WASHINGTON STATE DEPARTMENT OF
Natural Resources

PETER GOLDMARK
Washington State Commissioner of Public Lands

July 25, 2013

MEMORANDUM

TO: Forest Practices Board

FROM: Marc Engel, Forest Practices Assistant Division Manager, Policy and Services

SUBJECT: Adaptive Management Reform Rule Making – Request for Adoption

On August 13, 2013 I will request the Board adopt the enclosed rule language amending WAC 222-12-045 *Adaptive management program*. Staff supports the recommended rule amendments implementing changes to the adaptive management process as outlined in the settlement agreement on the Forest Practices Habitat Conservation Plan (FP HCP).

At the May 14, 2013 meeting, the Board approved filing a *Proposed Rule Making* (CR-102) with the Office of the Code Reviser along with the consensus proposed rule language from the Policy Committee. Two rule making hearings were held on June 25 and June 27, 2013. The Board received one comment on its proposed rule amendments prior to the close of the comment period on June 28, 2013. The commenter supports the rule and its adoption, and recommends a clarification to the language describing the voting structure of the Policy Committee. Staff supports and has incorporated this clarification as proposed.

Enclosed for your review are the rule proposal, the draft Concise Explanatory Statement, and the comment letter. This rule making is categorically exempt from State Environmental Policy Act (SEPA) review pursuant to WAC 197-11-800 (19) *Categorical exemptions.* It does not require economic analysis pursuant to RCW 34.05.328 *Significant legislative rules* and chapter 19.85 RCW Regulatory Fairness Act. It also does not require analysis of small forest landowner long term applications pursuant to WAC 222-20-016 (4)(b) because the Board is not considering new or amended rules to achieve resource protection objectives.

Upon your adoption of rule language, staff will finalize the Concise Explanatory Statement and the rule implementation plan (pursuant to the Administrative Procedure Act, chapter 34.05 RCW) for the rule making file, and file the CR-103 *Rule Making Order* with adopted rule language with the Office of the Code Reviser.

If you have any questions please contact me at 360-902-1390 or marc.engel@dnr.wa.gov.

SGF/
Enclosures: Rule Proposal for Adaptive Management Reform
Draft Concise Explanatory Statement
Comment Letter

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Adaptive Mangement Reform Rule Making
Forest Practices Board
August 2013

WAC 222-12-045 *Adaptive management program.

In order to further the purposes of chapter 76.09 RCW, the board has adopted and will manage a formal science-based program, as set forth in WAC 222-08-160(2). Refer to board manual section 22 for program guidance and further information.

(1) **Purpose:** The purpose of the program is to provide science-based recommendations and technical information to assist the board in determining if and when it is necessary or advisable to adjust rules and guidance for aquatic resources to achieve resource goals and objectives. The board may also use this program to adjust other rules and guidance. The goal of the program is to ~~affect~~ effect change when it is necessary or advisable to adjust rules and guidance to achieve the goals of the forests and fish report or other goals identified by the board. There are three desired outcomes: Certainty of change as needed to protect targeted resources; predictability and stability of the process of change so that landowners, regulators and interested members of the public can anticipate and prepare for change; and application of quality controls to study design and execution and to the interpreted results.

(2) **Program elements:** By this rule, the board establishes an active, ongoing program composed of the following initial elements, but not to exclude other program elements as needed:

(a) **Key questions and resource objectives:** Upon receiving recommendations from the TFW policy committee, or similar collaborative forum, the board will establish key questions and resource objectives and prioritize them.

(i) Projects designed to address the key questions shall be established in the order and subject to the priorities identified by the board.

(ii) Resource objectives are intended to ensure that forest practices, either singularly or cumulatively, will not significantly impair the capacity of aquatic habitat to:

(A) Support harvestable levels of salmonids;

(B) Support the long-term viability of other covered species; or

(C) Meet or exceed water quality standards (protection of beneficial uses, narrative and numeric criteria, and antidegradation).

(iii) Resource objectives consist of functional objectives and performance targets. Functional objectives are broad statements regarding the major watershed functions potentially affected by forest practices. Performance targets are the measurable criteria defining specific, attainable target forest conditions and processes.

(iv) Resource objectives are intended for use in adaptive management, rather than in the regulatory process. Best management practices, as defined in the rules and manual, apply to all forest practices regardless of whether or not resource objectives are met at a given site.

(b) **Participants:** The board ~~will~~ manages the program and ~~has empowered~~empowers the following entities to participate in the program:

- The cooperative monitoring evaluation and research committee (CMER)~~,~~;
- ~~the~~ The TFW policy committee (and/or similar collaborative forum)~~,~~;

- ~~the~~ The adaptive management program administrator~~,~~; and
- ~~other~~ Other participants as directed to conduct the independent scientific peer review process.

