A method to predict the number of platforms per acre based on information measurable from typical forest inventories. The method shall be derived from regression models or other accepted statistical methodology, and incorporate the best available data; and

(c) Other methods determined to be reliable by the department, in consultation with the department of fish and wildlife.

(16) **Guidelines** for evaluating potentially unstable slopes and landforms.

(17) **Guidelines** for the small forest landowner forestry riparian easement program.

(18) **Guidelines** for ~~riparian~~ rivers and habitat open space program.

(19) **Guidelines** for hardwood conversion.

(20) **Guidelines** for financial assurances.

(21) **Guidelines** for alternate plans.

(22) **Guidelines** for adaptive management program.

(23) **Guidelines** for field protocol to locate mapped divisions between stream types and perennial stream identification.

(24) **Guidelines** for interim modification of bull trout habitat overlay.

(25) **Guidelines** for bull trout presence survey protocol.

(26) **Guidelines** for placement strategy for woody debris in streams.

WAC 222-16-010 .*General definitions.

. . .

"Unconfined ~~avulsing~~ stream" ~~means generally fifth order or larger waters that experience abrupt shifts in channel location, creating a complex flood plain characterized by extensive gravel bars, disturbance species of vegetation of variable age, numerous side channels, wall-based channels, oxbow lakes, and wetland complexes. Many of these streams have dikes and levees that may temporarily or permanently restrict channel movement~~. See WAC 222-23-010 (2).

Chapter 222-23 WAC

~~RIPARIAN~~ RIVERS AND HABITAT OPEN SPACE PROGRAM

WAC 222-23-010 Policy and definitions. (1) Policy. The legislature determined that it is in the public interest to acquire (by purchase or donation) ~~an interest in~~conservation easements on forest lands within unconfined ~~avulsing~~ channel migration zones~~that are offered for acquisition by the landowner, and therefore established a riparian open space program in RCW 76.09.040 to be administered by the department~~ and forest lands containing a critical habitat for threatened or endangered species as designated by the board. The rivers and habitat open space program (formerly known as the riparian open space program), established in RCW 76.09.040, is for these forest lands voluntarily enrolled by the landowner. ~~The purpose of the acquisition is to provide for ecological protection and fisheries enhancement.~~ The department may acquire ~~either the fee interest in or~~ a permanent conservation easement over such lands. The purpose of this program, which will be administered by the department, is to provide for ecological protection and fisheries and wildlife enhancement. This chapter implements the ~~riparian~~ rivers and habitat open space program (hereinafter referred to in this chapter as "program"). In any circumstance where qualifying channel migration zone lands or qualifying critical habitat lands are not acquired by the department through a conservation easement, the landowner may elect to develop a management option for the lands in cooperation with the department, other agencies and affected Indian tribes.

(2) Definitions. ~~As used in this chapter, the~~The following ~~terms shall have the following meanings~~definitions apply to this chapter:

(a) "Qualifying channel migration zone (CMZ) ~~land(s)~~lands~~.~~" means those forest lands located within an unconfined channel migration zone. Qualifying CMZ lands are eligible for easement acquisition if they meet the standards in ~~See~~ WAC 222-23-020(~~1~~5).

(i) An "unconfined channel migration zone" means the area within which the active channel of an unconfined stream is prone to move and where the movement would result in a potential near-term loss of riparian forest adjacent to the stream. A merchantable stand of timber may exist within the zone and is considered a part of the channel migration zone. The unconfined channel migration zone does not include areas that are permanently restricted from channel movement by a dike or levee.

(ii) An "unconfined stream" is generally:

(a) a fifth order or larger water;

(b) less than two percent gradient; and

(c) found in a valley more than four times wider than the bankfull width of the channel.

(b) ~~An "unconfined avulsing channel migration zone" means the area within which the active channel of an unconfined avulsing stream is prone to move and where the movement would result in a~~

~~potential near-term loss of riparian forest adjacent to the stream. Sizeable islands with productive timber may exist within the zone and are considered a part of the channel migration zone. The unconfined avulsing channel migration zone does not include areas that are permanently restricted from channel movement by a dike or levee.~~"Qualifying critical habitat lands" means those forest lands that qualify as one or more of the critical habitats (state) defined in WAC 222-16-080 including forest lands that have existing plans or evaluations described in WAC 222-16-080 (6). Qualifying critical habitat lands are eligible for easement acquisition if they meet the standards in WAC 222-23-020 (5).

