

# HOUSE BILL REPORT

## 2SHB 1286

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### As Passed House:

March 10, 1995

**Title:** An act relating to the regulation of forest practices.

**Brief Description:** Regulating forest practices.

**Sponsors:** By House Committee on Appropriations (originally sponsored by Representatives Buck, Pennington, Fuhrman, Pelesky, Johnson, McMorris, Sheldon, Cairnes, B. Thomas, Kessler, Stevens and Talcott).

### Brief History:

#### Committee Activity:

Natural Resources: 2/1/95, 2/7/95 [DPS];

Appropriations: 3/1/95, 3/4/95 [DP2S(w/o sub NR)].

#### Floor Activity:

Passed House: 3/10/95, 69-26.

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### HOUSE COMMITTEE ON NATURAL RESOURCES

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Fuhrman, Chairman; Buck, Vice Chairman; Pennington, Vice Chairman; Basich, Ranking Minority Member; Beeksma; Cairnes; Elliot; Sheldon; Stevens; B. Thomas and Thompson.

**Minority Report:** Do not pass. Signed by 4 members: Representatives Regala, Assistant Ranking Minority Member; G. Fisher; Jacobsen and Romero.

**Staff:** Linda Byers (786-7129).

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### HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Natural Resources. Signed by 21 members: Representatives Silver, Chairman; Clements, Vice Chairman; Huff, Vice Chairman; Pelesky, Vice Chairman; Beeksma; Brumsickle; Carlson; Chappell; Cooke; Crouse; Foreman; Grant; Hargrove; Hickel; Lambert; Lisk; McMorris; Reams; Sehlin; Sheahan and Talcott.

**Minority Report:** Do not pass. Signed by 8 members: Representatives Sommers, Ranking Minority Member; Valle, Assistant Ranking Minority Member; G. Fisher; Jacobsen; Poulsen; Rust; Thibaudeau and Wolfe.

**Staff:** Susan Nakagawa (786-7145).

**Background:** Current law can be arranged into three tiers of policy addressing forest practices. First, the Legislature establishes the overall policy goals and intent of forest practices regulation. Second, it is the responsibility of the state's Forest Practices Board to adopt rules to accomplish the overall policy established by the Legislature and to meet other statutory requirements put in place by the Legislature. Third, it is the responsibility of the Department of Natural Resources, in the agency's role as regulator, to implement and enforce the laws of the state and the rules of the Forest Practices Board with regard to forest practices.

### **Overall State Policy**

RCW 76.09.010 contains the Legislature's findings and declarations regarding forest practices and the public interest. Included in these findings is a statement acknowledging the prime importance of a viable forest products industry to the state's economy. Current law also includes the following declaration:

(that) coincident with maintenance of a viable forest products industry, it is important to afford protection to forest soils, fisheries, wildlife, water quantity and quality, air quality, recreation, and scenic beauty (RCW 76.09.010).

### **Forest Practices Rules**

A second policy tier is the translation of legislative directives into forest practices rules. This task is accomplished by the state's Forest Practices Board. The Forest Practices Board was created in 1974 and consists of 11 members, appointed or designated as follows: the Commissioner of Public Lands or the commissioner's designee; the director of the Department of Community, Trade and Economic Development or the director's designee; the director of the Department of Agriculture or the director's designee; the director of the Department of Ecology or the director's designee; an elected member of a county legislative authority, appointed by the Governor; and six public members, appointed by the Governor, to include an owner of not more than 500 acres of forest land and an independent logging contractor. Members serve staggered, four-year terms.

Statute directs the Forest Practices Board to adopt rules where necessary to accomplish the purposes and policies established by the Legislature and to implement other provisions of the forest practices chapter. Specifically, the board is to establish

minimum standards for forest practices. The board adopts rules pursuant to the Administrative Procedure Act.

