

**The Status of Washington State's Forest Practice
Habitat Conservation Plan:
Its Origin, Objectives and Possible
Value for Different Landowners**

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Abstract

The purpose of Washington State Forest Practice Rules is to regulate certain forest operations – especially harvesting and road construction – on private lands to protect public resources. These public resources include water, wildlife, cultural resources and soil productivity. The purpose of the Federal Endangered Species Act (ESA) and the Federal Water Pollution Control Act (Clean Water Act) is to protect plant and animal species threatened with extinction and to protect the nation's waters from pollution. The Forest Practices Division within the Washington State Department of Natural Resources (DNR) is the regulating agency for the Forest Practice Act. The proposed Forest Practices Habitat Conservation Plan (FPHCP) will acquire federal assurances that forest practices operating in compliance with state rules will meet federal requirements under the ESA and also meet requirements under the Clean Water Act. The new rules, upon which the FPHCP is based, were adopted as a result of recommendations from the Washington Forests and Fish Report of 1999.

The potential value of the Forest Practices HCP for forest landowners in Washington include regulatory certainty and achieving a level of public confidence that forest practices in the state are conducted in a careful and thoughtful way. These benefits are viewed as significant by industrial forest landowners and may increase the long-term viability of industrial forest ownership in Washington. Small, non-industrial forest landowners, sometimes referred to as family forest owners, may be affected differently by the new rules. This class of forest ownership comprised nearly half the private forest land in Washington. Cumbersome permit application processes, complex prescriptions, significant restrictions on some harvest practices, and increased costs of road maintenance add up to significant disincentives for some small landowners. Many family forest owners believe the new rules are so burdensome as to reduce the viability of this class of forest ownership. The perceived disincentives may increase the rate of conversion of small forest parcels to non-forest use.

The Forest Practices Division within the Washington State Department of Natural Resources regulates forestry on 5 million acres of State and private forestlands. The proposed Washington State Forest Practices Habitat Conservation Plan (FPHCP) will ensure landowners who are in compliance with the state forest practice rules and administrative program that they meet federal requirements under the Endangered Species Act (ESA) of 1973 for aquatic species. The State rules also meet requirements of the Federal Water Pollution Control Act (Clean Water Act). The FPHCP and the 2001 forest practice rules, on which it is based, are implementing actions recommended in the Washington Forests and Fish Report, dated April 29, 1999.

I. Forests and Fish Report

The Forests and Fish Report was a response to listings of many Pacific salmon species under the federal ESA, which affected nearly 75% of the state. Many streams were also listed as polluted under the federal Clean Water Act, 300 of which were listed for temperature. This affected forestland. The Forest and Fish stakeholder groups, including federal and state agencies, treaty tribes, counties, and small and large private forest landowners jointly produced a science-based plan for protecting water quality and fish habitat covering 9.1 million acres of non-federal and non-tribal forestland in Washington State.

The Forests and Fish Act, passed by the Washington State Legislature and signed by Governor Gary Locke in 1999, directed the Forest Practices Board to adopt rules consistent with the recommendations in the Forests and Fish Report. The permanent rules were adopted in 2001. The rules gave Washington the greatest level of protection for forested streams in the United States (News Release No.05-GOV/DNR, February 9, 2005).

Washington's new Forests and Fish forest practice rules are designed to improve water quality and habitat for aquatic species, including native salmon, and for maintaining commercial forest management as an economically viable land use in the state. Significantly increased protection over previous rules is expected in several key areas:

- Identification and protection of unstable slopes and protection of streams from slope failure.
- Construction, maintenance and abandonment of forest roads.
- Management of riparian areas.

In addition, an active, adaptive management program was adopted and funded. The Forest Practice Adaptive Management program will advise the Forest Practices Board of new science-based information as it becomes available.

II. Federal Assurances

The Forests and Fish Act also directed the governor to obtain ESA assurances on behalf of the State of Washington. "Gaining federal assurances from the Environmental Protection Agency, the Fisheries branch of the National Oceanic and Atmospheric Administration, and the United States Fish and Wildlife Service will ensure that landowners who comply with Washington State's forest practices rules will also meet the requirements of the Endangered Species Act and

the Clean Water Act” (“Forests and Fish Report, At Work-On the Ground”, Washington State Department of Natural Resources, undated.)

On February 9, 2005, Governor Christine Gregoire and Commissioner of Public Lands Doug Sutherland jointly signed an application to the federal government for a programmatic, statewide HCP. The plan is a 50-year contract with the federal government for protection of Washington's streams and forests. DNR is now engaged in a collaborative effort with the federal agencies to obtain assurances that these rules comply with the ESA.

