



DEPARTMENT OF
ECOLOGY
State of Washington

**Conducting the 2009 review of the Clean
Water Act assurances given to the state's
Forest Practices Program**

April 4, 2008

For more information contact:

Mark Hicks
Forest water quality coordinator
Washington Department of Ecology
(360) 407-6477
mhic461@ecy.wa.gov

What is the Purpose of this Paper?

The Washington State Department of Ecology (Ecology) is reviewing the state's forest practices program. The purpose of the review is to determine if the program should continue to be relied on to protect water quality and to bring degraded waters back into compliance with the state surface water quality standards. This paper is intended to help the public understand how Ecology will proceed with the review.

Why is Ecology Reviewing State Forest Practices Program?

In 1999, forest landowners, tribes, state and federal resource agencies, county government, and environmental interests worked together to develop the Forests and Fish Report.¹ The report recommended substantial changes in the way forests should be managed, and established a formal adaptive management program to test the effectiveness of the new requirements. In 2000, the Forests and Fish Report was adopted into the state's forest practices regulations.

As part of the Forests and Fish Report (Schedule M-2), Ecology provided assurances to landowners that the new regulations would be relied on to protect water quality for a 10-year period (until June 30, 2009). This was believed to provide adequate time to determine if the rules and their associated programs are effective in protecting water quality.

Ecology is now in the process of assessing if the state's forest practices program can continue to be relied on to protect water quality, and to bring degraded waters into compliance with state water quality standards² and the federal Clean Water Act (CWA). The results of the review will be used by Ecology and the United States Environmental Protection Agency (EPA) to determine if Clean Water Act assurances should be continued beyond June 30, 2009.

What are the Clean Water Act Assurances?

The CWA assurances establish a time-limited assumption that the state forest practices program is adequate to protect water quality (this includes maintaining compliance with state water quality standards and restoring impaired water bodies to good health). The assurances also include time-limited promises that Ecology will not take action, other than requiring compliance with forest practices rules, to improve water quality.

The following summarizes the key assurances from Schedule M-2 of the Forests and Fish Report:

- 1) Total Maximum Daily Loads (TMDLs) are technical studies that determine what is necessary to bring a waterbody into compliance with the state water quality standards.

¹ See http://www.dnr.wa.gov/Publications/fp_rules_forestsandfish.pdf for the report.

² See <http://www.ecy.wa.gov/biblio/0610091.html> for a copy of the state standards.

TMDLs become a lower priority and need not be prepared prior to July 1, 2009, in waters subject to the state forest practices rules.

- 2) No new TMDL or other CWA requirements will be established prior to July 1, 2009, for waters where water quality impacts are largely the result of forestry.
- 3) If new federal CWA regulations don't support alternatives to TMDLs, EPA and Ecology will develop TMDLs beginning July 1, 2009, and completed by 2013³.
- 4) For TMDLs produced prior to 2009 in mixed use watersheds (watersheds with human sources of pollution besides forestry), Ecology will not require more stringent forest practices before July 1, 2009.
- 5) Landowners with individual Habitat Conservation Plans wishing CWA assurances may petition EPA and Ecology for coverage.

What was Ecology's Basis for Granting the Assurances?

Ecology recognized the 1999 Forests and Fish Report, when implemented, would significantly advance forest practices in the State of Washington. The revisions to the forest practices program were believed capable of improving water quality in the short term, and potentially meeting the state's water quality standards in the longer term. The urgency of developing TMDLs for water bodies impaired by current forest practices were thus believed to be significantly reduced. The Forests and Fish Report initiated a package of state regulations, guidance, funding, and restoration programs. The Report also served as the basis for a federal Endangered Species Act (ESA) Habitat Conservation Plan. The state forest practice regulations and the authority for ESA sanctions, taken together provided a reasonable assurance of implementation of the Forests and Fish Report and its recommendations.

