

# BOARD ISSUES WORK PLAN

**Issue #6: Forest Regulation**

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## **BACKGROUND**

The Oregon Forest Practices Act was passed in 1971 as the first comprehensive regulatory program governing the conduct of forest operations in the country. The Act actually was originally built on statutes which had been in place since 1941 requiring provisions for the regeneration of forest stands after harvest. The Forest Practices Act also establishes best management practices to insure to the maximum extent practicable nonpoint source discharges of pollutants resulting from forest operations on forestland do not impair the achievement and maintenance of water quality standards established by the Environmental Quality Commission for the waters of the state.

The Forest Practices Act has continued to evolve through the years as more information was developed regarding forest operations, their impacts on the public resources the Act is intended to protect, and the effective means of providing protection while encouraging the continued active management of forest land.

Much of the success of the Forest Practices Act can be attributed to an atmosphere of cooperative stewardship that has been maintained by the department and affected stakeholders throughout the history of the Act. The Board of Forestry and the department have a history of emphasizing voluntary compliance assisted by educational efforts. Oregon Department of Forestry stewardship foresters and the regulated community have a history of cooperation in community outreach and education to provide information about the Act. Resource protection can be most successful when private landowners and operators have an understanding, acceptance, and support of forest practice rules, and the purpose and goals behind the rules. This is demonstrated by high levels of compliance documented in recent monitoring efforts by the department, as well as the value that landowners place in the Act to maintain their 'social license to manage.' One of the keys to the future success of the Act will be maintaining this atmosphere of cooperative stewardship, and the strong working relationships between the department's stewardship foresters and the regulated community.

Since its inception, the Oregon Forest Practices Act provided considerable discretion to the Board of Forestry in adopting regulations. With the adoption of the 1994 Water Protection Rules, there was increased concern among landowners about the incremental increases in riparian protection. As a result, the 68<sup>th</sup> Legislative Assembly in a 1996 special session adopted ORS 527.714 that has provided a set of standards for adoption of new rules by the Board that arguably placed additional limits on the Board's discretion in a number of ways. These limits were dominantly designed to ensure that voluntary approaches were considered, that regulations were thoughtfully prepared, and changes in protection standards were consistent to the extent that problems are related to and caused by forest operations. Despite these limits, the long-term debate about the role of regulation, "regulatory certainty", and compensation for the impacts of regulation (as opposed to take of property as defined by the constitution) continues.

The 68<sup>th</sup> Legislative Assembly approved SB 160 in 1995 during the regular session. This bill was subsequently vetoed by then Governor Kitzhaber. (ORS 527.714 passed during the 1996 special session and was originally part of SB160). During the course of discussion about SB160, landowners expressed a desire for a stable regulatory climate under which they can make long-

term investments, that private forestlands not be asked to make an unfair contribution to resolving more commonly shared problems, and that they want to establish a limit on the burden the public might impose on them to provide public benefits.

On the other hand, concern has been expressed that inappropriately constraining regulation undermines the adaptive management underpinnings of the Act. Limiting the application of forest practice rules could also undermine the "one stop" approach of the Act and/or encourage processes (e.g., initiatives) that might result in less thoughtful and deliberative consideration of protection issues than through the Board of Forestry. From the conservation community perspective there is a concern that remaining "gaps" between existing regulations and water quality standards, watershed conditions, and/or desired ecological conditions could not be addressed, or that potential gaps would be widened. Absent improved and/or additional incentive programs to support their desired ecological outcomes, most in the environmental community are unlikely to support a regulatory compensation program even if limited to "disproportionate impacts."

The concern about "regulatory takings" resulted in Oregonians passing Ballot Measure 7 (BM 7) in November 2000 that would have required state compensation for regulations that restrict the use of real property, where the restriction reduces the value of the real property (the measure was subsequently determined not to meet legal standards for ballot initiatives). Prior to the passage of BM7, there were many court challenges to regulations as a "taking" of property. These challenges were often rejected on the basis that they did not prohibit all substantial economic use. The cases include challenges to limits on the physical extent of use or how real property is used such as: farm dwelling laws; forest practice regulations; bottle bill requirement to accept returns; subdivision approval conditions requiring annexation a fire district; building code requirements for the size of rooms; and restrictions on access to public roads. The department and/or Board currently have several cases under litigation related to "takings" for the protection of "sensitive resource sites."

For both the 2003 and 2005 Oregon Legislative sessions, the department and Board again considered draft legislation related to the topic of "regulatory takings." For a number of reasons, a choice was made to not pre-session file a concept on behalf of the Board. The possibility of Ballot Measure 37 was one reason for the Board to not propose legislation for the 2005 session. Voters passed ballot Measure 37 in November of 2004. This measure is similar to Ballot Measure 7, but different in substantive ways, particularly that it is a statutory provision, not a constitutional provision.