(c) ~~An "unconfined avulsing stream" is defined in WAC 222-16-010.~~"Unacceptable liabilities" means exposure to undesirable responsibilities or problems as determined by the department. This includes but is not limited to the presence of hazardous substances on the lands or by other conditions that may create a liability to the department, or that may jeopardize the department's ability to maintain ecological protection, and fisheries and wildlife enhancement of the qualifying lands. Unacceptable liabilities may exist when the applicant is unwilling or unable to provide reasonable indemnification to the department.

(d) "Hazardous substances" includes but is not limited to hazardous substances as defined in RCW 70.102.010(5), and 70.105D.020(10), and solid waste as defined in RCW 70.95.030(23).

(e) "Conservation easement" means a voluntary, legally enforceable land preservation agreement between the landowner and easement holder to permanently limit the type and amount of alteration of identified habitat or CMZ on the subject property while the landowner retains ownership.

WAC 222-23-020 Submitting and processing of applications for the ~~riparian~~ rivers and habitat open space program. (1) ~~Qualifying CMZ land(s). Lands that qualify for the riparian open space program are those lands located within an unconfined avulsing channel migration zone and are, as of the date an application is submitted to the department under this section, identified in records of the applicable county assessor as being classified or designated as forest land under chapter 84.33 RCW or as being subject to current use taxation as forest land under chapter 84.34 RCW. Qualifying CMZ lands may be placed in the riparian open space program whether they represent all or just a portion of the lands within the channel migration zone along a particular stream segment. That is, the lands to be placed in the program may include all of a landowner's lands located within the channel migration zone up to the boundary between that zone and the RMZ core area, or lands to be included may include only a portion of a landowner's lands within an unconfined avulsing channel migration zone of a given stream segment. Likewise, where more than one landowner owns land within the channel migration zone of a given stream segment, any landowner may elect to participate in the riparian open space program without regard to participation of neighboring landowners.~~

~~Land does not qualify for the riparian open space program where the department has determined that:~~

~~(a) The lack of legal access to the land is likely to materially impair the department's ability to administer the riparian open space program with respect to the land;~~

~~(b) All persons having an interest of any description in the land, including, but not limited to, joint tenancy, tenancy in common, holder of easement, or holder of lien or security interest, have not agreed to convey or subordinate such interests to the state to the extent deemed necessary by the state to transfer the fee or easement free of or superior to any such interest;~~

~~(c) The land is subject to unacceptable liabilities as defined in WAC 222-23-020(4); or~~

~~(d) There is any other circumstance making the land unsuitable for fisheries enhancement or~~

~~ecological protection.~~

~~(2)~~ **~~Application~~Rivers and habitat open space application.** An owner or owners of qualifying ~~CMZ~~ lands may apply to the department to place the qualifying CMZ lands or qualifying critical habitat lands within the ~~riparian open space~~ program. ~~Applications for the riparian open space program may, at the landowners' option, be submitted at the same time as a forest practices application for adjoining or nearby forestlands, or may be submitted separately (and without reference to or the requirement of a current forest practices application).~~ The department will accept or reject the program application based on eligibility for an easement acquisition. The application for the ~~riparian open space~~ program shall be in writing on a form provided by the department. ~~and~~ The application shall contain ~~the following~~ information the department determines is necessary to assess whether the land qualifies for the program, as well as the following information (see board manual section 18 for details):

~~(a) Name, address, and telephone number of applicant(s);~~

~~(b) Contact name and telephone number for questions concerning the application;~~

~~(c) Location and description of the land proposed for inclusion in the program, including estimated acreage, a~~

(a) A description of the methods ~~used by~~ the landowner used to ~~determine~~ propose that the land meets the eligibility for easement acquisition criteria ~~is qualifying CMZ land~~ ~~and a map showing the approximate boundary between the channel migration zone and the adjoining RMZ core area (and in situations were the latter is not applicable, a description of the process the landowner used to determine that the qualifying CMZ land is within an unconfined avulsing stream channel migration zone);~~

~~(d) Tax parcel identification number(s) that contain the qualifying CMZ land;~~

