



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 05-20-996; 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)
Identifying perennial initiation points of non-fish perennial streams.

Hearing location(s):

Community Colleges of Spokane-Colville Center, 985 S. Elm Street, Colville, Washington

Date: September 28, 2006 Time: 5:00 p.m.

CottonTree Inn, 2300 Market Street, Mount Vernon, Washington

Date: October 12, 2006 Time: 5:00 p.m.

Submit written comments to:

Name: Patricia Anderson, DNR Forest Practices Division

Address: 1111 Washington Street SE

PO Box 47012

Olympia, WA 98504-7012

e-mail forest.practicesboard@wadnr.gov

fax (360) 902-1428 by October 13, 2006

Assistance for persons with disabilities: Contact

Forest Practices Division at (360) 902-1400 by September 18, 2006

TTY (360) 902-1125

Date of intended adoption: November 1, 2006
(Note: This is NOT the effective date)

Purpose of the proposal and its anticipated effects, including any changes in existing rules:
WAC 222-16-030(3) and WAC 222-16-031(4) currently give an option to landowners to employ default basin sizes for Western and Eastern Washington on Type Np/Type 4 (perennial non-fish) streams. 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 is considering changes to WACs 222-16-030(3) and 222-16-031(4) that will:

- Eliminate the option to use a default basin size.
- Reference Forest Practices Board Manual Section 23 which will provide guidance on identifying the uppermost point of perennial flow on non-fish perennial streams. The guidance will include 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 amendments 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.

Statutory authority for adoption:
RCW 76.09.040

Statute being implemented:
RCW 76.09.370

Is rule necessary because of a:

- Federal Law? Yes No
- Federal Court Decision? Yes No
- State Court Decision? Yes No

If yes, CITATION:

CODE REVISER USE ONLY

CODE REVISER'S OFFICE
STATE OF WASHINGTON
FILED

AUG 22 2006

TIME 3:22 AM
WSR 06-17-151 PM

DATE
August 21, 2006

NAME Pat McElroy

SIGNATURE

TITLE Chair

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..... Jed Herman	1111 Washington Street SE, Olympia	(360) 902-1705
Implementation...Jed Herman	1111 Washington Street SE, Olympia	(360) 902-1684
Enforcement...Lenny Young	1111 Washington Street SE, Olympia	(360) 902-1744

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: Gretchen Robinson
Address: Department of Natural Resources
PO Box 47012
Olympia WA 98504-7012

phone (360) 902-1705
fax (360)902-1428
e-mail gretchen.robinson@wadnr.gov

No. Explain why no statement was prepared.

Please note: The preliminary cost-benefit analysis and small business economic impact statement are combined in the attached document, Preliminary Economic Analysis.

Is a cost-benefit analysis required under RCW 34.05.328?

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

Name: Gretchen Robinson
Address: Department of Natural Resources
PO Box 47012
Olympia WA 98504-7012

phone (360) 902-1705
fax (360)902-1428
e-mail gretchen.robinson@wadnr.gov

No: Please explain:

AMENDATORY SECTION (Amending WSR 05-12-119, filed 5/31/05, effective 7/1/05)

WAC 222-16-030 Water typing system. Until the fish habitat water type maps described below are adopted by the board, the Interim Water Typing System established in WAC 222-16-031 will continue to be used. The department in cooperation with the departments of fish and wildlife, and ecology, and in consultation with affected Indian tribes will classify streams, lakes and ponds. The department will prepare water type maps showing the location of Type S, F, and N (Np and Ns) Waters within the forested areas of the state. The maps will be based on a multiparameter, field-verified geographic information system (GIS) logistic regression model. The multiparameter model will be designed to identify fish habitat by using geomorphic parameters such as basin size, gradient, elevation and other indicators. The modeling process shall be designed to achieve a level of statistical accuracy of 95% in separating fish habitat streams and nonfish habitat streams. Furthermore, the demarcation of fish and nonfish habitat waters shall be equally likely to over and under estimate the presence of fish habitat. These maps shall be referred to as "fish habitat water typing maps" and shall, when completed, be available for public inspection at region offices of the department.

