



The Forest Practices Act Streamside Tree Retention Rule or “Shade Rule”

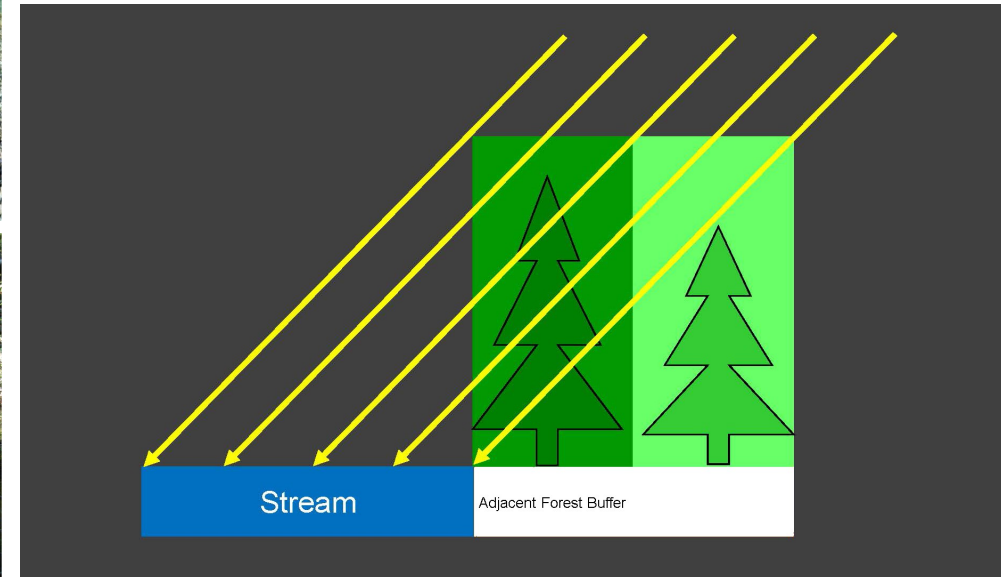
Updated June 2014

Retaining trees near fish-bearing streams is an important component of the Idaho Forest Practices Act.

Shade over streams benefits fish habitat in a myriad of ways, primarily by contributing to keeping water cool enough for successful spawning. Also, fish need the stream structures created when trees fall into the stream channel, forming eddies and pools that enhance the ability of fish to feed, spawn, rest, and migrate upstream. Stream structures also slow runoff.



The immediate adjacent buffer of trees next to the stream typically accounts for the majority of the shadow cast by a riparian buffer.



Roles and Authorities

The Idaho Department of Lands (IDL) administers the Idaho Forest Practices Act, which regulates harvest operations in Idaho. The Land Board provides oversight of IDL.

The Forest Practices Act Advisory Committee (FPAAC) provides technical advice to IDL and the Land Board in matters relating to the Idaho Forest Practices Act. FPAAC is comprised of nine voting members appointed by the IDL director for three-year terms. Members include a fisheries biologist; a nonindustrial private forest landowner; two forest landowners, one from northern Idaho and one from southern Idaho; two forest operators, one from northern Idaho and one from southern Idaho; two informed citizens from northern and southern Idaho; and an at-large member.

In accordance with the federal Clean Water Act, the Idaho Department of Environmental Quality (DEQ) administers Idaho’s Water Quality Standards.

The corresponding Best Management Practices (BMPs) for protecting water quality during timber harvesting operations are defined in the Idaho Forest Practices Act administrative rules, and IDL is the designated management agency for these BMPs.

DEQ leads an audit every four years on Idaho forestlands to check compliance with the Idaho Forest Practices Act rules (this is called the “Forest Practices/Water Quality Interagency Audit”). DEQ has this responsibility because it administers the Idaho Non-Point Source Management Plan and corresponding silvicultural (forestry) Memorandum of Understanding (MOU). The audit is defined in the MOU.

When DEQ provides post-audit, rule-changing recommendations, then FPAAC works with IDL to develop rule changes to address the DEQ recommendations.

