

# FINAL BILL REPORT

## ESHB 2091

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### PARTIAL VETO

C 4 L 99 E 1

Synopsis as Enacted

**Brief Description:** Contributing to salmon and water quality enhancement in areas impacted by forest practices.

**Sponsors:** By House Committee on Natural Resources (Originally sponsored by Representatives Buck, Regala, Dunshee, Thomas, Alexander, Doumit, Kessler, McMorris, Grant, Hatfield, Linville, G. Chandler, Reardon, Ericksen, Quall, Ogden, Clements, Schoesler, Anderson, Lisk, Eickmeyer, D. Sommers and Veloria; by request of Governor Locke).

### House Committee on Natural Resources

#### **Background:**

##### The Forest Practices Act

The 1974 Legislature passed the Forest Practices Act following more than a year of discussion among large and small timber processors, environmental groups, state agencies, and counties. The act recognized the interrelationship among forest practices and other resources. It was designed to protect timber supply, soil, water, fish, wildlife, and amenity resources by regulating timber removals, road construction and maintenance, reforestation, and the use of forest chemicals.

Three court decisions between 1978 and 1981 sparked the Legislature to reconsider sections of the act. Discussions ensued regarding the adequacy of environmental protection provided by the forest practices regulations. Particular concerns existed over protection of riparian areas. In 1985, the Legislature directed the Department of Natural Resources to prepare new rules, which would be more protective of riparian zones.

In 1986, representatives of tribes, the Departments of Fisheries and Game, the timber industry and environmental interests met to determine if they could collectively prepare alternative regulations to those prepared by the Forest Practices Board. The process became known as Timber Fish Wildlife (TFW). In December 1986, the TFW participants reached an agreement on a proposed regulatory framework, which became the basis of current regulation.

In 1997, faced with an imminent listing of several salmon species in Washington the TFW participants, in addition to representatives from federal agencies, reconvened to

develop a comprehensive plan to address salmon and other aquatic species on forest lands. After several months of negotiation, representatives of environmental interests withdrew from negotiations. The process became known as the forestry module of the state salmon plan. The resulting plan includes legislation and the Forests and Fish Report upon which rules are to be based. The legislation and rules address the recovery of salmon and other aquatic species on approximately 10 million acres of forest lands regulated under the Forest Practices Act.

#### The Endangered Species Act

The Endangered Species Act was originally enacted by the United States Congress in 1973 to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. The act provides a procedure whereby species of plants and animals may be nominated and eventually listed as "threatened" or "endangered."

Whenever a species is listed as threatened, the secretary of the listing agency (either the Department of Interior or the Department of Commerce) must issue regulations necessary to provide for the conservation of the species. Such a rule is often referred to as a Section 4(d) rule.

Once a species is listed, the act provides a broad list of prohibited acts, including the "taking" of an individual of the species. "Take" is defined very broadly by the act, and has been interpreted by the United States Supreme Court to include the modification of a species' habitat.

A secretary may permit the taking of an individual within a listed species if such a taking is incidental to, and not the purpose of, an otherwise lawful activity. Such a permit requires the submittal of an acceptable conservation plan which specifies, among other things, mitigation for the taking. Such a permit is often referred to as an "incidental take permit."

In Washington, Upper Columbia steelhead have been listed as endangered, Snake River and Lower Columbia steelhead and Columbia River bull trout have been listed as threatened, and Puget Sound chinook salmon and other salmonids are being considered for listing.

#### The Clean Water Act

The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. This act provides a regulatory framework for effluent discharges into navigable waters. Individual states are given the authority to implement state specific pollution control strategies within the federal framework. Effluent sources are divided into two types, point and non-point. Effluent sources falling into the first category are controlled through distinct effluent limitations. Non-point sources, which include discharges from non-discrete

sources such as agricultural fields, parking lots, streets, and forest lands, are addressed in a voluntary manner. States may prepare a management program for non-point source pollution. Such programs must include the identification of best management practices for non-point sources which will be undertaken to reduce pollutant loadings.

In Washington, the forest practices rules adopted by the Forest Practices Board include provisions for the control of non-point source pollution. These provisions are promulgated with the input of the Department of Ecology, who has a representative on the Forest Practices Board, and who also promulgates the provisions under the state's Clean Water Act.

In Washington, over 660 streams have been identified as having water quality problems under the Clean Water Act.

#### Forest Practices Rules

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.

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 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 a 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.

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.

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.

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 board are under the same guidelines as an appeal of a stop work order or any other case before the board.

