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SENATE BILL 5298

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State of Washington

58th Legislature

2003 Regular Session

By Senators Morton and Doumit; by request of Commissioner of Public Lands

Read first time 01/22/2003. Referred to Committee on Natural Resources, Energy & Water.

1 AN ACT Relating to assisting small forest landowners with the  
2 forest road maintenance and abandonment plan elements of the forest  
3 practices rules; amending RCW 76.09.020, 76.09.055, and 76.09.390;  
4 adding new sections to chapter 76.09 RCW; adding a new section to  
5 chapter 76.13 RCW; adding a new section to chapter 77.12 RCW; and  
6 creating a new section.

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

8 NEW SECTION. **Sec. 1.** (1) The legislature finds that the 1999 act  
9 known as the forests and fish law contains a requirement for all forest  
10 landowners to complete a road maintenance and abandonment plan. In the  
11 time since the law's 1999 enactment, it has become clear that the road  
12 maintenance and abandonment plan requirement may cause an unforeseen and  
13 unintended disproportionate financial hardship on small forest  
14 landowners.

15 (2) The legislature further finds that the commissioner of public  
16 lands and the governor have explored solutions that minimize the  
17 hardship caused to small forest landowners by the forest road  
18 maintenance and abandonment requirements of the forests and fish law,

1 while maintaining protection for public resources. This act represents  
2 the bulk of the recommendations stemming from that process.

3 **Sec. 2.** RCW 76.09.020 and 2002 c 17 s 1 are each amended to read  
4 as follows:

5 For purposes of this chapter:

6 (1) "Adaptive management" means reliance on scientific methods to  
7 test the results of actions taken so that the management and related  
8 policy can be changed promptly and appropriately.

9 (2) "Appeals board" means the forest practices appeals board  
10 created by RCW 76.09.210.

11 (3) "Aquatic resources" includes water quality, salmon, other  
12 species of the vertebrate classes Cephalaspidomorphi and Osteichthyes  
13 identified in the forests and fish report, the Columbia torrent  
14 salamander (*Rhyacotriton kezeri*), the Cascade torrent salamander  
15 (*Rhyacotriton cascadae*), the Olympic torrent salamander (*Rhyacotriton*  
16 *olympian*), the Dunn's salamander (*Plethodon dunnii*), the Van Dyke's  
17 salamander (*Plethodon vandyke*), the tailed frog (*Ascaphus truei*), and  
18 their respective habitats.

19 (4) "Commissioner" means the commissioner of public lands.

20 (5) "Contiguous" means land adjoining or touching by common corner  
21 or otherwise. Land having common ownership divided by a road or other  
22 right of way shall be considered contiguous.

23 (6) "Conversion to a use other than commercial timber operation"  
24 means a bona fide conversion to an active use which is incompatible  
25 with timber growing and as may be defined by forest practices rules.

26 (7) "Department" means the department of natural resources.

27 (8) "Forest land" means all land which is capable of supporting a  
28 merchantable stand of timber and is not being actively used for a use  
29 which is incompatible with timber growing. Forest land does not  
30 include agricultural land that is or was enrolled in the conservation  
31 reserve enhancement program by contract if such agricultural land was  
32 historically used for agricultural purposes and the landowner intends  
33 to continue to use the land for agricultural purposes in the future.

34 (9) "Forest landowner" means any person in actual control of forest  
35 land, whether such control is based either on legal or equitable title,  
36 or on any other interest entitling the holder to sell or otherwise  
37 dispose of any or all of the timber on such land in any manner:

1 PROVIDED, That any lessee or other person in possession of forest land  
2 without legal or equitable title to such land shall be excluded from  
3 the definition of "forest landowner" unless such lessee or other person  
4 has the right to sell or otherwise dispose of any or all of the timber  
5 located on such forest land.

6 (10) "Forest practice" means any activity conducted on or directly  
7 pertaining to forest land and relating to growing, harvesting, or  
8 processing timber, including but not limited to:

- 9 (a) Road and trail construction;
- 10 (b) Harvesting, final and intermediate;
- 11 (c) Precommercial thinning;
- 12 (d) Reforestation;
- 13 (e) Fertilization;
- 14 (f) Prevention and suppression of diseases and insects;
- 15 (g) Salvage of trees; and
- 16 (h) Brush control.

