

Current Land-Use Laws and Zoning: Impacts on Private Forestlands

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This paper is part of a series of discussion papers written to provide background information on salient issues identified as important by participants at the *Saving Washington's Working Forest Land Base* forum in November 2004.

Abstract

Private industrial and non-industrial forest landowners in Washington face federal, state, and local regulations concerning the practice of commercial forestry. Such regulations certainly impact decisions related to conversion of forestlands into other uses.

This paper briefly describes relevant laws and regulations governing forestry operations in Washington, including the State Forest Practices Act (FPA), the State Forests and Fish Rules (FFR), economic mitigation programs associated with those rules, federal Habitat Conservation Plans (HCP's), conservation easements, forestry and conservation tax issues, and the State Growth Management Act (GMA).

The Forest Practices Act and the Forest and Fish Rules attempt to simultaneously maintain a viable forest products industry while affording protection for forest soils, fisheries, wildlife, water quantity and quality, air quality, recreation, and scenic beauty. This balancing act between viability and protection is explored through a discussion of several economic mitigation programs that have been designed to reduce compliance costs for non-industrial owners and thus prevent forest conversion to other uses. The paper also looks at studies that have compared FFR compliance costs for large and small forest landowners.

HCP's are discussed briefly as a mechanism to provide landowners with regulatory certainty and thus potentially offset a driver behind forestland conversion. The paper cites the Washington State application to obtain assurances from federal agencies that all forest practices activities in compliance with the state forest practices rules will satisfy federal requirements under the Endangered Species Act for aquatic species, as well as other HCP efforts in the state.

Conservation easements (CE's) are discussed as a voluntary legal means to provide private and public benefits and encourage conservation. Working Forest Conservation Easements (WFCE) are illustrated as mechanisms that may provide the social benefits of a viable forest industry while simultaneously maintaining public conservation values.

Tax issues (income, estate, property tax) are discussed in the context of incentives and conservation easements. In addition, several tax programs in King County are cited as offering substantial tax breaks to landowners in exchange for guarantees that land will remain in forestry for a number of years. In addition, a brief discussion of the forest excise tax credit under FFR is presented. Further analysis of how these types of tax programs impact forestland conversion is necessary, yet outside the scope of this paper.

I. Introduction

Industrial and non-industrial private forest landowners practicing commercial forestry in Washington face a myriad of federal, state, and local regulations as they pursue social and economic objectives. This paper focuses on how this regulatory environment, in concert with other changing social and economic factors such as population growth, comparatively high prices for real estate (compared to revenues derived from forest management), and a desire on behalf of society to live in rural “ex-urban” areas, is affecting the decision-making processes of landowners as they decide whether to remain in forestry or convert lands to other uses.

It should be noted that laws and regulations affect different landowners in different ways, depending on the size of their ownership and their legal construct. Although corporate, private, and even governmental landowners share certain legal frameworks, each sector encounters legal issues unique to its ownership. Land management objectives can vary widely between the major types of landowners (Meidinger 1998). This paper will focus primarily on various types of industrial and non-industrial private forest landowners. Governmental and non-profit owners are discussed briefly within the context of conservation easement law.

This paper is intended to be both descriptive and analytical. It will describe relevant laws and regulations governing forestry operations and affecting conversion issues in Washington, including a brief history of the State Forest Practices Act (FPA), the State Forests and Fish Rules (FFR) of 1999, economic mitigation programs associated with those rules, federal Habitat Conservation Plans (HCP's), conservation easements, tax issues, and the State Growth Management Act (GMA).

This paper will also provide a brief analysis of how some land-use laws and zoning regulations may be affecting policy dimensions of the working forest conversion issue, including shifting ownership patterns and negative and positive incentives for conservation. Several analyses of the impacts of FFR and associated economic mitigation programs on non-industrial private landowners are included. A brief section on the compliance costs of FFR to small and large forest landowners is also included. The legal framework of government landowners, the scientific validity of statutes and rules, and *proper levels* of regulatory and conservation burden for private landowners in Washington are not discussed.

Practicing private forestry in Washington is challenging for landowners given the multilayered assortment of federal, state, and local laws and regulations governing the industry.¹ The following section discusses some of the most relevant statutes:

¹ It should be noted that landowners' regulatory challenges stem from societies attempt to balance environmental protection with recognition of property rights and economic activity. Thus, while complying with regulations is indeed one challenge faced by landowners, creating equitable and fair environmental laws is a challenge faced by our entire community.

