

# HOUSE BILL REPORT

## HB 2091

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### As Reported By House Committee On:

Natural Resources

**Title:** An act relating to forest practices as they affect the recovery of salmon and other aquatic resources.

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

**Sponsors:** 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.

### Brief History:

#### Committee Activity:

Natural Resources: 2/23/99, 3/2/99 [DPS].

#### Brief Summary of Substitute Bill

- Provides a comprehensive approach toward forest practices impacting the recovery of salmon.

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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 8 members: Representatives Buck, Republican Co-Chair; Regala, Democratic Co-Chair; G. Chandler; Clements; Doumit; Eickmeyer; Ericksen and Pennington.

**Minority Report:** Do not pass. Signed by 4 members: Representatives Anderson, Democratic Vice Chair; Sump, Republican Vice Chair; Rockefeller and Stensen.

**Staff:** Josh Weiss (786-7129).

### 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.

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### **Summary of Substitute Bill:**

#### Forestry Riparian Easement Program

The small forest landowner office is created which will administer the forestry riparian easement program. An advisory committee is established to assist the small forest landowner office to develop policy and recommend rules to the Forest Practices Board. The committee is composed of seven members including a representative from the Department of Ecology, the Department of Fish and Wildlife, and a tribal representative. Four additional members are small forest landowners who are appointed by the

Commissioner of Public Lands from a list submitted by the Washington Farm Forestry Association.

The forestry riparian easement program is established to acquire forestry riparian easements from small forest landowners. "Forestry riparian easements" are easements covering qualifying timber, which are voluntarily granted to the state. "Qualifying timber" includes trees covered by a forest practices application that a small landowner cannot harvest due to the rules adopted under the forests and fish report, or trees that cannot be economically harvested after such rules. This only includes timber located within a commercially reasonable harvest unit according to the Forest Practices Board.

A "Small forest landowner" includes entities who: a) own forest lands in fee, or have rights to a less than fee interest for at least 50 years; b) during the last three years prior to the application, have harvested from its own lands an average timber volume that would qualify the owner as a small timber harvester under the timber and forest lands property tax provisions (currently less than 2 million board feet), or; c) that certifies at the time of application that it does not intend to harvest more than 2 million board feet in the 10 years following the application. An entity can be deemed to be a "small forest landowner" even if it does not meet b) or c) if it can show compelling and unexpected obligations necessitating additional logging. The small forest landowner office is responsible for evaluating whether a landowner meets this definition, at the time of application.

The state is not required to acquire easements that would create unacceptable liabilities for the state. The Department of Natural Resources may not transfer easements acquired by the small forest landowners office, except to other state agencies.

Forestry riparian easements are effective for 50 years from the date of the application, and may only be terminated prior to that time if it is in the best interest of the state, or under the terms of a termination clause in the easement. Easements must be restrictive in nature and protect riparian functions. An entity granting a forestry riparian easement may still be taxed under existing provisions.

The small forest landowner office is required to determine the compensation that will be exchanged for easements. In determining the value of an easement the small forest landowner office will determine: 1) the volume of qualifying timber; and 2) the fair market value at the time of application, based upon data maintained by the Department of Revenue. Compensation will be offered at 50 percent of this value. Compensation is provided after the harvest has been completed, leave trees have been verified, and the easement document has been executed.

Compensation may be increased by 50 percent of the value of areas that are included in buffers or special management zones that are determined by the small forest landowners

office to exceed a high impact threshold, where the forest practices application is subject to high regulatory impact due to adopted rules.

The Forest Practices Board is required to adopt rules to implement the forestry riparian easement program. The bill also creates the forests and fish account in the state treasury.

Potential statutory and common law liability from falling trees which have been included in a forestry riparian easement is limited for both the Department of Natural Resources and the landowner.

A landowner who sells any land which is subject to a forestry riparian easement, must notify the buyer of the existence and nature of the obligation. The buyer is required to sign a notice of the obligation. If the seller fails to notify the buyer, he/she is liable for the costs related to the obligation, including legal costs and reasonable attorneys' fees.