17 "Forest practice" shall not include preparatory work such as tree  
18 marking, surveying and road flagging, and removal or harvesting of  
19 incidental vegetation from forest lands such as berries, ferns,  
20 greenery, mistletoe, herbs, mushrooms, and other products which cannot  
21 normally be expected to result in damage to forest soils, timber, or  
22 public resources.

23 (11) "Forest practices rules" means any rules adopted pursuant to  
24 RCW 76.09.040.

25 (12) "Forest trees" does not include hardwood trees cultivated by  
26 agricultural methods in growing cycles shorter than fifteen years if  
27 the trees were planted on land that was not in forest use immediately  
28 before the trees were planted and before the land was prepared for  
29 planting the trees. "Forest trees" includes Christmas trees, but does  
30 not include Christmas trees that are cultivated by agricultural  
31 methods, as that term is defined in RCW 84.33.035.

32 (13) "Forests and fish report" means the forests and fish report to  
33 the board dated April 29, 1999.

34 (14) "Application" means the application required pursuant to RCW  
35 76.09.050.

36 (15) "Operator" means any person engaging in forest practices  
37 except an employee with wages as his or her sole compensation.

1 (16) "Person" means any individual, partnership, private, public,  
2 or municipal corporation, county, the department or other state or  
3 local governmental entity, or association of individuals of whatever  
4 nature.

5 (17) "Public resources" means water, fish and wildlife, and in  
6 addition shall mean capital improvements of the state or its political  
7 subdivisions.

8 (18) "Small forest landowner" has the same meaning as defined in  
9 section 10 of this act.

10 (19) "Timber" means forest trees, standing or down, of a commercial  
11 species, including Christmas trees. However, "timber" does not include  
12 Christmas trees that are cultivated by agricultural methods, as that  
13 term is defined in RCW 84.33.035.

14 ((+19+)) (20) "Timber owner" means any person having all or any  
15 part of the legal interest in timber. Where such timber is subject to  
16 a contract of sale, "timber owner" shall mean the contract purchaser.

17 ((+20+)) (21) "Board" means the forest practices board created in  
18 RCW 76.09.030.

19 ((+21+)) (22) "Unconfined avulsing channel migration zone" means  
20 the area within which the active channel of an unconfined avulsing  
21 stream is prone to move and where the movement would result in a  
22 potential near-term loss of riparian forest adjacent to the stream.  
23 Sizeable islands with productive timber may exist within the zone.

24 ((+22+)) (23) "Unconfined avulsing stream" means generally fifth  
25 order or larger waters that experience abrupt shifts in channel  
26 location, creating a complex flood plain characterized by extensive  
27 gravel bars, disturbance species of vegetation of variable age,  
28 numerous side channels, wall-based channels, oxbow lakes, and wetland  
29 complexes. Many of these streams have dikes and levees that may  
30 temporarily or permanently restrict channel movement.

31 NEW SECTION. Sec. 3. A new section is added to chapter 76.09 RCW  
32 to read as follows:

33 (1) The board must adopt rules relating to road maintenance and  
34 abandonment plans that are substantially consistent with the  
35 recommendations contained in the forests and fish report, except for  
36 the following differences:

1 (a) A forest landowner who owns a total of eighty acres or less of  
2 forest land in Washington is not required to submit a road maintenance  
3 and abandonment plan for any parcels of land that are twenty contiguous  
4 acres or less in area; and

5 (b) A landowner who qualifies as a small forest landowner, but who  
6 does not qualify under (a) of this subsection, is only required to  
7 submit a checklist road maintenance and abandonment plan with the  
8 abbreviated content requirements provided for in subsection (3) of this  
9 section, and is not required to comply with annual reporting and review  
10 requirements.

11 (2) The department must provide a landowner who is either exempted  
12 from submitting a road maintenance and abandonment plan under  
13 subsection (1)(a) of this section, or who qualifies for a checklist  
14 road maintenance and abandonment plan under subsection (1)(b) of this  
15 section, with an educational brochure outlining road maintenance  
16 standards and requirements. In addition, the department must develop  
17 a series of nonmandatory educational workshops on the rules associated  
18 with road construction and maintenance.

19 (3) A landowner who qualifies for a checklist road maintenance and  
20 abandonment plan under subsection (1)(b) of this section is only  
21 required to submit a checklist, designed by the department in  
22 consultation with the small forest landowner advisory committee created  
23 in RCW 76.13.110, that confirms that the landowner has read the  
24 educational brochure provided under subsection (2) of this section and  
25 is applying it to the management of the landowner's forest roads. A  
26 landowner who qualifies for the checklist road maintenance and  
27 abandonment plan is not required to submit the checklist before the  
28 time that he or she submits a forest practices application for forest  
29 lands either covered by the checklist, or that are contiguous to the  
30 forest land that contains the forest practices application. The  
31 department may encourage and accept checklists prior to the time that  
32 they are due.