II. State Forest Practices Act (FPA)

The current Forest Practices Act (chapter 76.09 RCW) was enacted in 1974 and has been amended thirteen times. The Act created what is now a 13 member Forest Practices Board to adopt rules that would simultaneously maintain a viable forest products industry to serve both public and private interests while affording protection for forest soils, fisheries, wildlife, water quantity and quality, air quality, recreation, and scenic beauty (RCW 76.09.010). Forest practice rules govern road construction and maintenance, timber harvesting, reforestation, and the application of forest chemicals. In May 1987 the rules were revised to strengthen protection for riparian areas, fish, wildlife, and water quality based upon *first generation* negotiations of the collaborative Timber Fish and Wildlife forum (TFW)². *Second generation* negotiations (the 1989 Sustainable Forestry Roundtable) spawned more revisions in 1992 affecting wetlands, reserve trees, and harvest size and timing. In 1996, revisions spurred by the listing of northern spotted owl and marbled murrelet under federal or state endangered species acts added “critical wildlife habitat” for those species as well as other mitigation measures (WFPA 2003).

It should be noted that Washington’s State Environmental Policy Act (SEPA) also applies to Forest Practices. The FPA requires the Forest Practices Board to classify all forest practices according to their potential environmental impact. All forest practices that could have a *significant adverse environmental impact* must undergo SEPA review (Goldman pers. comm., 2005).

III. Washington State’s Salmon Recovery Act (SRA) and the Forests and Fish Rules (FFR)

Federal environmental laws prompted changes in the State Forest Practices Act. In 1997 the National Marine Fisheries Service listed nine stocks of salmon and steelhead as threatened and endangered under the Endangered Species Act (ESA), including several runs in Washington. At the same time, more than 300 stream segments on Washington forestlands were identified as non-compliant with Section 303(d) of the federal Clean Water Act. These emerging events led to discussions among the TFW caucuses to develop new forest practices rules that would 1) respond to these emerging clean water and endangered species concerns and 2) retain state and local control over salmon recovery efforts, and 3) ensure longer-term timber-production while avoiding another “spotted owl crisis” (Goldman pers. comm. 2005, Oneil 2003, WFPA 2003). Collaborative discussions among TFW members (minus the conservation interest groups, who departed the negotiations in 1998 disputing the scientific basis of the rules) led to the development of the Forest and Fish Report and the subsequent adoption of those rules as part of ESHB 2091, the Salmon Recovery Act (SRA) (Sec. 101, 75.46 RCW, 1999). The FFR addressed riparian function, identification of forest roads contributing to habitat degradation, steep and unstable slopes, and adaptive management and monitoring (Sec. 101, 75.46 RCW).

The goals of the FFR were not only to protect aquatic resources but to do so while “maintaining commercial forest management as an economically viable use of lands” within a “regulatory

² TFW participants included: Federal agencies (US Fish and Wildlife, NOAA Fisheries, Environmental Protection Agency), State agencies (Departments of Natural Resources, Ecology, and Fish and Wildlife), industrial and non-industrial forest landowners, environmental groups and treaty tribes. Counties were part of the 1989 discussions.

climate and structure more likely *to keep landowners from converting forest lands to other uses that would be less desirable for salmon recovery* “(ibid, emphasis added). In other words, the legislature was concerned that the FFR may have the unintended consequence of forcing landowners out of commercial forestry. The legislature was particularly concerned with small forest landowners, who would disproportionately feel the financial burdens of riparian protection measures (compared to industrial landowners) given their 1) more limited land base and smaller holdings, 2) limited financial resources to repair roads, plan and lay out timber sales, and 3) lower elevation lands with higher proportions of fish-bearing streams (Goldman pers. comm., 2005). Realizing this, the following three legislative mitigation programs were created to help mitigate the costs of implementing the FFR.

1. Mitigation: The Forest Riparian Easement Program (FREP)

Recognizing that the SRA may have negative repercussions for landowners, particularly small non-industrial forestland owners (NIPF), the legislature created the FREP, as well as other companion programs (discussed below), to avoid “the further erosion of the small forest landowners’ economic viability and willingness or ability to keep the lands in forestry use which would reduce the amount of habitat available for salmon recovery and conservation of other aquatic resources...” (WAC 222-21-030). Note that the economic mitigation programs specifically target small forest landowners, who arguably have less flexibility than industrial owners in mitigating the impacts of riparian set asides. The legislature is also required under the Regulatory Fairness Act (RCW 19.85) to address disproportionate impacts on small landowners (Oneil 2003, Perez-Garcia et al 2001, Zobrist 2003).

