

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

CITY OF NEWCASTLE,

Appellant,

v.

WASHINGTON DEPARTMENT OF
NATURAL RESOURCES, DALPAY
PROPERTIES LLC, and ERICKSON
LOGGING INC.,

Respondents.

PCHB No. 18-035c

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

The City of Newcastle (City) filed an appeal with the Pollution Control Hearings Board (Board) on May 21, 2018, challenging the Washington State Department of Natural Resources' (DNR) approval of Forest Practices Application (FPA) No. 2420111. The FPA was submitted by Dalpay Properties LLC (Dalpay) on April 20, 2018. The FPA authorizes Dalpay to harvest approximately 28 acres of timber and build 2,200 feet of forest road on timberlands it owns.

The Board conducted a hearing on October 18-19, 2022, via Zoom videoconference. The Board considering the matter was comprised of presiding Board Chair Carolina Sun-Widrow, and Board Members Neil L. Wise and Michelle Gonzalez. Attorneys Curtis J. Chambers and Charlotte Archer represented the City. Senior Counsel Terence A. Pruit represented DNR. Attorney Adam Asher represented Dalpay. Kurt Erickson, *pro se*, represented Erickson Logging Inc. (Erickson).¹

¹ Erickson's participation throughout the appeal proceedings and at hearing has been minimal. Erickson did not appear for the first day of hearing. *See*, Transcript of October 18, 2022, Videoconference Hearing at 10, 16, 32, 50, 69, 77, 85, 90, 135, 142. Erickson appeared briefly during the second day of hearing but did not present any witnesses. Transcript of October 19, 2022, Videoconference Hearing at 191-92, 216, 276

1 The parties had agreed to nine legal issues governing this case as established in the August
2 6, 2018, Prehearing Order. Before hearing, a former presiding officer struck legal issues 1 and 5
3 from the Prehearing Order at the parties' request. *See* December 14, 2018, Third Amended
4 Prehearing Order. On cross motions for summary judgment filed by the City and DNR, the Board²
5 dismissed legal issues 2, 3, 8, acknowledged the parties' withdrawal of issue 9, and narrowed the
6 scope of legal issue 4 from the Third Amended Prehearing Order.³ Thus, only legal issues 4, 6 and
7 7 proceeded to hearing as follows:

8 4. Whether the application was erroneously approved if it was based on facial deficiencies, such
9 as incomplete, inaccurate, and missing information relating to the access road and landing
10 construction, streams and wetlands on the properties, pursuant to RCW 76.09.060; WAC 222-16-
11 036(1), (2), and (4); WAC 222-20-010(8); WAC 222-24-015; WAC 222-24-035; WAC 222-24-
12 042; WAC 222-24-051; WAC 222-24-0511; WAC 222-30-020(7); and WAC 222-30-021(2)(b).

11 6. Whether "Stream B" was improperly typed as Ns instead of Np, creating the following other
12 errors: (a) lack of adequate buffering and other environmental safeguards required under WAC
13 222-30-021(2)(b); (b) failure to follow the requirements for culvert installation under WAC 222-
14 24-042; (c) violation of WAC 222-20-017(5), which requires disapproval if a forest practices
15 hydraulic project will result in direct or indirect harm to fish life, unless adequate mitigation is
16 assured or the project is modified.

17 7. Whether the approved application failed to: (a) assure that there is no net loss of wetland
18 function; or (b) provide adequate wetland mapping and delineation required by forest practices
19 rules and consistent with the Board Manual, Section 8; or (c) replace, substitute, or enhance lost
20 wetland functions contrary to WAC 222-24-015, 222-16-036, 222-24-042, and 222-30-021.

21 *See*, June 13, 2019, Order on Summary Judgment Motions, p. 20.

The Board received prehearing briefs, sworn testimony of witnesses, and written closing arguments. The Board also admitted exhibits, and heard the arguments presented. Having

² The Board that decided the cross motions for summary judgment was comprised of different members than the current Board issuing this decision.

³ The narrowed scope of legal issue 4 is explained in Conclusion of Law No. 12 below.

1 considered the record, the Board enters the following Findings of Fact, Conclusions of Law, and
2 Order affirming DNR's approval of FPA No. 2420111.

3 **FINDINGS OF FACT**

4 1.

5 Dalpay owns approximately 35 acres of property located in King County and partially
6 within the City of Newcastle. *Ex. A-NEW-017, p. 1.* ⁴ The FPA allows Dalpay to harvest 26 acres
7 of timber in Unit 1 and two acres in Unit 2 of its property. *Ex. A-NEW-002, p. 6.* At hearing, the
8 witnesses frequently referenced Dalpay's forest practices activity map below to locate various
9 features of Dalpay's property and surroundings. *Exs. A-NEW-002, p. 11; A-NEW-003.*