33 (4) The department must monitor the extent of checklist road  
34 maintenance and abandonment plan submissions and rates of compliance  
35 with rules relating to forest roads, and report its findings to the  
36 appropriate committees of the legislature by December 31, 2008, and  
37 December 31, 2013. The legislative reports must measure the success of  
38 the checklist road maintenance and abandonment plan approach and make

1 any suggestions for adjustments that are necessary to accomplish the  
2 goal of having all checklists submitted, and the corresponding road  
3 maintenance completed, by June 30, 2016. Reports conducted under this  
4 section should be linked to the program evaluations conducted under  
5 section 6(7) of this act.

6 (5) The board shall adopt emergency rules under RCW 34.05.090 by  
7 October 31, 2003, to implement this section. The emergency rules shall  
8 remain in effect until permanent rules can be adopted. The forest  
9 practices rules that relate to road maintenance and abandonment plans  
10 shall remain in effect as they existed on the effective date of this  
11 section until emergency rules have been adopted under this section.

12 (6) This section is only intended to relate to the board's duties  
13 as they relate to the road maintenance and abandonment plan element of  
14 the forests and fish report. Nothing in this section alters any forest  
15 landowner's duties and responsibilities under any other section of the  
16 forest practices rules, or any other state law or rule.

17 **Sec. 4.** RCW 76.09.055 and 2000 c 11 s 4 are each amended to read  
18 as follows:

19 (1) The legislature finds that the declines of fish stocks  
20 throughout much of the state require immediate action to be taken to  
21 help restore these fish runs where possible. The legislature also  
22 recognizes that federal and state agencies, tribes, county  
23 representatives, and private timberland owners have spent considerable  
24 effort and time to develop the forests and fish report. Given the  
25 agreement of the parties, the legislature believes that the immediate  
26 adoption of emergency rules is appropriate in this particular instance.  
27 These rules can implement many provisions of the forests and fish  
28 report to protect the economic well-being of the state, and to minimize  
29 the risk to the state and landowners to legal challenges. This  
30 authority is not designed to set any precedents for the forest  
31 practices board in future rule making or set any precedents for other  
32 rule-making bodies of the state.

33 (2) The forest practices board is authorized to adopt emergency  
34 rules amending the forest practices rules with respect to the  
35 protection of aquatic resources, in accordance with RCW 34.05.350,  
36 except: (a)(i) That the rules adopted under this section may remain in  
37 effect until permanent rules are adopted, or until June 30, 2001,

1 whichever is sooner; (ii) that the rules adopted under sections 3(5)  
2 and 9 of this act must remain in effect until permanent rules are  
3 adopted; (b) notice of the proposed rules must be published in the  
4 Washington State Register as provided in RCW 34.05.320; (c) at least  
5 one public hearing must be conducted with an opportunity to provide  
6 oral and written comments; and (d) a rule-making file must be  
7 maintained as required by RCW 34.05.370. In adopting (~~the~~) emergency  
8 rules consistent with this section, the board is not required to  
9 prepare a small business economic impact statement under chapter 19.85  
10 RCW, prepare a statement indicating whether the rules constitute a  
11 significant legislative rule under RCW 34.05.328, prepare a significant  
12 legislative rule analysis under RCW 34.05.328, or follow the procedural  
13 requirements of the state environmental policy act, chapter 43.21C RCW.  
14 Except as provided in sections 3 and 9 of this act, the forest  
15 practices board may only adopt recommendations contained in the forests  
16 and fish report as emergency rules under this section.