Currently the board, by rule, has established some special requirements for certain forest practices within what is called "critical wildlife habitat" or "critical habitat" of threatened and endangered species. The species for which the board has adopted permanent rules are the bald eagle, the gray wolf, the grizzly bear, the mountain caribou, the Oregon silverspot butterfly, the peregrine falcon, the sandhill crane, and the Western pond turtle. The board has adopted emergency rules for the Northern spotted owl and the marbled murrelet. If a person wishes to conduct one of the identified forest practices within the habitat range identified in the rules, that person must complete an environmental checklist and possibly an environmental impact statement prior to the approval of the person's forest practices application.

### **Implementing The Forest Practices Laws and Rules**

A third policy tier is the administration and implementation of the forest practices laws and rules by the Department of Natural Resources. This aspect of current law includes the classification of forest practices and delineation of procedures used for the conditioning of forest practices applications and the issuance of stop work orders and notices to comply.

### **Forest Practices Classifications**

There are four classifications of forest practices, each with its own set of requirements. A Class I forest practice is a forest practice with no direct potential for damaging a public resource. These practices may be commenced without any application or notification to the department. A Class II forest practice is a forest practice with less than ordinary potential for damaging a public resource. These practices require notification to the department but do not require any type of application. A Class III forest practice is a forest practice that is not a Class I, II, or IV. A person wishing to commence a Class III practice must submit an application to the department. The department has 30 days to either approve or disapprove a Class III application.

Class IV forest practices are those practices which have a potential for a substantial impact on the environment or are on lands platted after 1960, lands being converted to another use, or lands not to be reforested because of the likelihood of future conversion to urban development. Class IV breaks down further into Class IV - General and Class IV - Special. If a certain forest practice is proposed within habitat with a special designation due to a threatened or endangered species, that forest practice becomes a Class IV - Special. A person wishing to commence a Class IV forest practice must submit an application to the department. The department decides

whether a detailed statement must be prepared by the applicant under the State Environmental Policy Act. The department has 30 calendar days from date of receipt of the application to either approve or disapprove it, unless the detailed statement is required. If the statement is required, the application must be approved or disapproved within 60 days unless the commissioner issues an order determining that the process cannot be completed within the allotted time.

### **Conditions on Approved Forest Practices Applications**

The department exercises authority to condition forest practices applications to prevent material damage to public resources. "Material damage" is not defined in current law. "Public resources" means water, fish and wildlife, and capital improvements of the state or its political subdivisions.

If a person is aggrieved by the condition on the application's approval, that person may appeal the department's decision to the Forest Practices Appeals Board. The Forest Practices Appeals Board is a three-member board within the Environmental Hearings Office which hears a number of different kinds of appeals involving forest practices. The presiding officer in an appeals hearing has the authority to receive relevant evidence, and to secure and present in an impartial manner such evidence as the officer deems necessary to fairly and equitably decide the appeal.

### **Stop Work Orders**

The department has the authority under current law to issue a stop work order in three cases: (1) if there is a violation of the provisions of Chapter 76.09 RCW or the forest practices rules; (2) if there is a deviation from the approved application; or (3) if immediate action is necessary to prevent continuation of or to avoid material damage to a public resource.

If the department issues a stop work order, the department immediately files a copy of the order with the Forest Practices Appeals Board and mails a copy to the timber owner and landowner identified on the forest practices application. If the operator, timber owner, or landowner appeals the stop work order, the department must prove that one of the three above conditions justified issuing the order. The presiding officer at the appeals hearing has the authority to receive relevant evidence.

### **Notices To Comply**

If a violation, a deviation, material damage, or potential for material damage to a public resource has occurred, and the department determines that a stop work order is unnecessary, then the department instead issues a notice to comply. If the person receiving the notice so chooses, that person may request a hearing on the notice before the department. The final order issued by the department after this hearing

may be appealed to the Forest Practices Appeals Board. The proceedings before the appeals board are under the same guidelines as an appeal of a stop work order or any other case before the appeals board.

## **Summary of Bill:**

### **Overall State Policy**

Overall state policy for forest practices regulation is amended to add a policy that establishes the importance of encouraging economic and efficient forest practices to assure continuous growing and harvesting of timber as the primary use of private forest lands and state trust lands. The Legislature directs the state to implement forest practices rules in a manner which is compatible with this primary use of forest lands and maintenance of a viable forest products industry.