#### Riparian Open Space Program

The Forest Practices Board is required to establish the riparian open space program through administrative rule. The program will acquire either fee interests or conservation easements on lands within unconfined avulsing channel migration zones. All lands acquired shall be managed as riparian open space. An "unconfined avulsing stream" is a stream that is generally fifth order or larger, that experiences abrupt shifts in channel location, and creates a complex flood plain containing gravel bars, disturbance species, side channels, wall-based channels, oxbow lakes, or wetlands. An "unconfined avulsing channel migration zone" is where the active channel of such a stream is prone to move, and where movement would result in potential loss of forest adjacent to the stream. This can include sizeable islands of timber.

Easements may be held by the Department of Natural Resources, or transferred to a state agency, local government agency, or nonprofit nature conservancy corporation. The rules adopted by the Forest Practices Board shall include a definition of qualifying lands, priorities for acquisition, and provide an opportunity to transfer with limited warranties, and without full surveys.

These lands are presumed to have a value equal to the median value of commercial forest land according to property tax land value tables, or the cruised volume of timber that is 12 inches or larger in diameter breast height times the median value of timber of the same species in timber harvest excise tax tables.

#### Wood Debris

Generally it is unlawful to dispose of wood debris into navigable waters, though exemptions exist relating to forest practices. This exemption is expanded to include activities under the Forest Practices Act and salmon recovery.

#### Watershed Analysis

The Legislature finds that it is in the public interest to develop a watershed analysis system that addresses the cumulative impact of forest practices on public resources including fish, water, and public capital improvements. The Forest Practices Board is required to promulgate rules allowing for the development of watershed analyses. Persons aggrieved by the approval or disapproval of a watershed analysis may seek review from the appeals board.

**Substitute Bill Compared to Original Bill:** The substitute bill eliminates all sections of the original bill except for those which:

- Outline legislative intent;
- Define key terms;
- Provide intent for the Small Forest Landowners Office and the Forestry Riparian Easement Program;
- Limit the application of definitions which are relevant only to the chapter in the Forest Practices Act relating to stewardship of nonindustrial forests and woodlands;
- Enable the Small Forest Landowners Office and the Forestry Riparian Easement Program;
- Expand a landowners ability to promote large woody debris, and limits state and private landowner liability for trees which blow down in wind;
- Require the seller of forest lands which are encumbered by an easement or other interest to notify the buyer of such encumbrance;
- Allow for the development of watershed analyses under the forest practices rules;
- Enable the riparian Open Space Program; and
- Clarify that forest practices rules pertaining to water quality are to be adopted in agreement with the Department of Ecology.

In addition, the substitute bill:

- Eliminates three separate fiscal accounts, and creates one account in the treasury;
- Adds February 22, 1999, throughout the bill as the date of the Forests and Fish Report;
- Eliminates the landowner compensation language in Section 1, replacing it with a legislative finding suggesting that cost-sharing is appropriate; and
- Modifies the composition of the Small Forest Landowner Office Advisory Board. Listed members are the Department of Ecology, Department of Fish and Wildlife, and a representative of Native American Tribes. Four additional members will represent small landowners as appointed by the Commissioner of Public Lands and are chosen from a list of nominees promulgated by the Washington Farm Forestry Association; and
- Repeals RCW 20.98.150 which allowed persons or companies with an interest in logging to clear out obstructions, straighten channels, and cut across sand or gravel bars.



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**Appropriation:** None.