The program will strive to use a consensus-based approach to make decisions at all stages of the process. Specific consensus-decision stages will be established by CMER and approved by the board. Ground rules will follow those established by the TFW process as defined in the board manual.

(i) **CMER.** By this rule, the board establishes a cooperative monitoring evaluation and research (CMER) committee to impose accountability and formality of process, and to conduct research and validation and effectiveness monitoring to facilitate achieving the resource objectives. The purpose of CMER is to advance the science needed to support adaptive management. CMER also has ongoing responsibility to continue research and education in terrestrial resource issues. CMER will be made up of members that have expertise in a scientific discipline that will enable them to be most effective in addressing forestry, fish, wildlife, and landscape process issues. Members will represent timber landowners, environmental interests, state agencies, county governments, federal agencies and tribal governments from a scientific standpoint, not a policy view. CMER members will be approved by the board. This will not preclude others from participating in and contributing to the CMER process or its subcommittees. CMER shall also develop and manage as appropriate:

(A) Scientific advisory groups and subgroups;

(B) Research and monitoring programs;

(C) A set of protocols and standards to define and guide execution of the process including, but not limited to, research and monitoring data, watershed analysis reports, interdisciplinary team evaluations and reports, literature reviews, and quality control/quality assurance processes;

(D) A baseline data set used to monitor change; ~~and~~

(E) A process for policy approval of research, monitoring, and assessment projects and use of external information, including the questions to be answered and the timelines~~.~~; and

(F) A biennial research, monitoring, and assessment work plan to be presented to the policy committee at their regular April meeting beginning in 2015 and at least every two years thereafter.

(ii) **TFW policy committee (policy committee).** ~~TFW, or a similar collaborative forum, is managed by a policy committee (hereafter referred to in this section as "policy").~~ The policy committee is established to consider the findings of CMER research and monitoring and to make recommendations to the board related to forest practices rules and/or the board manual, and other guidance. Policy committee membership ~~is self-selecting, and at a minimum should include representatives of the following~~consists of caucus principals or their representatives from the following nine caucuses:

- ~~Timber landowners (~~industrial private timber landowners; ~~and~~
- nonindustrial private timber landowners~~)~~;
- environmental community;
- western Washington tribal governments;

- eastern Washington tribal governments;
- county governments;
- department of natural resources;
- state departments ~~(including~~ of fish and wildlife~~,~~ and ecology~~, and natural resources~~); and
- federal agencies (including National Marine Fisheries Service, U.S. Fish and Wildlife Service, and U.S. Environmental Protection Agency~~ and U.S. Forest Service)~~. ~~Policy members will participate without compensation or per diem.~~

Policy committee members or their representatives are the primary participants for discussion and decisions at policy committee meetings. Technical or scientific staff may attend policy committee meetings for consultation and staff member or visitors may attend policy committee meetings, but refrain from decision making. The policy committee will base consensus on one vote from each of the nine caucuses. The policy committee will act as a consensus based body.

Beginning in April 2014, the policy committee shall, among other responsibilities, and in cooperation with CMER, prepare for presentation to the board at their regular May meeting:

(A) A CMER master project schedule prioritizing all CMER research and monitoring projects through 2031;

(B) Assurances that the CMER work plan projects are scheduled according to the CMER master project schedule;

(C) A review and update of the CMER master project schedule at least every four years; and

(D) Assurances that all of the projects on the master project schedule, as amended by the Board, will be completed by 2040.

(iii) **Adaptive management program administrator (program administrator).** The department will employ a full-time independent program administrator to oversee the program and support CMER. The program administrator will have credentials as a program manager, scientist, and researcher. The program administrator will:

(A) ~~make~~ Make reports to the board and have other responsibilities as defined in the board manual.

(B) Work with the policy committee and CMER to develop the CMER master project schedule and present it to the board at their regular May 2014 meeting;

(C) Report to the board every two years, beginning at their regular May 2015 meeting on:

(I) Progress made to implement the CMER master project schedule and recommended revisions;

(II) The status of ongoing projects including adherence to scheduled timelines; and

(III) Policy committee's responses to all final CMER reports.

(iv) **Forest practices board (board).** The board, among other responsibilities, shall:

(A) Require the program to complete work according to the CMER master project schedule;

(B) Determine whether the program is in substantial compliance with the CMER master project schedule every two years, beginning at the regular August 2014 meeting; and

(C) Notify the National Marine Fisheries Service and the U.S. Fish and Wildlife Service by letter within thirty days after the August meeting meeting if the board determines the program is not in substantial compliance with the CMER master project schedule.