Ten years was considered a reasonable minimum time frame for the initial exercise of priority-setting discretion (the assurances described above), based on the overall protectiveness of the Report. The ten-year time frame was also consistent with the schedule for developing TMDLs established as part of a settlement agreement. Ten years was believed to allow enough time to test the assumptions underlying the proposed regulatory provisions and the effectiveness of adaptive management. Ten years was also believed to be a reasonable time frame to determine some initial water quality trends resulting from the changes to forest practices.

³ Alternatives to conducting TMDLs for impaired waters were developed by EPA. This includes an alternative that would make it unnecessary to develop TMDLs in waters where other water pollution control plans exist that provide a reasonable assurance of bringing them into compliance with the state standards.

What is the Focus of Ecology's 2009 Decision?

The CWA assurances are described in the Report along with conditions that might cause Ecology to modify or revoke them. The conditions for granting the CWA assurances are established in Schedule M-2 of the Report and in a more detailed 2006 Ecology/EPA discussion paper⁴. These previously-established documents provide the foundation for the 2009 decision.

As of July 1, 2009, the agreement to provide CWA assurances to forest practice activities conducted under the new forest practices rules will end. Prior to that date Ecology will formally determine whether to withdraw, extend, or augment those assurances in part or in whole. The final decision will be based on a holistic look at the state forest practices program.

What is the Process for Conducting the Review?

- 1) Ecology will conduct a draft assessment of the forest practices program:
 - a) All of the conditions previously established as the basis for continuing the assurances will be examined⁵. A summarized list of these conditions and a preliminary assessment of how well they have been met is provided in the appendix. For each item, the assessment will describe:
 - If it was completed.
 - Current progress and expected completion dates of ongoing work.
 - Results (or questions to be answered) of the work.
 - b) Programs establishing forest practice prescriptions different from the baseline forest practices rules will be assessed. These include federal Habitat Conservation Plan incidental take permits; alternate plans for forest harvest; the 20-acre exemption program; and legislative programs developed after the Report. The review of these programs will use existing and readily available information to assess:
 - Their relative footprint on the landscape and impact on water quality.
 - If they provide comparable CWA protection to the baseline rules.
 - The extent adaptive management is being used to test and revise them.
 - c) Ecology will evaluate how maintaining or revoking the assurances will affect its' ability to comply with the 1998 TMDL settlement agreement. The settlement agreement established a timeline for completing TMDLs for waters not meeting state water quality standards.

⁴ See http://www.ecy.wa.gov/programs/wq/nonpoint/cwa_0106whitepaper.pdf for 2006 the discussion paper on Washington State's Forest Practices Program and the Clean Water Act.

⁵ From Schedule M-2 of the Forests and Fish Report (1999) and the 2006 Ecology discussion paper describing information needed for the 2009 review.

- 2) By early 2009, Ecology, in consultation with the EPA and the Tribes, will submit a draft of the 2009 review to the Forests and Fish Policy Committee.
- 3) After considering the input of the Forests and Fish Policy Committee, the draft will be revised and sent out for a 30-day public review. Ecology will inform the public using established mail and email lists, through postings on its webpage, using public workshops, and by direct outreach to key groups.
- 4) Ecology, in consultation with the EPA and the Tribes, will prepare a final report on or before July 1, 2009. The final report will explain why or why not, or under what conditions, Ecology will continue to rely on the state's forest practices program to protect water quality. Ecology will advise the Forest Practices Board and Forests and Fish cooperators of any concerns prior to proposing to withdraw the assurances. If modification of existing rules or procedures would enable the continuation of CWA assurances, a reasonable time period will be allowed to make such modifications.

Who will assist Ecology in Conducting the Review?

