

**PRELIMINARY ECONOMIC ANALYSIS**  
**Forest Practices Board**  
**Rule Making Affecting Riparian Open Space Program**  
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**OBJECTIVES**

The Forest Practices Board is considering a rule change to implement amendments to the Riparian Open Space program made by Substitute Senate Bill (SSB) 5401 in the 2009 legislative session. The Riparian Open Space Program is authorized in the Forest Practices statute, chapter 76.09 RCW, and covered under the forest practices rules in Title 222WAC.

The Board's objective is to make changes to chapter 222-23 WAC as required to bring it into conformance with the legislative changes made to the Riparian Open Space Program as codified in RCW 76.09.040.

**CONTEXT**

As part of legislation implementing the Forests and Fish Report in 1999, the Legislature added the Riparian Open Space Program to the Forest Practices Act. The program was established to provide landowners compensation for islands of forested lands within unconfined avulsing channel migration zones<sup>1</sup> that could no longer be legally harvested under the new changes to the forest practices laws. The Department of Natural Resources was directed to purchase qualifying riparian lands isolated by river channels (in fee or in a conservation easement interest) in order to dedicate the use of that land for public ecological protection and fisheries enhancement.

To date, DNR has purchased 12 conservation easements under the Riparian Open Space program on 923 acres of qualifying lands for a total amount of approximately \$3,592,000. Funding for the program is subject to legislative appropriation specific to the program each biennium. Legislative appropriations to date have exceeded expenditures under the program because it has been difficult for landowner-applicants to meet the requirement that the timbered islands on their

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<sup>1</sup>The original Riparian Open Space legislation contained the following definitions:

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

"Unconfined avulsing stream" means generally fifth order or larger waters that experience abrupt shifts in channel location, creating a complex floodplain characterized by extensive gravel bars, disturbance species of vegetation of variable age, numerous side channels, wall-based channels, oxbow lakes, and wetland complexes.

property were created by avulsion, an abrupt (sudden and perceptible) change in the course of a stream, rather than a gradual and imperceptible one. All the Riparian Open Space acquisitions to date have been by conservation easement because none of the applicants under the program were willing to sell their qualifying land in fee.

SSB 5401 made four major changes to the existing law that established the Riparian Open Space Program:

1. Changed the type of channel migration zone lands eligible for acquisition from “unconfined avulsing channel migration zones” to “unconfined channel migration zones”, removing the requirement to provide evidence of avulsion;
2. Expanded the lands eligible for acquisition to include private forest lands that contain critical habitat for threatened or endangered species as designated by the Board, greatly increasing the amount of lands potentially eligible and taking them beyond riparian areas into the larger forested lands of the state;
3. Removed the authority for DNR to purchase fee title interest in eligible lands, allowing acquisition of permanent conservation easements only; and
4. Gave the landowner a choice to convey an interest either in the land (with the trees) or in the trees only (this option was previously authorized by the Board in rule in 2001).

SSB 5401 was introduced on behalf of the Northern Spotted Owl Working Group which was established as a part of the settlement of litigation that concerned habitat for the owl. The group worked to develop incentives for private landowners to support and protect endangered and threatened species on their lands. This bill significantly expands the original Riparian Open Space program by providing a mechanism to compensate landowners for forested lands which cannot be harvested under forest practices rules because they contain critical habitat for a threatened or endangered species.

The amount of compensation to be paid to the landowner for a conservation easement on qualifying lands is determined by applying a cookbook formula multiplying the timber cruise volume on the qualifying land by timber stumpage values established elsewhere in RCW for timber harvest excise tax purposes. If an interest in the land is being conveyed in addition to the trees, compensation includes an additional amount equal to the acreage of the qualifying land multiplied by forest land value tables established elsewhere in RCW and revised annually by the Department of Revenue.

## **PROPOSED RULE**

The changes made in the Riparian Open Space statute by SSB 5401 require several changes to rule language for the program in chapter 222-23 WAC (the four major changes are described above). The first change noted above (dropping “avulsing”) will also require a change to a definition in WAC 222-16-010. Forest Practices staff recommends changing the title of chapter 222-23 WAC from “Riparian Open Space Program” to “Rivers and Habitat Open Space Program”, which would require changes in WAC 222-10-125, WAC 222-12-010, and WAC 222-12-090 where the title of the program is referenced.

## **COST-BENEFIT ANALYSIS**

According to the Administrative Procedure Act (RCW 34.05.328) agencies must complete a cost-benefit analysis to:

- Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented; and
- Determine, after considering alternative versions of the rule, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives of the statute that the rule implements.

### **Benefits**

The intent of the proposed rule changes, in conformance with SSB 5401, is to significantly expand the private forest land base qualifying for compensation under the Riparian Open Space Program. Subject to legislative appropriation, it provides a mechanism for private forest landowners to receive monetary payments for conveying a conservation easement on two new additional types of qualifying lands: 1) any forest lands in “unconfined channel migration zones”, not just where avulsion can be proved and 2) forest lands where timber cannot be legally harvested because these lands are deemed more important for protection of habitat for threatened and endangered species. Landowners with such qualifying lands comprise the regulated community and they may elect to apply to convey a conservation easement on their lands and receive compensation under the program.

To date, compensation paid to landowners under the program has averaged approximately \$3900 per acre or \$300,000 per transaction (on qualifying lands on forested islands in unconfined avulsing channel migration zones). The compensation for qualifying lands anywhere in unconfined channel migration zones is expected to be similar. The compensation for qualifying land containing forested habitat for threatened and endangered species may be higher because of generally higher valued species of trees and older age classes on these lands. The rule changes to implement the statutory changes will certainly result in more acreage that will qualify for compensation. Subject to available funding from the legislature, this may raise the total amount of compensation to be paid under the program.