The Legislature also finds that some of the current rules that restrict forest practices are not compatible with the economic needs of private landowners and state trust beneficiaries and that the process by which these rules have been adopted and administered creates an unacceptable level of regulatory uncertainty. The Legislature finds it in the best interest of the state that rules restricting forest activities on private lands and state trust lands for the benefit of threatened and endangered species be adopted under normal rule-making procedures of the Forest Practices Board, that these rules be directed toward ensuring survival of the affected species as a whole, and that the rules impose the burden for the recovery of these species on public lands. Public lands are defined to exclude state trust lands and county forest board lands.

### **Forest Practices Rules**

New provisions address the general rule-making authority of the Forest Practices Board, the board's authority to adopt rules to protect fish and wildlife, and the board's authority to adopt rules to protect threatened and endangered species.

With regard to the board's general rule-making authority, the board shall not adopt any rule that would materially limit commercial forest management of forest lands unless the board makes the following express findings:

- The proposed rule fully assesses the feasibility of available alternatives to direct regulation;
- The proposed rule is based on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for and the consequences of adopting the rule;

- The restrictions on forest practices on nonpublic forest lands are reasonable and capable of being accomplished and comply with the state's Regulatory Fairness Act;
- The restrictions on forest practices on nonpublic forest lands are not likely significantly to reduce private investments in the acquisition and retention of forest lands in the state or in silvicultural activities in the state, or to cause conversion of significant amounts of forest lands to nonforest uses;
- The restrictions on forest practices on nonpublic forest lands set forth in the proposed rule will not result in the taking of private property without compensation; and
- The proposed rule includes a variance procedure for use by owners of parcels of land which are disproportionately affected by the rule as applied.

With regard to protection of fish and wildlife, the board shall not adopt any rule to protect fish and wildlife that would materially limit commercial forest management of forest lands unless the board expressly finds that:

- Protection of the species on public lands is inadequate;
- The proposed rule takes fully into account the protection of the species provided by other rules adopted by the board and by other cooperative plans and efforts such as habitat conservation plans;
- The proposed rule has clearly identified specific life requisites of the affected species which cannot reasonably be met without regulation of forest practices on nonpublic lands; and
- The restrictions on forest practices on nonpublic forest lands are the least costly means of meeting the life requisites of the species.

Any rules adopted by the board to protect fish and wildlife shall protect only known sites. The board shall not adopt any rule requiring surveys of habitat to determine occupancy or nonoccupancy or authorizing the Department of Natural Resources to reject applications or notifications as being incomplete in the absence of survey information.

With regard specifically to threatened and endangered species, the board shall not adopt permanent rules for the protection of threatened or endangered species until a final recovery plan has been issued for a species. The board shall not adopt an emergency rule to protect fish and wildlife unless (1) the species is endangered, and (2) the board finds that, in the absence of the emergency rule, forest practices on

nonpublic lands that are to be regulated by the proposed emergency rule would cause a material further decline in the species as a whole. This provision would expressly prohibit the board from adopting an emergency rule for a species listed or designated as a threatened species.

Any rule adopted by the Forest Practices Board after January 1, 1995, is declared invalid unless re-adopted within 180 days from the effective date of this act in accordance with the new rule-making directives. Any rule adopted prior to January 1, 1995, which classifies one or more forest practices as Class IV - Special due to federal designation of critical habitat shall be invalid to the extent that the federal designation occurs after January 1, 1995, unless the rule is re-adopted within 180 days under the new rule-making directives.

### **Implementing the Forest Practices Laws and Rules**

#### **Class IV Forest Practices**

The Forest Practices Board is given the authority to adopt regulations establishing planning processes to address the potential cumulative effects of forest practices conducted within a watershed. If an applicant has an approved plan pursuant to these regulations, then a forest practice conducted in accordance with the plan will not be a Class IV forest practice to the extent that it would have been included as one by reason of environmental issues addressed in the approved plan. To further encourage landowners to participate in these planning processes, the regulations may provide other preferential treatment for forest practices conducted in accordance with these plans. Approval of forest landowner plans by the department does not require preparation of a detailed statement under the State Environmental Policy Act.