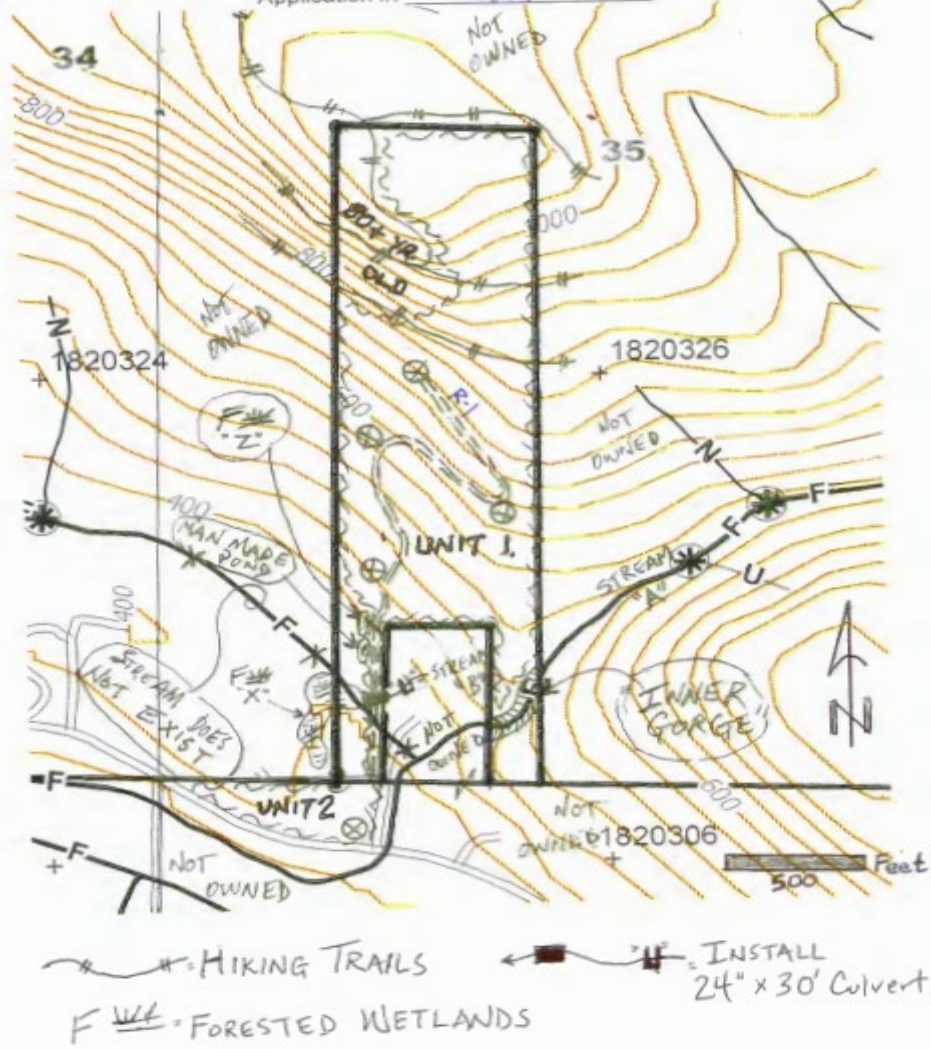
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⁴ Exhibit page numbers refer to pdf numbers.

ENLARGED FOREST PRACTICES ACTIVITY MAP

TOWNSHIP 24 NORTH, RANGE 05 EAST (W.M.) HALF 0, SECTION 35

Application #: 242011



2.

Unit 1 is an inverted “U” shaped parcel with two prongs in the southern border. Unit 1 surrounds on three sides a five-acre square-shaped residential property owned by Robert Henry

1 and Ms. Foote and referred to as the Henry/Foote parcel by witnesses. *Ex. A-NEW-003, p. 2; Miller*
2 *Testimony at 23, 50, Henry Testimony at 96-98, Dasso Testimony at 171-73, 178.*

3 3.

4 Unit 2 is an approximately 2.5 acre wedge of land bounded by SE May Valley Road to the
5 south and west, and larger parcels to the north, including the western “prong” of Unit 1. The eastern
6 boundary of Unit 2 is formed by 150th Place SE, a private road that provides access to both Units
7 1 and 2, and the Henry/Foote parcel. May Valley Road forms the southern boundary of Unit 2. To
8 the south of May Valley Road are a horse pasture, a horse stable and an arena complex. May Creek
9 is located south of the pasture, stable, and arena. *Dasso Testimony at 193; Exs. R-DNR-019, A-*
10 *NEW-002, p. 6, A-NEW-003.*

11 4.

12 May Creek is a salmonid-bearing stream that provides habitat for fish and terrestrial
13 animals. May Creek has experienced flooding. *Miller Testimony at 26-27; Ex. A-NEW-016, p. 2*
14 *(bullet items only)*. As discussed below, the City presented testimony on the potential for Dalpay’s
15 forest practices to adversely impact May Creek through runoff and sediment transport.

16 5.

17 The Dalpay property contains two wetlands and two streams, identified in the FPA as
18 Wetlands X and Z, and Streams A and B. *Exs. A-NEW-002, pp. 5, 7, 15-16; A-NEW-003; Dasso*
19 *Testimony at 176-77.*

20 6.

1 Stream A is a Type F (fish-bearing) stream that runs across the southeast corner of Unit 1,
2 through the Henry/Foote parcel, and crosses a culvert under May Valley Road to eventually join
3 May Creek. *Henry Testimony at 122; Exs. A-NEW-002, p. 7, A-NEW-003, p.1, R-DNR-015, p. 1.*

4 Stream B is a small non-fish-bearing stream that originates from springs in the Henry/Foote parcel
5 and flows into forested Wetland X in Unit 1 where it dissipates. *Henry Testimony at 129; Dasso*
6 *Testimony at 179, 203-205, 212.*

7 **Stream Typing (Issue 6)**

8 7.