Ecology will request special assistance from the following entities to help conduct the 2009 CWA review:

- 1) United States Environmental Protection Agency. EPA is a key partner in conducting the 2009 review. Ecology must conduct the review, but the decision on whether to continue the Clean Water Act assurances must be supported by EPA. EPA oversees the state's TMDL and 303(d) processes, which will be affected by the results of the review. Ecology will regularly consult with EPA to ensure the final report contains conclusions and directives both agencies can support.
- 2) Washington Department of Natural Resources (WDNR). WDNR is the state agency charged with implementing the forest practices regulations. WDNR chairs and staffs the key forests and fish science and policy committees, and oversees the compliance monitoring program. WDNR will play a key role by helping Ecology conduct the status review of how well the conditions have been met.
- 3) United States Fish and Wildlife Service (USFS) and the National Marine Fisheries Service (USFW). USFS and the NMFS are participants in the science and policy forums of the forests and fish program. They issued a Habitat Conservation Plan (HCP) for the forests and fish rules which Ecology is now evaluating. They are also responsible for approving other Habitat Conservation Plans that establish unique forest harvesting prescriptions. Assistance from both of these federal agencies is needed to fully understand the relationship of these HCPs to the requirement to meet state water quality standards (the focus of the assurances).
- 4) Tribal Government. Tribal governments are active participants in the forest practices program. Tribal representatives staff policy and technical committees, and conduct research, monitoring, and oversight related to forest practices activities. The Tribes

also represent sovereign governments with legal rights that may be affected by the administration of the federal Clean Water Act and the state's forest practices rules. Government to government consultation will occur with the Tribes prior to making a formal decision on whether or not to extend the Clean Water Act assurances.

- 5) Forests and Fish Caucuses. A formal multi-caucus process is used to help administer the adaptive management framework of the forests and fish agreement. Caucus members are intimately knowledgeable of the available information needed for the 2009 review and are directly affected by the Clean Water Act assurances. As such, the Forest Practices Policy Committee will be used as an early sounding board for reviewing draft reports and preliminary decisions.

Can Ecology give some early indication of what the decision may be?

Ecology has been an active participant in the state's forest practices program since its inception. Ecology's participation includes:

- Representation on the science and policy committees established to oversee the forest practices rules and the adaptive management program.
- Helping to fund and conduct scientific research under the Cooperative Monitoring, Evaluation, and Research committee.
- Supplying field crews to help implement the forest practices rules and evaluate compliance.
- Having formal representation on the Forest Practices Board.

As an active participant, Ecology is well aware of the progress accomplished since 1999 to determine the effectiveness of the forests and fish rules in protecting water quality. While Ecology's formal assessment is forthcoming, we have sufficient information now to provide a preliminary analysis (see Appendix).

The forest practices program has accomplished much of the training, outreach, and compliance monitoring objectives identified as necessary to support the CWA assurances. However, the program has still not answered key questions on compliance with the rules and has not completed the effectiveness studies needed to determine if water quality is being appropriately protected. In addition, the forests and fish program is just starting its formal monitoring program for assessing the status and trends of the water quality of forest streams.

As a strong supporter of the collaborative forests and fish process, Ecology would prefer to rely on the formal adaptive management process to protect water quality and bring any degraded waters into compliance with the state standards. However, we are concerned with the distinct lack of progress in implementing needed water quality work. It is clear that Ecology will not have the information it needs in 2009 to determine if the forest practices program is bringing waters into compliance with the state water quality standards. Ecology considers this to be a serious problem.

Ecology must have greater confidence the Forests and Fish program meets Clean Water Act requirements in order to extend the assurances. Ecology's director will be contacting key stakeholders in early April 2008 to set up a process for developing a pathway forward. We hope that with the help of the Forests and Fish Policy Committee and other key stakeholders such a plan can be developed over the next year.

Appendix

Draft Preliminary Assessment of Conditions for Continuing the Assurances:

The following summarizes information identified as needed to determine if the forest practices program is adequately addressing the requirements of the state water quality standards and the federal Clean Water Act.⁶ Ecology will refine this preliminary assessment as part of the 2009 Clean Water Act assurances review.

- ✓ Check-mark symbols indicate tasks that have or will be completed, or be satisfactorily met, by July 1, 2009.
- Open bullet-point symbols indicate tasks that are not expected to be completed, or satisfactorily met, by July 1, 2009. Most uncompleted tasks are expected to be completed from 2013 to 2016, but some have no foreseeable completion date.

