



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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December 3, 2021

Forest Practices Board Members

Sent by email only: patricia.anderson@dnr.wa.gov

Dear Forest Practices Board Members:

Twenty-two years have passed since the adoption of the 1999 Forests and Fish Report. During the intervening years, the Department of Ecology (Ecology), with the support of the U.S. Environmental Protection Agency (EPA), has maintained the commitment to provide the Clean Water Act Assurances (Assurances) for forest practices in Washington State. The Assurances provided promised state and federal guarantees covering both the Clean Water Act as well as the Endangered Species Act, to serve as a predictable and a consistent regulatory framework for the forest industry.

The Assurances require Ecology's considered determination that the Adaptive Management Program (AMP) established under the Timber, Fish, and Wildlife (TFW) agreement is effective at improving water quality in the short term and meeting water quality standards in the longer term. For Ecology to continue to uphold the assurances, we must determine that the AMP is functioning as originally envisioned in order to meet these objectives.

As a result of Forests and Fish, we have seen improvements across lands covered by the Forest Practices Act. Through the Road Maintenance and Abandonment Planning (RMAP) requirement, nearly all RMAP plans were completed by the October 31, 2021, deadline, resulting in more than 8,300¹ fish passage barriers corrected, opening more than 5,100 miles of fish habitat. The Washington Department of Natural Resources (DNR) is working with landowners to make sure the few remaining obligations are completed. The Cooperative Monitoring, Evaluation, and Research Committee has completed many studies. The Policy Committee and the Board have implemented and refined the Desired Future Conditions as well as provided two template alternate plans for small forest landowners.

Washington's AMP serves as a model for others. Stakeholders in Oregon have recently committed to a similar process to address regulatory practices within the forestry industry. The Board's motion to direct staff to file a CR-101, to notify the public of their intent to amend existing rules related to non-fish bearing perennial steams (Type Np riparian buffers) in Western Washington, is an encouraging signal to me that the TFW stakeholders are committed to water quality, TFW, and the AMP.

However, there is still much work that remains to be done. The TFW parties must consider process improvements to ensure that the AMP functions effectively and efficiently into the future. It is also imperative that the parties move expeditiously to develop a proposal for Type Np buffer prescriptions. Because I believe the parties are committed to accomplishing both things, Ecology has concluded that it

¹ 2020 Forest Practices Habitat Conservation Plan Annual Report, Chapter 11

is appropriate to allow time for the adaptive management process to demonstrate measurable progress over the next year.

Documented Problems with the Adaptive Management Program

On October 9, 2009, Ecology conditionally extended the Clean Water Act Assurances for a ten-year period. The extension was conditioned on the AMP meeting a scheduled set of milestones for program improvements and research development.

A detailed set of findings accompanied the 2009 extension decision. Those findings identified a number of existing problems with the adaptive management process:

The CWA assurances were established on the condition that an effective adaptive management process (AMP) would be established and maintained. A healthy and effective AMP is central to the ability of Ecology to offer the CWA assurances. The AMP needs to provide a scientific framework for testing whether the forest practices rules are effective in protecting water quality, and for identifying any changes needed to rules not found effective. Substantial progress has been made through establishing the structure and formal operational procedures of the AMP. An AMP board manual was developed to further outline how the program should operate, and significant funding and effort has occurred to get scientific studies underway to test various portions of the rules and guidelines governing forest practices.

In spite of these substantial efforts, the AMP has not completed any studies that directly test the effectiveness of the rules in protecting water quality. The science arm of the AMP has also been largely unsuccessful in providing research findings the Forest and Fish Policy Committee (Policy) and the Forest Practices Board (Board) will reliably use to validate or to revise the forest practices regulations and guidance. There are significant problems with the ability of the policy and science arms of the AMP to work together to test and revise the rules in a timely and effective manner. Part of the problem is simply inherent in a program that seeks to develop consensus among stakeholders with competing interests. But the problems also seem rooted in the foundation of the AMP itself. AMP participants frequently disagree about the appropriate roles of science and policy, as well as what role the initial negotiated forests and fish rules should play in evaluating the acceptability of future changes. These disagreements appear in part to stem from a lack of clarity in the underlying rules and guidance. Combined with poor communication between the science and policy arms of the program, this is compromising the AMP's effectiveness. To the credit of its participants, strategic planning efforts are underway with the intention of identifying and correcting the shortcomings of the program. The Policy committee has developed a strategic plan...with five broad goals supported by multiple objectives and specific tasks designed to revitalize the adaptive management program. There is also general understanding that testing the effectiveness of the rules for protecting water quality must be a top priority if Ecology is to continue the assurances.

The state legislature (RCW 76.09.370) directed that forest practices rules covering aquatic resources only be adopted or changed by the Board where those changes are consistent with recommendations resulting from a scientifically based adaptive management process. The stated purpose of having the adaptive management process is to make adjustments as quickly as possible to portions of the forest practices rules that are not achieving resource objectives. Both as a participant and a reviewer, Ecology has concluded that fundamental improvements are needed to ensure the rules and associated programs will be tested and revised in a timely

manner based on scientific inquiry, as intended by the legislature and consistent with CWA assurances.