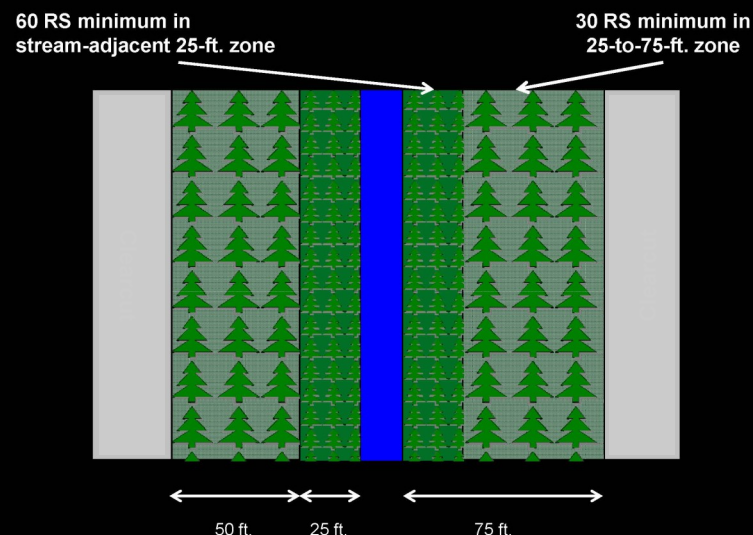
What are the Shade Rule options?

The Shade Rule requires a 75-ft.-wide tree-retention buffer in the Stream Protection Zone.

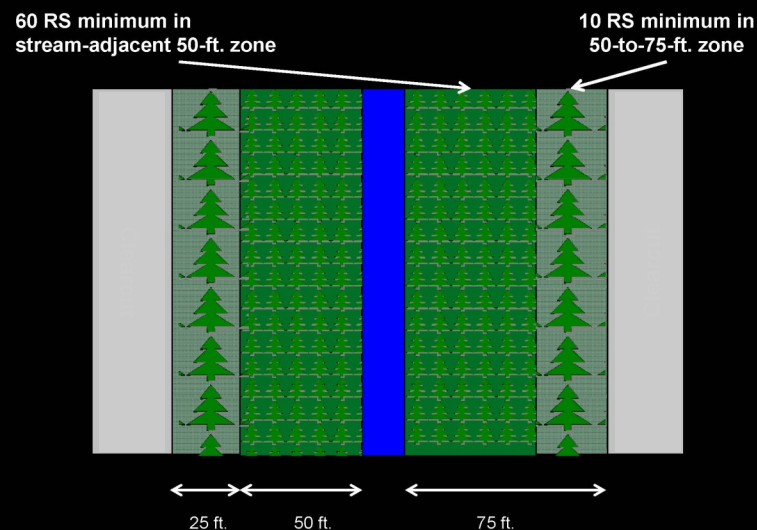
The Shade Rule offers landowners two options for management next to fish-bearing streams:

1. **“60-30 option”** - Requires more trees to be left (60 Relative Stocking) in the inner 25-ft.-wide zone right next to the stream. As long as the 60 Relative Stocking is maintained in the inner 25-ft. zone, trees can still be harvested. Fewer trees (30 Relative Stocking) are required to be left in the outer 50-ft. riparian zone (25-to-75 feet away from the stream edge).
2. **“60-10 option”** - Requires more trees (60 Relative Stocking) to be retained in the inner 50-ft.-wide zone next to the stream edge. Fewer trees (10 Relative Stocking) are required in the outer 25-ft. riparian zone (50-to-75 feet away from the stream edge).

75-ft.-wide 60/30 Option



75-ft.-wide 60/10 Option





The Forest Practices Act Streamside Tree Retention Rule or “Shade Rule”

Updated June 2014

DEQ Recommendations

Following the 2000 and 2004 DEQ-led Forest Practices/Water Quality Interagency Audits, DEQ came to FPAAC with recommendations for changing the streamside tree retention rule standards. FPAAC and IDL worked for nearly a decade (since 2004) to modify the streamside retention rules to reflect the DEQ recommendations.

The Work Since 2004

Although IDL worked with FPAAC since 2004 on a Shade Rule, it was in 2009 that the intensity of work on the proposed changes ramped up. At that time FPAAC and IDL contracted with a forest hydrology consultant and modeling scientist to use real Idaho stand data to simulate (model) over-stream shade and large woody debris contributions for multiple forest types and harvest prescriptions. The work was done to develop a science-based rule that addressed shade and large-wood recruitment, and that forest landowners could implement on the ground.

FPAAC used the outcomes of these modeling efforts to evaluate trade-offs among different “Stream Protection Zone” thinning prescriptions and develop implementable rule standards.

Key Issues Addressed

By 2012, FPAAC proposed a new Shade Rule, starting the process of negotiated rulemaking and presenting the science behind the proposed changes to many interested parties including forest industries, the Idaho Forest Owners Association, loggers, Environmental Protection Agency (EPA) and DEQ managers, and multiple tribal organizations.

