



# PROPOSED RULE MAKING

## CR-102 (June 2004)

(Implements RCW 34.05.320)

Do NOT use for expedited rule making

**Agency:** Forest Practices Board

- Preproposal Statement of Inquiry was filed as WSR 11-17-096; or
- Expedited Rule Making--Proposed notice was filed as WSR \_\_\_\_\_; or
- Proposal is exempt under RCW 34.05.310(4).

- Original Notice
- Supplemental Notice to WSR \_\_\_\_\_
- Continuance of WSR \_\_\_\_\_

**Title of rule and other identifying information:** (Describe Subject)  
Critical habitats (state) of threatened and endangered species (WAC 222-16-080)

**Hearing location(s):**

Olympia: Natural Resources Building  
1111 Washington Street SE, Room 172  
360.902.1400

Date: January 3, 2012 Time: 6 p.m.

Ellensburg: Department of Natural Resources  
713 E. Bowers  
509.925.8510

Date: January 5, 2012 Time: 6 p.m.

**Date of intended adoption:** February 14, 2012  
(Note: This is NOT the effective date)

**Submit written comments to:**

Name: Patricia Anderson, DNR Forest Practices Division  
Address: PO Box 47012  
Olympia, WA 98504-7012  
e-mail [forest.practicesboard@dnr.wa.gov](mailto:forest.practicesboard@dnr.wa.gov)  
fax (360) 902-1428 by January 6, 2012

**Assistance for persons with disabilities: Contact**

Forest Practices Division at (360) 902-1400 by December 20, 2011  
TTY (360) 902-1125

**Purpose of the proposal and its anticipated effects, including any changes in existing rules:**

The proposal will amend the Forest Practices Board (Board) rule WAC 222-16-080 *Critical habitats (state) of threatened and endangered species* to be consistent with other state laws. This rule making will reflect the changes made to WACs 232-12-014, 232-12-011, and 232-12-292 by the Washington Fish and Wildlife Commission by removing the bald eagle and the peregrine falcon from the Board's critical habitats (state) list and removing the option to use a bald eagle site management plan. The proposal also updates the common and scientific names for the Western pond turtle on the Board's critical habitats (state) list.

**Reasons supporting proposal:**

The Washington Fish and Wildlife Commission (Commission) has removed the bald eagle from the state's threatened and endangered species lists and has amended its bald eagle protection rule to require bald eagle site management plans only when the bald eagle is listed under state law as threatened or endangered. The Commission has also removed the peregrine falcon from the state's threatened and endangered lists. Three North American scientific societies that deal with fish, reptile, and amphibian issues have changed the common and scientific names of the Western pond turtle.

**Statutory authority for adoption:**  
RCW 76.09.040

**Statute being implemented:**  
N/A

**Is rule necessary because of a:**

- Federal Law?  Yes  No
  - Federal Court Decision?  Yes  No
  - State Court Decision?  Yes  No
- If yes, CITATION:

**DATE**  
November 15, 2011

**NAME** (type or print)  
Bridget Moran

**SIGNATURE**

**TITLE**  
Chair

**CODE REVISER USE ONLY**

**OFFICE OF THE CODE REVISER  
STATE OF WASHINGTON  
FILED**

**DATE: November 18, 2011**

**TIME: 11:57 AM**

**WSR 11-23-105**

**Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:**

**Name of proponent:** (person or organization)

Forest Practices Board

- Private  
 Public  
 Governmental

**Name of agency personnel responsible for:**

| Name                           | Office Location                    | Phone          |
|--------------------------------|------------------------------------|----------------|
| Drafting..... Sherri Felix     | 1111 Washington Street SE, Olympia | (360) 902-1446 |
| Implementation.... Marc Engel  | 1111 Washington Street SE, Olympia | (360) 902-1390 |
| Enforcement..... Donelle Mahan | 1111 Washington Street SE, Olympia | (360) 902-1396 |

**Has a small business economic impact statement been prepared under chapter 19.85 RCW?**

Yes. Attach copy of small business economic impact statement.

A copy of the statement may be obtained by contacting:

Name: Patricia Anderson  
Address: Department of Natural Resources  
P.O. Box 47012  
Olympia, WA 98506

phone (360) [902.1413](tel:3609021413)  
fax (360) [902.1428](tel:3609021428)  
e-mail [forest.practicesboard@dnr.wa.gov](mailto:forest.practicesboard@dnr.wa.gov)

No. Explain why no statement was prepared.