17 **Sec. 5.** RCW 76.09.390 and 1999 sp.s. c 4 s 707 are each amended to  
18 read as follows:

19 (1) Except as provided in subsection (2) of this section, prior to  
20 the sale or transfer of land or perpetual timber rights subject to  
21 continuing forest land obligations under the forest practices rules  
22 adopted under RCW 76.09.370, as specifically identified in the forests  
23 and fish report the seller shall notify the buyer of the existence and  
24 nature of such a continuing obligation and the buyer shall sign a  
25 notice of continuing forest land obligation indicating the buyer's  
26 knowledge thereof. The notice shall be on a form prepared by the  
27 department and shall be sent to the department by the seller at the  
28 time of sale or transfer of the land or perpetual timber rights and  
29 retained by the department. If the seller fails to notify the buyer  
30 about the continuing forest land obligation, the seller shall pay the  
31 buyer's costs related to such continuing forest land obligation,  
32 including all legal costs and reasonable attorneys' fees, incurred by  
33 the buyer in enforcing the continuing forest land obligation against  
34 the seller. Failure by the seller to send the required notice to the  
35 department at the time of sale shall be prima facie evidence, in an  
36 action by the buyer against the seller for costs related to the

1 continuing forest land obligation, that the seller did not notify the  
2 buyer of the continuing forest land obligation prior to sale.

3 (2) Subsection (1) of this section does not apply to road  
4 maintenance and abandonment plans.

5 NEW SECTION. Sec. 6. A new section is added to chapter 76.13 RCW  
6 to read as follows:

7 (1) The legislature finds that many small forest landowners are not  
8 in the financial position to adequately fund all of the fish blockage  
9 removal projects that are both critical to achieving the goals set  
10 forth in chapter 76.09 RCW, and required by the forest practices rules  
11 issued pursuant to the forests and fish report. The legislature  
12 further finds that a state-led cost-sharing program is necessary to  
13 assist small forest landowners with removing and replacing culverts and  
14 other man-made fish blockages that are present on their land and to  
15 help achieve the goals of the forests and fish report.

16 (2) The small forest landowner office must, if sufficient funding  
17 is available, establish in cooperation with the department of fish and  
18 wildlife a program designed to assist small forest landowners with  
19 repairing or removing fish blockages and assist lead entities in  
20 acquiring the data necessary to fill any gaps in fish blockage  
21 information. Lead entities shall use methods, protocols, and formulas  
22 for data gathering and prioritizing that are provided by the department  
23 of fish and wildlife.

24 (3) The small forest landowner office must actively seek out  
25 funding for the program authorized in this section. Funding may be  
26 obtained from state, federal, or private sources. Costs of a fish  
27 blockage removal project that are not covered by the program are the  
28 responsibility of the landowner.

29 (4) In implementing the program established in this section, the  
30 small forest landowner office must seek to provide the highest  
31 proportion of public funding available for the removal of a particular  
32 fish blockage.

33 (5)(a) The department, using ranked inventory information provided  
34 by the department of fish and wildlife as delineated in section 8 of  
35 this act, must establish an order for the funding of fish blockage  
36 removals on property owned by small forest landowners that ensures that



1 funding is provided first to the known fish blockages existing on  
2 forest land owned by small forest landowners that cause the greatest  
3 harm to public resources.

4 (b) As the department of natural resources collects information  
5 about the presence of fish blockages from submitted road maintenance  
6 and abandonment plans, it must share this information with the  
7 department of fish and wildlife and the technical advisory groups  
8 established in RCW 77.85.070. If the addition of the information  
9 collected in the road maintenance and abandonment plans, or any other  
10 changes to the scientific instruments described in section 8 of this  
11 act, alters the analysis conducted under section 8 of this act, the  
12 department of natural resources must alter the funding order  
13 appropriately to reflect the new information.

14 (6) The department of natural resources may accept commitments from  
15 small forest landowners that they will participate in the program to  
16 remove fish blockages from their land at any time, regardless of the  
17 funding order given to the blockages on a particular landowner's  
18 property.

19 (7) The program established in this section must be evaluated by  
20 the department of natural resources by December 31, 2008, and December  
21 31, 2013. The evaluations must measure the success of the program and  
22 identify any adjustments to the program that may be necessary.  
23 Evaluations conducted under this section should be linked to compliance  
24 monitoring under section 3(4) of this act. The results of the  
25 evaluations must be submitted to the appropriate committees of the  
26 legislature.

27 (8) To the extent possible, all efforts to correct man-made fish  
28 blockages in this section should be conducted within the context of any  
29 statewide culvert strategies.

30 NEW SECTION. **Sec. 7.** A new section is added to chapter 76.09 RCW  
31 to read as follows:

32 The department may not disapprove a forest practices application  
33 filed by a small forest landowner solely on the basis that fish  
34 blockages have not been removed if the small forest landowner filing  
35 the application has committed to participate in the program established  
36 in section 6 of this act for all fish blockages existing on the block  
37 of forest land covered by the forest practices application, and:

1 (1) The fish blockages existing on the block of forest land covered  
2 by the forest practices application are lower on the funding order list  
3 established for the program than the current projects being funded by  
4 the program; or

5 (2) Sufficient funding is not available for the program to share  
6 the costs of fish blockage removal with the small forest landowner on  
7 the block of forest land covered by the forest practice application.