A watershed analysis is an assessment of the condition of a watershed's resources, and the cumulative effect of forest practices within the watershed. These assessments may be performed by the Department of Natural Resources according to a statewide priority list, or by an individual landowner utilizing experts trained by the department. Forest practices prescriptions are written for the watershed based upon the results of the analysis. These prescriptions become requirements for forest practices applications.

## **Summary:**

### Intent

Legislative findings are made which link the elements of the bill and the Forests and Fish Report to salmon recovery statutes. There is also a direct policy link between the 50-year negotiated agreement, statutory elements of the plan, and provisions to be implemented by the Forest Practices Board through rules.

### Rule-Making

Findings are made which relate to the necessity of promulgating emergency rules to amend the state forest practices rules in response to declining fish runs. The Forests Practices Board may only adopt emergency rules that implement recommendations contained in the Forests and Fish Report. The emergency rules stay in effect until permanent rules are adopted, or until June 30, 2001. While additional procedural safeguards are implemented (such as the requirement that at least one public hearing must be held on the rules), other time-consuming steps are eliminated (such as the preparation of a small business economic impact statement). Emergency rules which are adopted by the board must meet most of the requirements of the Administrative Procedure Act. The emergency rule-making process is exempted from the State Environmental Policy Act. An emergency clause is provided for these provisions.

A permanent rule-making process which must be followed by the Forest Practices Board in amending the forest practices rules is provided. This process must comply with the Administrative Procedures Act. The board is strongly encouraged to follow the recommendations of the Forests and Fish Report. If the board chooses to adopt rules that are inconsistent with those recommendations, the board is required to report to the legislature regarding the proposed deviations, the reason for the deviations, and

whether the parties to the Forests and Fish Report still support the agreement. The board must defer adoption of permanent rules for 60 days of the legislative session to allow public input and legislative oversight. Rule making must be completed by June 30, 2001. Except in limited circumstances, future changes to forest practices rules must be accomplished through the adaptive management process as adopted by the board.

The rules adopted by the board must include a scientific-based adaptive management process described in the Forests and Fish Report.

The Forest Practices Board, prior to the adoption of permanent rules and no later than January 1, 2000, must report to the legislature regarding: the substance of the emergency rules, information on any changes made to the Forests and Fish Report since April 29, 1999, the status of the permanent rules, and the anticipated date of final adoption. The board must additionally report to the legislature by January 1, 2001. A final report is required on January 1, 2006, regarding modifications of the permanent rules according to the adaptive management process.

#### Definitions

Five new definitions are added to the Forest Practices Act including "adaptive management," "aquatic resources," "forests and fish report," "unconfined avulsing channel migration zone," and "unconfined avulsing stream."

#### Timber Excise Tax Credit

Provides a tax credit for timber harvested under a harvest permit subject to "enhanced aquatic resources requirements." This covers land which includes: riparian areas, wetlands, steep or unstable slopes, a federally approved habitat conservation plan, or an approved DNR road maintenance plan. The credit is equal to the stumpage value of timber harvest fore sale multiplied by eight-tenths of one percent. This credit is reduced by the amount of any compensation received from the federal government for reduced timber harvest due to enhanced aquatic resource requirements.

The Department of Natural Resources and the Department of Revenue are required to jointly conduct a study of the tax credits provided by the act.

#### Small Forest Landowners

The forestry riparian easement program is created, which includes a small landowner assistance office within the Department of Natural Resources to administer the new program. Subject to available funding, small landowners will be offered one-half of the value of "qualified timber" as compensation for 50-year riparian easements. The

program is created to prevent small landowners from being disproportionately impacted by the riparian buffer requirements outlined in the Forests and Fish Report.

The small forest landowner office is required to assist landowners in developing alternate management plans or alternate harvest strategies.

An advisory committee is established to assist the small forest landowner office. The small forest landowner office is required to report to the legislature by December 1, 2000. The report must estimate the number of small forest landowners in the state according to various acreages, the use of such holdings, the number of various forest practice applications, the effect of conversion of these lands to other uses, and recommendations. The office must provide an update to the legislature every four years which includes trends, whether the forest practices rules effect those trends, and whether the legislature has implemented previous recommendations.

Parcels of 20 acres or less which are held by landowners owning less than 80 acres total are exempted from riparian buffers required under the Forests and Fish Report. These landowners must comply with permanent forest practices rules in effect as of January 1, 1999, but may additionally be required to leave timber adjacent to streams equivalent to 15% of the volume of timber covering the harvest area. The small forest landowners office is required to work with such landowners to develop alternative management plans for such riparian buffers.