Some parties expressed the following concerns about the proposed shade rule, and after further deliberation FPAAC and IDL decided more analysis was warranted and discontinued the 2012 rule promulgation process. The Shade Rule options were revised after completing the additional analysis to address the concerns expressed below:

- ⇒ EPA sent comments stating the initial modeling efforts underestimated shade loss. IDL contracted an independent validation study to address this comment and found there was some under-prediction of shade loss in the initial modeled outputs. Therefore, tree retention levels were adjusted in the shade rule options to address this concern.
- ⇒ Tribes and environmental organizations sent comments stating that the rule was too lax and would not be compliant with Idaho Water Quality Standards or with existing TMDL’s. After extensive modeling and model validation efforts, the Shade Rule (as revised) will be an effective BMP for water quality and fish habitat protection.
- ⇒ The Idaho Forest Owners Association (non-industrial private forestland owners) was concerned about the infringement on private property owner rights. Therefore, the Shade Rule options were revised to eliminate the no-harvest zone and tree retention levels adjusted in each zone before harvest can occur.

After additional analysis and modeling efforts, rule promulgation moved forward in 2013.

The Shade Rule is scientifically sound and strikes the right balance of input received from a variety of interested parties.



SUMMARY

The work that has been done to address issues with the Shade Rule demonstrates that Idaho’s adaptive management process has been implemented exactly as it was designed to work.

The FPAAC and IDL began to look at ways to address concerns with the current rules identified in the DEQ quadrennial audit. Then a method to address the concerns was developed and tested, and the public was invited to comment on its merits and deficiencies. When the rule change was proposed in 2012 stakeholders expressed concerns so FPAAC recommended that IDL pull the rule in order to conduct additional analysis. Then the rule was re-evaluated, re-tested, and revised.

The “two options approach” is unique in the West and demonstrates Idaho’s leadership in developing solutions that balance landowner rights, provide flexibility, and protect Idaho’s forest and water resources.



**Idaho Department of Lands
Forestry Assistance Bureau
3284 W. Industrial Loop
Coeur d’Alene, ID 83815
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www.idahoforestowners.org

January 8, 2013

Ara Andrea
Regulatory Program Manager
Idaho Department of Lands
3284 W. Industrial Loop
Coeur d'Alene, ID 83815-6021

RE: Comments on Revised Rule for Class 1 Stream Protection Zones

Dear Ms. Andrea,

At the 12/11/2012 Idaho Forest Owners Association (IFOA) Directors meeting, the Forest Practices Act Advisory Committee's (FPAAC) "Nonindustrial Forest Landowner" representative presented the most recent proposal for a new Class 1 Stream Protection Zone (SPZ) rule. He showed several Powerpoint slides along with some handouts showing a "60/30" scenario. As IFOA understands this, it would require a "Relative Stocking" (RS) of 60 in the first 25' of SPZ followed by a RS of 30 in the outer 26'-75' of the SPZ. He explained that a RS of 60 would typically not allow any harvesting, as most natural stands do not exceed this level (which, according to the "Tepley" report, is already a declining forest). The RS of 30 would, in many cases, allow some harvesting.

IFOA understands that the previous proposal, with an Option A and Option B, contained some flaws in the data analysis that resulted in what could be perceived as "inadequate shade retention", particularly with the Option B. IFOA appreciates the necessity of developing a rule that is defensible in court.

The IFOA Board & membership have the following concerns regarding the current proposal:

1. Landowners want to maintain the ability to manage all of their land, including the SPZ's on Class 1 & 2 streams. Most family forest owners are motivated by a strong stewardship ethic and do not desire to inflict deleterious impacts to any of their ownership, particularly the streams. Forestland owners desire the ability to manage their SPZ's, especially if insect, disease, fire, or storm problems occur in this zone. It appears that the proposed rule would potentially allow some management if the RS exceeded 60. IFOA also understands that implementing an "Alternative Practice" will be available through direct negotiations with the local Private

Forestry Specialist (PFS). IFOA feels it is very important to maintain landowner management opportunity.

