

Concise Explanatory Statement
In Compliance with RCW 34.05.325(6)
Forest Practices Board

Identifying Perennial Initiation Points on Non-fish Streams
November 2006

PURPOSE, CONTENT, AND ADOPTION DATE OF RULE

WAC 222-16-030(3) and WAC 222-16-031(4) currently give an option to landowners to employ default basin sizes for determining the point at which a Type Np/Type 4 (non-fish) stream will be protected as a perennial stream (the demarcation between a seasonal and a perennial stream). This was provided for landowners who cannot identify the uppermost point of perennial flow with simple, non-technical observations.

A scientific study has been completed under the scientific-based adaptive management process (RCW 76.09.370 and WAC 222-12-045.) The study, *Type N Stream Demarcation Study, Phase I: Pilot Results*, indicates that the default basin sizes available for use in determining stream perennial initiation points are incorrect, i.e., they are too large. Therefore, the Forest Practices Board considered changes to WACs 222-16-030(3) and 222-16-031(4) that would:

- Eliminate the option to use a default basin size.
- Reference Forest Practices Board Manual Section 23 which would provide guidance on identifying the uppermost point of perennial flow on non-fish perennial streams. The guidance would have included a method to use during the dry season, a method to use during the wet season, and a mapping method for landowners who do not have legal access to the channel head.

The rule changes would affect landowners who would have used a default basin size to determine the demarcation between non-fish seasonal and non-fish perennial streams.

Reasons supporting proposal: The Forests Practices Board adaptive management program found that the default basin sizes listed in WAC 222-16-030(3) and WAC 222-16-031(4) are incorrect and cannot be scientifically supported as an optional method to determine perennial initiation points of non-fish streams.

On November 1, 2006, the Forest Practices Board adopted the rule the eliminated the option to use a default basin size. The Board did not approve the board manual. The rule was adopted on November 1, 2006, and will be effective December 15, 2006.

PROPOSED RULE CHANGES

WAC 222-16-031 Water typing system. ...

- * (3) **“Type Np Water”** means all segments of natural waters within the bankfull width of defined channels that are perennial nonfish habitat streams. Perennial streams are flowing waters that do not go dry any time of a year of normal rainfall. ~~However, for the purpose of water typing, Type 4 Waters and~~ include the intermittent dry portions of the perennial channel below the uppermost point of perennial flow. See board manual section 23 for guidance on identifying the uppermost point of perennial flow. If the uppermost point of perennial flow cannot be identified with simple, nontechnical observations (see board manual, section 23), then Type 4 Waters begin at a point along the channel where the contributing basin area is:
- ~~(a) — At least 13 acres in the Western Washington coastal zone (which corresponds to the Sitka spruce zone defined in Franklin and Dyrness, 1973);~~
 - ~~(b) — At least 52 acres in other locations in Western Washington;~~
 - ~~(c) — At least 300 acres in Eastern Washington.~~

The same changes are proposed for WAC 222-16-030(4) “Type 4 Water.”

DIFFERENCES BETWEEN PROPOSED AND FINAL RULE

Because the Board did not approve the proposed Board Manual Section 23, the Board did not adopt the language referencing that board manual. The sentence “See board manual section 23 for guidance on identifying the uppermost point of perennial flow” was not adopted in either WAC 222-16-030(4) or WAC 222-16-031(3). The Board did adopt the remainder of the proposal.

SUMMARY OF PUBLIC INVOLVEMENT OPPORTUNITIES FOR PERMANENT RULE

10/19/05	Preproposal Statement of Inquiry (CR-101) published in the Washington State Register.
10/5/05- 11/4/05	Thirty day review of draft language by counties, WDFW (per RCW 76.09.040(2)), and tribes.
4/06-5/06	Forest Practices Division conducted rule and board manual development sessions with interested stakeholders and tribal caucus.
9/6/06	Proposed Rule Making (CR-102) published in Washington State Register.
9/19/06	News release with information on public hearings.
9/13/06	SEPA checklist and threshold determination distributed
9/28/06	Public hearing, Colville
10/12/06	Public hearing, Mount Vernon
10/13/06	Due date for public comments

SUMMARY OF PUBLIC COMMENT

The Board received 56 oral and written comments: One in support of the proposal and 55 opposed. The following section, “Responses to Comments By Subject Matter” will serve as a summary of comments received.

RESPONSES TO COMMENTS BY SUBJECT MATTER

Credible Science and Adaptive Management

COMMENT The Forests and Fish adaptive management program relies on solid scientific analysis prior to policy changes. The study that preceded this policy decision was originally a pilot project for scoping a protocol to investigate the spatial variability of perennial streams; the purpose of the study was changed after the data was collected.

RESPONSE *The pilot phase (phase 1) of Type N Stream Demarcations study was designed to: test the adequacy and replicability of the pilot field protocol for identifying the Np/Ns break; estimate the size and variability of basin areas and other parameters; and evaluate the potential for using basin and channel attributes to determine the Np/Ns break in the field. Upon considering the results of the study, Policy determined that the phase I study provided sufficient information to indicate the default basin sizes were too large. Policy petitioned the Forest Practices Board to 1) conduct rule making that would eliminate the default option in the rule, and 2) develop a board manual describing simple, non-technical methods to identify the uppermost point of perennial flow.*

COMMENT The proposal does not have clear stakeholder consensus support.