~~(e) List of all persons having any right or interest in the land covered by the application for the riparian open space program and a description of such right or interest;~~

~~(f) The stumpage value area and hauling zone in which the qualifying lands lie (see map at WAC 458-40-640).~~

~~(g) A map of the qualifying CMZ land;~~

(~~h~~b) A statement indicating the landowner's desire to place the land covered by the application within the ~~riparian open space~~ program and whether the landowner wishes to ~~convey the qualifying land in fee or convey only~~grant a conservation easement to the state on both land and trees or in trees only;

(~~i~~c) Whether the landowner wishes to receive the statutory compensation for the conveyance or wishes to donate the qualifying ~~CMZ land~~lands;

(~~j~~d) Whether the landowner ~~representative submitting the application~~ is aware of the presence of any hazardous substances on the lands;

~~(k) Description and documentation of the legal and physical access to the land being acquired;~~

~~(l) The type of boundary description proposed by landowner (survey or other description); and~~

~~(m) Any other information DNR determines is necessary to assess whether the land qualifies for the riparian open space program.~~

(e) A statement affirming that the person or persons submitting the application stating they are the landowner and believes that the information contained in the application and its supporting materials is true and complete.

(~~3~~2) **Review and processing of application**. The application process will follow the program funding cycle process described in board manual section 18. ~~Within ninety days of receipt of~~After the department receives a complete and accurate application for the ~~riparian open space~~ program, the department ~~shall preliminarily determine (and advise the applicant) whether lands proposed for the riparian open space program appear to meet the requirements of this chapter and of RCW 76.09.040~~

~~(3) and (4), and, if so, whether there is funding available for the purchase~~ will make a preliminary determination whether the application is eligible for the easement acquisition. This determination is subject to the department's complete review, and subsequent confirmation of all information required for the program and ~~eligibility of the land as~~ identification of qualifying~~for the program~~ lands. ~~If~~ After the preliminary determination ~~is that the land qualifies for the program and if funding is available for the proposed purchase~~of eligibility, ~~then~~ the following shall occur ~~within the ninety days following notice to the landowner of the preliminary determination~~:

(a) The landowner, in cooperation with the department, shall delineate on the ground the boundary line ~~between~~ of the qualifying ~~CMZ~~ lands as indicated in the application; ~~and the RMZ core area; following which,~~

(b) The department shall verify the appropriateness of ~~that~~ the delineation of qualifying lands using the procedure outlined in board manual section 18, ~~determine the standards for the boundary description (i.e., a survey or other),~~ make a final determination whether there are any unacceptable liabilities on the lands proposed for inclusion in the program, and communicate the foregoing to the landowner.

(c) The department will rate, rank, and fund, as described in WAC 222-23-025(1), the eligible applications for each category of qualifying CMZ lands or critical habitat lands and for each funding cycle using a standardized scoring system.

(d) The department will prepare a combined preliminary project priority list, after evaluation and scoring of all applications.

(e) The department will submit the preliminary project priority list to the state legislature for budget consideration.

(f) The department will notify the applicant in writing of the funding decision for their application, subject to available funding from the legislature.

(g) ~~If~~ For those applications determined to be funded, and if the department determines there are no unacceptable liabilities on the lands, the department shall follow the guidelines in WAC 222-23-030 (2 and the landowner shall ~~mark~~enhance the boundary (as verified) using ~~tree tags or other long-term~~ boundary marking methods specified by the department.

(h) For those applications determined to be eligible but not funded, the application will be returned to the applicant. At any time thereafter, the applicant may resubmit the application with or without revision. This resubmitted application will be placed on the next available funding cycle and will be reprioritized under the process described in subsections (c) through (g) above.

(i) For those applications determined to be ineligible for reasons other than funding, the department must notify the landowner of the reason(s) and the application will be rejected.

(j) Once the landowner completes the boundary enhancement required in (2)(g) of this section, the department shall:

(i) Perform a traverse of the boundary of the qualifying lands;

(ii) Conduct and finalize a cruise of the timber on the qualifying lands;

(iii)Determine the statutory compensation to be paid to the landowner;

(iv) Prepare conveyance documents consistent with this chapter; and

(iv) Prepare any other documents necessary for closing and recording the conveyance, including without limitation a real estate excise tax affidavit.