#### Large Woody Debris

The bill allows wood debris to be placed or left in waters as part of a salmon restoration project. In addition, forest landowners, the Department of Natural Resources, and the state are protected from certain liability which is attributable to leaving or placing trees, logs, and large woody debris in or near streams or other areas to comply with the forest practices rules or to implement voluntary restoration measures under the Forests and Fish Report.

#### Riparian Open Space

The Forest Practices Board is directed to establish a riparian open space program to provide for the acquisition of unconfined avulsing channel migration zones. Subject to available funding, these zones are to be acquired in fee, or at the landowner option, through a conservation easement. Once acquired, these lands may be managed by the Department of Natural Resources or transferred to another state agency, appropriate local agency, or private nonprofit nature conservancy corporation.

Existing law is amended to clarify that the acquisition of lands under the riparian open space program will not be required to pay a compensating tax. Normally, lands that are classified as forest lands by a county assessor trigger a compensating tax when

they are re-classified to a different use. The bill provides that the classification of forest lands as riparian open space will not require the payment of a compensating tax.

#### Enforcement

The Department of Natural Resources is allowed to require financial assurances, prior to the conduct of further forest practices, from an operator who has demonstrated an inability to meet his or her financial obligations under the forest practices act. The department may deny an application for failure to provide financial assurances. An operator is deemed to have demonstrated an inability to meet financial obligations if, within the preceding three-year period, he or she has: 1) operated without an approved application; 2) continued to operate in breach of, or failed to comply with, the terms of a stop work order or notice to comply, or; 3) failed to pay any civil or criminal penalty.

The bill allows the Department of Natural Resources or the Department of Ecology to apply for an administrative inspection warrant. In addition, the Department of Natural Resources is allowed to recover interests, costs, and attorney's fees when seeking recovery of a penalty for a violation of the Forest Practices Act.

#### Watershed Analysis

Adds authority for the Forests Practices Board to develop a watershed analysis system to address the cumulative effects of forest practices on, at a minimum, the public resources of fish, water, and public capital improvements. Provides the Forest Practices Appeals Board jurisdiction over the approval or disapproval of any watershed analysis.

#### Forest Practices Board Composition

The director of the Department of Fish and Wildlife or the director's designee is added to the Forest Practices Board as a twelfth member. However, this position on the board may be terminated after two years if the Legislature finds that the department has not made substantial progress toward integrating the laws, rules, and programs governing hydraulics and forest practices. This finding may not be based upon any other actions taken by the director as a member of the board.

#### Water Quality Coordination

The bill simplifies the Department of Ecology's co-adoption requirement for water quality rules under the Forest Practices Act. Provides for adoption of water quality rules by the Forest Practices Board after an agreement is reached with the Director of Ecology or the Director's designee on the board.

## State Environmental Policy Act

Exempts certain Department of Natural Resources actions under the Forest Practices Act from the environmental impact statement procedures of the State Environmental Policy Act. Specific exempted actions are 1) approval of road maintenance and abandonment plans; 2) approval of certain clearcut timber harvests in eastern Washington; 3) acquisition of stream channel migration zones, and; 4) acquisition of riparian easements.

The bill also clarifies when the Department of Natural Resources may make a determination of significance in making a threshold determination for a watershed analysis. This provision applies prospectively only, and is not to be construed to effect pending litigation.

## Federal Assurances

The state's expectations for obtaining federal assurances under the Endangered Species Act and Clean Water Act are outlined. "Failure of assurances," is defined which includes failure of the National Marine Fisheries Services or the United States Fish and Wildlife Service to address acts prohibited under 16 U.S.C. 1538. The bill sets out a state process if the federal government fails to provide the assurances negotiated in the Forests and Fish Report.

## Miscellaneous

The bill repeals an antiquated provision of law that allows the straightening and dredging of streams in order to facilitate logging operations.

The Forests and Fish Account is created in the state treasury. Expenditures, subject to appropriation, may be used only to establish and operate the small landowner office, purchase riparian easements from small landowners, and acquire channel migration zones through the riparian open space program.

## **Votes on Final Passage:**

### First Special Session

House 69 27

Senate 29 17 (Senate amended)

House 67 27 (House concurred)

**Effective:** August 18, 1999, except sections 201-203 which take effect July 7, 1999.

**Partial Veto Summary:** The Governor vetoed two sections of the bill, including: (1) the section requiring the Department of Natural Resources to evaluate unconfined

avulsing streams on public lands which do not have sufficient canopy to provide adequate shade; and (2) the section providing that the measure is null and void unless harvest levels of specified salmon runs are reduced by 25 percent from 1997 levels.