

HOUSE BILL ANALYSIS

HB 2091

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.

HOUSE COMMITTEE ON NATURAL RESOURCES

Meeting Date: February 23, 1999.

Bill Analysis Prepared by: Josh Weiss, Counsel (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, or 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, 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 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.

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

The bill is one portion of the state's comprehensive salmon recovery program which also includes the state salmon strategy, and the forest and fish report. The bill, which incorporates the forests and fish report by reference, is intended to fully satisfy the Endangered Species Act through its incidental take provisions and the Clean Water Act's non-point source pollution provisions. The bill addresses forest practices on all non-federal forest lands in the state.

The bill also intends to coordinate forest practice rules relating to aquatic resources— with other land uses, through the statewide salmon recovery planning process. Aquatic resources— is defined to mean water quality, certain species of fish (including salmon), and the habitat of those species.

Forest Practices Board Rulemaking

The Forest Practices Board is required to amend the Forest Practices rules to implement the prescriptions in the forests and fish report. The board is authorized to first adopt interim rules implementing all or a portion of the forests and fish report, prior to final adoption. This adoption of interim rules need not comply with procedures in the Forest Practices Act, the Administrative Procedure Act, the Regulatory Fairness Act, or the State Environmental Protection Act.

In amending the Forest Practices Rules, the board may only deviate from the recommendations in the forests and fish report upon a) a super-majority vote of the board; b) a finding that deviation is necessary to prevent material damage to a public resource; c) a finding that an alternative rule can be adopted without jeopardizing the economic viability of timber industry; and d) a finding that an alternative rule accomplishes the purpose of the Forest Practices Act.

Final rules must be adopted within 24 months of adoption of the bill. Once implemented, the rules can only be changed if they go through the adaptive management process established in the forests and fish report. The adaptive management process does not need to be followed in these circumstances: a) If consensus is not reached through the completed adaptive management process; b) If legislative appropriations for the process are inadequate; c) If a court order requires the board to adopt or modify the rules; or d) If further state legislation requires additional rules or modifications.

When adopting rules pertaining to water quality protection, agreement must be reached with the director of the Department of Ecology.

Federal Assurances

The bill contemplates that adoption of the forest practices prescriptions found in the forest and fish report through rulemaking, will meet the requirements of federal law, including the Endangered Species Act and Clean Water Act. The forest and fish report describes the assurances that the federal government will make to the state of Washington upon adoption of the forest and fish report.

The bill describes the events that constitute a failure of assurances. These are: a) failure by the National Marine Fisheries Service or the United States Fish and Wildlife Service to promulgate a section 4(d) rule under the Endangered Species Act, or failure of such a rule to include an incidental take permit; b) promulgation of a section 4(d) rule that precludes forest practices consistent with the prescriptions in the forest and fish report; c) failure by either the Secretary of Interior or Secretary of Commerce to issue an acceptable incidental take permit covering all species included as aquatic resources— before June 30, 2003; d) failure of the Environmental Protection Agency or the Department of Ecology to provide Clean Water Act assurances as described in Appendix M of the forests and fish report; or e) reversal of these assurances by subsequent federal legislation, rulemaking, or court decision.

An Endangered Species Act incidental take permit is acceptable if it: a) permits the incidental take of species included as aquatic resources— from the conduct of forest practices in compliance with the report; b) provides protection to the state, subdivisions, landowners, and operators; c) does not require the commitment of resources in addition to those in the forest and fish report; and d) provides no surprises— protection under 50 CFR parts 17 and 222.

The Governor is allowed to negotiate to obtain assurances from federal agencies.

General Compensation to Landowners

The bill anticipates that private forest landowners will be awarded some level of compensation for compliance. The section addressing this compensation is left blank.

The bill also reduces the amount that may be collected by the Department of Revenue for the administration and collection of county and state forest excise taxes. County collection is reduced to 66 percent of the total collected and state collection is reduced to 34 percent of the total collected.

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 Forest Practices Board. The committee is composed of five people representing natural resource agencies and small forest landowners, who are appointed by the Governor upon the recommendation of the authors of the forests and fish report.

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 small forest landowner office account and the easement purchase account.

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 attorney's 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.

The bill also creates the riparian open space account in the state treasury.

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.

Enforcement

The bill expands the time in which the Department of Natural Resources may disapprove a forest practices application or notification which is submitted by a person who has failed to comply with a final order or decision or pay a civil penalty. This time is the greater of: 1) one year from the issuance of a notice of intent to disapprove, or 2) until the violator pays all outstanding civil penalties and complies with all valid notices to comply and stop work orders. Currently, the time is limited to one year. While a notice of intent to disapprove is in effect, the violator may not have any involvement in forest practices.

The Department of Natural Resources may require financial assurances prior to further forest practices from any person who has three significant violations— within a three-year period. Significant violations are: a) operating without an approved forest practices application; b) operating in breach of terms of an application, where operation causes an actual material damage to public resources; or c) continuation of operations in breach of a stop work order or notice to comply. The Department of Natural Resources may deny an application for failure to submit required financial assurances. The Department of Natural Resources is required to adopt rules establishing a standardized formula for determining the proper amount of financial assurances, and an appeal process.

The Department of Natural Resources and the Department of Ecology may obtain an administrative inspection warrant in superior court. Such a warrant is available when: a) the Department of Natural Resources has previously attempted an otherwise lawful inspection and access has been actually or constructively denied, and b) the Department of Natural Resources has reasonable cause to believe that a violation of the Forest Practices Act or associated rules has occurred or is occurring. In addition, the Department of Natural Resources may invite representatives of other agencies, tribes, and interest groups to accompany the department on an inspection performed in relation to a watershed analysis.

The Department of Natural Resources may additionally issue a stop work order in order to prevent threats to public safety, and a notice of failure to comply. A notice of failure

to comply must identify risks to public safety, if any have occurred. The Department of Natural Resources may require a corrective course of action, which includes public safety considerations. Compensation may be required for any material damage to public safety

The Office of the Attorney General is allowed to seek interest, costs, and attorney's fees in enforcing these provisions.

Forest Practices Board Composition

The director of the Department of Fish and Wildlife is included on the Forest Practices Board. However, this membership may be terminated after two years, unless the Legislature finds that the Department of Natural Resources has made substantial progress toward integrating laws, rules and programs relating to forest practices with those relating to hydraulic projects. Substantial progress— means, at a minimum, recommendations to the Legislature regarding closer integration of the Forest Practices Board and Washington Department of Fish and Wildlife rulemaking authority, and closer integration of the forest practices and hydraulic permitting processes, including the potential for a consolidated permitting process.

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

SEPA

Several agency decisions are exempted from the State Environmental Policy Act procedures. These include: a) approval of forest road maintenance and abandonment plans; b) approval of future timber harvest schedules involving east side clear-cuts under Forest Practices Act rules; c) acquisition of forest lands in stream channel migration zones; and d) acquisition of conservation easements in riparian zones.

In addition, when making a threshold determination on a watershed analysis, the department shall not make a determination of significance unless the prescriptions themselves, compared to prior rules or prescriptions, will cause likely significant adverse impacts on elements of the environment other than those addressed in the watershed analysis process.

Appropriation: None.

Fiscal Note: Requested February 11, 1999

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

Rulemaking Authority: Forest Practices Board.