~~(4) Unacceptable liabilities. As used in this section, unacceptable liabilities are created by the presence of hazardous substances on the qualifying CMZ lands or by other condition that creates such a liability to the department that may jeopardize the department's ability to maintain fisheries enhancement or the ecological protection of the qualifying CMZ lands, and with respect to which~~

~~liability the applicant is unwilling or unable to provide reasonable indemnification to the department. If the department finds unacceptable liabilities with respect to qualifying CMZ lands, the department may reject the landowner's application.~~

~~(5) Preparation of conveyance documents. Within ninety days following placement in the field of the long-term boundary between the CMZ and the RMZ core area as provided for in subsection (3) of this section, the following shall occur:~~

~~(a) The landowner shall:~~

~~(i) Traverse the boundary to determine the acreage of the qualifying lands;~~

~~(ii) Either perform a legal land survey or otherwise document the boundaries consistent with the requirements of WAC 222-23-030(3), as applicable; and~~

~~(iii) Prepare a map of the qualifying CMZ lands suitable for recording.~~

~~(b) The department shall:~~

~~(i) Conduct and finalize a cruise of the timber on the qualifying CMZ lands;~~

~~(ii) Determine the statutory compensation to be paid to the landowner;~~

~~(iii) Prepare conveyance documents consistent with this chapter; and~~

~~(iv) Prepare any other documents necessary for closing and recording the conveyance, including without limitation a real estate excise tax affidavit.~~

(~~6~~3) **Timber cruise.** For the purpose of determining the compensation, ~~The~~a timber cruise will be conducted by the department using a cruiser acceptable to the department and the landowner, ~~and~~ using a ~~generally accepted~~ cruise methodology determined by the department and sampling intensity acceptable to both parties. ~~The timber cruise shall measure all trees within the lands to be conveyed that contain measurable log volume and develop all information (species and grade) with respect to those trees necessary to apply the stumpage tables developed by the department of revenue pursuant to RCW 84.33.091; this includes volume by species and grade sufficient to apply the department of revenue stumpage tables in WAC 458-40-640, 458-40-650 and 458-40-660 (1) and (2).~~ The department will provide the cruise data to the landowner~~;~~. ~~within~~ Within thirty days thereafter, the landowner shall advise the department whether the cruise results are acceptable. The landowner or the department may, at their option, perform a check cruise.

(~~7~~4) **Compensation for conveyances.** RCW 76.09.040(3) specifies the compensation the department shall pay for ~~purchases~~ the conveyance of ~~qualifying CMZ lands~~a conservation easement under chapter 222-23 WAC, unless the landowner chooses to donate the ~~property in fee or donate a~~ conservation easement. The department will calculate compensation based on stumpage and land use value tables described in subsections (4) (a) and (b). The tables applied will be those in effect as of the date the complete timber cruise is received by the department for new or resubmitted applications.

(a) ~~Fee interests. For conveyances of fee interests, the department shall pay for both the land value and the timber value, as determined in this subsection. The land value component shall be the acreage of qualifying CMZ lands to be conveyed multiplied by the average per acre value of all commercial forest land in Western Washington or the average for Eastern Washington, whichever average is applicable to the qualifying CMZ lands. The department shall determine the Western and Eastern Washington averages based on the land value tables established by RCW 84.33.120 and revised annually by the department of revenue (see WAC 458-40-540). The timber value component of the compensation shall be based on the cruise volume multiplied by the appropriate department of revenue stumpage values from the stumpage value table for the applicable stumpage value area and hauling distance zone. The stumpage value tables to be applied are those found in WAC 458-40-660(2). Except as provided in (c) of this subsection, the tables applied shall be those in effect as of the date the application under this section is submitted to the department by the landowner.~~

~~(b) Conservation easements. Conservation easements shall be perpetual and not for a term of years.~~ For conveyances of a conservation easement in which the landowner conveys an interest in the trees only, the compensation shall only include the timber value component, as determined ~~as set forth in subsection (7)(a) of this section~~by the cruise volume multiplied by the appropriate stumpage value for timber of the same species shown on the appropriate table used for timber harvest excise tax purposes under RCW 84.33.091.