The FREP allows landowners to sell timber rights of non-harvestable trees in riparian areas (within buffers) to the government under a 50-year easement for a value equal to one-half the value of the non-harvestable timber. If the non-harvestable timber value is more than 19.1% of the total harvest value, compensation rates go up (Oneil 2003, Zobrist 2003). The impact of the FREP and its effectiveness in mitigating costs and preventing conversion of forestlands is discussed below.

2. Mitigation: Alternate Planning under FFR

A second mitigation program designed to offset costs to small landowners, by providing greater flexibility in implementation, was included in FFR: the Alternate Planning program. Appendix H of the 1999 FFR states, “A landowner may propose, through an alternate plan, a site management strategy different from the basic rules...provided that when judged in its totality, the alternate plan must provide protection for public resources at least equal in protection provided by the basic rules.” (SFLO website) The effects of the Alternate Planning program on lowering compliance costs are discussed along with FREP implementation below.

3. Mitigation: Family Forest Fish Passage Program

The 1999 FFR required forest landowners to complete a road maintenance and abandonment plan. In 2003 the Washington State Legislature again recognized that the 1999 FFR may “cause an unforeseen and unintended disproportionate financial hardship on small forest landowners” by

prescribing mandatory road management and abandonment plans. The legislature then passed HB 1095 to assist NIPF with forest road maintenance and abandonment planning through the implementation of a cost-share program that “provides 75-100 percent of the cost of repairing, replacing, or removing fish barriers such as culverts, dams, weirs, spillways, or other artificial in stream structures that block fish from migrating to upstream habitat.” (WA SFLO 2005) The program appropriated \$1.06M in 2004 for the removal of 36 fish barriers statewide, opening up over 58 miles of fish habitat. (SFLO Legislative Briefing, 2005)

4. Assessing the Impacts of FFR Economic Mitigation Programs on NIPF

The potential policy impacts of the FFR on NIPF landowners, as well as the performance of the FREP and Alternate Planning mitigation programs, have been assessed by Zobrist (2003) and Oneil (2003). NIPF lands are of particular concern, given the disproportionately high costs associated with FFR compliance for those owners, and the location of those lands (generally, NIPF lands abut urbanizing landscapes). Zobrist concludes that despite the economic mitigation efforts discussed above, “some small landowners will potentially incur significant economic losses as a result of the FFR.” (Zobrist 2003) (Impact variations between landowners are high, given the high variation in riparian conditions faced by small landowners.) High economic costs may drive landowners with high percentages of riparian acreage on their properties to convert their lands to other uses. Zobrist states that the landowners decision to convert forestlands to other uses is not only associated with the development value of his or her property in relation to FFR, but is also associated with other *non-economic* values the landowner associates with their property, as well as other relevant regulations (e.g., Growth Management Act or other zoning restrictions) that may prohibit economically motivated management activities.

Oneil (2003) assessed the effectiveness of implementing the Alternate Planning program and provides several areas of criticism. First, landowners are loathe to risk using alternate plans in determining legal compliance with FFR given the risk and adverse effects of having those alternate plans rejected based on subjective interpretations of amorphous program goals such as “protection” and “effectiveness”. Second, the requirement for an alternate plan interdisciplinary assessment team generates high costs in time and money for landowners, discouraging the use of the program. Third, Oneil cites the potential number of alternate plans subject to governmental review at 67,500 — a number that has the potential to bog down even the most efficient bureaucracy.

The use of alternate planning “templates” to counter some of these barriers is discussed by Oneil and others (Zobrist, Gehringer, Lippke 2004). According to the latter study, “the purpose of templates is to establish specific management guidelines for common situations, such as young, overstocked stands.” (Zobrist et al 2004) Pre-approved alternate plans would prevent landowners from developing costly alternatives “from scratch.” (ibid) The authors are developing tools that would help small landowners develop and implement such templates. The use of templates, if accepted by regulators as adequate under the FFR, should offer savings to small landowners.