There is a range of landowner concerns related to public resource protection "expectations" for private lands. The concerns can generally be described as landowners wanting to "know there will be an end or limit to the burden that might be imposed on private lands for public benefits." The notion of setting limits to expectations includes both limits to what should be accomplished through regulation and what is acceptable in terms of economic impact to private ownerships. Owners of forestland often express frustration that the public has higher expectations for forestlands in terms of public benefits than other lands uses. For example, this has resulted in forestlands having regulatory requirements for snags and green trees for wildlife habitat while other land uses do not have similar requirements. Pressure to exercise the "precautionary

principle” is another example of higher public expectations for forestlands, where landowners are asked to bear the cost of providing an increment of resource protection above and beyond what might be necessary to ensure the conservation of public values. This can result in disincentives for public prioritization of protection. If the landowner is bearing the cost of protection, there is little incentive for the public to prioritize the protection of resources.

The standard of protection for resources protected through the Forest Practices Act has been "sound management of soil, air, water, fish and wildlife resources," with the notion of "overall maintenance" being the target for fish and wildlife. Over time, new expectations have been added to the scope of the Forest Practices Act, such as "sensitive resource sites," public safety, and scenic highways. The more recent authority related to scenic highways and public safety has specific limits within statute. Landowners express concern that regulation might be expanded into other areas such as recreation or harvest scheduling. There has often been pressure on the Board to limit forest practices further in such areas as community water systems to further reduce perceived impacts from forest operations to drinking water. Others have promoted that the requirements (to avoid take) of the federal ESA be incorporated into the forest practice rules. Additional areas of concern include adding new special sites (caves, talus slopes, etc.) to the list of protected sites.

Other landowners are concerned about "regulatory creep." The political pressure to incrementally increase protection creates economic uncertainty for landowners (including public lands). The Forest Practices Act does not currently establish either a "primary purpose" or "dynamic ecosystem" context for protecting the different resources that are identified in ORS 527.710 to be protected, nor does it draw limits on the use of regulation versus voluntary approaches.

As management practices have been established on public lands, there is a perception that these practices then become viewed by the public as desirable and appropriate for private lands. With the adoption of the recent FPFO, the Board more clearly articulated a framework of "primary purpose" for different forestlands and that it is not a sound objective to manage or "protect" all forestlands the same.

Increases in regulation in the 1990s, listing of various fish species under the federal endangered species act, and more recently the passage of a regulatory compensation measure all encourage a serious look at voluntary approaches to achieving desired public benefits associated with the management of private forest land. The Board, in reviewing a number of riparian protection concepts for which there was little research or science to verify the inadequacy of current standards, has elected to pursue both voluntary measures and to direct additional monitoring and research efforts. This direction will lead to voluntary strategies and actions that private forest land managers may choose to implement, collaborative partnerships with state and federal natural resource regulatory agencies, and new incentives to support the private forest land manager.

**Dynamic Ecosystems**, priority issue and work plan #5, will have a significant influence on the outcomes of a number of projects associated with this work plan. What does “forest protection” mean and how should protection—whether it’s through regulatory or voluntary means—be

accomplished in dynamic forested landscapes where different ownerships are dedicated to different purposes? To develop a new approach in response to this question is not a trivial task as it involves a revolutionary change in nearly 100 years of how forest protection is perceived. A static perspective dominates the existing policy and science frameworks under which "protection" is applied.

There is considerable debate in the scientific community and a tremendous diversity of views among scientists and interests about what "protection" is and what forms and levels of protection are "adequate." There is a strong argument to be made that by better considering key ecosystem processes and cause-effect relationships, we may be able to achieve less costly and more efficient and effective protection strategies. At a minimum we need to learn to not "fix" or attempt to prevent impacts that we have historically viewed as "damage," such as riparian windthrow or in-unit landslides.

Protection focus needs to shift from disturbance prevention to utilizing the inevitable disturbance as an opportunity. Research is needed to better evaluate and document the impacts of wood production emphasis forests on key functions and processes that are thought to be vital to maintain fish habitat. Equal emphasis is needed to document how truly vital these key functions and processes are to maintaining fish habitat and other values.

The implementation of this work plan will need to be closely coordinated with work on the Dynamic Ecosystem priority issue to ensure that current and future "forest protection" efforts via the Forest Practices Act are consistent with current knowledge on the dynamic forest landscapes of Oregon.