**Fiscal Note:** Available. Requested on the substitute bill on March 3, 1999.

**Effective Date of Substitute Bill:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** (Original bill) This agreement comes down to providing scientific credibility, through the adaptive management process. The bill is a key component to the Governor's salmon recovery plan. These incorporate the best forest practices prescriptions in the country. The Governor's office fully supports this approach. The Washington Department of Fish and Wildlife supports this measure, and recognizes the credit that is due to the industry for helping in this. There are some concerns with certain sections of the bill. The Department of Fish and Wildlife should be added cleanly to the Forest Practices Board. A super majority is too big. The department can be a team player in integrating the permitting processes. The National Marine Fisheries Service is satisfied with this approach, and has never done a deal like this. This provides a flexible strategy which recognizes the differences between eastern and western Washington. This approach will be adopted into a National Marine Fisheries Service Section 4(d) rule when salmon are listed. The United States Fish and Wildlife Service supports this approach. This has been developed through protracted negotiation, and even though there is compromise incorporated, it is a proactive approach. This is based on sound science. The adaptive management process will address any concerns that the U.S. Fish and Wildlife Service has. Success depends on the adaptive management process and the funding provided. The Northwest Indian Fisheries Commission member tribes have mixed support. Adequate funding, enforcement, monitoring, and research are needed. The process needs to be open, as it is through the adaptive management process. The Environmental Protection Agency and Department of Ecology are giving joint assurances, including a 10-year delay on the total maximum daily loading process. There will be no new Clean Water Act requirements for at least 10 years. Adaptive management can and will work. This agreement is being watched across the country as a new model for these issues. This proposal is a proposal from five of the TFW caucuses and is not an industry proposal. The Legislature should be involved in this and shouldn't delegate to the Forest Practices Board. There has been public input through the Timber Fish Wildlife reports made to the Forest Practices Board. This does not tie the hands of the board, but simply preserves a negotiated agreement. The industry is willing to come to the table to avoid another train wreck such as the spotted owl listing.

The adaptive management provisions are the most comprehensive to be developed. These provisions were all developed prior to the environmental community walking away from the process. There is no veto power over the process. The alternative to this plan is a private habitat conservation plan, the greatest criticism of which is that they are

closed negotiations. Originally, the Forest Practices Board asked TFW to take this issue on. Washington Farm Forestry's position has developed into full support, though there are still some concerns with the proposal. Small forest landowners will be more impacted by salmon listings. These lands have declined by 74 percent due to regulatory pressure. This is a start in the right direction towards incentives. The Small Forest Landowners Office is a good idea. Landowners need the certainty involved in this plan. Other proposals are the product of special interest groups. The Colville Tribes have been critical in this process. This is the first time an environmental interest will be resolved through consensus instead of litigation. This ensures the long-term stability of industry and protects salmon. This balances environmental stewardship and economic viability. This is bitter medicine, but it is part of the statewide recovery plan. This will cost Simpson Timber \$112 million. However, we cannot afford another listing scenario like the spotted owl. The timber industry is interested in being part of the solution on this issue. Grays Harbor suffered a 93 percent reduction in annual harvest levels when the spotted owl was listed. This provides certainty to landowners.

(Neutral) The Department of Natural Resources has no position on this bill, since the Commissioner of Public Lands is the chair of the Forest Practices Board. There are several concerns with the bill. Be clear with what the Legislature intends for the board to do. To say that they should adopt rules that are "consistent" with the Forests and Fish Report is unclear. Requiring a super majority vote of the board to adopt rules inconsistent with the report is not necessary. The board usually operates with consensus. The caveats on the participation of the Washington Department of Fish and Wildlife are inappropriate. Funding for the board to adopt rules is needed regardless of whether this legislation passes. TFW has never previously been codified, and has been a loose-knit group. If the Legislature is going to codify them, do it through a specific statute. It is not appropriate for the Governor to appoint the membership of the Small Landowners Office, which is under the Department of Natural Resources.