According to a report from DNR to the Senate Natural Resources, Ocean, and Recreation Committee and the House Natural Resources, Ecology, and Parks Committee, (letter from Pat McElroy, Executive Director of Regulatory Programs to Sen. Ken Jacobsen and Rep. Brian Sullivan, February 7, 2005) DNR Forest Practice Division has worked closely with other state agencies, federal agencies, tribes, small forest landowners, the timber industry, and environmental organizations to develop the necessary documents to make formal application to the U. S. Fish and Wildlife Service and NOAA Fisheries for Federal Assurances under 16 U.S. C. Sec. 1533(d) and Section 10 of the ESA.

The National Environmental Policy Act (NEPA) required that an Environmental Impact Statement (EIS) be prepared to analyze the effects of the FPHCP. Public comments to the Draft EIS have been taken and are being reviewed. Responses to comments should be complete by October, 2005. Revisions to the draft FPHCP and draft EIS based on comments and other efforts for clarification, should be complete by November 2005. The state is seeking “incidental take permits,” evidence that adequate assurances have been provided through the FPHCP, before the end of 2005.

III. Intended Consequences of the HCP

The purpose of the HCP must be considered in the context of the Forests and Fish Report and the forest practice rules that codified it. Several consequences are expected.

- The purpose of the FPHCP, in narrow legal terms, is to obtain “incidental take permits” for ESA-listed aquatic species specifically covered in the FPHCP. Operations on private forestlands in Washington can proceed with confidence that any incidental “take” of a covered species that may occur as a result of operations compliant with the regulations will not result in a determination by the federal agencies of a violation of the ESA.
- In a broader sense, the Forests and Fish Report, subsequent forest practice rules, and assurances from the federal agencies as a result of the FPHCP are intended to lead to enhanced conservation of aquatic systems on Washington's private forestlands. This was clearly a widely shared motivation of the Forests and Fish Report participants.
- An important expectation for many of the Forests and Fish Report participants was to achieve regulatory certainty for forest operations in the state. All stakeholders benefit

from science-based forest practices rules, predictable resource protection, and predictable costs.

- An important outcome for state and federal agencies as well as for forest landowners is providing assurances to the general public that Washington's forest lands are being well cared for and that fish, wildlife, and clean water are being protected. There is a general sense that the public expects all stakeholders to work together to provide a wide array of environmental, social, and economic outputs. Forest landowners are anxious to demonstrate they are delivering.

IV. How Does the HCP Affect the Viability of Working Forests in Washington?

For the purposes of the Working Forest Forum, how do the Forests and Fish Report, the forest practice rules that come from the report, and the FPHCP contribute to the goal of maintaining working forests in Washington. Multiple perspectives exist. Intended consequences of the Forest and Fish process are clearly positive and well meaning, providing benefits for all stakeholders. However, unintended consequences may make the outcome uncertain.

The timber industry can be credited with initiating and supporting the process. Faced with potentially much to lose, the industry had much to gain by a successful process. The prospects of repeating the uncertainty and disruption of the 1980s over northern spotted owl and other listed species were unacceptable. With salmon listings and other aquatic issues looming, a better outcome was needed to ensure long-term viability of industrial forestland ownership in Washington. The HCP provides a way forward that has the potential of regulatory certainty. But there are costs associated with the new rules.

All stakeholders in the Forest and Fish process contributed an immense amount of human resources as well as direct financial support. More significant for timber companies may be the 20% costs¹ estimated by the Cost Benefit Analysis that is attributed to the new forest practice rules. Yet the costs are judged acceptable in light of the likely regulatory alternatives — a key consideration when making decisions on maintaining forest ownership in Washington.

Regulatory certainty is the number one issue for timber companies when considering expected outcomes from the HCP. It can give companies confidence to make investments in forestland in Washington. This can be true of untraditional organizations such as Timber Investment Management Organizations (TIMO's) as well. A stable regulatory environment can be an important factor, providing a source of confidence when considering positioning of forestland assets. Industry investors and landowners cite California as an example of an uncertain regulatory climate, featuring multiple layered regulatory authorities, and casting doubt on future investments in commercial forestlands.

Regulatory certainty depends upon achieving the conservation goals in the FPHCP and the continued support of the process by all stakeholders. Public opinion surveys have shown

¹ Cost Benefit Analysis for New Proposed Forest Practices Rules Implementing the Forests and Fish Report, 2/21/01, John Perez-Garcia.

continued gains in positive public perception of forest industry stewardship as they have become aware of the Forests and Fish protection measures (WFFPA opinion survey results, Bill Wilkerson, 2005). A generally satisfied public is unlikely to demand changes in forest practice regulations.