8 NEW SECTION. **Sec. 8.** A new section is added to chapter 77.12 RCW  
9 to read as follows:

10 In coordination with the department of natural resources, the  
11 department must, if sufficient funding is available, establish a ranked  
12 inventory of fish barriers on land owned by small forest landowners  
13 based on the principle that culverts blocking the most fish habitat or  
14 causing actual damages to public resources would be replaced first.  
15 The department shall first gather and synthesize all available existing  
16 information about the locations and impacts of fish blockages in  
17 Washington. This information must include, but not be limited to, the  
18 most recently available limiting factors analysis conducted pursuant to  
19 RCW 77.85.060(2), the stock status information contained in the  
20 department of fish and wildlife salmonid stock inventory (SASSI), the  
21 salmon and steelhead habitat inventory and assessment project (SSHIAP),  
22 and any comparable science-based assessment when available. The  
23 inventory of fish barriers must be kept current and at a minimum be  
24 updated by the beginning of each calendar year.

25 NEW SECTION. **Sec. 9.** A new section is added to chapter 76.09 RCW  
26 to read as follows:

27 (1) The legislature finds that the definition of "forest road" as  
28 it exists in the Washington Administrative Code on the effective date  
29 of this section, and the definition of "forest land" as it exists in  
30 RCW 76.09.020 on the effective date of this section, are unnecessarily  
31 broad as they apply to the road maintenance and abandonment plan  
32 element of the forest practices rules. Therefore, the board must:

33 (a) Adopt by rule a new definition of the term "forest road" at  
34 least as that term affects road maintenance and abandonment plans. In  
35 redefining the term "forest road," the board must ensure a more narrow

1 interpretation than the current definition and expressly exclude  
2 residential driveways that are not used for forest practices from the  
3 definition;

4 (b) Clarify by rule that existing forest roads must be maintained  
5 only to the extent necessary to prevent potential or actual damage to  
6 public resources; and

7 (c) Clarify by rule the effect of the following terms used in the  
8 statutory definition of "forest land," at least as the terms apply to  
9 road maintenance and abandonment plans: (i) "Capable of supporting a  
10 merchantable stand of timber"; (ii) "being actively used"; and (iii)  
11 "incompatible with timber growing." In clarifying these terms, the  
12 board must ensure a more narrow interpretation than the current  
13 definitions provide and expressly exclude agricultural crop lands,  
14 pastures, and orchards.

15 (2) The board must adopt emergency rules under RCW 34.05.090 by  
16 October 31, 2003, to implement this section. The emergency rules stay  
17 in effect until permanent rules are adopted.

18 NEW SECTION. **Sec. 10.** A new section is added to chapter 76.09 RCW  
19 to read as follows:

20 (1) A small forest landowner means a forest landowner meeting all  
21 of the following characteristics: (a) An entity that has harvested  
22 from its own lands in this state an average timber volume of two  
23 million board feet in a calendar year during the three years prior to  
24 the year of submitting a checklist road maintenance and abandonment  
25 plan as described in section 3 of this act; and (b) an entity that  
26 certifies at the time of submitting a checklist road maintenance and  
27 abandonment plan that it does not expect to harvest from its own lands  
28 in this state more than an average timber volume of two million board  
29 feet in a calendar year during the ten years following checklist  
30 submission. If a landowner's prior three-year average harvest exceeds  
31 the limit of two million board feet in a calendar year, or the  
32 landowner expects to exceed this limit during the ten years following  
33 checklist submission, and that landowner establishes to the  
34 department's reasonable satisfaction that the harvest limits were or  
35 will be exceeded to raise funds to pay estate taxes or equally  
36 compelling and unexpected obligations such as court-ordered judgments

1 or extraordinary medical expenses, the landowner must be deemed a small  
2 forest landowner.

3 (2) For purposes of determining whether a person qualifies as a  
4 small forest landowner, the department, with assistance from the small  
5 forest landowner office created in RCW 76.13.110, shall evaluate the  
6 landowner under this definition as of the date that the checklist road  
7 maintenance and abandonment plan is submitted. A small forest  
8 landowner can include an individual, partnership, corporate, or other  
9 nongovernmental legal entity.

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