RESPONSE *Policy’s initial decision to petition the Board for rule making and board manual development was a consensus decision. The proposed rule and associated board manual did not have unanimous stakeholder support.*

Inappropriate to adopt new rules now.

COMMENT The science is incomplete, inconclusive, and does not warrant moving PIPs further up hill.

RESPONSE *CMER concluded, and recommended to Policy, that the full statewide study would not likely produce significantly different information relative to the default basin sizes than was determined in the phase I study. Policy accepted this recommendation and decided to not pursue the statewide study. Policy petitioned the Forest Practices Board to conduct rule making to eliminate the default basin sizes. In cases where a landowner would have elected to use a default basin option to locate a PIP, this may add stream length to the Type Np Water.*

COMMENT No new science has demonstrated that increasing Type Np stream protection will have discrete benefits to public resources. The current rules have been in

place for only six years, and it has not yet been determined that existing rules are not protecting the resources.

RESPONSE Policy's petition to the Board was in response to information contained within the pilot Type N stream demarcation study about the accuracy of the default basin sizes. That study was not designed to consider the effects of existing Type Np regulatory prescriptions or the benefits of alternative prescriptions. Ongoing work with the adaptive management program will be considering the effectiveness of different Type Np regulatory prescriptions.

Proposed Rule

COMMENT Don't eliminate the default basin sizes available for use in determining stream perennial initiation points.

- Even though the sizes may not be correct, they provide a workable guideline.
- Forest land managers need to be able to find PIPs year round, i.e., at times other than a week or less in any given year.

RESPONSE The rule emphasizes locating in the field the uppermost point of perennial flow. When the rule was adopted in 2001, it was not intended that landowners apply the default option before determining whether the PIP can be found on the ground.

COMMENT "Intermittent" and "perennial" in the same definition creates problems.

RESPONSE These concepts are in existing rule because they were in the Forests and Fish Report. The current rule proposal does not change the fact that both concepts are included in the definition of Type Np Water. The proposed board manual attempted to provide simple instructions for landowners to locate the uppermost point of perennial flow based on this definition. The Board, however, decided not to approve the board manual.

COMMENT WAC 222-16-030(3) conflicts with definition in the Forests and Fish Report Section B.1. The report defines *perennial streams* as not going dry during any time during a year of normal rainfall. The rule includes intermittent dry portions in the definition. RCW 76.09.370, 76.09.020, and 77.85.180 adopt the Forests and Fish Report.

RESPONSE The Forests and Fish Report Section B.1 definition further states that non-fish perennial waters contain a "spatially intermittent component." The 2001 rules incorporated both concepts following the recommendations of the Forests and Fish Report.

COMMENT If the intent of the proposed amendments is to require use of Board Manual Section 23 for the identification of Type NP Waters indicating the uppermost point of perennial flow, the language should be revised accordingly. Suggest replacing "See board manual 23 for guidance . . .", with "Board manual section 23 must be used to identify the uppermost point of perennial flow if that point cannot be identified with simple, non-technical observations."

RESPONSE The rules cannot require board manual guidance to be used in forest practices activities. As stated in WAC 222-12-090, the manual serves as an advisory technical supplement to the rules. As it turned out, however, the Board decided not to approve the proposed board manual.

Proposed Board Manual

COMMENT The board manual leaps ahead of the science. There was a commitment in the Forests and Fish Report to develop a protocol for finding PIPs; this protocol has not yet been developed.

RESPONSE A "protocol" for finding PIPs has not been developed. The proposed board manual was developed to provide simple methods to locate the uppermost point of perennial flow based on the proposed rule definition. However, the Board decided not to approve the board manual.

COMMENT The board manual provides for a wet season default located 32 feet below the channel head. This virtually eliminates the seasonal stream type. What started as a small wording change is now the basis for removing approximately 10 percent of the forest land base from management.

RESPONSE At any time of the year a dry channel is a non-fish seasonal water when located above perennial flow. The proposed board manual was developed to offer landowners the opportunity to demarcate the break between Np and Ns Waters during any season. If the entire stream channel has running water during the wet season, the proposed board manual offered a prescribed distance downstream from the channel head to establish the break between Type Np and Type Ns Waters. The landowner would have had the option to adjust the Np/Ns break later during the low-flow season. However, the Board decided not to approve the board manual.

COMMENT The guidelines in the manual would cause classification of many *intermittent* and entirely *dry* stream reaches incorrectly as *perennial*. The Forests and Fish rules for Type Np streams were designed to address stream breeding amphibian habitat, temperature effects on downstream fish bearing segments, and sediment related water quality issues. All these elements require a presence of flowing water for either provision of on-site value or propagation of effects to downstream segments. This is undesirable because it would obscure functional landscape linkages and their assessment on managed forest lands, misrepresent the status of individual stream reaches and collectively the state's stream resource, and misallocate conservation resources.