## **GOAL**

To ensure that Oregon's forests provide diverse social, economic, and environmental outputs and benefits valued by the public in a fair, balanced, and efficient manner; and to continue the role of the Forest Practices Act as a cornerstone in providing these outputs and benefits. (Based on *Forestry Program for Oregon* Strategy B and Key Action A.1)

## **OBJECTIVES**

**Objective 1: Establish Board policies about expectations for public benefits from private lands and landowner compensation for the impacts of regulation.**

This objective addresses the policy impacts of 2004 Ballot Measure 37 (BM 37). These are yet uncertain but may include impacts to Board policies and existing FPA policies. Where protections under the FPA are not exempt from BM 37 requirements, the Board will need to consider options to address the issue. This objective will also include Board consideration of both emergency rules and long-term program policy changes in response to BM 37.

### *Current Issues*

**Ballot Measure 37**, passed in the 2004 election, creates a right for landowners to seek a waiver of land use regulation or compensation when a land use regulation results in a reduction in fair market value of their property if the property was owned prior to the enactment of the land use regulation. Certain land-use regulations are exempt from such claims. Implementation of the measure raises a substantial number of legal, procedural, coordination, and workload issues.

Ballot Measure creates tremendous uncertainty and raises significant policy, legal, and practical issues for all land use practice, including forestry. BM 37 may undermine the policies of the Forest Practices Act related to maintaining the forest land base and maintaining the productive capacity of that land base. There is uncertainty about which of the BM 37 exemptions may apply to forest practice regulations. Future legal determinations will strongly influence some of the specific projects in this work plan such as development of new forest practice regulations. The department is currently working on procedural and legal aspects with the Department of Administrative Services (DAS) and the Department of Justice (DOJ) as directed by the Governor. The Board may need to soon consider emergency rules to determine how the department would evaluate claims and make decisions for either waiver or compensation.

The implementation of BM 37 and the related legal and policy developments have the potential to significantly impact the administration of the Forest Practice Act, as well as and the Board and department's effectiveness in working towards the goals of the *Forestry Program for Oregon*. Over the course of the next year, as legal and policy determinations are being made on BM 37 and on the issue of "regulatory takings" in general, the Board and the department have an opportunity to proactively influence these determinations for the betterment of the Forest Practice Act and *Forestry Program for Oregon*.

#### ***Board Products***

- An expanded and revised issue paper based upon the LC 629-05 issue paper.
- Recommendations by an ad hoc advisory group for rule or statutory modifications to clarify exemptions under BM 37, or other recommendations as appropriate.
- Alternative approaches for modifying FPA policies or rules and/or providing a compensation program.

#### ***Research and Information Gathering***

- As part of the ad hoc committee process (described below), relevant research and information will be gathered and presented to the group to inform their discussions.
- Periodic updates will be presented to the Board on the committee's progress.
- Department of Administrative Services and Department of Justice recommendations and interpretations will be incorporated into agency procedures and policy.

#### ***Stakeholder/Public Involvement***

- Convene an ad hoc group of forestry stakeholders (the process has already started). This ad hoc group needs to have the involvement of BM37 sponsors to ensure both credibility by the Legislature and the development of viable recommendations. Direct involvement of two members of the Board is also recommended due to the high level of policy impact and legislative timelines. Tapping into the expertise of the group that assisted staff in developing the LC 629-05 issue paper is also recommend. This group will:

- Have a dialogue about the possible intended and unintended impacts of BM 37 to the Board's policies and the policies of the FPA;
- Develop alternatives that may clarify how BM 37 "exemptions" could or should apply to the FPA;
- Develop recommendations for modifications to FPA policies or rules where compensation is or may be required;
- Develop alternative approaches for implementing BM 37 with emphasis on how compensation might be provided;
- Provide a forum for Board and department consideration of legislative Bills that may modify BM 37; and
- Potentially make recommendations to address identified issues and opportunities.

The ad hoc group will include forestry stakeholders, and public and other stakeholders will have the opportunity to provide testimony during regular scheduled Board meeting where agenda items related to Ballot Measure 37 items are discussed.

### *Timeframe with Milestones*

Implementation of the work plan will occur through 2005 and 2006 until completion, or the need for modification. The timeframe for this objective will need to be iterative and fluid given that issues related to BM 37 could be addressed in any number of ways throughout the legislative session. The following are possible actions leading up to the next legislative session:

January 2006

- Status report to the Board on Ballot Measure 37 legislative developments and legal opinions.
- Revisit proposed process for policy and rule development related to impacts of Ballot Measure 37.

### *Resources Required*

Short-term work can be completed with existing department resources. However, long-term implementation of potential administrative or policy changes may require dedicated additional FTE.