Fish habitat water type maps will be updated every five years where necessary to better reflect observed, in-field conditions. Except for these periodic revisions of the maps, on-the-ground observations of fish or habitat characteristics will generally not be used to adjust mapped water types. However, if an on-site interdisciplinary team using nonlethal methods identifies fish, or finds that habitat is not accessible due to naturally occurring conditions and no fish reside above the blockage, then the water type will be immediately changed to reflect the findings of the interdisciplinary team. The finding will be documented on a water type update form provided by the department and the fish habitat water type map will be updated as soon as practicable. If a dispute arises concerning a water type the department shall make available informal conferences, as established in WAC 222-46-020 which shall include the departments of fish and wildlife, and ecology, and affected Indian tribes and those contesting the adopted water types.

The waters will be classified using the following criteria:

* (1) **"Type S Water"** means all waters, within their bankfull width, as inventoried as "shorelines of the state" under chapter 90.58 RCW and the rules promulgated pursuant to chapter 90.58 RCW including periodically inundated areas of their associated wetlands.

* (2) **"Type F Water"** means segments of natural waters other

than Type S Waters, which are within the bankfull widths of defined channels and periodically inundated areas of their associated wetlands, or within lakes, ponds, or impoundments having a surface area of 0.5 acre or greater at seasonal low water and which in any case contain fish habitat or are described by one of the following four categories:

(a) Waters, which are diverted for domestic use by more than 10 residential or camping units or by a public accommodation facility licensed to serve more than 10 persons, where such diversion is determined by the department to be a valid appropriation of water and the only practical water source for such users. Such waters shall be considered to be Type F Water upstream from the point of such diversion for 1,500 feet or until the drainage area is reduced by 50 percent, whichever is less;

(b) Waters, which are diverted for use by federal, state, tribal or private fish hatcheries. Such waters shall be considered Type F Water upstream from the point of diversion for 1,500 feet, including tributaries if highly significant for protection of downstream water quality. The department may allow additional harvest beyond the requirements of Type F Water designation provided the department determines after a landowner-requested on-site assessment by the department of fish and wildlife, department of ecology, the affected tribes and interested parties that:

(i) The management practices proposed by the landowner will adequately protect water quality for the fish hatchery; and

(ii) Such additional harvest meets the requirements of the water type designation that would apply in the absence of the hatchery;

(c) Waters, which are within a federal, state, local, or private campground having more than 10 camping units: Provided, That the water shall not be considered to enter a campground until it reaches the boundary of the park lands available for public use and comes within 100 feet of a camping unit, trail or other park improvement;

(d) Riverine ponds, wall-based channels, and other channel features that are used by fish for off-channel habitat. These areas are critical to the maintenance of optimum survival of fish. This habitat shall be identified based on the following criteria:

(i) The site must be connected to a fish habitat stream and accessible during some period of the year; and

(ii) The off-channel water must be accessible to fish.

(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 Np Waters)~~) and include the intermittent dry portions of the perennial channel below 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 Np 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, or~~

~~(c) At least 300 acres in Eastern Washington.)~~ See board manual section 23 for guidance if the uppermost point of perennial flow cannot be identified with simple, nontechnical observations.

(4) **"Type Ns Water"** means all segments of natural waters within the bankfull width of the defined channels that are not Type S, F, or Np Waters. These are seasonal, nonfish habitat streams in which surface flow is not present for at least some portion of a year of normal rainfall and are not located downstream from any stream reach that is a Type Np Water. Ns Waters must be physically connected by an above-ground channel system to Type S, F, or Np Waters.

*(5) For purposes of this section:

(a) "Residential unit" means a home, apartment, residential condominium unit or mobile home, serving as the principal place of residence.

(b) "Camping unit" means an area intended and used for:

(i) Overnight camping or picnicking by the public containing at least a fireplace, picnic table and access to water and sanitary facilities; or

(ii) A permanent home or condominium unit or mobile home not qualifying as a "residential unit" because of part time occupancy.