(b) For conveyances of a conservation easement in which the landowner conveys interests in both land and trees, the compensation shall include the timber value component plus such portion of the land value component as determined just and equitable by the department. The timber value component will be as set forth in subsection (4) (a). The land value component must be the acreage of qualifying lands to be conveyed, multiplied by the average per acre value. The department shall determine the averages based on the land value tables established by RCW 84.33.120 and revised annually by the department of revenue with separate values for western and eastern Washington.

~~(c) Adjustment in compensation. Where the department does not complete its duties as required in subsections (3) through (5) of this section within the required time period or the department is unable to complete the acquisition because of a lack of funds or other reason, the landowner has the option to require that the department recompute the compensation based on the most recently published land value and stumpage value tables.~~

~~(8) Management options. In any circumstance where qualifying CMZ lands are not acquired by the department in fee or through a conservation easement, the landowner may elect to develop a management option for the lands in cooperation with the department, other agencies and affected Indian tribes.~~

(5) Qualifying lands. The lands proposed in an application must include qualifying CMZ lands or qualifying critical habitat lands that are eligible for easement acquisition as follows:

(a)Qualifying lands are lands that, once a complete application, is received, are identified in records of the applicable county assessor as being assessed and taxed either under chapter 84.33 RCW as designated forest land or under chapter 84.34 RCW as current use classification timber land or open space.

(b)Qualifying lands are lands owned by an individual, partnership, corporation or other nongovernmental entity.

(c)Lands do not qualify for the program where the department has determined that:

(i) The lack of access to the land is likely to materially impair the department's ability to administer the program with respect to the land;

(ii) The land is subject to unacceptable liabilities. See WAC 222-23-010(2) (c).

WAC 222-23-025 Priorities for conveyances and funding--Use of lands conveyed. (1) **Priorities for conveyances and funding.** ~~The legislature recognized, in RCW 77.85.180(4), that the adoption of forest practices rules consistent with the forests and fish report will impose substantial burdens on forest landowners. The purpose of this program, which will be administered by the department, is to compensate landowners and provide for ecological protection and fisheries enhancement.~~ The department shall ~~prioritize~~ rate, rank and fund eligible CMZ applications ~~under this section~~ separately from eligible critical habitat applications based on ~~the following criteria (not in priority order): Order of receipt, ecological value (including importance to salmonids, water quality benefits, quality of habitat, site significance, etc.), and immediacy of need. If funding is or becomes unavailable to consummate a conveyance with respect to otherwise qualifying CMZ lands, the application may (at the~~

landowner's option) be kept on file at the department pending the future availability of funding conservation benefits and landowner management options. See board manual section 18 for the rating, ranking and funding details for qualifying lands. The department will consult with representatives of affected Indian tribes, department of fish and wildlife, and department of ecology as necessary for technical expertise. The board will include, in its reports to the legislature required in RCW 76.09.380, a review of this program with recommended amendments, as necessary, to accomplish the goals of this program.

(2) **Use and management of lands and easement interests acquired under riparian rivers and habitat open space program.** Subject to the exceptions set forth in this subsection (or as otherwise provided in the conveyance or easement documents), the lands conveyed or subject to the conservation easements under this chapter shall be managed by the department only in a manner necessary for ecological protection, or and fisheries and wildlife enhancement. The conveyance of lands easements under the riparian open space program shall not create a right of public access to the conveyed landsor across adjoining or other lands owned by the landowner conveying property orgranting an easement under the riparian open space program.

(3) **Transfer of fee or easement interest or management responsibility.** After acquisition of a fee oran easement interest in qualifying CMZ lands, the department may transfer its interest in such lands by a recorded instrument to another state agency, a local governmental entity within which the lands lie, or a private nonprofit nature conservancy corporation (as defined in RCW 64.04.130). Alternatively, the department may contract with one or more of the foregoing entities to exercise the department's management authority over the qualifying CMZ lands. Any such contract will include provisions fully advising the contracting party of the rights of the landowner under this chapter and the conveyance instrument. The department shall notify the landowner of any transfer of its interest in the qualifying CMZ lands or any transfer of management responsibilities over those lands, provided that failure to so notify the landowner shall not affect the validity of the transfer.

