

PRELIMINARY ECONOMIC ANALYSIS
Forest Practices Board
Rule Making Affecting WAC 222-16-080 Critical Habitats
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PROPOSAL

The Forest Practices Board (Board) proposes to amend [WAC 222-16-080](#), *Critical habitats (state) of threatened and endangered species*. The amendments include:

- Deleting the bald eagle (*Haliaeetus leucocephalus*) and the peregrine falcon (*Falco peregrinus*) from the list of critical habitats in subsection (1);
- Deleting bald eagle management plans from the list in subsection (6) of federal and state approved plans that can exempt a forest practices application (FPA) from a Class IV-special classification; and
- Changing the name of the species identified in the rule as Western pond turtle (*Clemmys marmorata*) to Pacific pond turtle (*Actinemys marmorata*) as recommended by the Washington Department of Fish and Wildlife.

RULE-COMPLYING COMMUNITY

The rule-complying community for this proposal is forest landowners who propose forest practices within the critical habitats of the bald eagle and the peregrine falcon defined in WAC 222-16-080(1). In this document, the rule complying community is often referred to as “landowners” and “affected landowners.”

ANALYSIS REQUIREMENTS

In Washington State, agencies are required to analyze the economic effects of rule proposals for those required to comply with them.

The laws that govern agency rule making are in the Regulatory Fairness Act (chapter 19.85 RCW) and the Administrative Procedure Act (chapter 34.05 RCW). The Regulatory Fairness Act requires agencies to produce a small business economic impact statement explaining the impacts of their rule proposals on small businesses, if the proposed rule will impose more than minor costs on businesses in an industry. The statute defines small businesses as businesses that are independently owned or operated and having 50 or fewer employees. To determine whether the proposed rule will have a disproportionate impact on small businesses, the cost of compliance for small businesses is compared with the costs for the ten percent of businesses that are the largest businesses required to comply with the proposed rule.¹

¹ See [chapter 19.85 RCW](#) *Regulatory fairness act* for a detailed description of small business analysis requirements.

The Administrative Procedure Act requires agencies to complete a cost-benefit analysis before adopting a rule that affects a policy or regulatory program. An agency cannot adopt a rule unless it:

- Determines the rule is needed to achieve the general goals and specific objectives of statute;
- Determines 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
- Determines 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 the rule implements.²

This document fulfills those requirements for the portion of the proposal that affects the forest practices regulatory program: eliminating the critical habitat definitions of two species in WAC 222-16-080(1) and eliminating bald eagle management plans from WAC 222-16-080(6)(d). Changing the name of the pond turtle in WAC 222-16-080(1) is not analyzed because it has no material effect on the program or the rule-complying community.

CONTEXT

Forest Practices Act and rules

The rule proposed for amendment is in Title 222 WAC *Forest Practices Board* which contains the rules that regulate forest practices on state managed and privately owned forest lands. These rules implement the Forest Practices Act (chapter 76.09 RCW). Two general goals of the Forest Practices Act are to maintain a viable forest products industry and to ensure forest lands are managed consistent with sound policies of natural resource protection.³

The forest practices rules address wildlife habitat protection in a variety of ways. One is requiring the Department of Natural Resources (DNR) to classify certain forest practices applications (FPAs) Class IV-special; this triggers environmental analysis in compliance with the State Environmental Policy Act (SEPA).⁴

Among the circumstances that require the Class IV-special classification are specific forest practices within certain distances and timeframes associated with forest-dependent species listed as “threatened” or “endangered” in Washington.⁵ These species and their “critical habitats” are defined in WAC 222-16-080, and the bald eagle and the peregrine falcon are among the species on this list.

² See [RCW 34.05.328](#) *Significant legislative rules* for more information about rule making requirements.

³ [RCW 76.09.010\(1\)](#).

⁴ See [RCW 76.09.050](#) and [WAC 222-16-050](#) for classes of forest practices.

⁵ Washington Department of Fish and Wildlife rules contain state lists of species designated as endangered, threatened, and sensitive. See [WAC 232-12-011](#) and [WAC 232-12-014](#).

There is an exception to the Class IV-special classification for forest practices within the critical habitats. If they are consistent with certain approved state or federal conservation plans for a particular species, the FPA is not classified Class IV-special based on critical habitat for that species. These plans are listed in [WAC 222-16-080\(6\)](#). One is a bald eagle management plan between landowners and the Washington Department of Fish and Wildlife (WDFW) under WAC 232-12-292 *Bald eagle protection rules*. However, due to a 2011 change in a WDFW rule, this plan is no longer available to exempt FPAs from the Class IV-special classification.