(c) **Independent scientific peer review process.** By this rule, the board establishes an independent scientific peer review process to determine if the scientific studies that address program issues are scientifically sound and technically reliable; and provide advice on the scientific basis or reliability of CMER's reports. Products that must be reviewed include final reports of CMER funded studies, certain CMER recommendations, and pertinent studies not published in a CMER-approved, peer-reviewed journal. Other products that may require review include, but are not limited to, external information, work plans, requests for proposal, subsequent study proposals, the final study plan, and progress reports.

(d) **Process:** The following stages will be used to ~~affect~~ effect change for managing adaptive management proposals and approved projects. If consensus cannot be reached by participants at any stage, the issue will be addressed within the dispute resolution process as defined in (2)(h) of this subsection.

(i) **Proposal initiation:** Adaptive management proposals can be initiated at this stage by any of the participants listed in (2)(b) of this subsection to the program administrator, or initiation may be proposed by the general public at board meetings. Proposals must provide the minimum information as outlined in the board manual and demonstrate how results of the proposal will address key questions and resource objectives or other program rule and/or guidance issues. The board may initiate proposals or research questions in the course of fulfilling their duties according to statute.

(ii) **Proposal approval and prioritization:** The program administrator will manage the proposal approval and prioritization process at this stage and consult with CMER on the program workplan. CMER proposals will be forwarded by the program administrator to policy and then to the board. The board will make the final determination regarding proposal approvals and prioritization. The board will act on proposal approval and prioritization in a timely manner.

(iii) **CMER implementation of proposal:** Board approved proposals are systematically implemented through CMER at this stage by the program administrator.

(iv) **Independent scientific peer review:** An independent scientific peer review process will be used at identified points within this stage of implementation depending upon the study and will be used on specified final studies or at the direction of the board.

(v) **CMER committee technical recommendations:** Upon completion, final CMER reports and information will be forwarded at this stage by the program administrator to policy in the form of a report that includes technical recommendations and a discussion of rule and/or guidance implications.

(vi) **Policy committee petitions ~~for amendment~~and recommendations to the board:** Upon receipt of ~~the~~ a CMER report or a requested action by the board, the policy committee will prepare a report for the board outlining

recommended actions including: need for additional research, program rule ~~amendments~~ petitions; and/or guidance recommendations ~~in the form of petitions for amendment~~. When completed, the recommendations, including rule petitions and the original CMER report and/or other information as applicable will be forwarded by the program administrator to the board for review and action. Policy committee recommendations for rule amendment to the board will be accompanied by formal petitions for rule making (as described in WAC 222-08-100, RCW 34.05.330). The ~~Policy~~ policy committee will use the CMER results to make specific ~~petitions~~ recommendations to the board ~~for amending~~ on:

(A) The regulatory scheme of forest practices management (Title 222 WAC rules and board manual);

(B) Voluntary, incentive-based, and training programs affecting forestry;

(C) The resource objectives; and

(D) CMER itself, adaptive management procedures, or other mechanisms implementing the recommendations contained in the most current forests and fish report.

(vii) **Board action to ~~adopt~~ accept petitions for ~~amendment~~rule making and/or recommendations from the policy committee:** Upon receiving ~~a formal petition~~recommendations from the policy committee for ~~amendment to~~ rules petitions and/or recommendations for guidance, the board will take appropriate and timely action. There will be a public review of all petitions as applicable. The board will make the final determination.

(e) **Biennial fiscal and performance audits.** The board shall require biennial fiscal and performance audits of the program by the department or other appropriate and accepting independent state agency.

(f) **CMER five-year peer review process.** Every five years the board will establish a peer review process to review all work of CMER and other available, relevant data, including recommendations from the CMER staff. There will be a specified, but limited, period for public review and comment.

(g) **Funding.** Funding is essential to implement the adaptive management program, which is dependent on quality and relevant data. The department shall request biennial budgets to support the program priority projects and basic infrastructure needs including funding to staff the adaptive management program administrator position. A stable, long-term funding source is needed for these activities.