WAC 222-23-030 Conveyance forms and procedure. (1) **Fee interest.** Conveyance of a fee interest in qualifying lands shall be by deed with limited warranties. Deeds will include terms reasonably necessary and appropriate to the circumstances of the particular lands involved and shall be in a form acceptable to the department and the landowner. Prior to closing, the landowner shall procure a title report or title history for the lands being conveyed, provided that in the case of qualifying CMZ land being donated to the department, the department shall pay the cost of the report.

(2) **Conservation easement.** Conveyances of a conservation easement shall be through execution by the landowner and the department of a conservation easement in a form acceptable to the department and the landowner. The easement shall be perpetual and not for a term of years. The easement will include terms reasonably necessary and appropriate to the circumstances of the particular lands involved. Prior to closing, the landowner shall procure a litigation guarantee orpreliminary title history insurance report from a title company, provided that in the case of an easement being donated to the department, the department shall pay the cost of the guarantee or other report.

(32) **Description standards.** The description of the qualifying lands being conveyed shall be a legal land survey description orunless the cost of securing the survey would be unreasonable in relation to the value of the lands conveyed. When the department determines, if a survey is need not being be performed, the description shall include the township, range, section, and legal subdivision, and utilize a map at a scale of 1:400 indexed either to one legal land survey point or two geopositional system points plus a GPS traverse of the boundary between the CMZ and the RMZ core area, tied to one legal

~~land survey point or two geopositional system points, or other description~~be in the form that can depict the location of the lands conveyed without relying on verbal evidence, or another form acceptable to the department.

(~~4~~3) **Closing and recording.** Upon execution of the conveyance documents and other documents required for closing, the department shall pay any compensation owed to the landowner and record the conveyance documents. The department shall pay the recording fees. No compensating taxes under chapters 84.33 and 84.34 RCW shall be owed. ~~Any~~ Title insurance premiums and any real estate excise tax owed shall be paid by the landowner conveying ~~the property or~~ easement.

(4) **Internal department of natural resources procedure for review of decisions.** Certain decisions of the department pursuant to this chapter may be appealed to the supervisor of the department or his or her designee. Any person that wishes to appeal final written decisions of the department pertaining to the following procedural determinations: application eligibility, application prioritization, easement valuation, and related decisions made may submit a request for review within thirty days after the date of the department's final written notice of procedural determination. The request for review must identify the issue being raised and provide any supporting documentation. The supervisor will issue a written response within thirty days. The supervisor's written response shall constitute the Department's final decision.

PRELIMINARY ECONOMIC ANALYSIS
Forest Practices Board
Rule Making Affecting Riparian Open Space Program

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OBJECTIVES

The Forest Practices Board is considering a rule change to implement amendments to the Riparian Open Space program made by Substitute Senate Bill (SSB) 5401 in the 2009 legislative session. The Riparian Open Space Program is authorized in the Forest Practices statute, chapter 76.09 RCW, and covered under the forest practices rules in Title 222WAC.

The Board's objective is to make changes to chapter 222-23 WAC as required to bring it into conformance with the legislative changes made to the Riparian Open Space Program as codified in RCW 76.09.040.

CONTEXT

As part of legislation implementing the Forests and Fish Report in 1999, the Legislature added the Riparian Open Space Program to the Forest Practices Act. The program was established to provide landowners compensation for islands of forested lands within unconfined avulsing channel migration zones[1] that could no longer be legally harvested under the new changes to the forest practices laws. The Department of Natural Resources was directed to purchase qualifying riparian lands isolated by river channels (in fee or in a conservation easement interest) in order to dedicate the use of that land for public ecological protection and fisheries enhancement.

To date, DNR has purchased 12 conservation easements under the Riparian Open Space program on 923 acres of qualifying lands for a total amount of approximately $3,592,000. Funding for the program is subject to legislative appropriation specific to the program each biennium. Legislative appropriations to date have exceeded expenditures under the program because it has been difficult for landowner-applicants to meet the requirement that the timbered islands on their

[1]The original Riparian Open Space legislation contained the following definitions:

> "Unconfined avulsing channel migration zone" means the area within which the active channel of an unconfined avulsing stream is prone to move and where the movement would result in a potential near-term loss of riparian forest adjacent to the stream. Sizeable islands with productive timber may exist within the zone.
>
> "Unconfined avulsing stream" means generally fifth order or larger waters that experience abrupt shifts in channel location, creating a complex floodplain characterized by extensive gravel bars, disturbance species of vegetation of variable age, numerous side channels, wall-based channels, oxbow lakes, and wetland complexes.

property were created by avulsion, an abrupt (sudden and perceptible) change in the course of a stream, rather than a gradual and imperceptible one. All the Riparian Open Space acquisitions to date have been by conservation easement because none of the applicants under the program were willing to sell their qualifying land in fee.