(c) "Public accommodation facility" means a business establishment open to and licensed to serve the public, such as a restaurant, tavern, motel or hotel.

(d) "Natural waters" only excludes water conveyance systems which are artificially constructed and actively maintained for irrigation.

(e) "Seasonal low flow" and "seasonal low water" mean the conditions of the 7-day, 2-year low water situation, as measured or estimated by accepted hydrologic techniques recognized by the department.

(f) "Channel width and gradient" means a measurement over a representative section of at least 500 linear feet with at least 10 evenly spaced measurement points along the normal stream channel but excluding unusually wide areas of negligible gradient such as marshy or swampy areas, beaver ponds and impoundments. Channel gradient may be determined utilizing stream profiles plotted from United States geological survey topographic maps (see board manual section 23).

(g) "Intermittent streams" means those segments of streams that normally go dry.

(h) "Fish habitat" means habitat which is used by any fish at any life stage at any time of the year, including potential habitat likely to be used by fish which could be recovered by restoration or management and includes off-channel habitat.

WAC 222-16-031 Interim water typing system. Until the fish habitat water type maps mentioned above are available, waters will be classified according to the interim water typing system described below. If a dispute arises concerning a water type, the department shall make available informal conferences, which shall include the departments of fish and wildlife, ecology, and affected Indian tribes and those contesting the adopted water types. These conferences shall be established under procedures established in WAC 222-46-020.

For the purposes of this interim water typing system see the following table:

Water Type Conversion Table

Permanent Water Typing	Interim Water Typing
Type "S"	Type 1 Water
Type "F"	Type 2 and 3 Water
Type "Np"	Type 4 Water
Type "Ns"	Type 5 Water

* (1) **"Type 1 Water"** means all waters, within their ordinary high-water mark, as inventoried as "shorelines of the state" under chapter 90.58 RCW and the rules promulgated pursuant to chapter 90.58 RCW, but not including those waters' associated wetlands as defined in chapter 90.58 RCW.

* (2) **"Type 2 Water"** means segments of natural waters which are not classified as Type 1 Water and have a high fish, wildlife, or human use. These are segments of natural waters and periodically inundated areas of their associated wetlands, which:

(a) Are diverted for domestic use by more than 100 residential or camping units or by a public accommodation facility licensed to serve more than 10 persons, where such diversion is determined by the department to be a valid appropriation of water and only considered Type 2 Water upstream from the point of such diversion for 1,500 feet or until the drainage area is reduced by 50 percent, whichever is less;

(b) Are diverted for use by federal, state, tribal or private fish hatcheries. Such waters shall be considered Type 2 Water upstream from the point of diversion for 1,500 feet, including tributaries if highly significant for protection of downstream water quality. The department may allow additional harvest beyond the requirements of Type 2 Water designation provided by the department of fish and wildlife, department of ecology, the affected tribes and interested parties that:

(i) The management practices proposed by the landowner will adequately protect water quality for the fish hatchery; and

(ii) Such additional harvest meets the requirements of the water type designation that would apply in the absence of the hatchery;

(c) Are within a federal, state, local or private campground

having more than 30 camping units: Provided, That the water shall not be considered to enter a campground until it reaches the boundary of the park lands available for public use and comes within 100 feet of a camping unit.

(d) Are used by fish for spawning, rearing or migration. Waters having the following characteristics are presumed to have highly significant fish populations:

(i) Stream segments having a defined channel 20 feet or greater within the bankfull width and having a gradient of less than 4 percent.

(ii) Lakes, ponds, or impoundments having a surface area of 1 acre or greater at seasonal low water; or

(e) Are used by fish for off-channel habitat. These areas are critical to the maintenance of optimum survival of fish. This habitat shall be identified based on the following criteria:

(i) The site must be connected to a fish bearing stream and be accessible during some period of the year; and

(ii) The off-channel water must be accessible to fish through a drainage with less than a 5% gradient.