- 2. Another concern is that a landowner be able to correctly understand and apply the rule themselves, or have assistance available through the IDL from a Private Forestry Specialist (PFS). IFOA does not support a rule that effectively requires a landowner to hire a Consulting Forester to determine what can legally be harvested. If a landowner marks timber within the SPZ for removal, they need assurance that upon request, a PFS will review the SPZ on the ground prior to harvest to avoid a violation.**
- 3. When determining effective shade, there is some scientific opinion that hardwoods and conifers should be treated differently, with hardwoods weighted more heavily. Though adequate supporting documentation may not exist at this time, IFOA would like FPAAC to research this possibility and make a determination. If a shade difference does exist, this finding should be incorporated into the current IDL Relative Stocking worksheet.**
- 4. For RS determination in the SPZ, the current proposal treats all streams as if they are 10 ft. wide. This is not the case, and a RS needed to shade a 2 ft. wide stream is obviously less than for 10 ft. This reality calls for a proposal which allows for *at least* two delineations of average stream width (e.g. 1-5' and 6-10') with appropriately adequate RS requirements for each width category in the SPZ.**

IFOA understands that this proposal will be discussed at the FPAAC meeting in February, 2013. Assuming this 60/30 proposal is accepted by FPAAC, IFOA feels this may represent a workable solution, if the concerns outlined above are adequately addressed.

Sincerely,



**Paul Buckland
President
Idaho Forest Owners Association**

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IDAHO DEPT. OF LANDS
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June 25, 2013

Ara Andrea
Regulatory Program Manager
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3284 W. Industrial Loop
Coeur d'Alene, ID 83815-6021

RE: Comments on Revised Rule for Class 1 Stream Protection Zones

Dear Ms. Andrea,

Idaho Forest Owners Association (IFOA), representing forest landowners with ownerships of only a few acres or up to thousands of acres in Idaho (an aggregate of millions of acres), have been informed by Idaho Forest Practices Act Advisory Committee (IFPAAC) representatives that, in addition to the required minimum "Relative Stocking" (RS) of 60 in the first 25' of a Class I Stream Protection Zone (SPZ) followed by a RS of 30 in the outer 26'-75' of the SPZ, another option of a minimum RS 60 in the first 50' of SPZ and RS 10 in the outer 25' has been proposed. Having a choice is good, and this additional option may be a good solution for an "industrial" owner's silvicultural model.

IFOA understands that the existing "shade rule" has been problematic for enforcement to maintain target shade levels on fish bearing streams. IFOA agrees with the Idaho Department of Lands (IDL) desire to develop a rule that is measurable, more easily administered, and defensible in court.

The IFOA Directors & members still have the following concerns regarding the latest proposal:

1. Landowners want to maintain the ability to manage all of their land, including the SPZ's on Class 1 streams. Family forest owners are motivated by a strong stewardship ethic and do not desire to inflict deleterious impacts to any of their ownership, particularly the streams. Forestland owners desire the ability to manage their SPZ's, especially if insect, disease, fire, or storm problems occur in this zone. It appears that the proposed rule would potentially allow some management if the RS exceeds 60. IFOA also understands that landowner implementation of an additional "Riparian Management Plan," that will meet or exceed the long-term intent of the rule, is available. We sincerely desire that adequate assistance from a full complement of local IDL Private Forestry Specialists (PFS) will be available for

this requirement. IFOA feels it is *very* important for landowners to have active and adaptive management opportunities to keep their forests healthy and productive.

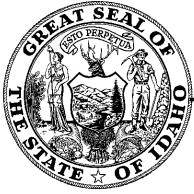
2. Another concern is that a landowner be able to correctly understand and apply the rule themselves, or have assistance available through the IDL from a PFS. If a landowner marks timber within the SPZ for removal, they need assurance that upon request, a PFS will review the SPZ on the ground *prior* to harvest to avoid a violation. Family forest landowners *want* to “do the right thing”. We understand that field testing of this methodology has been problematic for IDL, but we would like to see substantive progress toward a guidance document that provides the layman a simple and clear explanation of the work required.
3. Since this comment letter is directed through you to the IFPAAC, we would appreciate it if IFPAAC’s agenda included advising the State Forester, and thus the Idaho Board of Land Commissioners, of the inadequacy of requiring *only* timberland owners to bear the responsibility for cooling streams to temperatures said to be necessary for healthier fish populations. If this shade rule is mandated for good habitat, where is the requirement for *all* ownerships along fish-bearing streams – and not just Category 6 or 7 land uses – to contribute to the attainment of this public good? Should not 25’ or 75’ on all Class I stream-sides be providing shade? Economic disincentives to forestland management drive the unintended consequences of conversion out of that use, to the detriment of Idaho’s forest industry and natural resource habitats. We feel it is appropriate and would appreciate this concern being communicated to the Land Commissioners through IFPAAC, as well as our citizen efforts in that regard.