**Objective 2: When forest practice regulations are necessary, minimize the adverse financial effects of regulations that require private landowners to contribute forest resources to provide increased public benefits (FPFO Action A.5).**

This objective includes the development of Board consensus about the findings under ORS 527.714, the application of "maximum extent practicable" under ORS 527.765, and possible consideration of legislative concepts for potential revisions. This objective also encompasses the completion of the revisions to the forest practice rules related to water protection. This objective is achieved through a science-based approach to rulemaking, as well as through an active monitoring program that provides a continuous evaluation of the Water Protection Rules.

### *Current Issues*



**ORS 527.714** has guided forest practice rule development since it became law in 1996. It establishes types of rules (procedural, definitional, and rules that set standards for forest practices) as well as necessary findings, analysis, and procedures for adopting rules. This statute affords the Board wide latitude in defining the procedures used to making findings and the supporting analyses. This statute has been applied on three occasions since it was passed: the pesticide application rules (1996); landslide and public safety rules (2002); and road drainage and wet season road use rules (2002).

The implementation of this statute is not contingent on Ballot Measure 37, however, the measure does inform how the findings and analyses are conducted. One of the findings requires the Board to consider “the availability, effectiveness, and feasibility of alternatives to the proposed rule, including nonregulatory alternatives.” How BM 37 is ultimately implemented will influence how the Board will make their findings relative to the feasibility of alternatives, as well as their availability and effectiveness.

**ORS 527.714** requires the State Board of Forestry to “. . . establish best management practices and other rules applying to forest practices as necessary to insure that to the maximum extent practicable nonpoint source discharges of pollutants resulting from forest operations on forestlands do not impair the achievement and maintenance of water quality standards established by the Environmental Quality Commission for the waters of the state.” When considering the effectiveness of the current rules in meeting water quality standards, it is within the Board’s discretion to define the “maximum extent practicable” threshold and whether or not it is being met.

The department has been working on a revised set of draft water protection rules and voluntary recommendations for the Board of Forestry to consider and adopt. These proposed changes are based on recommendations from the Forest Practices Advisory Committee and the Eastside Riparian Functions Advisory Committee, as well as the Independent Multidisciplinary Science Team that has scientific oversight of the Oregon Plan for Salmon and Watersheds, and the water quality sufficiency analysis completed by the department and the Department of Environmental Quality in 2002.

Rule concepts were first reviewed by the Board of Forestry in April and June of 2003. The Board directed the department to return with proposed rule language for each of the concepts. Through 2003 and 2004, the Board considered each concept. The department reviewed the concepts with the Regional Forest Practices Committees, the Oregon Department of Fish and Wildlife, the Oregon Department of Environmental Quality, and other interested parties. The Board has considered comment from these and other sources. By July 2004, the Board had completed its initial determinations on each of the concepts. The Board deferred action on the rule concept related to small non-fish-use streams (“small Type Ns”) and directed the department to continue working with landowners, technical specialists, agencies, and other interested parties to develop a satisfactory measure. Current deliberations are now considering the recommendations of the committees, as well as addressing new information that has come to light as a result of monitoring and research work that has been completed since the concepts were drafted.

Additionally, the Department of Environmental Quality (DEQ) has made a request that the Forest Practices Act (FPA) rules be directly linked to TMDL rules (DEQ/ODF September 24, 2004, Memorandum to the Environmental Quality Commission and Board of Forestry). To help move towards a resolution of the issues related to water quality standards, the department held a "Forest practices and water quality workshop" for the Board in September 2004, and a joint meeting with the Environmental Quality Commission in October 2004 to review and discuss forest practices and water quality issues. One of the goals was to create a shared understanding of the legal, technical, and policy implications of the Board's decisions related to meeting water quality standards and the EQC's choices in setting water quality standards.

Those rule concepts that have been approved by the Board to be implemented using a voluntary approach can precede independent of issues associated with Ballot Measure 37. The implementation of rule concepts approved by the Board for rule development will be significantly impacted by the legal and policy developments associated with the measure.

#### ***Board Products***

- Review the intent and application of ORS 527.714 and 527.765 using real applications pending for proposed regulatory changes to the Water Protection Rules.
- Create a practical example of the outcomes of the possible approaches and decision-space under ORS 527.714 and MEP, and potentially adopt guidance and/or rules. Develop a Board Position Paper outlining recommended changes (if any) to guidance, administrative rule or statute for ORS 527.714 provisions, including draft legislative concepts for recommended statutory changes (if any).
- Investigate the possibility of developing an evidence-based science process to address future forest practice issues. This will be a department-wide effort, coordinated with other programs in the department.
- For the set of revised Water Protection Rule concepts with conditional approval for rule development, the Board of Forestry will come to a decision on implementation.