5. FFR Impacts on Large and Small Forest Landowners

Perez-Garcia et al (2001) assessed the compliance costs of proposed FFR on small and large businesses. Under the analysis, small businesses are defined as those businesses with 50 or fewer employees. “Compliance cost is defined as a loss in current revenue, a loss in asset, and higher operating costs.” (Perez-Garcia et al 2001) Costs are in terms of the cost per one hundred dollars of sales. According to the study, compliance costs are 25.6% for small businesses and 18.5% for large businesses, where percentages represent cost of compliance relative to timber asset value (or total business value). For Riparian Zone Management compliance, costs were estimated as 19.1% for small businesses and 11.1% for large businesses, which seems to validate the assumption cited above that small landowners have less flexibility in terms of riparian area management when compared to industrial owners. Road maintenance and stream crossing mitigation costs for large businesses are estimated at 22.1% and 31% for small businesses. This explains the creation of the Family Forest Fish Passage Program, targeting small forest landowners, cited above. The authors cite declining employment and wage losses as being disproportionately distributed to small businesses — losses are estimated at \$160M in the saw-milling and forestry sectors of western Washington, assumed to be mostly small businesses. Compensation programs (FREP) would pay \$0.68 for every lost dollar for western Washington small landowners. Perez-Garcia et al found that total compensation would amount to only \$3.9M for the small businesses sampled compared to \$5.7M in riparian compliance costs for those same businesses. In addition to this discrepancy, Zobrist (2003) argues that FREP does not have the capacity to deliver funding for all landowners who may wish to participate in the compensation program. Zobrist cites “current” (2000) funding levels for the program as roughly \$2.5M per biennium, compared to a need of \$24M per biennium for eligible landowners in western Washington alone. Oneil (2003) cites one riparian easement in western Washington costing the state 20% of the total biennium allotment, raising important questions as to whether the legislature will be able to fully fund the program.

We now turn to other laws, regulations, and programs that may affect forestland conversion.

IV. Habitat Conservation Plans

In February of 2005 the State of Washington made application for a statewide Habitat Conservation Plan (HCP) “to obtain assurances from the National Marine Fisheries Service and U.S. Fish and Wildlife Service that all forest practices activities in compliance with the state forest practices rules and administrative program will satisfy federal requirements under the ESA for aquatic species.” HCP’s are authorized under the ESA to allow for “incidental take” of endangered species within an approved conservation plan. If approved, a statewide HCP would cover 9.1 million acres of private forestland and would ensure that landowners who comply with the State Forest Practices Act standards would also be in compliance with ESA for aquatic species for a period of 50 years (DNR 2005). Such assurances, or regulatory certainty, will have repercussions for landowners’ decision-making regarding long-term forest management. It could be argued that regulatory uncertainty may drive landowners to exit the commercial forest market due to fluctuations or unknowns in terms of future regulatory costs.

Some 2.5 million acres of WA DNR and private forestland are managed under HCP's. Some industrial landowners, including West Fork Timber Company LLC, Plum Creek Timber Company, Port Blakely Tree Farms, and Simpson (now Green Diamond) already have HCP agreements with the federal government. Non-industrial landowners are also pursuing a "cooperative" HCP for non-industrial forest management activities in Lewis County that would cover 10-15,000 acres (WFPA 2003).

V. Conservation Easements

A distinct body of common law, servitudes, allows government entities and non-profit organizations such as land trusts to purchase conservation easements or "otherwise negotiate agreements limiting owners' use of land in specified ways" (Meidinger 1998). Conservation easements can provide financial incentives for landowners to manage lands for long-term conservation and stewardship values, and are a useful tool in conserving working forests. In Washington, such servitude laws are found in RCW 84.34.200-250 (acquisition), RCW 64.04.130 (easements/conveyances), and RCW 84.36.500 (tax exemptions for conservation of farm land) (Evergreen State College, online).

A detailed discussion of the variety of easement types and mechanisms, including the increased use of "working forest easements" is of great importance to the Working Forest Forum, yet outside the scope of this paper. The following is a brief summary of conservation easements (CE's), how they may incentivize stewardship and conservation, and Working Forest Conservation Easements (WFCE's).³

Conservation easements are voluntary and legally enforceable agreements between landowners and easement holders that restrict landowner rights to engage in a variety of activities, such as timber harvest, mining, or residential or commercial development in order to protect the land for ecological, wildlife, watershed, scenic, recreation, or other public values. CE's are generally donated to, or purchased by, non-profit conservation organizations (i.e. land trusts) or public agencies. CE's are unique, that is, individual CE's are customized to mesh with the physical characteristics of a particular landscape and blend the goals of the landowner (the "grantor") with the easement holder (the "grantee"). Given the fact that CE's are unique joint agreements between landowners and easement holders based on mutually agreed upon goals and objectives, one can imagine a range of easement types. CE's should not be thought of as "locking up" parcels of land, in that the permitted and restricted activities governed by any CE are agreed upon by the participants.⁴

As mentioned above, CE's can provide financial incentives to landowners to conserve certain values on their lands by selling or donating certain "rights" to other parties. Those benefits can be donative, that is, the donation of conservation restrictions through CE's may be deductible for federal and state income tax purposes. CE's can also be conveyed by sale. Either way, the value of the CE is the "difference between the fair market value of the property before and after the

³ See Best and Wayburn, as well as Lind for discussions of working forest easements.