(h) Formal ~~Dispute~~ dispute **resolution process for CMER and policy committee.** If consensus cannot be reached through the adaptive management program process, participants will have their issues addressed by this dispute resolution process. Potential failures include, but are not limited to:

- The inability of policy to agree on research priorities, program direction, or recommendations to the board for uses of monitoring and/or research after receiving a report from CMER;
- the inability of CMER to produce a report and recommendation on schedule; and
- the failure of participants to act on policy recommendations on a specified schedule. Key attributes of the dispute resolution process are:

(i) Specific substantive and benchmark (schedule) triggers will be established by the board for each monitoring and research project for invoking dispute resolution;

(ii) The dispute resolution process is available and can be initiated by both CMER and the policy committee to resolve disputes that result in the course of their respective processes. Formal dispute resolution ~~will be staged in three parts~~involves two stages and may be applied at any level of the adaptive management process. Any ~~participant~~participating policy committee caucus or board approved CMER member, or the board~~,~~ may invoke ~~each succeeding~~ stage two, if agreement is not reached ~~by the previous~~ stage one, within the specified time (or if agreements are not substantially implemented) as follows:

(A) Stage one dispute resolution will be an attempt by CMER ~~and~~ or the policy committee, as applicable to reach consensus. ~~On technical issues,~~ CMER and the policy committee ~~shall~~ have up to ~~six~~ two months to reach ~~a~~ consensus under stage one; unless otherwise agreed upon by CMER or the policy committee if substantive progress is being made. ~~Parties~~ Any party may move the process to stage two after an issue has been in dispute resolution before CMER or the policy committee for ~~six~~ two months ~~unless otherwise agreed~~. The time periods commence from ~~referral of technical issues to CMER, report by CMER to policy, or the raising of a nontechnical issue (or matter not otherwise referable to CMER) directly at policy~~the date the dispute resolution process is invoked.

(B) Stage two dispute resolution in CMER or the policy committee will be either ~~informal~~ mediation or ~~formal~~ arbitration. Within one month, one or the other will be picked, with the default being ~~formal~~ mediation unless otherwise agreed. Stage two will be completed within three months (including the one month to select the process) unless otherwise agreed based on substantive progress being made.

(C) If stage two dispute resolution within CMER does not result in consensus, the program administrator will forward the dispute to the policy committee for a decision, which could include initiation of the dispute resolution process within policy committee.

(D) If stage two dispute resolution within the policy committee does not result in consensus, ~~stage three will be action by~~ the ~~board. The board will consider policy and CMER reports, and~~program administrator will report the majority and minority ~~thinking regarding the results and uses of the results can be brought forward~~recommendations to the board for all disputes failing to reach resolution following stage two. The board will make the final determination regarding dispute resolution.

STATE OF WASHINGTON **PO Box 47012**
FOREST PRACTICES BOARD **Olympia, WA 98504-7012**

As required by
the Administrative Procedure Act
Chapter 34.05 RCW

DRAFT CONCISE EXPLANATORY STATEMENT
AND
RESPONSIVENESS SUMMARY

ADOPTION OF AMENDMENT TO THE FORST PRACTICES RULES
WAC 222-12-045 *Adaptive Management Program*

Prepared by: Sherri Felix
July 12, 2013

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1. Introduction

Washington state agencies are required to provide a concise explanatory statement to any person upon request or from whom the agency receives comments during a rule making (RCW 34.05.325(6)). Before an agency adopts a rule, the agency:

> *…shall prepare a concise explanatory statement of the rule:*
> *(i) Identifying the agency's reasons for adopting the rule;*
> *(ii) Describing differences between the text of the proposed rule, as published in the register and the text of the rule as adopted, other than editing changes, stating the reason for the differences; and*
> *(iii) Summarizing all comments received regarding the proposed rule, and responding to the comments by category or subject matter, indicating how the final rule reflects agency consideration of the comments, or why it fails to do so.*

2. Content of Rule Amendments and Reasons to Adopt

The Forest Practices Board's rule making titled Adaptive Management Program Reform amends one rule:

- WAC 222-12-045 *Adaptive management program*

The amendments to the Adaptive Management Program rule are designed to reform the program as outlined in the 2012 settlement agreement for the Forest Practices Habitat Conservation Plan. The amendments modify the adaptive management program in the following ways:

- The Timber/Fish/ Wildlife Policy Committee (Policy Committee) is reestablished as a consensus-based body composed of caucus principles or their representatives;
- Nine caucuses are established for the Policy Committee with one vote per caucus;
- The dispute resolution process is revised by allowing the Cooperative Monitoring Evaluation and Research Committee (CMER) to utilize stage 2 and shortening the decision making timelines for both the Policy Committee and CMER while allowing for timeline extension by consensus vote; and
- The scope of the CMER work plan process is expanded to incorporate a prioritized Master Project Schedule with rule required timelines for review and updates, and additional roles for the Adaptive Management Program Administrator and the Policy Committee.

Additional minor amendments clarify rule language without changing the intent of the rule.

3. Comments – Summary, Commenters, and Responses

Summary

The Board received a total of one comment on its amendments to WAC 222-12-045 *Adaptive management program.* The commenter supported the rule and suggested one language clarification.