9 The City claimed that DNR erroneously typed Stream B as untyped water (Ns) when it
10 should have been typed as a perennial non-fish water (Np). Water typing means the designation
11 given to a waterway under the forest practices rules. *Dasso Testimony at 167.* The City asserts that
12 the error in stream typing increased the risk of adverse impacts to wetlands and the May Creek
13 basin. Under the interim water typing rules, Type “Np” waters are Type 4 waters, defined as all
14 segments of natural waters within the bankfull width of defined channels that are perennial nonfish
15 habitat streams. WAC 222-16-031(4); *Dasso Testimony at 203-04.* Type Ns waters are Type 5
16 waters defined in part as seasonal, nonfish habitat streams in which surface flow is not present for
17 at least some portion of the year and are not located downstream from any stream reach that is a
18 Type 4 Water. WAC 222-16-031(5); *Dasso Testimony at 203-04.* While an Np typed stream can
19 have dry segments throughout the channel, it must nonetheless have a defined channel consistent
20 with its definition under the forest practice rule. *Dasso Testimony at 204.*

1 8.

2 The City presented testimony of senior wetland scientist Darcey Miller. *Ex. A-NEW-033*.
3 Miller believed that the FPA was missing information to properly classify Stream B. She testified
4 that to properly classify Stream B, one would have to walk the length of the stream and determine
5 how it flows, and whether Stream B connects to May Creek. *Miller Testimony at 21-22*. Miller
6 acknowledged that she did not have enough information to determine the exact classification for
7 Stream B and surmised that Stream B could be considered an Np stream if it flowed all the way to
8 May Creek in a constant channel. *Miller Testimony at 24-26*. Miller was not familiar with the
9 topography of the area where Stream B leaves the Henry/Foote parcel. Although she was on site
10 during the interdisciplinary team meeting with DNR and other agency representatives, she did not
11 see any surface water flow from Unit 2 to May Creek because she was not in that area. *Miller*
12 *Testimony at 26, 61*.

13 9.

14 The City also presented the testimony of Robert Henry, whose property is bounded on three
15 sides by Unit 1. Henry testified that Stream B flows from his property onto the Dalpay property
16 and remains in a distinct channel. He also testified that he has followed Stream B and observed a
17 flow of water coming off the Dalpay property and through a culvert on May Creek Road. *Henry*
18 *Testimony at 107-09, 140-41*. On cross examination, Henry acknowledged that he had stated
19 during his deposition that Stream B's channel was manmade as the previous owners of his property
20 had dug the channel. *Henry Testimony at 132-33*. Henry is familiar with his property and
21 surrounding areas and feels responsible for good stewardship of the lands and May Creek basin.

1 He is not a hydrologist or wetland scientist, and he did not have experience with the Forest
2 Practices Act rules before this appeal. *Henry Testimony at 121, 127.*

3 10.

4 To rebut the City’s witnesses, DNR presented the testimony of Eric Dasso, a DNR Forest
5 Practices Forester who reviewed and approved the FPA with input from professionals outside
6 DNR. *Ex. R-DNR-16; Dasso Testimony at 164.* Dasso’s duties include verifying water type and
7 reviewing installation or removal of water crossing structures in certain typed waters for
8 compliance with forest practices rules. *Dasso Testimony at 166.*

9 11.

10 Dasso testified that Stream B is channelized on the Henry/Foote property. But as it crosses
11 into Dalpay’s property, it quickly dissipates into Wetland X in Unit 1, losing velocity and any
12 semblance of a defined channel. *Dasso Testimony at 180-81, 203-205, 229.* Dasso also testified
13 that Stream B does not connect to any waterway, and that water in Wetlands X and Z percolates
14 into the ground north of May Valley Road. Because Stream B does not have a continuous defined
15 channel, it does not meet the definition of an Np stream on the Dalpay property. *Dasso Testimony*
16 *at 189-90, 204-05; Ex. R-DNR-015, p. 1.*

17 12.

18 Dasso’s testimony was based on his six visits to the site, during five of which he examined
19 the wetlands on Dalpay’s property and Stream B. *Dasso Testimony at 180, 184-85, 194, 200-02.*
20 Some of the site visits were conducted during very wet times of the year. *Dasso Testimony at 189.*
21 One of the site visits included the May 7, 2018, interdisciplinary team meeting where Dasso was

1 joined by Miller, and representatives from other divisions of DNR, Washington Department of
2 Fish & Wildlife, Muckleshoot Indian Tribe, King County, the City, and Dalpay. *Dasso Testimony*
3 *182-184; Ex. R-DNR-0015.*

4 13.

5 DNR also presented the testimony of David Parks, a professional wetland scientist and a
6 Washington State licensed geologist, engineering geologist, and hydrogeologist. *Parks Testimony*
7 *at 243-44, 247; Ex. R-DNR-012.* Parks visited the site two times, and also concluded that there is
8 no connection between waters on Dalpay's property and May Creek. *Parks Testimony at 267-68.*

9 14.

10 The Board gives more weight to Dasso's and Parks' testimony regarding Stream B as they
11 were based on multiple site visits and observations of the entire stream and wetland system on
12 Dalpay's property and south toward May Creek, including an interdisciplinary team site visit. The
13 Board finds and concludes that although Stream B may have a human made channel on the
14 Henry/Foote parcel based on photos, Stream B lacks a defined channel as it flows into the Dalpay
15 property and does not connect to another waterway. *Exs. A-NEW-040, R-DNR-017.* Therefore, it
16 does not meet the definition of an Np stream.

17 15.

18 If Stream B was typed Np, it would receive certain protections from forest practices
19 impacts such as riparian buffers and culvert of specified size under the riparian management zone
20 rules. *Miller Testimony at 25.*

1 16.