Except as provided by the board by rule, an incidental take permit, incidental take statement, unlisted species agreement, special rule, or other written approval by the U.S. Fish and Wildlife Service or the National Marine Fisheries Service is equivalent to a watershed plan approved by the department with respect to the species of fish and wildlife covered by the federal permit or approval.

#### **Conditions on Approved Forest Practices Applications**

The department may impose a condition on a forest practices application only after the department has concluded that the condition is necessary to prevent "material damage" to a "public resource." "Material damage" is defined to mean actual damage that significantly exceeds the ordinary impact of comparable forest practices and is long term and of more than localized effect. The definition of "public resources" in current law is amended to mean capital improvements, water, and species of fish and wildlife "as distinct from individual members of species." The

department must also determine that there is no less restrictive or less costly measure reasonably likely to prevent the material damage.

Before imposing the condition on the forest practices application, the department must prepare and attach to the approved application a written decision document. The decision document must (1) outline the reasons for the department's conclusion that material damage will occur unless the condition is imposed; (2) identify all evidence relied upon by the department; and (3) identify the alternative conditions, if any, which were considered and rejected and the reasons the alternatives were not accepted.

If the applicant chooses to appeal the condition to the Forest Practices Appeals Board, the department shall have the burden of proof to show that the condition is necessary to prevent material damage to public resources and that no less restrictive or less costly condition is reasonably likely to prevent the material damage. Unless the applicant agrees otherwise, the department is limited in the proceedings before the appeals board to presenting evidence which supports the basis, as identified in the decision document, for its conclusion that material damage would occur unless the condition is imposed..

### **Stop Work Orders**

If the department has issued a stop work order because immediate action is necessary to prevent continuation of or to avoid material damage to a public resource, then the department must prepare and mail a written decision document to the operator and landowner within two business days following the serving of the stop work order. The written decision document must (1) outline the reasons for the department's conclusion that material damage will occur unless the stop work order is issued; (2) identify the information relied upon by the department; and (3) identify the reasonable alternative actions which were considered and rejected and the reasons why the alternatives were not accepted.

If the stop work order issued in this situation is appealed, the department bears the burden of proving that the stop work order is necessary to prevent the continuation of or to avoid material damage to public resources. The definition of "public resources" is amended to mean capital investments, water, and species of fish and wildlife as distinct from individual members of species. "Material damage" means actual damage that significantly exceeds the ordinary impact of comparable forest practices and is long term and of more than localized effect. The department must also prove that no less restrictive or less costly measures are reasonably likely to accomplish the same objective. Unless the landowner and the operator agree otherwise, in the proceedings before the appeals board, the department is limited to presenting evidence which supports the basis, as identified in the decision document, for the department's conclusion that material damage would occur unless the stop work order was issued.



## **Notices to Comply**

Prior to issuing a notice to comply because of the potential for or the occurrence of material damage to a public resource, the department must prepare a written decision document and attach it to the notice. The decision document must (1) Outline the reasons for the department's conclusions that material damage will occur unless the notice to comply is issued; (2) identify the information relied upon by the department; and (3) identify any alternative conditions which were considered and rejected and the reasons these alternatives were not accepted.

The provision requiring a hearing before the department prior to going to the appeals board is removed, allowing the operator, forest landowner, or timber owner to appeal any notice to comply directly to the Forest Practices Appeals Board. In an appeal of a notice to comply, the department bears the burden of proving that the notice to comply was necessary. With respect to those notices issued to avoid material damage to public resources, the department is limited in the appeal to presenting evidence which supports the basis, as identified in the decision document, for the department's conclusion, unless the landowner and operator agree otherwise.