The proposed rule does not meet the threshold of imposing more than minor costs on businesses.

**Is a cost-benefit analysis required under RCW 34.05.328?**

Yes A preliminary cost-benefit analysis may be obtained by contacting:

Name: Patricia Anderson  
Address: Department of Natural Resources  
P.O. Box 47012  
Olympia, WA 98506

phone (360) [902.1413](tel:3609021413)  
fax (360) [902.1428](tel:3609021428)  
e-mail [forest.practicesboard@dnr.wa.gov](mailto:forest.practicesboard@dnr.wa.gov)

No: Please explain:

AMENDATORY SECTION (Amending WSR 10-11-081, filed 5/17/10, effective 6/17/10)

**WAC 222-16-080 Critical habitats (state) of threatened and endangered species.** (1) Critical habitats (state) of threatened or endangered species and specific forest practices designated as Class IV-Special are as follows:

~~(a) ((Bald eagle (*Haliaeetus leucocephalus*)) - Harvesting, road construction, aerial application of pesticides, or site preparation within 0.5 mile of a known active nest site, documented by the department of fish and wildlife, between the dates of January 1 and August 15 or 0.25 mile at other times of the year; and within 0.25 mile of a communal roosting site. Communal roosting sites shall not include refuse or garbage dumping sites.~~

~~(b))~~ Gray wolf (*Canis lupus*) - Harvesting, road construction, or site preparation within 1 mile of a known active den site, documented by the department of fish and wildlife, between the dates of March 15 and July 30 or 0.25 mile from the den site at other times of the year.

~~((c))~~ (b) Grizzly bear (*Ursus arctos*) - Harvesting, road construction, aerial application of pesticides, or site preparation within 1 mile of a known active den site, documented by the department of fish and wildlife, between the dates of October 1 and May 30 or 0.25 mile at other times of the year.

~~((d))~~ (c) Mountain (woodland) caribou (*Rangifera tarandus*) - Harvesting, road construction, aerial application of pesticides, or site preparation within 0.25 mile of a known active breeding area, documented by the department of fish and wildlife.

~~((e))~~ (d) Oregon silverspot butterfly (*Speyeria zerene hippolyta*) - Harvesting, road construction, aerial or ground application of pesticides, or site preparation within 0.25 mile of an individual occurrence, documented by the department of fish and wildlife.

~~((f) Peregrine falcon (*Falco peregrinus*)) - Harvesting, road construction, aerial application of pesticides, or site preparation within 0.5 mile of a known active nest site, documented by the department of fish and wildlife, between the dates of March 1 and July 30; or harvesting, road construction, or aerial application of pesticides within 0.25 mile of the nest site at other times of the year.~~

~~(g))~~ (e) Sandhill crane (*Grus canadensis*) - Harvesting, road construction, aerial application of pesticides, or site preparation within 0.25 mile of a known active nesting area, documented by the department of fish and wildlife.

~~((h))~~ (f) Northern spotted owl (*Strix occidentalis caurina*).

(i) **Within a SOSEA boundary** (see maps in WAC 222-16-086), except as indicated in (h)(ii) of this subsection, harvesting, road

construction, or aerial application of pesticides on suitable spotted owl habitat within a median home range circle that is centered within the SOSEA or on adjacent federal lands.

(ii) **Within the Entiat SOSEA**, harvesting, road construction, or aerial application of pesticides within the areas indicated for demographic support (see WAC 222-16-086(2)) on suitable spotted owl habitat located within a median home range circle that is centered within the demographic support area.

(iii) **Outside of a SOSEA**, harvesting, road construction, or aerial application of pesticides, between March 1 and August 31 on the seventy acres of highest quality suitable spotted owl habitat surrounding a northern spotted owl site center located outside a SOSEA. The highest quality suitable habitat shall be determined by the department in cooperation with the department of fish and wildlife. Consideration shall be given to habitat quality, proximity to the activity center and contiguity.