2 The FPA calls for construction of a new road, R-1, which would begin at the northeast
3 corner of Unit 2 and run north along the boundary with the Henry/Foote parcel to the east before
4 climbing to higher elevations. *Dasso Testimony at 176-177; Exs. A-NEW-002, p.5, A-NEW-003,*
5 *p. 2.* No timber harvest is proposed, except as needed for road construction, in the stretch of the
6 road near the boundary with the Henry/Foote parcel. *Dasso Testimony 207-08.*

7 17.

8 Dasso explained how forest practices rules protect Np type streams. *Dasso Testimony at*
9 *206.* Under WAC 222-30-021(2)(b), at least 50 percent of the total length of the Np stream must
10 be protected by a 50-foot buffer, also called a riparian management zone. *Id.* Furthermore, Dasso
11 explained that buffers established under WAC 222-30-021 do not preclude road construction in a
12 wetland. *Dasso Testimony at 206-207; WAC 222-30-021(2)(c).* There will be no timber
13 harvesting, except for road construction, within approximately 300 feet north and south of where
14 Stream B empties into the Dalpay property. *Dasso Testimony at 208.* The City's expert, Miller,
15 agreed. *Miller Testimony at 54-55.* Therefore, even if Stream B was an Np typed stream, the FPA
16 provides an additional 250 feet beyond the required no-cut 50-foot buffer for Np streams under
17 WAC 222-30-021(2)(b). *Dasso Testimony 209.*

18 18.

19 The FPA proposes to install a 24-inch diameter and 30-foot long culvert where Stream B
20 exits the Henry/Foote parcel to allow water to flow under the proposed road. *Dasso Testimony at*
21 *178-79; Ex. A-NEW-003, p. 2.* Dasso determined that the 24-inch culvert was appropriate for

1 Stream B based on his measurement of one foot as the bankfull width of Stream B. Assuming that
2 Stream B was an Np stream, the size of the culvert satisfies the requirements of the forest practices
3 rules. *Dasso Testimony at 210*. Miller also agreed that a 24-inch culvert satisfies the requirements
4 of the forest practices rules for Stream B. *Miller Testimony at 56*.

5 19.

6 WAC 222-20-017 requires DNR to review applications that include forest practices
7 hydraulic projects in Type S and F and associated Np waters for consistency with fish protection
8 standards.⁵ The application of the rule is expressly limited to those Np waters that are “associated”
9 with Type S or F waters. Assuming that Stream B is an Np stream, the findings above show that it
10 does connect with fish-bearing typed waters (i.e., May Creek). *See Findings of Fact No. 11-14*.
11 The City did not present any evidence that the 24-inch culvert, the only hydraulic project proposed
12 in the FPA, harms fish life in violation of WAC 222-20-017(5) (requiring disapproval of FPA if
13 forest practices hydraulic project will result in direct or indirect harm to fish life, unless adequate
14 mitigation is assured or project is modified).

15
16 **Wetlands (Issue 4, 7)**

17 20.

18 Both the FPA and Forest Practices Activity Map show that activity will occur in or near
19 forested wetlands X and Z. *Dasso Testimony at 174-76; Parks Testimony at 250; Exs. A-NEW-*

20 _____
21 ⁵ A forest practices hydraulic project is a forest practice activity that includes construction or work that will use, divert, obstruct, or change the natural flow or bed of any Type S, F, or N Water. WAC 222-16-010.

1 002, p. 5; A-NEW-003, p. 2. Wetland X is located southwest of Unit 1, and north of unit 2. Wetland
2 Z is located east of Wetland X, inside the west prong of Unit 1. *Ex. A-NEW-003, p. 2.* The FPA
3 identifies both wetlands by type, size, and the planned activities in or near them. *Ex. A-NEW-002,*
4 *p. 5.*

5 21.

6 Only timber harvest for road construction will occur in Wetland X. *Dasso Testimony at*
7 *177; Ex. A-NEW-002, p. 5.* No landing construction is proposed in wetlands. *Dasso Testimony at*
8 *221-22.* The proposed road starts at the northeast corner of Unit 2, heads north and then
9 switchbacks northeast up a hill. The Henry/Foote property is located to the east of the road. *Dasso*
10 *Testimony at 177; Ex. A-NEW-003, p. 2.*

11 22.

12 The portion of the proposed road impacting wetlands will be 660 feet long and 16 feet
13 wide, yielding a total area of 10,560 square feet, which is just under one fourth of an acre. *Ex. R-*
14 *DNR-015, p.1; Dasso Testimony at 186-89.* Dasso testified that even if the entire road was
15 constructed in Wetland X, which it is not, it would still only fill less than a quarter acre of wetlands.
16 As the findings below demonstrate, substantially less acreage of wetlands will be filled by road
17 construction.

18 23.

19 The City presented Miller's testimony that wetlands X and Z were inadequately mapped
20 and evaluated, and that a large wetland extending west, northwest, and southwest from the western
21 prong of Unit 1 was missing entirely from the FPA. Miller testified that inaccurate or missing

1 wetland delineations can result in damage to these critical areas by the proposed timber harvest
2 and road construction. *Miller testimony at 40-41; Ex. A-NEW-017*. The City also presented the
3 testimony of Henry, who stated that the wetland area was much larger than depicted in the FPA
4 based on his observation of an increase in deciduous trees and hearing frogs in the areas he believes
5 are wetlands. *Henry Testimony at 112-15*.

6 24.

7 To rebut Miller's and Henry's testimony, DNR presented the testimony of Parks. As stated,
8 Parks is a wetland scientist and hydrogeologist, and he has worked as a natural resource scientist
9 with DNR for 28 years. *Parks Testimony at 242*. In that role, Parks reviewed forest practices
10 applications for compliance with forest practices rules related to, among other things, water typing,
11 wetlands, and hill slope stability. He estimates that 30 to 60 forest practices applications per year
12 involved review for compliance with wetlands rules. Parks also developed training classes for
13 identifying wetland types in the field and guidance materials on how to implement forest practices
14 rules relating to wetlands. *Parks Testimony at 245-47*.