⁴ Management standards must be in accordance with relevant laws, and will usually be "above and beyond" those required by law.

easement restrictions are put in place (Pacific Forest Trust, 2005).” CE’s can have other tax benefits for landowners, including reducing or eliminating estate taxes, by replacing the *speculative value* of land with a reduced *current use value*.

A Working Forest Conservation Easement (WFCE) is a rather amorphous term that implies that the agreement between landowner and easement recipient will allow for the continued existence of forest management activities on the property. Typically, the WFCE will employ a tailored forest management plan to specify the distinct goals and objectives. For example, a WFCE may specify practices that encourage a specified forest type (i.e. structurally complex riparian forests), or protect certain forest values (i.e. threatened and endangered species). Importantly, WFCE’s allow landowners to continue to derive economic value from their lands through timber management. In addition, WFCE’s can satisfy broader societal goals (at broader spatial scales) by sustaining working forests and associated benefits while conserving public values (Lind 2001).

VI. Other Tax Issues

Landowner decision-making and forest conversion are driven by more than environmental laws; tax benefits and programs are also used to incentivize sustainable forestry and conservation. As mentioned above, conservation easements can provide mechanisms that promote sustainable forestry, and can provide benefits to landowners by reducing income and estate taxes by stripping speculative values from properties. Property taxes can also be affected by CE’s by reducing the development potential of a property and thus reducing the assessed market value and lowering the owner’s property tax. Tax incentives do not occur strictly through the use of CE’s. For example, governments can offer tax breaks to incentivize conservation. Wadsworth cites three tax programs (Timberlands and Forestland Taxation, and the Public Benefit Rating System) in King County offering substantial tax breaks to landowners in exchange for guarantees that land will remain in forestry for a number of years. In addition, a forest excise tax credit is available to any landowner impacted by FFR. The credit refunds 16% of the forest excise tax, yet according to one analysis “the tax credit does not effectively mitigate the economic losses resulting from new riparian buffers” (Zobrist 2003). Further analysis of how these types of tax programs impact forestland conversion is necessary, yet outside the scope of this paper.

VII. The Growth Management Act (GMA)

GMA (RCW 36.70A, WAC 365-195 procedural criteria for adopting comprehensive plans and development regulations and WAC 365-190 guidelines to classify natural resource and critical areas) defines a statewide land-use planning law that requires counties and cities to develop 20-year comprehensive plans to designate urban growth areas and conservation areas, as well as “forest lands that are not already characterized by urban growth and that have long-term significance for the commercial production of timber” (RCW 36.70A.170). Objective #8 in the GMA is to “Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.”

The effectiveness of the GMA in achieving the conservation of forestlands has been criticized. Wadsworth, analyzing the fragmentation of forestlands in King County argues that “Urban growth boundaries, zoning regulations, financial incentives, and technical assistance programs have slowed the conversion, but they have not solved the problem” (Wadsworth 1999). In the King County case study, growth and fragmentation of NIPF forestland is occurring within forestlands of the primarily non-industrial Rural Forest District which is not subject to *specific* zoning restrictions (ibid). Even the Forest Production District (FPD) of the County, made up of large tracts of industrial timberlands and zoned for one home per 80 acres, is experiencing development along edges and major highways despite GMA constraints and objectives. Wadsworth concluded in 1999 that tightening of regulations within the FPD may be necessary (and controversial) to restrict development, while emphasizing that incentive programs, technical assistance, and conservation easements will also be useful (and less controversial) conservation tools. As it turns out, as of this writing, it appears that much of the FPD in King County (i.e. the Snoqualmie Tree Farm) is subject to a conservation easement, allaying concerns over further zoning regulations (Wadsworth pers. comm., 2005). Further analysis of the effectiveness of the GMA in meeting its working forest conservation objectives is needed, but is outside the scope of this paper.

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