(iv) **Small parcel northern spotted owl exemption.** Forest practices proposed on the lands owned or controlled by a landowner whose forest land ownership within the SOSEA is less than or equal to 500 acres and where the forest practice is not within 0.7 mile of a northern spotted owl site center shall not be considered to be on lands designated as critical habitat (state) for northern spotted owls.

~~((i) Western))~~ (g) Pacific pond turtle (~~((*Clemmys*))~~) *Actinemys marmorata* - Harvesting, road construction, aerial application of pesticides, or site preparation within 0.25 mile of a known individual occurrence, documented by the department of wildlife.

~~((j))~~ (h) Marbled murrelet (*Brachyramphus marmoratus*).

(i) Harvesting, other than removal of down trees outside of the critical nesting season, or road construction within an occupied marbled murrelet site.

(ii) Harvesting, other than removal of down trees outside of the critical nesting season, or road construction within suitable marbled murrelet habitat within a marbled murrelet detection area.

(iii) Harvesting, other than removal of down trees outside of the critical nesting season, or road construction within suitable marbled murrelet habitat containing 7 platforms per acre outside a marbled murrelet detection area.

(iv) Harvesting, other than removal of down trees outside of the critical nesting season, or road construction outside a marbled murrelet detection area within a marbled murrelet special landscape and within suitable marbled murrelet habitat with 5 or more platforms per acre.

(v) Harvesting within a 300 foot managed buffer zone adjacent to an occupied marbled murrelet site that results in less than a residual stand stem density of 75 trees per acre greater than 6 inches in dbh; provided that 25 of which shall be greater than 12 inches dbh including 5 trees greater than 20 inches in dbh, where they exist. The primary consideration for the design of managed buffer zone widths and leave tree retention patterns shall be to mediate edge effects. The width of the buffer zone may be reduced in some areas to a minimum of 200 feet and extended to a maximum of

400 feet as long as the average of 300 feet is maintained.

(vi) Except that the following shall not be critical habitat (state):

(A) Where a landowner owns less than 500 acres of forest land within 50 miles of saltwater and the land does not contain an occupied marbled murrelet site; or

(B) Where a protocol survey (see WAC 222-12-090(14)) has been conducted and no murrelets were detected. The landowner is then relieved from further survey requirements. However, if an occupied marbled murrelet site is established, this exemption is void.

(2) The following critical habitats (federal) designated by the United States Secretary of the Interior or Commerce, or specific forest practices within those habitats, have been determined to have the potential for a substantial impact on the environment and therefore are designated as critical habitats (state) of threatened or endangered species.

(3) For the purpose of identifying forest practices which have the potential for a substantial impact on the environment with regard to threatened or endangered species newly listed by the Washington fish and wildlife commission and/or the United States Secretary of the Interior or Commerce, the department shall after consultation with the department of fish and wildlife, prepare and submit to the board a proposed list of critical habitats (state) of threatened or endangered species. This list shall be submitted to the board within 30 days of the listing of the species. The department shall, at a minimum, consider potential impacts of forest practices on habitats essential to meeting the life requisites for each species listed as threatened or endangered. Those critical habitats (state) adopted by the board shall be added to the list in subsection (1) of this section. See WAC 222-16-050 (1)(b).

(4) For the purpose of identifying any areas and/or forest practices within critical habitats (federal) designated by the United States Secretary of the Interior or Commerce which have the potential for a substantial impact on the environment, the department shall, after consultation with the department of fish and wildlife, submit to the board a proposed list of any forest practices and/or areas proposed for inclusion in Class IV - Special forest practices. The department shall submit the list to the board within 30 days of the date the United States Secretary of the Interior or Commerce publishes a final rule designating critical habitat (federal) in the Federal Register. Those critical habitats included by the board in Class IV - Special shall be added to the list in subsection (2) of this section. See WAC 222-16-050 (1)(b).

(5)(a) (~~Except for bald eagles under subsection (1)(a) of this section,~~) The critical habitats (state) of threatened and endangered species and specific forest practices designated in subsections (1) and (2) of this section are intended to be interim. These interim designations shall expire for a given species on the earliest of:

(i) The effective date of a regulatory system for wildlife protection referred to in (b) of this subsection or of substantive rules on the species.

(ii) The delisting of a threatened or endangered species by the Washington fish and wildlife commission and by the United States Secretary of Interior or Commerce.