15 25.

16 Parks generally explained two methods for identifying the wetland boundaries at issue: an
17 approximate determination using remote information (i.e., wetland maps and aerial photographs),
18 and an accurate delineation involving field evaluation for hydric soil, wetland hydrology, and
19 hydrophytic vegetation. *Parks Testimony at 254-56*. These two methods are described in the Forest
20 Practices Board Manual. *Ex. A-NEW- 037, pp. 7-8*. An approximate determination of wetland
21 boundaries is needed when filling out a forest practice application, and an accurate delineation is

1 needed when determining the amount of road fill to be placed in wetlands. *Parks Testimony at*
2 *255.*

3 26.

4 Parks created wetland boundary maps using both methods based on his remote and field
5 work. *Parks Testimony at 253-57, 259; Exs. R-DNR-003, R-DNR-008, A-NEW-003, p. 1.* Parks
6 first made an approximate determination of wetland location by reviewing wetlands data in DNR's
7 geographic information system, aerial photographs, and soils and geologic information for the site.
8 He also conducted a site review with Dasso on July 15, 2019, to produce an accurate delineation
9 of wetland in the area where the road will be built. *Parks Testimony at 249, 255-56.* Parks also
10 visited the site again a second time on September 29, 2022, to look at the wetland in Unit 2 and
11 Stream B to prepare for hearing. *Parks Testimony at 249; Dasso Testimony at 200-01.*

12 27.

13 One map depicts the accurate delineation of wetland boundaries in the area to be filled by
14 road construction in Unit 1. The map shows a thin rectangular area representing the proposed road
15 that will fill only 0.068 acres of wetlands. *Ex. R-DNR-003, p.1.* That map also shows the forested
16 wetland in Unit 2 to be 0.332 acres. *Id.* It is undisputed that no wetlands will be filled in Unit 2.
17 *Dasso Testimony at 222; Parks Testimony at 263.* And there are no riparian management zones in
18 Unit 2 because Stream B does not extend into it. *Parks Testimony at 263-64; Dasso Testimony at*
19 *189-90.*

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28.

Under WAC 222-16-036, wetland mapping and approximate determination of wetland boundaries is required in three instances: (1) where more than 0.1 acres of wetlands will be filled and mitigation for such filling is required, (2) when forest practices will occur within a riparian management zone in a forested wetland, and (3) where a forested wetland is larger than three acres. WAC 222-16-036(1)-(3); *Parks Testimony at 263*.

29.

There is no requirement to map or do an approximate determination of the forested wetland in Unit 2 under WAC 222-16-036 because it is less than 3 acres, is not within a riparian management zone, and will not be filled. *Parks Testimony at 261-64; Exs. A-NEW-003, R-DNR-003*.

30.

The forest practices rules also require approximate determination of wetland boundaries when road construction is proposed in wetland areas in order to avoid wetland impacts during road design and construction. WAC 222-16-015; *Parks Testimony at 250*. Parks approximately determined the wetland boundary in the area of the proposed road construction. *Parks Testimony at 254-55*. An accurate delineation of wetland boundaries is not required unless the road or landing construction results in filling or draining more than (0.1) one tenth acre of a wetland. WAC 222-16-015(2); *Parks Testimony at 257*.

31.

1 Here, it is undisputed that Parks' site evaluation and resulting accurate delineation of the
2 wetland area to be filled by road construction showed that only 0.068 acres would be filled, which
3 is less than 0.1 acres. Thus, the Board finds and concludes that DNR exceeded the wetland
4 mapping and delineation requirements of WAC 222-16-015 with respect to the road construction
5 by doing an accurate delineation of the wetland area impacted by the proposed road in Unit 1.

6 32.

7 Miller did not perform an accurate delineation to call into question Parks' calculations. She
8 did not set foot in the western prong of Unit 1 where wetland X and Z are located. *Miller Testimony*
9 *at 52*. Miller surmised that 0.068 acres is close to 0.1 acres, and that Parks' July 2019 delineation
10 may not be accurate due to time of year (not during growing season) and lack of complete
11 hydrology information. *Miller Testimony at 40-45*. The Board finds that neither Miller's nor
12 Henry's testimony rebutted Parks' testimony discussed above based on his approximate
13 determination and accurate delineation of wetland boundaries. *Parks Testimony at 271, 274-75*.

14 33.

15 The FPA avoids and minimizes new road construction and filling wetlands by: 1) using an
16 existing road to access Dalpay's property, 2) selecting a route that follows close to the Dalpay
17 property line on the west side of the Henry/Foote parcel so that the road traverses only the edge of
18 wetland, and 3) using 16 feet as the width of the road subgrade, which is the minimum necessary
19 for logging equipment to get through. Parks opined that these measures comply with the no net
20 loss of wetland function. *Parks Testimony at 251-52*.

21 34.