Completion of guidance, training, and outreach commitments

- ✓ Protocol established for perennial stream identification.
- ✓ Implementation of the regional unstable landform identification project.
- ✓ Procedure manual developed with detailed guidance regarding alternate plans.
- ✓ Training established to help with identifying potentially unstable slopes.
- ✓ Training established on road maintenance and construction standards.
- ✓ Outreach program created to assist small landowners protect public resources.

Findings from compliance monitoring programs

- Compliance monitoring data showing the forest practices rules are being implemented in a consistent manner across the state.
 - What level of compliance is being achieved in each DNR region?
 - ✓ When rules are different for small landowners than for large landowners, what level of compliance is being achieved by each landowner category?
 - How well rules regarding water quality protection measures such as riparian buffers, road construction, maintenance and abandonment; alternate plans; and unstable slope requirements are being implemented?
- ✓ Ready availability of Road Maintenance and Abandonment Plan (RMAP) results, including: where RMAPs are complete, and a summary of all active and orphan roads and abandoned roads.
- ✓ Results of an analysis of small forest landowner roads not yet covered by RMAPs or checklist RMAPs. The goal of the analysis is to estimate whether these roads potentially threaten water quality, so strategies can be developed or modified to assure they are fixed by 2016.

⁶ From the 2006 Ecology discussion paper describing information needed for the 2009 review.

- Results of an analysis of alternate plan compliance with standards in the rules that evaluates whether alternate plans provide protection to public resources at least equal in overall effectiveness as default forest practices prescriptions.

Adaptive management program

- ✓ An approved Adaptive Management Program section in the Forest Practices Board Manual that provides formal procedures for participants to successfully link science questions to policy decisions.
- ✓ A Cooperative Monitoring, Evaluation, and Research committee (CMER) work plan that includes water quality-related projects that have been prioritized for funding and include program integration across spatial scales.
- ✓ Easy access to Adaptive Management Program reports and data on the Internet.

Adaptive management studies

Temperature:

- An estimate of the current status of stream temperature and riparian stand conditions on forest lands subject to the Forest Practices Act across Washington.
- An evaluation of the reach-scale effectiveness of riparian buffer prescriptions at providing adequate shading post-harvest to protect stream temperatures.
- An evaluation of the cumulative effects of harvest on stream temperature.

Sediment:

- An evaluation of the effectiveness of the Forest Practices Program in reducing input of road sediment to streams.
- An evaluation of the cumulative effects of forest practices on sediment input and effects on stream habitat.
- Identification of high landslide hazard areas.

In addition to the specific conditions described above, any of the following may cause withdrawal or modification of the assurances:⁷

- ✓ New water quality standards not anticipated in the Forests and Fish Report, unless those new standards can be accommodated with adaptive management.
- ✓ Failure to implement for any reason, including:
 - A significant loss of funding or staffing to the state regulatory agencies.
 - A lack of enforcement on the part of state regulatory agencies.
 - Broad scale landowner non-compliance with the forest practice regulations or the Forests and Fish Report.
 - Lack of final regulations consistent with the Forests and Fish Report.

⁷ From Schedule M-2 of the Forests and Fish Report (1999)

- Weakening of enabling state statutes or regulations which affect the Forests and Fish Report and its implementation. (Note: Changes have been made by the state legislature that weaken requirements for parcels of 20-acre or less in size, and reduced the assurance that small forest landowners will bring their roads into compliance with current standards. No studies or processes have been developed to assess how the 20-acre exemptions will affect the ability of streams to meet the state water quality standards. A 2008 status update required by the legislature, may provide critical information on the effect of not requiring formal road maintenance and abandonment plans of small forest landowners.)
- ✓ General failure to upgrade regulations or guidance called for in adaptive management. This includes failure to develop agreed upon resource objectives, research priorities, and compliance monitoring programs.
- ✓ Court orders, changes to the CWA, or state or federal regulatory changes that cannot be otherwise addressed.