**Appropriation:** None.

**Fiscal Note:** Requested on January 26, 1995.

**Effective Date of Bill:** The bill contains an emergency clause and takes effect immediately.

**Testimony For:** (Natural Resources) There is surprise at the intensity of opposition to the bill. The bill takes away no regulatory authority and does no harm to public resources. It clarifies the authority of the board and DNR to regulate harvesting, road building, and other forestry operations. It reforms current rule-making to provide increased government accountability. There need be no incompatibility between supporting fish and wildlife and supporting the economic health of working forests. The Timber-Fish-Wildlife (TFW) agreement marked a new day of cooperation in forest management; the timber industry is committed to the continued success of that agreement. Anyone is free to seek a solution in another forum without hurting TFW; all other TFW participants have done so over the years. Balance and common sense have been scarce on the regulatory front. The timber industry would not support a bill that guts the environment. There is no striking language that removes protection for public resources. We need regulatory stability to produce timber. This is an opportunity to show we all care about the same things. The cost of protection of public resources has grown tremendously over the last five years. We are protecting resources now and will continue to do so. This is not a draconian bill but a modest effort to clean up errors where the industry believes abuse has taken place. For people who have invested in HCPs, etc, there is a SEPA exemption for

just those forest practices, so if you've done all that work, you don't have to do it again. It is rumor that this bill is a radical departure from the past and that it guts the Forest Practices Act. This is not true; it is a moderate, middle-of-the-road bill, not extreme. Current management policies for federal forest lands are not appropriate for private lands and state trust lands; these lands have to have a positive cash flow. When the rule for watershed analysis was adopted, it was hoped that the state would pay for them. Instead it is private money paid for the public benefit. These are good tools to protect the environment; there should be no way to challenge them through the EIS process. There used to be a policy of balance in the department, and now we are asking for that policy to be returned. The provisions in the bill provide incentives for landowners to plan on a landscape basis and would give them statutory assurances. The bill gives certainty to forest land owners to retain management of their lands into the future. It establishes due process for forest practices. It would add stability to timber-dependent communities suffering from a lack of management of the federal wood supply. This will help assure that forest land is left for wildlife. This is a common sense bill that will go far in restoring confidence in the business of growing trees. People first grow trees to earn a living, and then to live in harmony with nature and to make the land better than they found it; doing the latter things depends completely on being able to earn a living. This bill would require regulators to achieve their objectives on private land within the framework of profitability. The state and federal governments are spending millions on separate recovery plans for the same species, and the landowners have to keep up with this duplication. This bill will restore accountability to the department and allow small landowners to earn a living with their tree farms. It asks for good, objective reasons for why a forester is doing what he is doing. Foresters are under real difficulties, feeling like they cannot err other than in favor of the environment. Landowners fear that they won't be able to harvest in the future and so have to do so now.

(Appropriations) This bill requires that DNR explain the basis of their decisions and explain why permits are denied. This is an accountability issue, and accountability is addressed by requiring the agency to explain the basis for their decisions. Most of the conditioning of forest practice applications is based on insignificant material damage. The fiscal impact identified in the fiscal note is too high; the bill does not require this level of expenditures, and could result in savings. Supporters of the bill have developed some amendments that could reduce the costs identified by DNR. Right now, costs are disproportionately borne by landowners.

**Testimony Against:** (Natural Resources) Usually the TFW cooperators appear together. It is significant that today you are hearing from one separate from all the others. Usually industry sits with TFW as they bring policy to the Legislature or the Forest Practices Board by consensus. The tribes do not support the bill. In 1974, the unique decision of *U.S. v. Washington* made the tribes co-managers. Part one of that was management, and the second part is the habitat part. In about 1980, the tribes decided to work with the timber industry and the state after they got into big fights