#### ***Research and Information Gathering***

- Prepare two issue papers with the assistance of the department on the background, decision space, and policy alternatives for meeting statutory obligations under ORS 527.714 and 527.765.
- Prepare a white paper with the assistance of the Department of Justice addressing the legal considerations related to the decision-space the Board has under each of the elements of ORS 527.714 and for making "maximum extent practicable" (MEP) decisions.
- Review the pending applications of ORS 527.714.
  - Review draft ORS 527.714-related findings for rule concepts #3, #4, and #8 in a non-decision workshop format.
  - Hear invited and other testimony from a range of stakeholder interests on ORS 527.714 applications.

- Summarize the outcome of the review in a Board Decision Paper documenting the experience and ideas for further investigation with respect to the standards for analysis and findings related to ORS 527.714 and ORS 527.714.
- Road test sequential decision model application of ORS 527.714 with respect to water protection rule concept #12 (small type N streams) and present findings and analysis either for Board decision under current statute or for board discussion and review for the purpose of developing proposed changes either in guidance, administrative rule, or statute for ORS 527.714 provisions.
- Develop an issue paper in collaboration with Department of Environmental Quality and Department of Justice on policy implications for creating a link between the Forest Practices Act and Total Maximum Daily Load allocations. The issue paper will review the pros and cons of such a link and recommend options to the Board on how to proceed on the issue.

***Stakeholder/Public Involvement***

- Hold a workshop for the Board to have a dialogue and reach consensus on ORS 527.714 and the “maximum extent practicable” decisions process, and include invited and other testimony from a range of interests on ORS 527.714 applications.
- As part of the Water Protection Rule revision process, convene an ad hoc stakeholder group to explore alternative approaches to achieving protection along small Type N streams in western Oregon (related to rule concept 12). Recommendations from this group would be brought to the Board to make a determination on final action.

***Timeframe with Milestones***

The timeframe for the ORS 527.714 review is from May 2005 to June 2006. The time frame for the work related to the ORS 527.765 and Water Protection Rule revision begins in July 2005. The closing date for the process would be variable, depending on the Board’s decision on each issue. If the Board determines that rulemaking is to result for Concepts #3, 4, 7, 8, or 12 it would need to review the department report on the findings and economic analysis required by ORS 527.714. The department estimates that the earliest rulemaking would potentially occur is in the Fall of 2006. Milestones include the following:

July 2005

- Staff presents issue papers on the decision-space the Board has under each of the elements of ORS 527.714, and on the application of “maximum extent practicable” under ORS 527.765 at the July Board meeting.

September 2005

- Workshop on the decision-space under ORS 527.714 and 527.765., and on pending applications to rule concepts #3, #4, and #8.
- The Department of Justice presents a white paper on legal considerations related to the decision-space the Board has under each of the elements of ORS 527.714 and for making “maximum extent practicable” (MEP) decisions.

November 2005

- Board develops recommendations on and approves procedures on “maximum extent practicable” determinations and the ORS 527.714 findings requirements.
- Board makes a determination on how to proceed with rule concepts #3, #4, and #8.

March 2006

- Presentation, review, and discussion of potential alternative to rule concept #8.

Summer/Fall 2006

- Complete formal rule-making: Rule concepts #3 and #4 (July).
- Board reviews the issue paper and the alternatives on the FPA/TMDL linkage issue and recommends a course of action (September).

2007

- Determination to begin rule-making on rule concept #8 (January)
- Potential rule adoption on rule concept #8 (April)
- Determination on how to proceed with small type N stream protections (June)

### ***Resources Required***

Work on this objective can be completed with existing department resources, with the exception of a possible need to hire a professional facilitator for the September workshop and the ad hoc stakeholder group process. Otherwise there are no additional resources required at this time.

### **Objective 3: Develop and encourage the use of voluntary methods, such as landowner incentives, to achieve public policy goals on private forestlands; and promote ongoing voluntary resource restoration and enhancement efforts by forest landowners through the Oregon Plan. (Based on *FPFO* Actions A.7 and D.2)**

This objective includes the development and implementation of new or modified Oregon Plan voluntary measures. This objective will also involve the development and adoption of rule procedures and criteria for stewardship agreements under 2003 HB 3616 by coordinating with the Oregon Department of Agriculture, in consultation with the Oregon Department of Fish and Wildlife.

### ***Current Issues***

**2003 House Bill 3616** directs the Board of Forestry and the Oregon Department of Agriculture, in consultation with the Oregon Department of Fish and Wildlife, to adopt rule procedures and criteria for stewardship agreements. This is one pathway for new incentives. However, the development of these rules offers an opportunity to look more broadly at incentives.