SSB 5401 made four major changes to the existing law that established the Riparian Open Space Program:

1. Changed the type of channel migration zone lands eligible for acquisition from "unconfined avulsing channel migration zones" to "unconfined channel migration zones", removing the requirement to provide evidence of avulsion;
2. Expanded the lands eligible for acquisition to include private forest lands that contain critical habitat for threatened or endangered species as designated by the Board, greatly increasing the amount of lands potentially eligible and taking them beyond riparian areas into the larger forested lands of the state;
3. Removed the authority for DNR to purchase fee title interest in eligible lands, allowing acquisition of permanent conservation easements only; and
4. Gave the landowner a choice to convey an interest either in the land (with the trees) or in the trees only (this option was previously authorized by the Board in rule in 2001).

SSB 5401 was introduced on behalf of the Northern Spotted Owl Working Group which was established as a part of the settlement of litigation that concerned habitat for the owl. The group worked to develop incentives for private landowners to support and protect endangered and threatened species on their lands. This bill significantly expands the original Riparian Open Space program by providing a mechanism to compensate landowners for forested lands which cannot be harvested under forest practices rules because they contain critical habitat for a threatened or endangered species.

The amount of compensation to be paid to the landowner for a conservation easement on qualifying lands is determined by applying a cookbook formula multiplying the timber cruise volume on the qualifying land by timber stumpage values established elsewhere in RCW for timber harvest excise tax purposes. If an interest in the land is being conveyed in addition to the trees, compensation includes an additional amount equal to the acreage of the qualifying land multiplied by forest land value tables established elsewhere in RCW and revised annually by the Department of Revenue.

PROPOSED RULE

The changes made in the Riparian Open Space statute by SSB 5401 require several changes to rule language for the program in chapter 222-23 WAC (the four major changes are described above). The first change noted above (dropping "avulsing") will also require a change to a definition in WAC 222-16-010. Forest Practices staff recommends changing the title of chapter 222-23 WAC from "Riparian Open Space Program" to "Rivers and Habitat Open Space Program", which would require changes in WAC 222-10-125, WAC 222-12-010, and WAC 222-12-090 where the title of the program is referenced.

COST-BENEFIT ANALYSIS

According to the Administrative Procedure Act (RCW 34.05.328) 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 changes, in conformance with SSB 5401, is to significantly expand the private forest land base qualifying for compensation under the Riparian Open Space Program. Subject to legislative appropriation, it provides a mechanism for private forest landowners to receive monetary payments for conveying a conservation easement on two new additional types of qualifying lands: 1) any forest lands in "unconfined channel migration zones", not just where avulsion can be proved and 2) forest lands where timber cannot be legally harvested because these lands are deemed more important for protection of habitat for threatened and endangered species. Landowners with such qualifying lands comprise the regulated community and they may elect to apply to convey a conservation easement on their lands and receive compensation under the program.

To date, compensation paid to landowners under the program has averaged approximately $3900 per acre or $300,000 per transaction (on qualifying lands on forested islands in unconfined avulsing channel migration zones). The compensation for qualifying lands anywhere in unconfined channel migration zones is expected to be similar. The compensation for qualifying land containing forested habitat for threatened and endangered species may be higher because of generally higher valued species of trees and older age classes on these lands. The rule changes to implement the statutory changes will certainly result in more acreage that will qualify for compensation. Subject to available funding from the legislature, this may raise the total amount of compensation to be paid under the program.

The amendment to the statute may have the result of providing a greater amount of compensation than intended to landowners with qualifying forested habitat for threatened and endangered species. Some Washington forest lands contain habitat for threatened and endangered species because the timber has not to date been practical or economic to harvest. Other habitat is located on lands, for example on unstable slopes, which cannot currently be legally harvested due to other regulations. By including this timber which is otherwise not economic, practical, and/or legal to harvest in the timber cruise volume used to calculate compensation under the program, landowners could potentially receive compensation for timber that would not or could not be harvested even without the presence of habitat for the threatened and endangered species.