* (3) "Type 3 Water" means segments of natural waters which are not classified as Type 1 or 2 Waters and have a moderate to slight fish, wildlife, or human use. These are segments of natural waters and periodically inundated areas of their associated wetlands which:

(a) Are diverted for domestic use by more than 10 residential or camping units or by a public accommodation facility licensed to serve more than 10 persons, where such diversion is determined by the department to be a valid appropriation of water and the only practical water source for such users. Such waters shall be considered to be Type 3 Water upstream from the point of such diversion for 1,500 feet or until the drainage area is reduced by 50 percent, whichever is less;

(b) Are used by fish for spawning, rearing or migration. The requirements for determining fish use are described in the board manual section 13. If fish use has not been determined:

(i) Waters having any of the following characteristics are presumed to have fish use:

(A) Stream segments having a defined channel of 2 feet or greater within the bankfull width in Western Washington; or 3 feet or greater in width in Eastern Washington; and having a gradient of 16 percent or less;

(B) Stream segments having a defined channel of 2 feet or greater within the bankfull width in Western Washington; or 3 feet or greater within the bankfull width in Eastern Washington, and having a gradient greater than 16 percent and less than or equal to 20 percent, and having greater than 50 acres in contributing basin size in Western Washington or greater than 175 acres contributing basin size in Eastern Washington, based on hydrographic boundaries;

(C) Ponds or impoundments having a surface area of less than 1 acre at seasonal low water and having an outlet to a fish stream;

(D) Ponds or impoundments having a surface area greater than 0.5 acre at seasonal low water.

(ii) The department shall waive or modify the characteristics in (i) of this subsection where:

(A) Waters have confirmed, long term, naturally occurring water quality parameters incapable of supporting fish;

(B) Snowmelt streams have short flow cycles that do not support successful life history phases of fish. These streams typically have no flow in the winter months and discontinue flow by June 1; or

(C) Sufficient information about a geomorphic region is available to support a departure from the characteristics in (i) of this subsection, as determined in consultation with the department of fish and wildlife, department of ecology, affected tribes and interested parties.

* (4) "Type 4 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. (~~(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 Byrness, 1973);~~

~~(b) At least 52 acres in other locations in Western Washington;~~

~~(c) At least 300 acres in Eastern Washington.)~~ See board manual section 23 for guidance if the uppermost point of perennial flow cannot be identified with simple, nontechnical observations.

* (5) "Type 5 Waters" means all segments of natural waters within the bankfull width of the defined channels that are not Type 1, 2, 3, or 4 Waters. These are seasonal, nonfish habitat streams in which surface flow is not present for at least some portion of the year and are not located downstream from any stream reach that is a Type 4 Water. Type 5 Waters must be physically connected by an above-ground channel system to Type 1, 2, 3, or 4 Waters.

* (6) For purposes of this section:

(a) "Residential unit" means a home, apartment, residential condominium unit or mobile home, serving as the principal place of residence.

(b) "Camping unit" means an area intended and used for:

(i) Overnight camping or picnicking by the public containing at least a fireplace, picnic table and access to water and sanitary facilities; or

(ii) A permanent home or condominium unit or mobile home not qualifying as a "residential unit" because of part time occupancy.

(c) "Public accommodation facility" means a business establishment open to and licensed to serve the public, such as a restaurant, tavern, motel or hotel.

(d) "Natural waters" only excludes water conveyance systems which are artificially constructed and actively maintained for irrigation.

(e) "Seasonal low flow" and "seasonal low water" mean the conditions of the 7-day, 2-year low water situation, as measured or estimated by accepted hydrologic techniques recognized by the department.

(f) "Channel width and gradient" means a measurement over a representative section of at least 500 linear feet with at least 10 evenly spaced measurement points along the normal stream channel but excluding unusually wide areas of negligible gradient such as marshy or swampy areas, beaver ponds and impoundments. Channel gradient may be determined utilizing stream profiles plotted from United States geological survey topographic maps: (See board manual section 23.)