IFOA understands that this proposal will be discussed at an IFPAAC meeting in summer 2013. Assuming this 60/30-60/10 proposal is accepted by IFPAAC, IFOA feels this may represent a workable solution, if the concerns outlined above are eventually adequately addressed.

Sincerely,



Paul Buckland
President
Idaho Forest Owners Association



State of Idaho
DIVISION OF FINANCIAL MANAGEMENT
Executive Office of the Governor

BRAD LITTLE
Governor

ALEX J. ADAMS
Administrator

April 23, 2019

MEMORANDUM

**TO: Executive Branch Agency/Department Heads
Rules Review Officers**

FROM: Alex J. Adams 

SUBJECT: Process to Reauthorize Rules Beyond July 1

The Idaho Legislature did not reauthorize all existing administrative rules as they have done in the past. This will require executive administrative action to ensure existing rules remain in effect in FY20. Governor Little, his staff, DFM, and the Attorney General's Office have been working diligently to assess and plan how to address this unique circumstance. The following lays out the first phase of the Governor's plan to accomplish this process.

The Governor has directed DFM and all state executive agencies to exercise necessary executive authority to minimize the impact on state agencies, and the public most importantly. The efficient operation of state government is a priority to Governor Little, and the people of Idaho expect it.

DFM will begin the process of re-publishing existing rules by IDAPA chapter, using the engrossed rules updated for 2019 legislative action. Rules will be published as both temporary and proposed rules concurrently in a special edition of the Idaho Administrative Bulletin in June 2019. The temporary rules will have an effective date of June 30, 2019 to ensure there is no gap with the expiring rules.

Given that many agencies have already identified IDAPA rules they intend to eliminate as part of the Red Tape Reduction Act, agencies have two pathways to move forward:

1. Allow Rule to Expire

If an agency intends to eliminate a rule, the rule will expire by default on July 1, 2019. No ARRF is needed and no legislative review of the chapter will occur during the 2020 session. DFM will count the elimination of the chapter toward the "bank" agencies are accumulating under the Red Tape Reduction Act. Agencies must submit an email to Adam Latham (Adam.Latham@dfm.idaho.gov) identifying the rules they intend to let expire no later than **May 10, 2019**. Agencies should include a brief explanation of why they are proposing to eliminate the rules. The Governor's office will review each rule that an agency proposes to let expire and the Governor will make the final decision whether to promulgate each rule as temporary and proposed.

2. Re-Authorize Rule by July 1, 2019

If an agency intends to re-authorize a rule, several action steps will be necessary to publish the temporary and proposed rules in the June 2019 Bulletin:

- Agencies must submit a completed Notice of Omnibus Rulemaking form and separately a Notice of Omnibus Fee Rulemaking form to DFM no later than **May 10, 2019**.

- a. Templates for each Notice are enclosed.
 - b. One of each Notice is needed per agency.
 - c. Please submit completed Notices to Adam Latham (Adam.Latham@dfm.idaho.gov)
 - d. If rulemaking authority is vested in a board or commission – not agency staff – the board or commission must convene to properly authorize the Notice. This is required by law. Please work closely with your attorney to ensure the Notice is properly authorized.
 - e. No ARRF will be required.
- It is crucial that each agency carefully and thoroughly complete each Notice and closely follow the requirements of the Idaho Administrative Procedure Act, Chapter 52, Title 67, Idaho Code.
 - Questions regarding the Notice and the process should be directed to Alex Adams (Alex.Adams@dfm.idaho.gov; 208-334-3900).
 - Agencies must post each Notice published in the Bulletin onto, or be accessible from, the home page of the agency's website so that interested parties can view it online (§67-5221(3)). This will need to occur in June on or around when the special Bulletin publishes.
 - Agencies must accept written comments on the proposed rules for 21 days pursuant to 67-5222. If comments are received or an oral comment is requested, please contact Adam Latham (Adam.Latham@dfm.idaho.gov) for additional information prior to scheduling the hearing.
 - All rules re-authorized through this process will be subject to legislative review during the 2020 Idaho Legislature, as is the case each year.
 - Each agency must keep all records of this rulemaking process for at least two (2) years pursuant to Idaho Code § 67-5225. Please ensure the record is thorough and complete.

Frequently Asked Questions

Can agencies add rules concurrently with the publication of the re-authorized chapter?

- No, agencies must go through the traditional ARRF process for any new or added rules.
- Only rule expiration can be accomplished via the procedure set out above.