(b) The board shall examine current wildlife protection and department authority to protect wildlife and develop and recommend a regulatory system, including baseline rules for wildlife protection. To the extent possible, this system shall:

(i) Use the best science and management advice available;

(ii) Use a landscape approach to wildlife protection;

(iii) Be designed to avoid the potential for substantial impact to the environment;

(iv) Protect known populations of threatened and endangered species of wildlife from negative effects of forest practices consistent with RCW 76.09.010; and

(v) Consider and be consistent with recovery plans adopted by the department of fish and wildlife pursuant to RCW 77.12.020(6) or habitat conservation plans or 16 U.S.C. 1533(d) rule changes of the Endangered Species Act.

(6) Regardless of any other provision in this section, forest practices applications shall not be classified as Class IV - Special based on critical habitat (state) (WAC 222-16-080 and 222-16-050 (1)(b)) for a species, if the forest practices are consistent with one or more of the following:

(a) Documents addressing the needs of the affected species provided such documents have received environmental review with an opportunity for public comment under the National Environmental Policy Act, 42 U.S.C. section 4321 et seq.:

(i) A habitat conservation plan and incidental take permit; or an incidental take statement covering such species approved by the Secretary of the Interior or Commerce pursuant to 16 U.S.C. § 1536(b) or 1539(a); or

(ii) An "unlisted species agreement" covering such species approved by the U.S. Fish and Wildlife Service or National Marine Fisheries Service; or

(iii) Other conservation agreement entered into with a federal agency pursuant to its statutory authority for fish and wildlife protection that addresses the needs of the affected species; or

(iv) A rule adopted by the U.S. Fish and Wildlife Service or the National Marine Fisheries Service for the conservation of an affected species pursuant to 16 U.S.C. section 1533(d); or

(b) Documents addressing the needs of the affected species so long as they have been reviewed under the State Environmental Policy Act;

(i) A landscape management plan; or

(ii) Another cooperative or conservation agreement entered into with a state resource agency pursuant to its statutory authority for fish and wildlife protection;

(c) A special wildlife management plan (SWMP) developed by the landowner and approved by the department in consultation with the department of fish and wildlife;

(d) ~~((A bald eagle management plan approved under WAC 232-12-292;~~

~~(e))~~ A landowner option plan (LOP) for northern spotted owls

developed pursuant to WAC 222-16-100(1);

~~((f))~~ (e) A cooperative habitat enhancement agreement (CHEA) developed pursuant to WAC 222-16-105; or

~~((g))~~ (f) A take avoidance plan issued by the U.S. Fish and Wildlife Service or the National Marine Fisheries Service prior to March 20, 2000;

~~((h))~~ (g) Surveys demonstrating the absence of northern spotted owls at a northern spotted owl site center have been reviewed and approved by the department of fish and wildlife and all three of the following criteria have been met:

(i) The site has been evaluated by the spotted owl conservation advisory group; and

(ii) As part of the spotted owl conservation advisory group's evaluation, the department's representative has consulted with the department of fish and wildlife; and

(iii) The spotted owl conservation advisory group has reached consensus that the site need not be maintained while the board completes its evaluation of rules affecting the northern spotted owl. The spotted owl conservation advisory group shall communicate its findings to the department in writing within sixty days of the department of fish and wildlife's approval of surveys demonstrating the absence of northern spotted owls.

In those situations where one of the options above has been used, forest practices applications may still be classified as Class IV-Special based upon the presence of one or more of the factors listed in WAC 222-16-050(1), other than critical habitat (state) for the species covered by the existing plan or evaluations.

(7) The department, in consultation with the department of fish and wildlife, shall review each SOSEA to determine whether the goals for that SOSEA are being met through approved plans, permits, statements, letters, or agreements referred to in subsection (6) of this section. Based on the consultation, the department shall recommend to the board the suspension, deletion, modification or reestablishment of the applicable SOSEA from the rules. The department shall conduct a review for a particular SOSEA upon approval of a landowner option plan, a petition from a landowner in the SOSEA, or under its own initiative.

(8) The department, in consultation with the department of fish and wildlife, shall report annually to the board on the status of the northern spotted owl to determine whether circumstances exist that substantially interfere with meeting the goals of the SOSEAs.