1 The City also claims that the FPA contains inadequate information as to wetland mapping
2 and delineation. Dasso testified that the Forest Practices Activities Map in the FPA was created by
3 Dalpay Forester Jim Murphy after he and Murphy conducted an onsite investigation of wetlands
4 on March 8, 2018, as part of a pre-application review. *Dasso Testimony at 230-31*. Murphy did a
5 “rough delineation” of wetlands onsite to enable him to draw the wetlands in the Forest Practices
6 Activities Map. *Dasso Testimony at 231*. As Parks testified, the forest practices rules do not require
7 a site visit for an approximate determination of wetland boundaries for purposes of filling out an
8 FPA. *Parks Testimony at 255*. Nonetheless, Murphy and Dasso went onsite to make an
9 approximate determination of wetland boundaries to include that information in the FPA when
10 only a remote review of data was required. *Finding of Fact No. 25*. And after FPA submittal, Parks
11 performed an accurate wetland delineation. *Findings of Fact 26-31*. Because the City did not
12 present any evidence that an accurate delineation or anything more than what was included in the
13 Forest Practices Activities Map or FPA had to be included, the Board finds that the FPA was not
14 deficient with respect to information relating to wetlands, access road, landing construction, and
15 streams.

16 **FPA Completeness and Accuracy (Issues 4, 6, 7)**

17 35.

18 The City presented the testimony of David Williams, a Washington licensed geologist and
19 engineering geologist. *Ex. A-NEW-034; Testimony of Williams at 71*. Williams reviewed the FPA,
20 geologic maps of the site, the Forest Practices Board Manual, and portions of the Newcastle City
21

1 Code. He also participated in the interdisciplinary team meeting onsite and later visited the upper
2 portion of the Dalpay property from adjacent property to the north. *Williams Testimony at 75.*

3 36.

4 Williams opined that there was potential for erosion from the access road, and that he would
5 have liked to see a runoff control plan that would identify and implement temporary erosion and
6 sedimentation control measures to prevent sediment transport to wetlands or May Creek. *Williams*
7 *Testimony at 78-79.* However, Williams acknowledged that such plan is neither required by the
8 forest practices rules nor commonly included in FPAs. *Id. at 78; Ex. A-NEW-018, pp. 1-2.* He also
9 testified that he had not analyzed whether compliance with the forest practices rules on road
10 construction and maintenance would sufficiently address the erosion and sediment transport
11 concerns. *Williams Testimony at 87-88.* Finally, Williams did not conduct any analysis to show
12 that road construction would generate erosion and sediment transport, or that any such sediment
13 would eventually reach May Creek. *Id. at 86, 89.*

14 37.

15 Moreover, Miller testified that Williams had stated in a phone call with her in May 2018
16 that nothing indicates the likelihood of sediment transport and erosion on the proposed access road.
17 *Ex. R-DNR-005; Miller Testimony at 65.* Williams' opinion is consistent with that of Bob Penhale,
18 the representative from the Department of Ecology who went onsite with Dasso in June 2018 to
19 evaluate wetlands X and Z, the small wetland in Unit 2, and property across May Valley Road to
20 the south. *Ex. R-DNR-006; Dasso Testimony at 194-95.* Based on the site visit, and his specific
21 observation of a densely vegetated culvert crossing May Valley Road, Penhale concluded that the

1 risk of sediment delivery to a typed water from the proposed forest activities is very low. *Ex. R-*
2 *DNR-006, p. 1; Dasso Testimony at 198-99.* Dasso also agreed with Penhale’s conclusion. *Id. at*
3 *199.*

4 38.

5 In sum, the City did not present evidence regarding erosion and sediment transport
6 resulting from the road construction. In contrast, DNR’s evidence shows that there is very little
7 risk that the proposed forest activities will result in erosion or sediment transport to wetlands or
8 May Creek. The Board thus finds that the FPA was not deficient by way of not including a runoff
9 control plan.

10 39.

11 The City also claimed deficiencies in the FPA related to access road and landing
12 construction violated WAC 222-24-035, WAC 222-24-051 (large forest landowner road
13 maintenance schedule), and WAC 222-24-0511 (small forest landowner road maintenance
14 planning). However, the FPA contains Dalpay’s acknowledgment that the proposed landing and
15 roads must be built and maintained to meet the requirements of forest practice rules. *Ex. A-NEW-*
16 *002, p. 9; Dasso Testimony at 173.* And Dasso testified that if forest practices do not comply with
17 an approved FPA and applicable rules, DNR could enforce through either a stop work order or
18 notice to comply before issuing a civil penalty. *Dasso Testimony at 169-70; WAC 222-46-030, -*
19 *040, -060.* No roads or landings have been built; thus, the City cannot show any violation of the
20 above rules. The Board concludes any claim of future violations is premature and speculative.

21 40.

1 To the extent the City argues that DNR erroneously approved the FPA because the private
2 driveway, 150th Place SE, does not comply with rules on road maintenance, there is no evidence
3 to support such argument. WAC 222-24-0511(3) requires small forest landowners to maintain
4 roads to the extent necessary to prevent damage to public resources. Both the City's and DNR's
5 witnesses testified that the driveway is in good condition and did not create a risk of runoff
6 delivering sediment to typed waters. *Henry Testimony at 116-20; Dasso Testimony at 202, 237-*
7 *38.*

8 41.

9 The Board also finds and concludes that there were no deficiencies in the FPA that would
10 violate WAC 222-30-020(7), which requires use of low-impact timber harvest methods within
11 forested wetlands unless otherwise approved by DNR. In this case, there is no timber harvest
12 proposed in Wetlands X or Z, except some timber harvest for road construction in wetland X in
13 Unit 1. *Dasso Testimony at 208.* Although timber harvest is proposed for Unit 2, to the extent that
14 Dalpay harvests timber in the small wetland area in Unit 2, the FPA states that Dalpay will use
15 low-impact harvest methods in WAC 222-30-020(7). *Ex. A-NEW-002, p. 4* (Dalpay will use shovel
16 and rubber-tired skidder). Shovel harvesting is a low-impact harvest method used to reduce ground
17 disturbance in wetlands. *Dasso Testimony at 223.* Moreover, DNR placed low impact harvest
18 conditions in its FPA approval that will reduce ground disturbance. The FPA approval, or Notice
19 of Decision, requires Dalpay to put slash mats to reduce soil erosion where harvest equipment has
20 created ruts deeper than six inches, and to notify DNR when harvest begins, which will help DNR

1 ensure such low impact harvest methods are used. *Ex. A-NEW-001, p. 1; Dasso Testimony at 223-*
2 *26.*

3 42.