Failure to adopt the proposed guidelines would not leave these segments without protection. Both the RMAP program and unstable slopes protection would provide assurance that water quality would be protected and sediment delivery from management activities controlled.

RESPONSE The proposal addressed the definition of Type Np Water. If you don't find flowing water in a stream channel, the entire stream channel above the uppermost point of perennial flow is a Type Ns Water. The effectiveness of

the current required buffers applied to Type Np Waters is not addressed in this rule making.

COMMENT The proposed manual contained definitions of “headwall seeps” and “headwater springs” inconsistent with the definitions in WAC 222-16-010; board manual language cannot be used to change rule language.

RESPONSE *We corrected that inconsistency; however, the Board decided not to approve the board manual.*

COMMENT The proposal does not provide for consistent field application and does not provide clarity in locating PIPs. Rule and guidance must be understandable, locatable, by anyone, any time of year. Without simplicity, “If you need help, contact DNR for technical assistance” will have to be supported more than it is now.

RESPONSE *The proposed board manual was developed to offer non-technical options for landowners to identify the Np/Ns break in a variety of scenarios that landowners face. It was also meant to offer step-by-step approaches for landowners to appropriately apply the rule. However, the Board decided not to approve the board manual.*

Costs to Industry and the Economic Analysis

COMMENT The cost to Washington’s timber industry is severely underestimated in the cost-benefit analysis.

RESPONSE *The cost-benefit analysis estimated the acreage and value of timber that will not be harvested annually because of the rule change. The analysis found that 18 percent of landowners used the default option to determine the PIP in the year between June 1, 2005 and May 31, 2006. This number was used to determine an estimated annual cost (i.e., loss of revenue) to forest landowners statewide.*

COMMENT The economic analysis inappropriately only selected FPAs already showing perennial waters, and discarded those with only seasonal streams prior to assessing impacts. This caused a greatly underestimated impact of the proposal.

RESPONSE *We randomly selected 50 forest practices applications per DNR region for a period of one year. We analyzed the applications in which the landowner identified Type Np Waters within the application area. The analysis was a comparison of field-identified Np/Ns breaks and default basin-identified Np/Ns breaks.*

COMMENT The numbers for the westside regions appear to be reported backwards. The coastal zone and Olympic Region has as much as 10 miles of streams per square mile.

RESPONSE *We have reviewed the forest practices applications used in the random sample for Olympic Region and find the numbers to be correct for the sample.*

COMMENT The economic analysis didn't take into account the lost income for loggers and haulers.

RESPONSE *DNR's standard method is to use landowner costs and revenue statistics in its economic analyses. Including harvesting, hauling and processing of timber products would tremendously increase the scope of the research and analysis.*

COMMENT Should the Board choose to proceed with the rule adoption process it must:

- Receive sufficient guidance and instruction in economic analysis to make a credible and defensible economic decision, and reexamine the assumptions and methodologies used to estimate probable costs.
- Commission a credible expert to write a report describing any probable benefits and their relative importance.

RESPONSE *The Board found that the probable benefits of eliminating the use of default basin sizes outweigh the costs, and deemed the cost-benefit analysis and small business economic impact statement adequate to support adopting the rule that eliminated the default basin option. However, the Board directed staff to re-evaluate the methods and assumptions employed in the economic analysis in anticipation that similar analyses will be necessary to evaluate the costs of Policy's future recommendations. The Board also urged staff to apply a reasonable method to quantify the benefits of any proposal that is brought forward by Policy.*

COMMENT The Board must examine less burdensome alternatives to the proposed rule.

RESPONSE *Upon Policy's petition to the Board for rule making (as described in previous responses), the Board directed staff to conduct rule making that would eliminate the default basin size option. The scope of the economic analysis was restricted to examining the economic effects of that rule change.*

COMMENT The Board must examine the sufficiency of the mitigation suggested in the small business economic impact statement.

RESPONSE *The economic analysis stated that compliance costs for small businesses are partially mitigated by participation in the Forestry Riparian Easement Program. The extent of mitigation is contingent on funding by the Legislature.*

SEPA Process

COMMENT A "determination of non-significance" is not appropriate for this proposal. The proposal has the potential to create economic and social impacts, which were not analyzed in the environmental checklist. A determination of significance is appropriate with an accompanying analysis of the economic and social impacts of widespread conversion to residential, urban and other high intensity uses.

RESPONSE *A determination of significance is dependent on whether the responsible official determines the proposal has the potential to significantly affect the quality of the environment. See WAC 197-11-330, first paragraph. The threshold determination for this proposal was based on the low probability of*

significant environmental impact of eliminating the option for landowners to use the basin default sizes for determining the uppermost point of perennial flow. The default basin sizes were determined (via the Forests and Fish adaptive management process) to be too large; eliminating the option to use them would not create an adverse environmental impact.

Making a determination of significance based on the assumption of widespread conversion would be speculative given the information we have available. The existing and proposed rule emphasizes locating the PIP in the field. The information we have (via communications with DNR region staff and an analysis of FPAs) indicates most landowners are doing that.

Prepared by Marc Engel and Gretchen Robinson, November 2006.