The Board of Forestry approved a project work plan for implementing HB 3616 at its January 2005 meeting. The department has started implementing the work plan and is in the process of establishing a steering committee of 5 to 10 members that will gather needed information and develop options, and a rule advisory committee with broader representation that can provide feedback and assist in establishing a program from the various strategies developed by the steering committee.

This issue is independent of Ballot Measure 37 and can move forward regardless of how the measure is implemented.

#### ***Board Products***

- New or modified Oregon Plan voluntary measures that include, but are not limited to, Water Protection Rule concepts the Board has approved for a voluntary pathway.
- Final adoption of Stewardship Agreement rule procedures and criteria.

#### ***Research and Information Gathering***

As part of the consultation with stakeholders for the development of the Oregon Plan voluntary measures (see below), relevant research and information will be gathered and summarized to inform the process.

#### ***Stakeholder/Public Involvement***

Representatives of key stakeholder groups will be sought for participation on the HB 3616 rule advisory committee, and to provide input and feedback for the development of the Oregon Plan voluntary measures. The Department of Forestry will also meet with the three Regional Forest Practices Committees and the Committee for Family Forestlands as the primary contact with affected forest landowners.

#### ***Timeframe with Milestones***

This objective is anticipated to be completed by September of 2006. Milestones include the following:

September 2005

- Board receives an update on the Oregon Plan Voluntary Measures project.

November 2005

- Board receives a status report on the Stewardship Agreement rules

January 2006

- Review draft rules with the Board of Forestry and Department of Agriculture

April 2006

- Board receives a status report on the Oregon Plan Voluntary Measures project.

June 2006

- Board temporary rule adoption related to large wood placement restoration on forestlands.

September 2006

- Board approves Water Protection voluntary measures.

November 2006

- Board permanent rule adoption related to large wood placement restoration on forestlands.
- Board approves Stewardship Agreement rules.

#### ***Resources Required***

Work on this objective can be completed with existing department resources. No additional resources are required at this time.

#### **Objective 4: Effectively and efficiently implement the regulatory elements of the FPA to maintain "one-stop" shopping and minimize program and compliance costs.**

This objective includes the revision of the forest practice rules to comply with 2003 HB 3264, which replaced the State Forester's authority to "approve" written plans with "review and comment". This objective will also include Board consideration of both emergency rules and long-term program changes in response to the administration of 2004 Ballot Measure 37 (process claims, make decisions about waiver versus compensation, etc.). Finally, this objective will address sensitive resource site protection sites that have not yet been through the process to as set forth in ORS 527.710 and OAR 629-680-100.

#### ***Current Issues***

**2003 House Bill 3264** replaced the State Forester's authority to "approve" written plans with "review and comment." The bill states that the standards for operations set by the Act and rules should be "achieved through a combination of education and review prior to commencement of an operation and through enforcement actions where appropriate under state law, rather than through a system of prior approvals."

The Board has discretion to identify cases when written plans are to be submitted that are in addition to written plans that are statutorily required in the Forest Practices Act. The Board may specify what must be included in a written plan and what constitutes a complete written plan. HB 3264 contemplates that written plans will be a mechanism through which the department can promote compliance with the forest practice standards by providing comments to operators. That process can only work, or can only work well, if operators provide sufficient information.

The Board at its October 2004 meeting approved "guiding principles" for this process and a revised project work plan. The Board directed the department to move aggressively to complete this project. In addition to the rule modifications that need to occur under HB 3264, this project will involve significant updates and/or additions to the current guidance on the implementation of the FPA.

Given that the implementation of HB 3264 does not propose any change to existing levels of regulations, this issue is independent of Ballot Measure 37 and can move forward regardless of how the measure is implemented.

**Special Resource Sites** include threatened and endangered fish and wildlife species, sensitive bird nesting, roosting and watering sites, biological sites, and significant wetlands. The Forest Practices Act currently requires the Board to collect and analyze the best available information and establish inventories of sites needing protection, determine whether forest practices conflict with such resource sites, consider the consequences of conflicting uses, and determine appropriate levels of protection. The peregrine falcon, northern spotted owl, and marbled murrelet are all listed as threatened or endangered species by the Oregon Fish and Wildlife Commission or U.S. Fish and Wildlife Service (USFWS). The Board has established interim protection measures for spotted owls but has not addressed the other listed species nor addressed other potential sites.

Currently, significant wetland protection standards are based solely on size without regard to wetland functions and values. Wetlands with low habitat values have the same protection standards as those with high wildlife habitat values. A classification system that matches the physical characteristics and beneficial uses to protection measures may improve resource protection.