No comments were received at the June 25, 2013 Ellensburg hearing.

One comment was received at the June 27, 2013 Olympia hearing in addition to one written comment from the following:

- Washington Forest Protection Association (WFPA) (Comment #13-13)

Responses

- Comment #13-13: WFPA supports the rule and requests the Board adopt the rule, and recommends one clarification to the language describing the voting structure of the Policy Committee: Replace the language at WAC 222-12-045 (2)(b)(ii) with "*The Policy Committee will base consensus on one vote from each of the nine caucuses."*

  Response: The recommended change has been incorporated as proposed.

4. Differences between Proposed and Final Rule

To be completed upon Board adoption of the rule amendments

5. Adoption Date

The expected adoption date is August 13, 2013 at the Forest Practices Board meeting. If adopted then, the rule would become effective in late September 2013.

6. Rule Making Timeline and Opportunities to Participate

05/24/2012	Agreement between the Conservation Caucus, State of Washington, and Washington Forest Protection Association to settle potential litigation on the Forest Practices Habitat Conservation Plan and reform the Adaptive Management Program.
02/04/2013	Semi-Annual Rule Making Agenda, including Board consideration of Adaptive Management Program rule making, published in Washington State Register (WSR 13-04-077 filed 02/04/2013)
02/12/2013	Forest Practices Board meeting: Consideration of possible rule making for the adaptive management program and notice to public. Opportunity to comment at the meeting prior to Board action
03/20/2013	*Preproposal Statement of Inquiry* (CR-101) published in the Washington State Register (WSR 13-06-013 filed 02/25/2013)
03/22/2013	Forest Practices Rule Making Activity update (CR-101) about rule making intent on Adaptive Management Program Reform sent to interested parties (#13-02).
05/14/2013	Forest Practices Board meeting: Consider approval of draft rule language for Adaptive Management Program Reform. Opportunity to comment at meeting prior to Board action
06/05/2013	*Proposed Rule Making* (CR-102) published in Washington State Register (WSR 13-11-131filed 05/22/2013)
06/05/2013	Forest Practices Rule Making Activity update (CR-102) on rule making hearings and commenting on the proposed rule sent to interested parties (#13-03). Comment period open until 5:00 p.m. on June 28, 2013
06/24/2013	Notice of Rule Making Hearing sent to interested parties
06/24/2013	Semi-Annual Rule Making Agenda, including Board consideration of Adaptive Management Program rule making, published in Washington State Register (WSR 13-14-024 filed June 14, 2013)
06/25/2013	Rule making hearing in Ellensburg
06/27/2013	Rule making hearing in Olympia
06/28/2013	Due date for comments on Adaptive Management Program Reform rule proposal
8/13/2013	Forest Practices Board meeting: *Remainder to be completed after rule adoption*

13-13

WASHINGTON FOREST PROTECTION ASSOCIATION
724 Columbia St NW, Suite 250
Olympia, WA 98501
Phone: 360-352-1500
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June 28, 2013

Re: Proposed Rulemaking for Adaptive Management Reform

Dear Chairman Everett and Members of the Forest Practices Board:

The Washington Forest Protection Association (WFPA) would like to thank the Board for this opportunity to comment on the proposed rulemaking for reforming the Adaptive Management Program. This rule implements an Agreement between the Conservation Caucus, State of Washington and the Washington Forest Protection Association designed to settle potential litigation and improve the Adaptive Management Program. Associated work on the Adaptive Management Reform board manual also continues with the collaboration among Natural Resources, Ecology, Fish and Wildlife, tribes, conservation caucus and landowners. We expect a board manual product for the Board to accept as the rule moves toward approval.

Provisions in the draft rule:

- Expand and clarify the Policy Committee membership.
- Recommit the Policy Committee to consensus decision-making.
- Streamline and expand the Policy Committee and CMER dispute resolution process.
- Create stronger accountability for the entire Adaptive Management Program.

WFPA supports the rule and requests that the Board adopt the rule.

We do recommend one clarification to the language. The intent behind the vote structure at the Policy Committee is to determine whether consensus exists. The revision to WAC 222-12-045(2)(b)(ii) states in part: "Each caucus of the policy committee is allowed one vote on any action before the policy committee. The policy committee will act as a consensus based body." In the discussions about the board manual, the group has actually developed more succinct language. We suggest that the rule language above be replaced by: "The Policy Committee will base consensus on one vote from each of the nine caucuses."

Thank you for your consideration.

Sincerely,

Karen Terwilleger
Senior Director of Forest and Environmental Policy