

Agenda Item No.:	6
Work Plan Title & #:	Forest Regulation – Issue 6
Objective # & Title:	Obj. 2 - Minimize the Adverse Financial Effects of Regulation, Landslides and Public Safety – Intermediate Risk Sites, OAR Amendments, and Rule Type
Presentation Title:	Landslides and Public Safety – Intermediate Risk Rules
Date of Presentation:	November 4, 2008
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**SUMMARY**

This agenda item: (1) reports on permanent rule development to address the Intermediate Downslope Public Safety Risk category; (2) requests a rule type determination pursuant to ORS 527.714; and, (3) requests direction to proceed to formal rule making.

**CONTEXT AND BACKGROUND**

Division 623, Shallow, Rapidly Moving Landslides and Public Safety Rules, was an outcome of the 1996 storms. These rules recognize that shallow rapidly moving landslides might be a public safety risk affected by forest operations and also that there is a high natural landslide hazard in certain locations. These rules articulate that in the short term, forest practices regulations can reduce the risk to people who are present in locations prone to shallow, rapidly moving landslides. In the long term, effective protections of the public can only be achieved through the shared responsibilities of homeowners, road users, forestland owners, and local governments. The purpose of the shallow rapidly moving landslides and public safety rules is to reduce the risk of serious bodily injury or death caused by shallow rapidly moving landslides directly related to forest practices.

At the November 2006 Board meeting, the Board reviewed an issue paper that demonstrated practice allowed under the current Intermediate Downslope Public Safety Risk rules do not necessarily reduce the level of risk for intermediate sites. Consequently, the Board directed the department at this meeting “to work with appropriate partners to review OAR ch. 629 Division 623 Shallow, Rapidly Moving Landslides and Public Safety and develop proposed amendments to improve the intermediate risk rules and to improve the overall clarity, efficiency and effectiveness of the division rules for future rulemaking consideration.”

At the April 2008 Board meeting, the Board approved a temporary rule, requiring geotechnical reports for operations in the intermediate-risk category, in June 2008. The temporary rule is in effect for 180 days (i.e., July 18, 2008 through January 13, 2009) and may not be extended.

The Department has developed draft permanent rules with the help of regional forest-practices committees, some members of the original landslide rules advisory committee, agency foresters, interested organizations, and community members.

## ANALYSIS

### *Preliminary draft rule language*

The focus of Division 623 policy changes is on improving the intermediate risk rules, as directed by the Board. The proposed rule retains the policy of requiring some level of risk reduction for operations on intermediate risk sites, within the constraints of providing for public safety (ORS 527.710(10)). The proposed rule, however, no longer provides the default option of allowing an intermediate-risk, steep-gradient slope (formerly High Landslide Hazard Location) to be harvested in halves, separated by a 10-year waiting period. The geotechnical-report option now described in the proposed rule is intended to give landowners and operators more accurate, site-based, public-safety-risk determinations and may also evaluate the slope-stability aspects of a range of operations proposed by the operator. The report can also verify initial screenings of steep gradient slopes and downslope public risk made by Department staff.

Attachment 1 contains draft permanent rule language for the intermediate risk category. Attachment 2 contains the same language organized in chart form to show, line-by-line, the current rule language (column 1), the rationale for proposed changes to the rule language (column 2), and the proposed new rule language (column 3).

The proposed rule is intended to maximize operational flexibility within the constraints of providing for public safety. The Department also changed rule language for purposes of clarity, efficiency, and effectiveness. These changes included: (1) wording; (2) improving rule organization; and, (3) clarifying the roles of the operator and State Forester regarding shared responsibility, stated in OAR 629-623-0000(1). The Department did not modify the intent and purpose of the rules, as stated in OAR 629-623-0000(3).

### *Determination of rule type*

The Board must follow ORS 527.714 in analyzing new or revised forest practices rules. This analysis must precede the Notice of Proposed Rulemaking Hearing (ORS 183.335).

In 2002, the Board found that the proposed landslides and public safety rules triggered the need for scientific-findings and economic-analysis requirements of ORS 527.714 (5) and (7). In conducting this analysis the Department identified the following key points as relevant to determining the rule type for the attached draft permanent rule language:

- The criteria set in ORS 527.714(5) for triggering an analysis are “new or increased standards for forest practices.” The proposed permanent amendment to this rule removes the problematic default option of allowing an intermediate-risk, steep-gradient slope to be harvested in halves, separated by a 10-year waiting period. It does not provide a new default prescription other than to require a geotechnical report to determine downslope public safety risk and evaluate site-specific operations. A range of harvest, mitigation, and road-building outcomes is possible based on findings of geotechnical reports. The proposed permanent rule is likely to result in some unknown average increase in operational requirements as compared to the current rule.
- According to geotechnical consultants working in this field, the average cost of an assessment and report for a conventional, moderate-size operation is about \$2000. Operators working in intermediate-risk sites in the past that have chosen to provide a geotechnical report have experienced an added cost prior to harvest.
- The proposed rule changes are not intended to modify existing rule standards, by allowing some level of harvest while providing a reasonable likelihood of reducing the short-term risk of serious bodily injury or death as required under ORS 527.710(10). The changes replace existing rule language whose unintended consequence was to allow harvest practices that might not achieve the intent of existing rule standards.

## **ALTERNATIVES CONSIDERED**

### Option 1:

Determine that the draft permanent rules implement the provisions of ORS527.710 (10) and trigger the need for scientific-findings and economic-analysis required by ORS 527.714 (5) and (7) prior to formal rule making.

### Option 2:

Determine that the draft permanent rules implement the provisions of ORS527.710 (10) but do not result in new or increased standards for forests practices. Therefore, scientific-findings and economic-analysis under ORS 527.714 (5) and (7) are not required and formal rule making may proceed.

### Option 3:

Determine that the draft permanent rules implement the provisions of ORS527.710 (10) but do not result in new or increased standards for forests practices. Therefore, scientific-findings and economic-analysis under ORS 527.714 (5) and (7) are not required. However, given that analysis done in the process of developing the proposed rules indicates some potential for increased restriction and/or economic impact to landowners, direct the Department to provide the Board with appropriate information on alternatives evaluated and economic impact prior to requesting formal rule making authority.

## **RECOMMENDATION**

The Department recommends that the Board direct the Department to proceed under option 3, as described above. This option will ensure the Board is informed on the most relevant issues related to ORS 527.714 findings without having to make a determination that the findings are required. The Board has utilized this approach previously for rule-making related to leave-tree requirements along small, non fish-bearing streams prone to debris-flows. In that instance the Board chose to make the determination that ORS 527.714 findings were not required, but requested that the Department conduct portions of the analysis to better understand the likely economic consequences of the proposed rule.

## **NEXT STEPS**

At the direction of the Board, the Department will provide the Board with information on alternatives evaluated and economic impact prior to requesting formal rule making authority in January 2009. Following Board review of information and approval, the Department will then proceed with the formal rule-making process, with the intent of conducting public hearings, and returning final rule language to the Board for consideration in early 2009.

## **ATTACHMENTS**

- (1) Proposed Permanent Rule Language
- (2) Line-by-Line Changes to the Existing Rule Language