Can agencies add, modify or eliminate rules apart from the re-authorized chapter?

- Yes, agencies will still be permitted to submit ARRFs for new rules or modified rules through the traditional process in 2019.
- When an ARRF is approved by DFM and the Governor's Office, agencies can move forward with publishing in the Bulletin. These rulemaking actions are considered separate, legal rulemaking actions from the re-publishing of the existing rules as temporary and proposed. As such, they will be reviewed by the 2020 Legislature, and those that take effect will be engrossed into the existing rule chapters upon *sine die* in 2020.



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Idaho Conservation League

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Ara Andrea
Service and Regulatory Program Manager, Forest Practices Act
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June 26, 2013

RE: Idaho Forest Practice Act changes pertaining to the Streamside Protection Rule (Section 20.02.01.030.07.e.ii), Docket No. 20-0201-1301 (aka Shade Rule)

Dear Ms. Andrea,

Thank you for considering our comments on the Forest Practices Act proposed rule changes. Since 1973, the Idaho Conservation League has been Idaho's voice for clean water, clean air and wilderness—values that are the foundation for Idaho's extraordinary quality of life. The Idaho Conservation League works to protect these values through public education, outreach, advocacy, and policy development. As Idaho's largest state-based conservation organization, we represent over 25,000 supporters, many of whom have a deep personal interest in ensuring our forests are managed sustainably and that Idaho's clean water is protected.

The Idaho Conservation League has significant experience in forest management issues. We serve on several forest restoration collaborative efforts in Idaho, including on the Payette, Boise, Salmon-Challis, Nez Perce-Clearwater, and Panhandle National Forests. Each of these collaborative efforts has components of active forest management and timber production, as well as watershed restoration and water quality protection programs.

Background

As we noted in our comments submitted in October 2012, while riparian areas may collectively be small in size, they are of tremendous importance with respect to water quality protection and other values. Forested riparian areas serve numerous purposes: a source of shade to keep waters cool enough to support fisheries, a filtration system to prevent uncharacteristic amounts of sediment from polluting waterways, a source of coarse woody debris for stream habitat, and as habitat for riparian-dependent species. Healthy functioning riparian areas are critical in restoring

303(d) listed waterways so they satisfy beneficial uses. In addition, riparian protection zones can prevent other streams from becoming 303(d) listed in the future. As such, it is critical that the Shade Rule provide sufficient assurance that water quality will be protected, maintained and conserved consistent with existing water quality standards.

Further, listed fish species cannot adequately be recovered in Idaho without the active partnership of state, private and industrial forestland owners and managers. The Forest Service and the Bureau of Land Management implement more protective prescriptions (INFISH and PACFISH) to ensure that timber harvest and other federal land management practices improve and maintain habitat for these species. However a significant portion of this habitat is located on private and state lands, thus requiring complimentary efforts to recover these species. While we recognize that private and state lands operate under different management schemes, it is critical that management standards here are based on sound science and complement other programs.

Based on the anticipated impacts of climate change (hydrology, timing of snowmelt, precipitation and other factors), we feel that maintenance and enhancement of cold water should be a state priority.

Rule Analysis

We recognize the complexity associated with revising the shade rule and the large amount of time it has taken to develop this proposal. Because of this time span, we are concerned that if the rule is found to be inadequate through on-the-ground monitoring, it could take another 10-15 years to implement any future modifications. As such, we feel that it is critical to implement a conservative approach that can ensure compliance with existing water quality standards now and into the future.

It is important to recognize the need for a change to ensure compliance with Idaho Water Quality Standards. In 2000, the Idaho Forest Practices Water Quality Audit (Final Report) recommended that changes in the shade rule “be made so that it will better protect or maintain stream temperatures preferred by the fishes that occur there.” While we feel that the proposal may provide better protection than the existing rule, we remain unconvinced that the proposed rule will effectively maintain temperatures preferred by fish that currently occur in Idaho’s waters. We are also concerned that the rule will not ensure compliance with Idaho Water Quality Standards. In order to better meet the intent of this rule change, we recommend that IDL 1) consider a no-cut buffer; 2) link the inner and outer zones together and 3) guarantee monitoring to evaluate effectiveness of the revised rule.

We do appreciate the fact that the IFPA Advisory Committee acknowledged the findings of the 2000 Forest Practices Audit, and undertook revision of the Shade Rule. At the same time, we are concerned that neither Options 1 nor 2 will sufficiently curtail degradation of riparian areas to ensure protection of Idaho’s water and water users. Further, consideration should be given to ensure that any new regulations are readily understandable by private property owners and are adequately enforceable.