On February 23, 2021, the State Auditor issued a performance audit report describing the significant issues that continue to plague the AMP. The Auditor's Office concluded that the program is not "operating as intended" and that, without needed changes, the "program would continue to languish." The Auditor's Office recognized that, while the program was "designed to allow nimble changes to forest practices rules," the program has in fact only resulted in two science-based rule revisions since 2006. The Audit Report contains a number of recommendations designed to get the program on track so that it can perform its functions as intended.

Ecology is aware that the Forest Practices Board has submitted a budget request to address some of the recommendations contained in the Audit Report, and Ecology commends the Board's clear commitment to doing so. In addition, Ecology is grateful that the Public Lands Commissioner is convening a meeting of TFW principals so that we can address these issues at the highest levels of accountability within our respective organizations. Of course, the TFW stakeholders themselves must also commit to program improvement. This will necessarily entail an openness to changing current aspects of the program, such as revisiting the unanimous voting requirement and/or streamlining the dispute resolution process. Because fixing problems with the AMP is so integrally tied to the Clean Water Act Assurances, making clear and measurable progress toward addressing the Auditor's recommendations is necessary to provide Assurances that the forest industry is making progress towards protecting water quality.

Rulemaking for Type Np Streams

The maintenance of forested buffers is critical to protect water quality. Under current rules, non-fish bearing perennial streams (Type Np) receive less forested buffers than fish bearing streams. As a result, the 2009 findings recognized that "the prescriptions associated with the Type Np rules have the greatest potential risk of violating the water quality standards."

On December 2, 2019, Ecology issued another conditional extension of the Clean Water Act Assurances. In doing so, Ecology concluded that the Type Np Hard Rock study² clearly demonstrates the need to strengthen the Type Np riparian rules to protect water quality. Ecology noted that the TFW Policy Committee and the Forest Practices Board "recently agreed to a workgroup process aimed at developing new rule prescriptions."³ In light of this commitment to rulemaking by TFW stakeholders, Ecology extended the Assurances for an additional two years so that the Board would have ample time "to reach an agreement on the Type N rules." As evidence that the Adaptive Management Program was working, Ecology noted that there would need to be a CR101 filing in the summer of 2021 and a draft CR102 distributed for public review by the end of November 2021.

While we are pleased that the Board directed staff to issue a CR101 at its November 2021 meeting, Washington Department of Natural Resources (DNR) staff have not distributed a draft CR102, and there is no feasible pathway for them to distribute a draft by the end of this year. It is clear that the Board did not meet the conditions included in Ecology's 2019 extension of the Assurances insofar as DNR has not issued a draft CR102. Nevertheless, I have spoken with representatives of the TFW stakeholders and perceive a genuine commitment to moving this rulemaking forward. Despite this commitment, it is

² *"Effectiveness of Experimental Riparian Buffers on Perennial Non-fish-bearing Streams on Competent Lithologies in Western Washington", McIntyre et al, September 2018, CMER #18-100*

³ Timber Fish and Wildlife Policy Technical Type N Prescriptions Charter – March 7, 2019

evident that we cannot make progress without meaningfully addressing the issues identified in the 2021 Audit Report. Achievement of our objectives will require a concerted effort by all TFW stakeholders in the TFW process over the next several months.

Clean Water Act Assurances

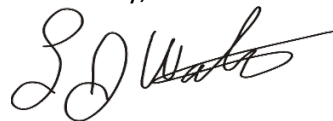
Ecology has determined that it is appropriate to allow time for the AMP to make measurable progress implementing the 2021 Audit Report recommendations and for Policy to make a final recommendation on Type Np buffer prescriptions to the Board, with the Board directing Board staff and DNR to develop a rule package and prepare the CR102. Achievement of these objectives during this extension of the assurances for an additional year will help all of us continue to meet the obligations we committed to when we signed onto the groundbreaking Forests and Fish Agreement.

By December 31, 2022, Ecology must submit to EPA and the National Marine Fisheries Service/United States Fish and Wildlife Service (Services) an updated statewide non-point source pollution management plan under Section 319 of the Clean Water Act. EPA and the Services will review the non-point plan under both the Clean Water Act and Endangered Species Act following its submittal at the end of 2022.

The performance of the Forests and Fish Agreement and associated Forest Practices Rules are key components of the non-point plan regarding the protection of water quality on forest lands. Therefore, the achievements over the next year will help us evaluate the effectiveness of the AMP as we complete the plan. In the plan, Ecology must document whether the rules are effective in protecting Washington's waters, and this determination is key to the Clean Water Act Assurances. If the rules are not achieving the resource objectives, Ecology must document the steps it will take instead to address the protection of water quality.

My sincere hope is that the TFW stakeholders will use the next year to demonstrate that we can work together to improve the Adaptive Management Program so that forest lands are managed in a way that protects water quality now and into the future. I look forward to working with all TFW stakeholders to accomplish our important shared mission of providing regulatory certainty for the industry while protecting our cherished natural resources.

Yours truly,



Laura Watson
Director

cc: Hilary Franz, Commissioner of Public Lands, DNR
Michelle Pirzadeh, Acting Regional Administrator/Deputy Regional Administrator, EPA Region 10