




**DEPARTMENT OF
NATURAL RESOURCES**

Forest Practices Division
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October 30, 2019

TO: Forest Practices Board 

FROM: Marc Engel, Senior Policy Planner, Forest Practices Division

SUBJECT: Petition for Rulemaking Regarding the Northern Spotted Owl

The attached petition for rulemaking from the North Central Washington Audubon Society (Audubon) was received as complete on September 23, 2019. Board staff notified Audubon of receipt within the required five business days and, by November 21st, the Board must either accept the petition and initiate rulemaking or deny the petition in writing stating its reasons for denial specifically addressing Audubon's concerns. (WAC 222-08-100) If the Board issues a denial, its explanation may also indicate the alternative means by which it will address the concerns raised by the petitioner. (RCW 34.05.330(1))

The petition states that the rules for spotted owl special emphasis areas (SOSEA) east of the Cascade Crest are not achieving the protection measures intended for spotted owl habitat. The petition suggests the rules are failing in the recovery of the owl and thereby demonstrate that the rules or their application in eastern Washington need to be revisited and strengthened. Audubon requests the following:

“Pursuant to WAC 222-10-041(6), North Central Washington Audubon requests a moratorium be placed on logging anywhere within SOSEA sites in Eastern Washington pending reconsideration of WAC 222-10-041 as it applies to them and confirmation that the rules as currently written have been and are being adhered to.”

The petition specifically references the Board's SEPA policies for forest practices applications. WAC 222-10-041 *Northern spotted owls*, is designed to identify and address potential adverse impacts to the owl through an environmental analysis when specific forest practices, including harvest, are proposed within suitable spotted owl habitat.

Recommendations:

DNR staff recommends the Board deny the petitioner's request for a moratorium. There are two reasons for this recommendation. First, the Board, through the Commissioner of Public Lands, asked for a formal opinion of the Attorney General of Washington concerning its authority with respect to a proposed moratorium on forest practices applications submitted on potentially unstable slopes. This request followed the 2014 Oso landslide. The Attorney General's Opinion (2015 No. 1) stated that:

Nothing in the Forest Practices Act expressly authorizes the Forest Practices Board to adopt a moratorium on the acceptance or approval of forest practices applications. Moreover, we find it unlikely that such a power should be implied because it would be contrary to the statutory directives regarding processing and approval or disapproval of such applications.¹

The second reason comes from the rule proposal's structure. The rules in Chapter 222-10 WAC, such as the one cited in the petition, are SEPA policies that guide environmental analysis for individual proposals (i.e., to determine whether a proposal will have a probable significant adverse environmental impact, requiring further analysis through an environmental impact statement). Those rules are not designed or intended to establish hard and fast substantive standards dictating acceptable or unacceptable harvest practices or locations for harvest.

With regard to increasing the options for spotted owls, staff recommends the Board continue to support the development of a programmatic Northern Spotted Owl Safe Harbor Agreement (SHA). DNR has prepared draft legislation requesting authority to enter into a programmatic SHA with the U.S. Fish and Wildlife Service. Under the Endangered Species Act and rules, SHAs provide incentives for non-federal landowners to voluntarily restore, enhance, or maintain habitat for listed species and provides assurances that additional restrictions will not be imposed as a result of their voluntary conservation efforts.

At your upcoming November 13 meeting, staff will provide additional information regarding the process DNR uses to evaluate proposed applications involving spotted owl habitat, including determining classifications and updating habitat maps. Should you have any questions in the meantime, please feel free to contact me at 360-902-1309 or marc.engel@dnr.wa.gov.

SF

Attachment

c: Joseph Shramek, Marc Ratcliff, Sherri Felix, DNR
Hannah Anderson, Chris Conklin, Gary Bell, WDFW

¹ This opinion is available at: <https://www.atg.wa.gov/ago-opinions/authority-forest-practices-board-adopt-moratorium-forest-practices-applications-due> (last visited Oct. 29, 2019).



North Central Washington
AUDUBON SOCIETY

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September 23, 2019

Department of Natural Resources
Stephen Bernath, Forest Practices Board Chair
1111 Washington St. SE
PO Box 47012
Olympia, WA 98504-7012

Re: Petition to the Forest Practices Board Regarding the Spotted Owl in Eastern Washington

Washington State's Spotted Owl Special Emphasis Areas (SOSEA) represent a core strategy for preventing the continued decline of the Northern Spotted Owl on nonfederal lands in Washington over which the state has jurisdiction. North Central Washington Audubon Society contends that the rules applying to SOSEAs east of the Cascade Crest demonstrably are not achieving the protection of needed habitat. Simply put, they are failing the owl, and thereby show that the law, or at least its application in Eastern Washington, needs to be revisited and strengthened.

The following example, involving the only known breeding pair of Northern Spotted Owl remaining in Eastern Washington and Oregon, demonstrates the current rules are insufficient and thereby flawed, and/or they are not being adhered to.

Case in Point

We are aware of a pair of Northern Spotted Owls (NSO) occupying a SOSEA in Eastern Washington. In 2016 they returned to nest in federal timberlands that are part of a SOSEA that also contains private forest parcels in checkerboard fashion. The same year, the timber company that owns the private parcels applied for and received permits to log some of its lands lying within the 1.8-mile radius area (222-10-041 (4) refers to it as the "median home range circle") of the SOSEA. In the process of considering the requested permits, the Department of Natural Resources (DNR) and the Department of Fish and Wildlife determined the habitat quality within this zone did not meet defined standards that would allow them to deny the applications. Hence, the permits were granted.