with business. Now they are heading for big fights again, not just here but in other areas such as water and resource funding. Salmon is not on any agenda, and there is no funding to bring the resource back. Management is all piecemeal. There is nothing being demonstrated to show working together by the states, federal government, tribes, and business. This will then be played out elsewhere. One option is the courts. One option is the initiative process. Another option is to find another way. We're on a collision course. This bill goes fundamentally to the heart of TFW. This bill puts protection of public resources subservient rather than at an equal level with protection of a viable forest industry. In TFW, there was a pledge to work for both, not for one, and we have tried to do that. The change in the definition of public resources moves from protection of fish and wildlife to protection of species of fish and wildlife, which will get to listed species only. A goal of TFW looks at habitat for fish and habitat for wildlife, not just for threatened, endangered, and sensitive species, and talks about the role of fish and wildlife in forest ecosystems. It is sad to be put back at the beginning again on a new basis. The bill goes to the very heart of the agreement and puts us back in a position where its very basis is upset. Citizens' fish and wildlife values have not changed and are still strong. The bill throws everything out of balance. There is balance in the law now. Don't shift one natural resource to be subservient to another resource. TFW is an alternative to litigation, an alternative to fights, an alternative to all the things that didn't work for the timber industry and the environment. The strength of TFW was in consensus. The bill was developed without the knowledge of the other TFW cooperators. There is balance in current law by attempting to prohibit damage to public resources while encouraging responsible and profitable forest management. Timber company profits are up; there are no deficit timber sales; and people are looking for forest land to buy, and all this has occurred under the existing forest practices act. This bill will upset the very system that has encouraged a very profitable timber industry and improved protection of public resources. It encourages forest practices to sink to the lowest common denominator. The material damage definition could encourage extensive local damage. The timber industry has been bragging about trying to do better than others and than legal requirements. This bill is going back an awfully long way. Which timber industry should we believe? This will cause excessive red tape and paperwork. Watershed analysis has absolutely no wildlife protection in it. Under the guise of watershed analysis, you would get to avoid environmental review. This will have the public paying for this in terms of cutting into the forest principal. The new definition of material damage disavows that there are cumulative effects. Small perturbations will be ignored; this is destructive and unrealistic. The vagaries of the timber market are a bigger factor to rates of return than environmental regulation is. The bill is a death warrant for wildlife. This will create dismay in the public at large and make the climate fertile for an initiative to reverse it. This will lead to an atmosphere of increased acrimony and lawsuits. It is a deeply flawed piece of legislation and not modest as the industry would have you believe.

(Appropriations) The long-term negative impacts to the economy of the state from this legislation will lead to confrontation and gridlock. This bill has costs beyond those identified in the fiscal note, including rule making, for which the DNR did not identify costs. This bill was not a consensus bill and will hurt the progress made under the Timber/Fish/Wildlife cooperative agreements. The rules and restrictions called for in this bill are bad policy. This bill makes review of forest practice applications very site-specific and this is expensive. Each forester in the field is responsible for 127,000 acres. This legislation requires greater review and more field staff. Review will be necessary from the Office of the Attorney General of every document produced.

**Testified:** (Natural Resources) Bill Jacobs and Dick Best, Washington Forest Protection Association; Jeff Van Duzer, MRGC Company; Jan Pauw, Weyerhaeuser Company; Dave Crooker, Plum Creek Timber Company; Steve Tveit, Boise Cascade; Nels Hanson and Fred Pickering, Washington Farm Forestry Association (all in favor); Jennifer Belcher and Judith Freeman, TFW; Billy Frank, Northwest Indian Fisheries Commission; Judy Turpin; Jim Pissot, National Audubon Society; Scott Merriman, Washington Environmental Council; Toby Thaler, Washington Environmental Council and TFW; Peggy Bruton, League of Women Voters; and Gordon Kinder, Mountaineers (all opposed).

(Appropriations) (In favor) Representative Jim Buck, prime sponsor; Nels Hanson, Washington Farm Forestry Association, and Bill Jacobs, Washington Forest Protection Association. (With concerns) Bill Vogler, Association of Counties. (Against) Jim Anderson, Executive Director, NW Indian Fisheries Commission; Guy Parsons, Skokomish Watershed Coalition; Kaleen Cottingham, Supervisor, DNR; and Judy Turpin, Washington Environmental Council.