**Testimony Against:** (Original Bill) The environmental community has an alternative plan to this approach which deserves consideration during the full rule-making process before the Forest Practices Board. This bill would allow the adoption of the Forests and Fish Report without the full two year rule-making process. This bill is not needed as there are other bills which will allow the Forest Practices Board to accomplish what needs to be done. Funding exists in the Governor's budget. The small landowner elements from the Family Forestry Bill are sufficient. There is another bill in the House that gives the Department of Fish and Wildlife a seat on the Forest Practices Board, without any conditions. There are no significant enforcement changes in the bill that are absolutely necessary. Adaptive management has already been defined in last year's salmon recovery bill. The federal assurances will come from the federal government regardless of passage of this bill. The federal agencies will adopt the Forests and Fish report into their Section 4(d) rule regardless of this bill. Finally, there is no other portion of the Governor's salmon recovery package, such as growth management or agriculture, before the Legislature. The League of Women Voters is concerned that this

package eliminates public process. This is a rushed approach. Government bodies need to protect the public right to know. If the Forest Practices Board is not able to consider other alternatives to the Forests and Fish Report findings, then can the public challenge the findings before the board during the rule-making process? The Forest Practices Board is regulatory by law, and this bill upsets that. The Legislature needs more time to comprehend this bill, before they enter into a 50-year agreement with the federal government. The Legislature is being asked to adopt a complex and detailed set of regulations without having any public input. The adaptive management process which underlies the bill is flawed. TFW membership is limited to those who are committed to the Forests and Fish Report. The same parties who determine resource objectives will be determining funding. Control of adaptive management is given to TFW. This plan, if adopted, will provide 100-foot buffers for about 20 percent of the land. This will not meet the goals of the bill, and will not eliminate extinction as an option. The prescriptions are in conflict with available published data. This would provide less protection than other state and federal programs. The adaptive management process is suspicious. Start from an acceptable risk of extinction, which should be set at 5 percent.

The Puyallup Tribe has concerns with this bill including: SEPA exemptions provided, the mandated rule changes, adaptive management, assistance for tribes through court relief, and the protection of cultural resources. During the TFW process in 1997 cultural resource protection was an early stated goal. There has been no attempt to link this old agreement with the new one. The Puyallup Tribe has a minority proposal to the Forest Practices Board which has been submitted through TFW protocols. Both the bill and the Forests and Fish Report are flawed. The report is not technically defensible. The Hoh Tribe supports the Puyallup and Muckleshoot proposals. The goal should be a return to natural conditions, but a negotiated agreement is important. The current proposal won't meet this goal. There are other science-based reports that recommend significantly higher protection levels. The Hoh Tribe depends on these fish stocks. The Muckleshoot Tribe has concerns that an incomplete report is being adopted in the bill and that it does not incorporate the best available science. The Yakama Nation opposes the report and opposes the bill. Eastside buffers are lower than westside, even though the habitat is more sensitive and more protection is needed. The stream typing is based on a model that isn't even developed yet, and will not allow on-the-ground findings to influence the typing. The riparian buffers are too complex and impossible to impose or enforce. If compensation is granted to small landowners, then tribes should be compensated for past losses. These measures are not strict enough to warrant federal assurances. Watershed analysis should not be exempt from the State Environmental Policy Act.

**Testified:** (In support) Curt Smitch, Special Assistant to the Governor for Natural Resources; Russ Cahill, Washington Fish and Wildlife Commission; Steve Landino, National Marine Fisheries Service; Craig Hanson, United States Fish and Wildlife Service; Joseph Pavel, Northwest Indian Fisheries Coordinator; Phil Millam, Environmental Protection Agency; Bill Wilkerson Washington Forest Protection

Association; Cassie Phillips, Weyerhaeuser Company; Chan Norenberg, Washington Farm Forestry Association; Dick Just, Boise Cascade; John Walker, Simpson Timber; and Bob Paylor, Grays Harbor County Commission.

(Neutral) Jennifer Belcher, Commissioner of Public Lands.

(Opposed) Josh Baldi, Washington Environmental Council; Ron Shultz, National Audubon Society; Elizabeth Perini, League of Women Voters; Marcy Golde, Washington Environmental Council; Dr. Michael Pollock, citizen; Kari Frank, Puyallup Tribe; Jeffrey Thomas, Puyallup Tribe; Jill Silver, Hoh Tribe; Karen Allston, Muckleshoot Tribe; and Harris Teo Jr., Yakama Nation.