With these permits approved, logging took place in the winter of 2016 and into the nesting season of 2017. Because it was so close to and disruptive of the owl's nest site, they abandoned the stand they've occupied for 13 of the last 16 years and moved east to a section of the privately-owned timberland within the median home range circle previously determined to be unsuitable for them. In 2017, they successfully fledged a

chick while nesting on this supposedly unsuitable private timber land. In 2018, they returned to the historic nest on National Forest Land and successfully fledged 2 chicks. Importantly, this is the only documented NSO pair known to have successfully reproduced in 2018 in all of both eastern Washington and eastern Oregon. In 2019, possibly because of the loss of foraging habitat north of the historic nest site in 2016 and 2017, they nested again on the supposedly unsuitable private timber land parcel.

Applicable Law

We believe DNR must adhere to WAC 222-10-041 (2), (4), (6), and (7) in making decisions in this matter:

“(2) **In SOSEAs or areas of SOSEAs where the goal is dispersal support**, either suitable spotted owl habitat should be maintained to protect the viability of the owl(s) associated with each northern spotted owl site center or dispersal habitat should be managed, over time, to provide the dispersal support for that particular SOSEA as described in the SOSEA goals. Dispersal support is provided by a landscape which includes dispersal habitat at the stand level interspersed with areas of higher quality habitat. Stands of dispersal habitat should be managed to reduce gaps between stands and to maintain a sufficient level of dispersal habitat to meet the SOSEA goals over time.”

“(4) **Within SOSEAs**, the following amounts of suitable habitat are generally assumed to be necessary to maintain the viability of the owl(s) associated with each northern spotted owl site center, in the absence of more specific data or a mitigation plan, as provided for in subsections (6) and (7) of this section respectively:

(a) All suitable spotted owl habitat within 0.7 mile of each northern spotted owl site center;

(b) Including the suitable spotted owl habitat identified in (a) of this subsection:

(i) For the Hoh-Clearwater/Coastal Link SOSEA - A total of 5,863 acres of suitable spotted owl habitat within the median home range circle (2.7-mile radius).

(ii) For all other SOSEAs - A total of 2,605 acres of suitable spotted owl habitat within the median home range circle (1.8-mile radius).”

“(6) The assumptions set forth in subsection (4) of this section are based on regional data. Applicants or others may submit information that is more current, accurate, or specific to a northern spotted owl site center, proposal, or SOSEA circumstances or goals. The department shall use such information in making its determinations under this section where the department finds, in consultation with the department of fish and wildlife, that the information is more likely to be valid for the particular circumstances than the assumptions established under subsection (4) of this section. If the department does not use the information, it shall explain its reasons in writing to the applicant.”

“(7) The department shall consider measures to mitigate identified adverse impacts of an applicant’s proposal. Mitigation measures must contribute to the achievement of SOSEA goals or to supporting the viability of impacted northern spotted owl site centers.”

Discussion

These habitat calls and approval of harvest in a circle already deficient in suitable spotted owl habitat raise the question of whether WAC 222-10-041 (2), (4), (6), and (7) were, or are, being followed. If a SOSEA has less than the 2,605 acres of suitable spotted owl habitat within its median home range circle and additional unsuitable habitat is allowed to

be harvested, the circle will remain deficient and the achievement of SOSEA goals will thereby never be met. This is contrary to (2) above.

The fact that this owl pair subsequently chose to nest, and did so successfully, in the habitat previously determined not to be of high enough quality to support them, proves that the law, as it applies to Eastern Washington SOSEA median home range circles is flawed, not being followed, or both. DNR should be required to consider and use this information in accordance with (4) and (6) above. It is also known that the Northern Spotted Owl in Eastern Washington is in continuing decline and facing almost certain extirpation if stronger measures are not taken.

Approval of the permits cited in the case above were certain to have negative impacts within the median home range of the owl circle and thereby on the SOSEA itself. WAC 222-10-041 (7) clearly states that DNR must consider mitigation measures for the adverse impacts approval of these permits allowed. We are, however, unaware of any such action having been taken.

Recently the timber company announced that they will reserve 100 acres around this nest tree on their land. This mitigation measure is entirely inadequate given that the circle is already below threshold. The integrity of the SOSEA must be maintained if extirpation of the northern spotted owl there is to be prevented. For this to occur, the rules and administration of the law as they apply to SOSEAs east of the Cascade Crest warrant reconsideration.

Also of concern is the well documented threat the Barred Owl poses to the continued existence of the NSO. Habitat fragmentation is known to be a primary factor contributing to the Barred Owl's interface with, and thereby negative impact upon, the NSO. It should be obvious that actions that increase fragmentation within SOSEAs are contrary to the goals they are intended to achieve.

Our Request

Pursuant to WAC 222-10-041(6), North Central Washington Audubon Society requests a moratorium be placed on logging anywhere within SOSEA sites in Eastern Washington pending reconsideration of WAC 222-10-041 as it applies to them and confirmation that the rules as currently written have been and are being adhered to.

Sincerely,



Arthur Campbell
President, North Central Washington Audubon Society

CC Hillary Franz, Commissioner of Public Lands
Todd Welker, Region Manager, DNR Southeast Region
Jim Brown, Director, Washington Department of Fish & Wildlife Region 2
Trina Bayard, Director of Bird Conservation, Audubon Washington