Costs

The costs are minimal to the landowner who elects to convey a conservation easement on qualifying lands and receive compensation under the program. The landowner needs to fill out the application and pay the cost of title insurance and any real estate excise tax due at transaction closing. There may also be tax implications for the landowner to consider.

By conveying away an interest in land, the landowner is giving up part of the "bundle of sticks" in the title to their property and they no longer have full use and enjoyment of their property. The state would then hold an interest in the property, along with the right to access and enter the property, an obligation to monitor its easement interest, and the right to enforce remedies for violations of the terms and conditions of the easement.

Comparison of Benefits and Costs

Since conveying a conservation easement and receiving compensation is voluntary on the landowner's part, it is implicit in a landowner's decision to proceed that the total benefits (quantitative and qualitative) exceed the total costs (quantitative and qualitative) for that landowner on that particular parcel of land.

The landowner may well find that the amount of compensation more than makes up for a government entity holding an encumbrance on the property. This is especially true since the market value of the conservation easement would generally be only a token value because the timber on these lands cannot be legally harvested and because these lands otherwise have generally limited economic uses because of their attributes and location.

Alternatives to Rule Making and Consequences of Not Adopting the Rule

There were no alternatives to the proposed rule change considered since it is restricted to making changes to the existing rules required to bring them into conformance with statute it was amended by the 2009 legislation (SSB 5401).

If the proposed rule change is not adopted, the Riparian Open Space Program rule will be out of conformance with the statute as amended. The statute instructs the Board to make rules to implement the program as described in statute.

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.

Since participating in the program is voluntary, there is no burden on owners of qualifying land who do not wish to convey a conservation easement on their property. There is also no burden for landowners who voluntarily elect to convey a conservation easement and receive compensation under the Riparian Open Space Program. The requirement for the landowner to be responsible for the cost of the title insurance policy and any real estate excise tax at closing is not considered burdensome because these are seller's responsibilities under standard real estate practice in Washington.

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

There are no new or additional requirements or costs imposed on any members of the regulated community by the proposed rule change since conveying a conservation easement and receiving compensation is voluntary on the part of the business (landowner), whether it is a large business, a small business, or an individual. Therefore 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. As stated above, there is therefore no disproportionate impact on small businesses.

Estimated Number of Jobs Created or Lost

RCW 19.85.040 (2)(d) requires that the small business economic impact statement include "(a)n estimate of the number of jobs that will be created or lost as the result of compliance with the proposed rule."

Processing and completing a conservation easement transaction under the program may require work by timber cruisers, surveyors, and title insurance officers in private businesses. The program's impact on jobs is proportional to the amount of the appropriation and the number of transactions. To date, there have been 12 transactions completed under the Riparian Open Space Program in the 8 years from 2001 to 2009. At this level of activity, there is no significant impact on the number of jobs created or lost.

Even though the proposed rule change greatly expands the acreage of potentially qualifying lands, adopting the rule change itself does not have an impact on jobs because that is dependent upon the level of the related appropriations and the number of transactions. If larger appropriations are provided for the program in future biennia, there would be more work for timber cruisers, surveyors, and title companies, but the work would probably be absorbed by existing job positions unless the amount of appropriations for the program becomes exceedingly higher than it has been in the past.

CONCLUSIONS

Since conveying a conservation easement and receiving compensation is voluntary on the landowner's part, it is implicit in a landowner's decision to proceed that the benefits exceed the costs for that landowner and that piece of qualifying land.

There were no alternatives to the proposed rule change considered since it is restricted to making changes to the existing WAC required to bring it into conformance with the statute as amended by SSB 5401.

Since participating in the program is voluntary, the rule proposal does not:

- Impose a burden on owners of qualifying land, whether or not they elect to convey a conservation easement on their property; or
- Have a disproportionate cost impact on small businesses.

The rule change itself does not have an impact on jobs. Any additional work created for timber cruisers, surveyors, and title companies by the program would be absorbed by existing job positions unless the amount of appropriations for the program becomes exceedingly higher than it has been in the past.