As with any negotiated agreement, not all stakeholders got everything they wanted from the Forest and Fish Report and subsequent rules. Many still believe the HCP may not provide adequate protection for aquatic species. Not all state environmental organizations sanctioned the Forests and Fish Report. Tribes, while supporting the report, have separately raised issues of continued concern. Regulatory certainty depends upon the continued general acceptance of the new forest practice rules by the stakeholders and on the continued public perception of good stewardship on the part of forest landowners, large and small.

In 2004 Washington's forest sector contributed \$14 billion in gross business income according to the State's Department of Revenue. While industrial forest lands in Washington contribute significantly to the State's economy and provide an abundance of ecological services, small non-industrial forestland ownership accounts for a nearly half of the private forestland acreage in Washington. According to the Washington Farm Forestry Association (WFFA), between 30,000 and 60,000 non-industrial forest landowners control this significant portion of the private forestlands in Washington (Sherry Fox, personal contact, 2005). In terms of forestlands most likely to be converted to other uses, this ownership class is most critical.

Assessments have demonstrated that non-industrial forest landowners, sometimes referred to as Family Forest Owners, are disproportionately impacted by Forest and Fish forest practice rules. The WFFA currently views the Forest and Fish forest practice rules as a negative incentive to continued ownership in Washington and is seeking mitigation for the economic damage resulting from the rules.

The FPHCP includes a proposal to mitigate the disproportionate impact to small landowners by exempting 20-acre parcels from some portions of some rules. But small landowners argue that this exemption is not helpful because, as applied currently, other streamside requirements negate any intended relief. In any case, economy of scale works to the disadvantage of small land owners. Complex rules such as the three tiered approach to riparian management require space to move prescriptions around as well as the expertise required from biologists, silviculturists and legal support. Family forest owners often cannot afford this kind of professional help (Sherry Fox, personal contact, 2005).

Recognizing the disparity of economic impacts between large and small landowners, the Legislature authorized the Forest Riparian Easement Program to provide funds for purchasing easements along streams on small non-industrial forestlands, partially compensating owners for leave-tree requirements. This program is viewed as working well but is seriously under funded to mitigate impacts across the ownership class. The WFFA estimates that it would take \$2 billion over the life of the FPHCP to compensate those landowners that could potentially harvest timber from riparian zones (Sherry Fox, personal contact, 2005). Only \$14 million has been appropriated over the last two biennia.

The FPHCP does allow for alternate plans for all lands owners as long as they provide equal or better protection to aquatic resources as under the prescriptive rules. This would seem to have potential benefit to small landowners. In practice, alternate plans are extremely problematic as individual cases must be assessed and scientific evidence is required to support the assertion of equal or better protection as a result of the alternate plan. Alternate plan templates could provide cost effective, science-based support for small landowners but they are not yet acceptable. Applying a portion of the resources devoted to adaptive management research could help solve issues for small non-industrial landowners, who as a group feel underserved by the adaptive management provisions in the Forest and Fish Report.

Many small non-industrial forest landowners believe the Forest and Fish rules and the FPHCP create uncertainty over the financial viability of this class of forestland ownership in Washington. The demographics of this ownership group, average age near 70, (Sherry Fox, personal contact, 2005) forces owners to consider whether or not their heirs will continue ownership in light of perceived regulatory disincentives. Intergenerational transfer issues may be exasperated by perceived uncertainty created by increasingly complex and costly regulations.

Proponents of the FPHCP recognize the concerns of the non-industrial or family forest owners. They point out the advantages that all forestland owners in Washington will achieve if federal assurances are provided. Family forest owners will no longer face the uncertainty of compliance with federal salmon or clean water regulations. If they conduct operations in compliance with the new forest practice rules they cannot be prosecuted if they inadvertently "take" a listed species covered by the ESA.

Yet some family forest owners question the need for this protection, noting that the new rules offer defensible protection from federal regulations and third-party lawsuits. These assurances can come at a high cost to some small landowners challenging the proposition that the federal assurances are worth the costs. However, without federal assurances, which the FPHCP will provide, potential challenges to the rules pose a continued risk to the forest practice permit process.

According to DNR, "Federal assurances are important and advantageous to all forest landowners. Assurances will decrease legal risks for both the state and landowners, will impart more stability and predictability into the regulatory program, and help insure long-term funding stays in place" (Washington State Department of Natural Resources, News Release, "Family Forest Owners and Federal Assurances", February 20, 2004).

IV. Conclusion

The Forests and Fish Report, forest practice rules and FPHCP are likely to increase the probability of industrial forest lands persisting in Washington, although risks remain and the outcome is uncertain over time. The situation may be different for non-industrial forest landowners or family forest owners. If the forest practice rules are significantly increasing financial burdens, in the view of non-industrial forestland owners, a complex combination of factors may accelerate the conversion of these lands to non-forest uses.

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