Our primary concerns relate to:

- The need for a simple, easily understood and measurable no harvest buffer,

- Linkage between the inner and outer streamside zones (i.e. before timber harvest can proceed in the outer zone, the inner zone must meet minimum standards), and
- The need for ongoing effectiveness monitoring and accountability.

Fundamentally, we are concerned that the existing proposal will be insufficient to ensure protection and adherence to State Water Quality Standards. For waterbodies that do not currently meet water quality criteria, IDAPA direction requires no reduction in water quality. For these streams, we are concerned that this rule would fail this test. In particular, we are concerned that the Relative Stocking ratios of either Option 1 or 2 would authorize a lowering of water quality below existing condition, in violation of IDAPA direction. Our understanding is that the scientific basis and modeling applied to evaluate the rule change relied upon an assumption that both the inner and outer zones would meet the minimum Relative Stocking levels. Based on the disclosure that the inner and outer zones are not linked, we question the accuracy of the modeling. If modeling runs did in fact evaluate the impacts associated with inner and outer zones independently, we would be interested to see the results of that analysis.

Regardless of whether IDL responds to concerns over the adequacy of either Option 1 or 2 to protect water quality consistent with existing standards, we strongly suggest that IDL include a 3rd option that incorporates a no-harvest buffer. A no-harvest buffer would be easier to understand, implement and enforce and far more likely to be effective in meeting water quality standards. Having a consistent no-harvest buffer would also help meet TMDL shade requirements for 303(d) listed streams and help prevent future listings as Idaho's climate and runoff patterns continue to change. In addition, riparian areas with diverse age classes of trees offer greater resilience to wildfires than riparian areas with single-aged stands. Idaho DEQ has offered similar feedback during FPAAC meetings where they supported the simplicity of a no harvest buffer, pointing out that it would avoid non-compliance issues. As such, we suggest a 75-foot no cut buffer as a minimum.

We also feel that ongoing monitoring of the effectiveness of any revised Shade Rule should be incorporated as a component of this rulemaking. Effectiveness monitoring and accountability to ensure that the Shade Rule is meeting the intent of the FPAAC and existing water quality standards are crucial. Whether it is incorporated as part of the Shade Rule, or considered separately, we feel strongly that accountability and monitoring, with required feedback loops, need to be incorporated into this rule.

While we recognize that "constitutional takings" concerns were expressed in response to the original shade rule, which proposed a no-cut buffer, we do not feel that an optional no-cut buffer would invite similar concerns.

We are also concerned that neither Option 1 nor 2 contains adequate protections for large trees. Large trees are particularly important in providing these benefits within riparian areas, and play a critical role in increasing the resiliency to fires and other disturbances and in providing snags for wildlife habitat and aquatic structure. Large trees are also below historic levels in many private and state-managed stands.

Under the proposed rule, both Options only encourage landowners to retain all trees immediately adjacent to the stream. The first step in responsible forest and stream management would be to make tree retention here mandatory and then significantly expand the no harvest buffer proportionate to the productivity of the site. No exceptions should be made for line skidding in the riparian area, as this type of disturbance in such close proximity to streams has disproportionate negative impacts on water quality.

Thank you again for considering our comments. Please keep us on the mailing list for this rulemaking. We look forward to working with IDL and the FPAAC to ensure that regulations provide for the protection of Idaho's water quality, which simultaneously ensuring the health and sustainability of Idaho's timber economy. Please feel free to contact either of us if you have any questions or need any additional information.

Sincerely,



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Jonathan Oppenheimer
Senior Conservation Associate
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Governor Brad Little

Memorandum

DATE: July 11, 2019

TO: **Executive Branch Agency/Department Heads
Rules Review Officers**

FROM: **Zach Hauge, Chief of Staff**

SUBJECT: **Process to Finalize Pending Rules for Reauthorization Effort**

On June 19, 2019, a special edition of the Idaho Administrative Bulletin reauthorized rules that were deemed necessary to protect public health, safety, and welfare or to confer a benefit. Each rule docket was published as temporary and proposed concurrently. The proposed rules must be adopted as pending rules prior to the 2020 legislative session. DFM intends to publish a special edition of the Idaho Administrative Bulletin to adopt pending rules on **November 20, 2019**. This memo outlines the process for agencies to finalize their pending rules.