The amendment to the statute may have the result of providing a greater amount of compensation than intended to landowners with qualifying forested habitat for threatened and endangered species. Some Washington forest lands contain habitat for threatened and endangered species because the timber has not to date been practical or economic to harvest. Other habitat is located on lands, for example on unstable slopes, which cannot currently be legally harvested due to other regulations. By including this timber which is otherwise not economic, practical, and/or legal to harvest in the timber cruise volume used to calculate compensation under the program, landowners could potentially receive compensation for timber that would not or could not be harvested even without the presence of habitat for the threatened and endangered species.

## **Costs**

The costs are minimal to the landowner who elects to convey a conservation easement on qualifying lands and receive compensation under the program. The landowner needs to fill out the application and pay the cost of title insurance and any real estate excise tax due at transaction closing. There may also be tax implications for the landowner to consider.

By conveying away an interest in land, the landowner is giving up part of the “bundle of sticks” in the title to their property and they no longer have full use and enjoyment of their property. The state would then hold an interest in the property, along with the right to access and enter the property, an obligation to monitor its easement interest, and the right to enforce remedies for violations of the terms and conditions of the easement.

## **Comparison of Benefits and Costs**

Since conveying a conservation easement and receiving compensation is voluntary on the landowner’s part, it is implicit in a landowner’s decision to proceed that the total benefits (quantitative and qualitative) exceed the total costs (quantitative and qualitative) for that landowner on that particular parcel of land.

The landowner may well find that the amount of compensation more than makes up for a government entity holding an encumbrance on the property. This is especially true since the market value of the conservation easement would generally be only a token value because the timber on these lands cannot be legally harvested and because these lands otherwise have generally limited economic uses because of their attributes and location.

## **Alternatives to Rule Making and Consequences of Not Adopting the Rule**

There were no alternatives to the proposed rule change considered since it is restricted to making changes to the existing rules required to bring them into conformance with statute it was amended by the 2009 legislation (SSB 5401).

If the proposed rule change is not adopted, the Riparian Open Space Program rule will be out of conformance with the statute as amended. The statute instructs the Board to make rules to implement the program as described in statute.

## **Least Burdensome Alternative**

The Administrative Procedure Act states that agencies shall determine after considering alternative versions of the rule that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives of the statute that the rule implements.

Since participating in the program is voluntary, there is no burden on owners of qualifying land who do not wish to convey a conservation easement on their property. There is also no burden for landowners who voluntarily elect to convey a conservation easement and receive compensation under the Riparian Open Space Program. The requirement for the landowner to be responsible for the cost of the title insurance policy and any real estate excise tax at closing is not considered burdensome because these are seller's responsibilities under standard real estate practice in Washington.

## **SMALL BUSINESS IMPACTS**

A small business economic impact statement is required by the Regulatory Fairness Act (chapter 19.85 RCW) to consider the impacts on small businesses of administrative rules adopted by state agencies. The statute defines small businesses as those with 50 or fewer employees. To determine whether the proposed rule will have a disproportionate cost impact on small businesses, the impact statement compares the cost of compliance for small business with the cost of compliance for the ten percent of businesses that are the largest businesses required to comply with the proposed rule.

### **Small Business Analysis**

There are no new or additional requirements or costs imposed on any members of the regulated community by the proposed rule change since conveying a conservation easement and receiving compensation is voluntary on the part of the business (landowner), whether it is a large business, a small business, or an individual. Therefore there is no disproportionate cost impact on small businesses.

### **Reducing Costs for Small Businesses**

RCWs 19.85.030 and .040 address an agency's responsibility in rule making to consider how costs may be reduced for small businesses, based on the extent of disproportionate impact on the small businesses. As stated above, there is therefore no disproportionate impact on small businesses.

### **Estimated Number of Jobs Created or Lost**

RCW 19.85.040 (2)(d) requires that the small business economic impact statement include "(a)n estimate of the number of jobs that will be created or lost as the result of compliance with the proposed rule."

Processing and completing a conservation easement transaction under the program may require work by timber cruisers, surveyors, and title insurance officers in private businesses. The program's impact on jobs is proportional to the amount of the appropriation and the number of transactions. To date, there have been 12 transactions completed under the Riparian Open Space Program in the 8 years from 2001 to 2009. At this level of activity, there is no significant impact on the number of jobs created or lost.

Even though the proposed rule change greatly expands the acreage of potentially qualifying lands, adopting the rule change itself does not have an impact on jobs because that is dependent upon the level of the related appropriations and the number of transactions. If larger appropriations are provided for the program in future biennia, there would be more work for timber cruisers, surveyors, and title companies, but the work would probably be absorbed by existing job positions unless the amount of appropriations for the program becomes exceedingly higher than it has been in the past.

## **CONCLUSIONS**

Since conveying a conservation easement and receiving compensation is voluntary on the landowner's part, it is implicit in a landowner's decision to proceed that the benefits exceed the costs for that landowner and that piece of qualifying land.

There were no alternatives to the proposed rule change considered since it is restricted to making changes to the existing WAC required to bring it into conformance with the statute as amended by SSB 5401.

Since participating in the program is voluntary, the rule proposal does not:

- Impose a burden on owners of qualifying land, whether or not they elect to convey a conservation easement on their property; or
- Have a disproportionate cost impact on small businesses.

The rule change itself does not have an impact on jobs. Any additional work created for timber cruisers, surveyors, and title companies by the program would be absorbed by existing job positions unless the amount of appropriations for the program becomes exceedingly higher than it has been in the past.