4 Finally, the City did not present any evidence that deficiencies in the FPA or FPA approval
5 violate RCW 76.09.060 (form and contents of forest practices application and notification). And
6 as discussed in Findings of Fact No. 16-19, and Conclusion of Law No. 2, the City fails to
7 demonstrate that deficiencies in the FPA or FPA approval violates WAC 222-24-042 (water
8 crossing structures in Type Np and Ns Waters and WAC 222-30-021(2)(b) (buffers for riparian
9 management zone protection along Type Np Waters).

10 43.

11 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. Based
12 upon the foregoing Findings of Fact, the Board enters the following:

13
14 **CONCLUSIONS OF LAW**

15 1.

16 The Board has jurisdiction over the subject matter and the parties pursuant to RCW
17 43.21B.110(1)(i). The Board reviews the issues raised de novo. WAC 371-08-485(1). Since the
18 City is appealing the approved forest practice permit, it has the burden of proof. WAC 371-08-
19 485(3).

20 Stream Typing (Issue 6)

21 2.

1 The Board concludes that the City did not meet its burden in proving that Stream B was
2 improperly typed. The FPA properly typed Stream B as Ns stream instead of Np stream. *Findings*
3 *of Fact No. 11-14*. Even if Stream B is an Np stream, the approximately 300 feet of no-harvest
4 buffer provided by the FPA for Stream B exceeds the buffer requirement under WAC 222-30-
5 021(2)(b). *Findings of Fact No. 16-17*. Similarly, even if Stream B is an Np stream, the FPA's
6 proposed 24-inch diameter culvert complies with the requirement for culvert installation in Np
7 streams under WAC 222-24-042(2) and does not harm fish life in violation of WAC 222-20-
8 017(5). *Findings of Fact No. 18-19*.

9 Wetlands (Issues 4, 7(a), 7(b), 7(c))

10 3.

11 Under WAC 222-16-036, wetland mapping and approximate determination of wetland
12 boundaries is required: (1) where more than 0.1 acres of wetlands will be filled and mitigation for
13 such filling is required, (2) when forest practices will occur within a riparian management zone in
14 a forested wetland, or (3) where a forested wetland is larger than three acres. *Finding of Fact No.*
15 *28*. Here, it is undisputed that no mapping and approximate determination of wetland boundaries
16 in Unit 2 was required because it is less than 3 acres, is not within a riparian management zone,
17 and will not be filled. *Finding of Fact No. 29*. Nonetheless, DNR exceeded the wetland mapping
18 and determination requirements in WAC 222-16-036 when Parks accurately delineated and
19 mapped the wetlands in Unit 2. *Findings of Fact No. 25-27*. The Board concludes that the City did
20 not meet its burden of showing that the FPA approval violates WAC 222-16-036.

1 4.

2 The Board concludes that the road construction proposed by the FPA complies with WAC
3 222-16-015(2), which requires an approximate determination of wetland boundaries for the
4 purpose of avoidance during road construction and design. DNR not only performed the
5 approximate determination but exceeded the rule's requirement by conducting an accurate
6 delineation of the wetlands in the area of the proposed road. *Findings of Fact No. 30-32*. An
7 accurate delineation is required only when road or landing construction results in filling or draining
8 more than (0.1) one tenth acre of a wetland. WAC 222-16-015(2); *Finding of Fact No. 30*. The
9 road construction will fill only 0.068 acres of wetland; thus, an accurate delineation was not
10 required. *Finding of Fact No. 31*. Because the City did not perform its own approximate
11 determination or accurate delineation to rebut Parks' work, it failed in its burden to demonstrate
12 that the FPA violates WAC 222-24-015. *Finding of Fact No. 32*.

13 5.

14 The City argues that DNR did not perform an accurate delineation of wetlands until after
15 it had approved the FPA, and that the post-approval delineation did not make up for Dalpay's and
16 Erickson's failure to adequately delineate wetlands. The Board disagrees because it engages in a
17 de novo review of whether DNR's FPA approval complies with the Forest Practices Act and rules.
18 Such de novo review considers evidence that was not before DNR at the time of FPA approval.
19 *See, generally, Port of Seattle v. Pollution Control Hrg's Bd.*, 151 Wn.2d 568, 597-98, 90 P.3d
20 659 (2004).

1 6.

2 Forest practices rules also protect forested wetlands from impacts related to road and
3 landing construction by requiring such construction to follow a mitigation sequence to ensure there
4 is no net loss of wetland function. WAC 222-24-015(1). The sequence begins with the most
5 preferred choice of avoiding impacts by selecting the least environmentally damaging road
6 location and road length. The next sequences are minimizing impacts by reducing the subgrade
7 width, fill acreage and spoil areas, restoring affected areas by removing temporary fills or road
8 sections when project is complete, reducing impacts over time, and finally, replacing affected areas
9 by creating new wetlands or enhancing existing wetlands. Replacement is the least preferred
10 alternative. WAC 222-24-015(1)(a)-(e).