Adoption of Pending Rule

Two action steps are necessary to publish in the November 2019 Bulletin:

1. Agencies must submit a completed *Notice of Omnibus Rulemaking – Adoption of Pending Rule* form and separately a *Notice of Omnibus Fee Rulemaking - Adoption of Pending Fee Rule* form (if applicable) to DFM no later than **October 16, 2019**.
 - a. Templates for each Notice are enclosed.
 - b. Please submit completed Notice(s) to Adam Latham (Adam.Latham@dfm.idaho.gov)
 - c. If rulemaking authority is vested in a board or commission – not agency staff – the board or commission must convene to properly authorize the Notice(s). This is required by law. Please work closely with your attorney to ensure the Notice is properly authorized.
 - d. No ARRF will be required.
 - e. Prior to the adoption of the pending rule, the agency shall consider fully all written and oral submissions respecting the proposed rule, per § 67-5224.
2. Agencies must provide a **cover sheet** for each rule chapter. This is a new addition to allow citizens to more easily navigate the administrative rules. This cover sheet will be added as the first page of the official Idaho Administrative Code for each chapter, preceding the current Table of Contents.

- a. A template cover sheet is attached. Please submit one cover sheet per chapter to DFM no later than **October 16, 2019**.
- b. The cover sheet will replace the previous uniform formatting requirements within a rule chapter. As such, OARC will remove the following sections from each pending rule:
 - i. 002. Written Interpretations.
 - ii. 005. Office – Office Hours – Mailing Address – Street Address – Web Address.

Accomplishing the Red Tape Reduction Act and Licensing Freedom Act

The rules reauthorization process has provided an unprecedented, one-time opportunity to eliminate obsolete, outdated, and unnecessary rules.

It is the expectation of the Governor that each agency continues to review their reauthorized proposed rules for opportunities to eliminate or simplify. Recommendations provided to the Governor in conjunction with the Licensing Freedom Act should be considered by each agency. This should be done in open, public meetings with opportunities for public input, and in accordance with the Administrative Procedures Act, including § 67-5227.

Frequently Asked Questions

Can agencies **add** rules concurrently with the publication of the pending rule?

- No, agencies must go through the traditional ARRF process for any net new rules.
- If a rule is simply being moved from one chapter to another, DFM does not consider that a net new rule.

Can agencies **eliminate or modify** rules concurrently with the publication of the pending rule?

- Yes, an agency can eliminate or modify additional rules, if in compliance with the requirements of the Administrative Procedures Act, including § 67-5227. Agencies should do so in an open, public hearing. Please vet any substantive changes by your Governor's office contact.
- Agencies must provide a marked-up version showing all desired edits in Microsoft Word by October 16, 2019. Do not use track changes as it can be difficult to follow changes; rather, agencies should highlight changes and use strikethroughs and underlines. Obtain a word copy of your rule from OARC if you have changes.

How can I schedule a public hearing to discuss and consider changes to the proposed rule?

- An agency can publish a Notice of Hearing in the Idaho Administrative Bulletin identifying the date, time, location, and subject matter for the scheduled public hearing.
- If an agency is considering modifying the content of a proposed rule in a substantive way pursuant to § 67-5227, it is directed to hold a public hearing after publishing a Notice of Hearing in the Idaho Administrative Bulletin. Any such agency is also directed to consider and take all reasonable steps to provide notice of the public hearing to interested parties and individuals. The Notice of Hearing should make clear that the public can provide oral or written comment through the day of the public hearing.
- Any agency holding a public hearing should accept and consider both written and oral public comments received at the public hearing prior to adopting a pending rule.

- A template Notice of Hearing is attached and can be submitted directly to OARC at adminrules@adm.idaho.gov. The agency should time the publication of the Notice so that the Bulletin publishes with enough lead time to meet guidelines for the state’s open meeting laws.

Can I vacate a proposed rule that we have since found to be unnecessary?

- Yes, an agency can vacate a proposed rule simply by making a notation on your *Notice of Omnibus Rulemaking – Adoption of Pending Rule*.
- The temporary rule will automatically expire at the end of the 2020 legislative session so it is not necessary to vacate the temporary rule; if an agency needs to rescind a temporary rule prior to this time, contact OARC at adminrules@adm.idaho.gov

Upcoming Training Sessions

DFM will host a training session with a specific focus on finalizing the pending rules in this unique circumstance, as follows:

Date	Time	Location
July 25	11:00 a.m.	LB Jordan Basement room 09

To attend, please RSVP to Adam Latham (Adam.Latham@dfm.idaho.gov) at least three days prior to the event.