Washington Fish and Wildlife Commission actions

After the U.S. Fish and Wildlife Service (USFWS) removed the bald eagle and peregrine falcon from federal endangered and threatened wildlife lists in 2007 and 1999 respectively, the Washington Fish and Wildlife Commission (Commission) changed the classifications of the peregrine falcon and bald eagle to a “state sensitive” status. These actions took place in 2002 for the falcon and 2008 for the eagle. According to Washington Department of Fish and Wildlife (WDFW) rule making documents, both species’ populations recovered dramatically after the ban on DDT use after 1972 and habitat protection laws were enacted.⁶

Both the eagle and the falcon continue to be protected by state and federal law. At the state level Washington’s “state sensitive” species are protected from hunting and fishing. At the federal level both species are protected under the Migratory Bird Treaty Act which protects birds and their nests. The bald eagle is also protected under the federal Bald and Golden Eagle Protection Act which prohibits the disturbance of eagles.⁷

In April 2011, the Commission adopted an amendment to [WAC 232-12-292](#) *Bald eagle protection rules* which added an introductory statement that the “...rules are only applicable and enforceable when the bald eagle is listed under state law as threatened or endangered.”⁸ In other words, WAC 232-12-292 is no longer in effect until such time as the bald eagle is reclassified under state law as state threatened or endangered.

When in effect, WAC 232-12-292 requires WDFW to make information available to governmental entities, interest groups, and landowners regarding the location and use pattern of eagle nests and communal roosts. It also contains a process for permitting agencies to notify WDFW of proposals in the vicinity of eagle nests or roosts according to existing data. If WDFW determines an activity would adversely impact eagle habitat, the permitting agency, a wildlife biologist, or WDFW could work with the landowner to develop a bald eagle management plan, and WDFW would then approve or disapprove the plan. Now that this rule is not in effect (until such time as the bald eagle is reclassified as state threatened or endangered), WDFW is no longer assisting landowners with or approving these plans.

⁶ See Washington State Registers (WSRs) [02-06-122](#) and [02-11-069](#) for the peregrine falcon and WSR [07-21-123](#) and [08-03-068](#) for the bald eagle for more information about these actions. The state endangered species list is in [WAC 232-12-014](#) and the lists of threatened and sensitive species are in [WAC 232-12-011](#).

⁷ Information about the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act can be seen at <http://www.fws.gov/pacific/migratorybirds/mbta.htm>.

⁸ See Washington State Registers [11-03-088](#) and [11-10-049](#) for information about this rule activity.

Effect of the Commission's actions on forest practices

The effect of the above described Commission actions for Washington State forest practices is twofold: WAC 222-16-080(1) is now inconsistent with the reclassification of the eagle and the falcon, and bald eagle management plans are not available to exempt FPAs from the Class IV-special classification under WAC 222-16-080(6)(d).

GOALS AND OBJECTIVES OF RULE PROPOSAL

The goal of the rule proposal is to make WAC 222-16-080 consistent with changes in state status of the bald eagle and peregrine falcon. Objectives are to:

- Eliminate the requirement for DNR to classify FPAs Class IV-special for critical habitats of species whose state protection status is no longer “threatened” or “endangered”; and
- Eliminate process burdens on affected landowners caused by the inconsistency between WAC 222-16-080 and the Commission's decision to remove these species from the state endangered and threatened lists in WACs 232-12-011 and -014.

LEAST BURDENSOME ALTERNATIVE ANALYSIS

RCW 34.05.328(1)(e) requires agencies to 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 the rule implements.

Not changing WAC 222-16-080 *Critical habitats (state) of threatened and endangered species* would continue the burden on affected landowners of an extra step in the FPA process – conducting an environmental analysis in compliance with SEPA for two species that are no longer listed as threatened or endangered. This is contrary to common sense and creates uncertainty for landowners about the FPA process. Process uncertainty and extra process steps are burdensome for those required to comply with the regulations.

Another alternative to the rule as currently proposed would be to add language to the FPA classification rules (WAC 222-160-050) to ensure consistency with federal law and guidelines that protect eagle nests and roosts. To explore this, at the request of the Board, WDFW recently convened a multi-caucus Wildlife Work Group which discussed regulatory and administrative options. The group determined by consensus opinion that additional rules are not needed. This is based on DNR and WDFW performing a set of administrative actions and functions including providing eagle location data and advising affected landowners to contact the USFWS for guidance on bald eagle protection.⁹ Had there been a recommendation to the Board for additional rule language, the rule making process may have taken a longer time. The longer it takes to amend WAC 222-16-080 the greater the burden on affected landowners.

⁹ Department of Fish and Wildlife, David Whipple memorandum dated October 19, 2011 to the Forest Practices Board.

http://www.dnr.wa.gov/BusinessPermits/Topics/OtherInteragencyInformation/Pages/bc_fp_agendas_minutes.aspx
11-8-11 Meeting Materials.

In summary, amending the rule as proposed is less burdensome for affected landowners than not amending the rule at all, and the sooner it is amended the less burdensome it will be for those required to comply with it.