11 7.

12 The Board concludes that the proposed new road complies with the mitigation sequence to
13 assure no net loss of wetland function in WAC 222-24-015(1) by avoiding wetland impacts
14 through using an existing road to access Dalpay's property (instead of constructing a new road)
15 and selecting a road route that minimizes wetland fill. *Finding of Fact No. 33*.

16 8.

17 The Board has already concluded on summary judgment that the proposed road will result
18 in filling less than 0.5 acres. *City of Newcastle v. Dep't of Nat'l Resources*, PCHB No. 18-035c, p.
19 11 (Order on Summ. J. Motions, June 13, 2019). DNR's evidence at hearing further supports the
20 Board's ruling on summary judgment since its accurate wetland delineation in the area of proposed
21 road construction shows that only 0.068 acres of wetlands would be filled for road construction if

1 the entire road was in the wetland, which it is not. *Findings of Fact No. 27, 28, 30-32.* The City
2 did not meet its burden to show otherwise. The Board concludes that the FPA approval complies
3 with the requirement in WAC 222-24-015(4) to replace or enhance lost wetland function where
4 road or landing construction fills or drains more than 0.5 acre of a wetland.

5 9.

6 The City did not meet its burden to demonstrate that DNR erroneously approved the FPA
7 on the basis that there was incomplete, inaccurate, and missing information in the FPA on wetlands
8 in violation with WAC 222-16-036(1), (2), (4) (requirements for wetland mapping and
9 approximate determination of wetland boundaries for timber harvest and road construction), and
10 WAC 222-24-015 (requirements for wetland mapping and mitigation sequence when road
11 construction occurs in wetlands). *Finding of Fact No. 34.*

12 FPA Completeness and Accuracy (Issues 4, 6, 7)

13 10.

14 The City did not meet its burden of proving that DNR erroneously approved the FPA where
15 it lacked a runoff control plan. The forest practices rules do not require such a plan and DNR
16 presented uncontested evidence based on site evaluations that the risk of sediment delivery is very
17 low. *Findings of Fact No. 35-38.*

18 11.

19 The Board rejects the City's contention that the FPA should have included additional
20 information on road construction or other conditions that are not required by the forest practices
21 rules. Compliance with the forest practices rules, including rules on road construction and

1 maintenance, should be sufficient to achieve compliance with federal and state laws regarding
2 nonpoint sources of water pollution from forest practices that may cause material damage to public
3 resources. *City of Bellingham v. Dep't of Nat'l Resources*, PCHB Nos. 11-125 and 11-130
4 (consolidated), pp. 11-12, 17 (Order Granting Summ. J. to Respondents, Apr. 9, 2012); RCW
5 76.09.010(2)(g).

6 12.

7 Although the Forest Practices Act authorizes DNR to add site specific conditions beyond
8 what the forest practices rules require where additional conditions are necessary to avoid material
9 damage to public resources, there must be a factual showing that the approved FPA will result in
10 material damage to public resources. RCW 79.04.050(4); *City of Bellingham*, PCHB Nos. 11-125
11 and 11-130, p. 18. Here, the Board had precluded the City from broadening Issue 4 beyond arguing
12 about potential violation of the rules listed in Issue 4. *City of Newcastle*, PCHB No. 18-035c, p.
13 19 (Order on Summ. J. Motions, June 13, 2019); *see also*, *City of Newcastle v. Dep't of Nat'l*
14 *Resources*, PCHB No. 18-035c, p. 5, n. 2 (Order Denying Appellant's Mot. to Amend Issues on
15 Appeal, Aug. 15, 2019) (Issue 4 precludes argument that DNR should have imposed conditions
16 beyond those required by forest practices rules to avoid the potential for material damage to public
17 resources from flooding of May Creek). To the extent the City has raised or is raising the precluded
18 argument, the Board concludes that the City nonetheless failed to present evidence showing that
19 the FPA approval will cause material damage to public resources. *Findings of Fact No. 35-38, 8,*
20 *9, 14, 23, 32*. Therefore, the Board rejects any claim that the FPA was erroneously approved

1 because it contained deficiencies resulting in material damage to public resources from flooding
2 of May Creek.

3 13.

4 The City did not meet its burden to show that claimed deficiencies in the application related
5 to access road and landing construction violated WAC 222-24-035 (landing location and
6 construction), WAC 222-24-051 (large forest landowner road maintenance schedule), and WAC
7 222-24-0511 (small forest landowner road maintenance planning). Such claims are premature and
8 speculative as roads have not been built, and Dalpay acknowledged in its application that all forest
9 practices must meet the requirements of applicable forest practices rules. Moreover, there is no
10 evidence that 150th Place SE does not comply with WAC 222-24-0511. *Findings of Fact No. 39-*
11 *40.*

12 14.

13 In sum, the City did not meet its burden of establishing that deficiencies in the FPA or FPA
14 approval decision created risk of damage to wetlands, streams, and other public resources in
15 violation of the Forest Practices Act or rules. *Findings of Fact No. 36-42.*

16 15.

17 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Having
18 so found and concluded, the Board enters the following:

19 **ORDER**

20 The Department of Natural Resources' Forest Practices Application/Notification Notice of
21 Decision FPA/N No. 2420111 is **AFFIRMED**.

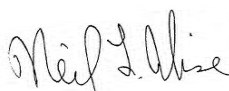
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SO ORDERED this 8th day of February 2023.

POLLUTION CONTROL HEARINGS BOARD



CAROLINA SUN-WIDROW, Presiding



NEIL L. WISE, Member



MICHELLE GONZALEZ, Member