



# What Has To Be A Rule? What Can Be Agency Guidance? Why Does It Matter?

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# FPB Rulemaking and the Board Manual

- The Legislature directs the Board to adopt forest practices rules. RCW 76.09.040(1).
- The Board also maintains a Board Manual.
  - WAC 222-12-090 has identified the contents of a Board Manual since 1976.
  - The Legislature first acknowledged the Board Manual in 2012, directing the adoption of technical guidance regarding fish protection standards for Forest Practices Hydraulic Projects. RCW 76.09.040(3)(c).

# Why Does the Rule/Guidance Distinction Matter?

- Rules must be adopted through different procedures than administrative guidance.
  - The Administrative Procedure Act (APA) requires many steps to further the public participation and to evaluate economic effects of "significant legislative" rules.
  - Adaptive management is required for water-related rules. (RCW 76.09.370(6); WAC 222-12-045)
- Properly adopted rules have the force and effect of law.
- A rule adopted without following the proper process may be invalidated. RCW 34.05.570(2).
- Administrative guidance does not have the force or effect of law. Agencies cannot "enforce" administrative guidance.

# What is a Rule?

- Washington courts apply definition in RCW 34.05.010(16).
- The result is a three-pronged statutory inquiry, which, to some extent, could be summed up as asking whether a statement has a legally binding effect by exposing a person to penalty or affecting a person's legally created right.

# What is a Rule?

RCW 34.05.010(16)

Any agency order, directive, or regulation of *general applicability*

- (a) the violation of which subjects a person to a penalty or administrative sanction; . . .
- (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of *benefits or privileges conferred by law*;
- (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; . . .

# General Applicability

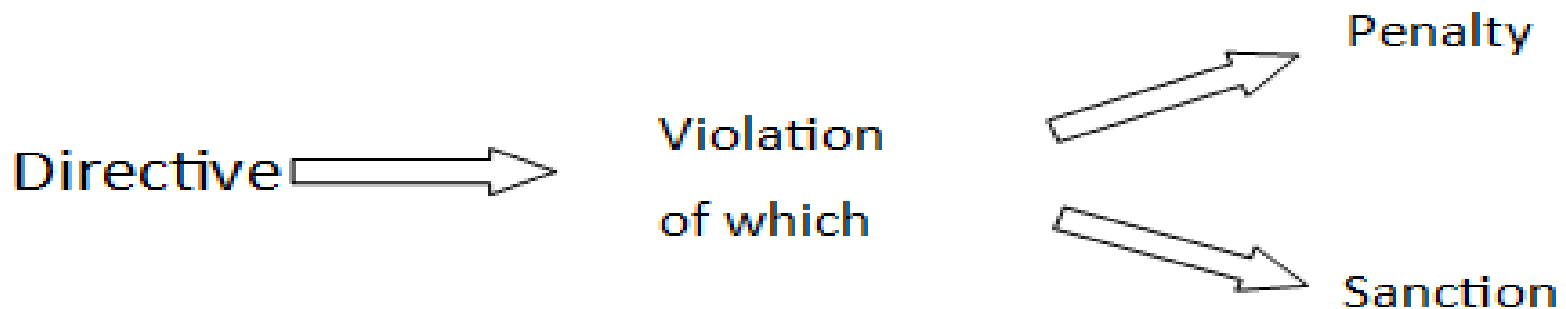
A directive is of "general applicability" when it applies to similarly situated people or entities.

## Examples:

- Forest Practice Applicants
- Applicants of a similar class of forest practice
- People conducting similar forestry activities

# Penalty or Sanction

If a person may be penalized or sanctioned for violating a directive in the Board Manual, that directive must undergo rulemaking.



# Qualification for Benefit, Privilege, or Permit

If a guidance document alters a basis for obtaining/maintaining a benefit under laws or rules, including a permit, that directive must undergo rulemaking.





# Benefit or Privilege Defined

A benefit or a privilege conferred by law in the forest practices context would be a particular right or advantage, or an exemption from a duty or obligation provided by the Forest Practices Act or Rules.

Examples:

- Right to harvest once permit obtained.
- Right to an application decision decided in 30 days.
- SEPA exemption for Class I through III FPAs

# APA Non-Rule Guidance

## RCW 34.05.010(8) and .010(15)

- 1988 APA (enacted 12 years after first Board Manual) recognizes value of agency guidance.
- An “interpretive statement” provides an agency’s written opinion about the meaning of a statute, rule, court decision, or an agency order.
- A “policy statement” provides an agency’s written description of its *current implementation approach* regarding a law, rule, court decision, or agency order.

# “Advisory Only” Character of Administrative Guidance

- RCW 34.05.230(1) encourages agencies to express their current opinions, approaches, and likely courses of action through interpretive or policy statements.
- Same statute says such statements are “*advisory only*.”
- Thus, interpretive or policy statements cannot be used to substitute for rules when an agency intends to dictate conduct or outcomes.

# Rule—Simplified Summary

- A directive that if violated may result in a penalty or sanction to similarly situated people.
- A generally applicable directive altering a qualification or requirement affecting a law-based benefit.
- A generally applicable directive altering a qualification or standard affecting a commercial license.

# The Point