BENEFITS AND COSTS

In this analysis, the benefits and costs of the rule proposal are determined by comparing the FPA process for affected landowners under current rule with the FPA process that will take place after the rule is adopted.

Until WAC 222-16-080 is amended to reflect the Commission's actions, DNR is continuing to implement the critical habitat definitions for the eagle and the falcon. FPAs proposing activities within their defined critical habitats are Class IV-special. Conversely, after WAC 222-16-080 is amended DNR will not classify FPAs Class IV-special based on the eagle and falcon critical habitat definitions (which will no longer exist in the forest practices rules) and landowners will not be required to fulfill the SEPA requirement based on the proximity of their proposed activities to eagle and falcon habitat.

Since May 2011, WDFW is deferring protection of the bald eagle to the USFWS. DNR and WDFW are encouraging landowners to implement federal guidelines for the protection of the bald eagle. Landowners who want to ensure their activities will not adversely affect eagles must now work with a new agency, the USFWS, and follow a different process than they are accustomed to. This new process will continue for landowners even after WAC 222-16-080 is amended.

It is beyond the scope of this cost-benefit analysis to predict any changes in timber income or habitat conditions that may result from the changes in status for the bald eagle and the peregrine falcon to "state sensitive." Permitted forest management activities have been, are, and will continue to be determined on a site-by-site basis by the governmental entity with jurisdiction (formerly WDFW and DNR). The agency of jurisdiction for timber operations and forest practices affecting bald eagle and peregrine falcon habitat is now the USFWS, which continues to be responsible for the protection of those species under federal laws. The level of permitted management activity on a given site may or may not change depending on the level considered necessary to protect eagles and falcons under federal laws.

Benefits

The probable benefits of the rule change for affected landowners are providing more certainty about FPA procedures and eliminating the extra process step of completing SEPA. We can roughly estimate a cost savings for affected landowners by determining how much they will save when they are not required to conduct a SEPA analysis. Assuming the cost is for completing an environmental checklist (and not an environmental impact statement), DNR estimates each SEPA checklist of this nature would cost roughly \$400. This is based on an estimate of 16 hours

to complete the SEPA checklist and conduct the necessary internal review, and at an average of \$25 per hour for staff (16 hours x \$25 per hour = \$400).

From June 2011, the full month after the Board started the rule making process, through September 2011, landowners have attached 46 SEPA checklists to FPAs proposing activities within areas that correspond to the critical habitat definitions of the bald eagle (there were no checklists for the peregrine falcon in that timeframe). This is an average of about 11.5 SEPA checklists per month. It can be estimated, therefore, that affected landowners are collectively spending an average of approximately \$4600 per month for this extra process step until the rule is amended ($\$400 \times 11.5$ SEPA checklists per month = \$4600 per month). In other words, we are estimating that once the rule becomes effective, the proposed rule could result in a cost savings for affected landowners statewide of roughly \$4600 per month, or \$55,200 per year (12 months x \$4600).

Costs

No costs specific to this rule proposal have been identified for affected landowners. Any costs associated with changes in the FPA process are due to the reclassification of the eagle and the falcon by the Washington Fish and Wildlife Commission and the fact that bald eagle management plans are no longer available. Environmental impacts are currently being analyzed by DNR.

SMALL BUSINESS IMPACTS

As explained under “Analysis Requirements”, the Regulatory Fairness Act (chapter 19.85 RCW) requires agencies to produce a small business economic impact statement explaining the impacts of their rule proposals on small businesses. When these impacts are identified the agency must try to find ways to reduce the impacts.

No costs specific to this rule proposal have been identified; therefore, the rule proposal does not meet the threshold of imposing more than minor costs on businesses and a Small Business Economic Impact Statement is not required.

SUMMARY

The Forest Practices Board has determined that the proposed rule is needed to achieve consistency with the Washington Fish and Wildlife Commission’s reclassification of the peregrine falcon and bald eagle from state “threatened” or “endangered” to “state sensitive” status.

Least burdensome alternative

Application processes can be burdensome for those required to comply with rules. This proposal will alleviate the uncertainty and extra process caused from the bald eagle and peregrine falcon critical habitats remaining in WAC 222-16-080(1). Amending the rule as proposed is less burdensome for affected landowners than not amending the rule at all, and the sooner it is amended the less burdensome it will be for those required to comply with it.

Benefits and costs

The main benefit for affected landowners is that FPAs involving the currently defined critical habitats of the bald eagle and peregrine falcon will no longer be classified Class IV-special based on critical habitat. Consequently, affected landowners will no longer be required to complete the SEPA process step which is only required for state listed threatened or endangered species according to WAC 222-16-080(1) and they will benefit by no longer incurring the associated costs. The proposal is not expected to impose any costs on affected landowners.

Small business impact

The proposed rule does not meet the threshold of imposing more than minor costs on businesses; therefore, a small business economic impact statement is not required for this rule proposal.