Process and policies related to special resource sites will be significantly impacted by the legal and policy developments associated with Ballot Measure 37. Depending on Ballot Measure 37 implications, the Board will need to evaluate the extent to which special resources related to endangered species will continue to be addressed through the Forest Practices Act. To the extent that special resources will continue to be addressed, it is the department and Board's intent to initiate a systematic process of reviewing and reporting special resource site protection effectiveness on a biennial basis as specified in current administrative rules.

#### ***Board Products***

- The development of final rules for the 2003 House Bill 3264 project.
- Potential development of emergency rule(s) or guidance (or other effective methods) for 2003 House Bill 3264 project.
- Potentially adopt rules that set general policies regarding exemptions, waivers, and compensation for Ballot Measure 37.
- Evaluate analyses and recommendations from the Attorney General's office regarding the application of exceptions contained in Ballot Measure 37 and determine a course of action on addressing special resources related to endangered species through Forest Practices administrative rules.
- Options for the protection of special resource sites will be presented to the Board to make a determination on possible action. This will need to occur after the significant progress has been made on the Ballot Measure 37 work plan.

#### ***Research and Information Gathering***

- Issue papers have been developed for the underlying issues related to HB 3264, as well as any other issue identified by the department. The issue papers developed recommended alternatives for the purpose of ensuring a consistent level of protection and enforceability under the revised rules.
- On the Ballot Measure 37 issue, some or all of the following may need to occur:

- Department of Administrative Services and Department of Justice recommendations and interpretations will be incorporated into agency procedures and policy.
- A determination of database elements needed for excessive processing and tracking of claims.
- Background papers on decision points.
- Matrix of historical statute and rule adoption and amendment.
- Updated general file system.
- Assessment of workforce needs.
- Assessment of rule need.
- Compilation of interested party inputs.
- Education plan based on assessment of internal and external training needs.
- Target audience assessment for training and communication.
- A background paper will be developed by the department and presented to the Board, summarizing the history and key issues related to the current Special Resource Sites statutes and rules.
  - Depending on how the Board decides to proceed on the Special Resource Site issue, a series of technical review papers might be developed on Northern Spotted Owls, Marbled Murrelets, Peregrine Falcon, and Significant Wetlands to help inform the rulemaking process.
- Receive periodic reports on the number and types of operations conducted near resources sites as set forth in OAR 629-680-030, and available information on compliance levels and rule-effectiveness for other special resource sites.

***Stakeholder/Public Involvement***

- Potentially convene an advisory committee to assist the Board and the department in analyzing the best available information on special resource sites needing protection as defined in the current rules, and in determining whether forest practices conflict with such resource sites. This would include the consideration of the consequences of conflicting uses and determine appropriate levels of protection.

***Timeframe with Milestones***

Rule revisions related to HB 3264 are expected to be completed by November 2005. The timeframe for Ballot Measure 37 administration process will need to be iterative and fluid given that issues related to BM 37 could be addressed in any number of ways throughout the legislative session. The timeframe for the Special Resource Sites project will extend into 2006. Work related to the Northern Spotted Owl technical review may be initiated in either the fall of 2005 or winter of 2006.

July 2005

- Develop and finalize HB 3264 rule revisions for Board approval and begin formal rule-making.

September 2005



- Present background paper to the Board summarizing the history and key issues related to the current Special Resource Sites statutes and rules (September meeting)

November 2005

- Present HB 3264 rule revisions to the Board for approval.

January 2006

- Board reviews issue paper on special resource sites that includes a Department of Justice analysis on Ballot Measure 37 implications.

March 2006

- Board determination on how to proceed with Special Resource Site protection.

April 2006

- Annual P&CFP Research and Monitoring Presentation.

September 2006

- Board review and approval of SRS Ad Hoc Committee proposal: Committee charge and guiding principles (Committee to be convened in January 2007).

November 2006

- Present Landslide & Public Safety issue paper (from the Board issue scan)
- Invasive species background paper (from the Board issue scan)

2007

- Determination on Landslide & Public Safety draft rule revisions (March)
- Determination on SRS Ad Hoc Committee recommendations (July/September)

### ***Resources Required***

Short-term work can be completed with existing department resources. However, long-term implementation of potential administrative or policy changes may require dedicated additional FTE.

### **MONITORING/MEASURING PROPOSAL**

Monitoring and measuring the progress of Board policy direction as a result of this work plan will generally be addressed through the on-going adaptive management process that is part of the Forest Practices Act. Under OAR 629-635-0110 (3) a high priority is placed on conducting the necessary monitoring of the Water Protection Rules:

#### **OAR 629-635-0110 Applicability and Monitoring**

“(3)(a) Monitoring and evaluation of the water protection rules are necessary because of the innovative approach taken in the rules. Monitoring and evaluation are needed to

increase the level of confidence of all concerned that the rules will maintain and improve the condition of riparian vegetation and waters of the state over time.

(b) In cooperation with state and federal agencies, landowners and other interested parties, the department shall conduct monitoring on a continuing basis to evaluate the effectiveness of the water protection rules. The monitoring shall determine the effectiveness of the rules to meet the goals of the Forest Practices Act and the purposes stated in the rules, as well as their workability and operability.

(c) It is the Board of Forestry's intent that the department and its cooperators place a high priority on assessing the monitoring needs and securing adequate resources to conduct the necessary monitoring. The department shall work with its cooperators and the Legislature to secure the necessary resources, funding and coordination for effective monitoring.

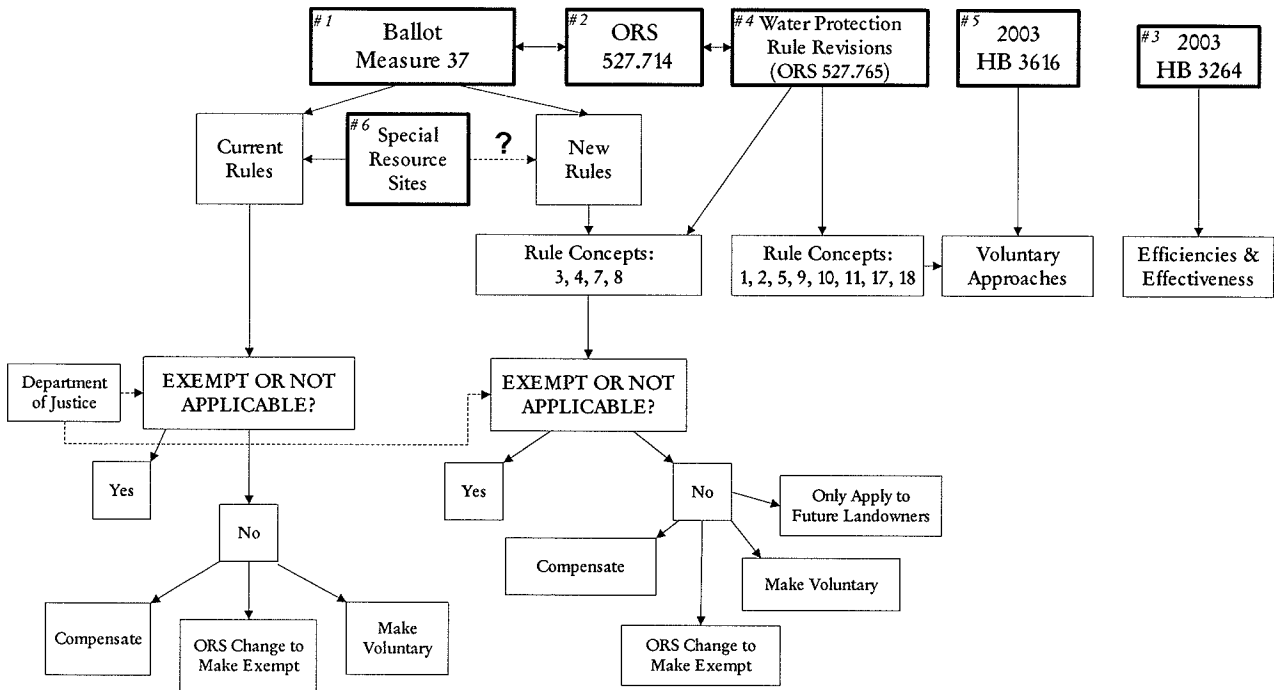
(d) The department shall report to the Board of Forestry annually about current monitoring efforts and, in a timely manner, present findings and recommendations for changes to practices. The Board of Forestry shall consider the findings and recommendations and take appropriate action.”

Through the monitoring of the Forest Practices Act combined with the annual Board issue scan and work plan review, the outcomes of the decisions made in carrying out this work plan will be evaluated and reviewed by the Board. The following are some monitoring actions specific to the objectives in this work plan:

- The Board will receive periodic summary reports on the status of Ballot Measure 37 policy developments and implementation. (*Objectives 1 and 4*)
- Those Water Protection Rule concepts the Board has determined not to proceed on due to a lack of information to support rule changes (rule concepts 14, 15, and 16) will be evaluated through a review of the monitoring program's existing list of monitoring and research questions. Additions to this list and prioritization will be updated and presented to the Board as part of the annual monitoring update required by rule. (*Objective 2*)
- Periodic updates on both the Oregon Plan voluntary work plan and HB 3616 process will be presented to the Board. (*Objective 3*)

**WORK PLAN FLOWCHART**

**Forest Regulation Work Plan**



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