

Appendix G.

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G. Road Maintenance and Abandonment Plans (HB 1095)

The Road Maintenance and Abandonment Act directed the Forest Practices Board (the Board) to assist small forest landowners with the Road Maintenance and Abandonment Plan elements of the forest practices rules. After the enactment of the Forests and Fish Law (Appendix C) it became clear that both the planning and implementation requirements for road maintenance and abandonment plans could cause an unforeseen and unintended disproportionate financial hardship for small forest landowners. As a result, the Commissioner of Public Lands and the Governor explored solutions that would help minimize the impact to small forest landowners, while maintaining protection for public resources. This Road Maintenance and Abandonment act represents recommendations stemming from that process. Following the passage of the act, the Board promulgated emergency rules to assist small forest landowners. Those rules have been incorporated into the Forest Practices Habitat Conservation Plan.

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CERTIFICATION OF ENROLLMENT

SECOND SUBSTITUTE HOUSE BILL 1095

58th Legislature

2003 Regular Session

Passed by the House April 21, 2003

Yeas 96 Nays 0

Speaker of the House of Representatives

Passed by the Senate April 9, 2003

Yeas 49 Nays 0

President of the Senate

Approved

Governor of the State of Washington

CERTIFICATE

I, Cynthia Zehnder, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is SECOND SUBSTITUTE HOUSE BILL 1095 as passed by the House of Representatives and the Senate on the dates hereon set forth.

Chief Clerk

FILED

Secretary of State

State of Washington

SECOND SUBSTITUTE HOUSE BILL 1095

AS AMENDED BY THE SENATE

Passed Legislature - 2003 Regular Session

State of Washington 58th Legislature 2003 Regular Session

By House Committee on Appropriations (originally sponsored by Representatives Rockefeller, Sump, Linville, Orcutt, Schoesler, Pearson, Holmquist, Haigh and Kristiansen; by request of Commissioner of Public Lands)

READ FIRST TIME 03/10/03.

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

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

NEW SECTION. **Sec. 1.** (1) The legislature finds that chapter 4, Laws of 1999 sp. sess. strongly encouraged the forest practices board to adopt administrative rules that were substantially similar to the recommendations presented to the legislature in the form of the forests and fish report. The rules adopted pursuant to the 1999 legislation require all forest landowners to complete a road maintenance and abandonment plan, and those rules cannot be changed by the forest practices board without either a final order from a court, direct instructions from the legislature, or a recommendation from the adaptive management process. In the time since the enactment of chapter 4, Laws of 1999 sp. sess., it has become clear that both the planning aspect and the implementation aspect of the road maintenance and abandonment plan requirement may cause an unforeseen and unintended disproportionate financial hardship on small forest landowners.

(2) The legislature further finds that the commissioner of public lands and the governor have explored solutions that minimize the hardship caused to small forest landowners by the forest road maintenance and abandonment requirements of the forests and fish law, while maintaining protection for public resources. This act represents recommendations stemming from that process.

(3) The legislature further finds that it is in the state's interest to help small forest landowners comply with the requirements of the forest practices rules in a way that does not require the landowner to spend unreasonably high and unpredictable amounts of money to complete road maintenance and abandonment plan preparation and implementation. Small forest landowners provide significant wildlife habitat and serve as important buffers between urban development and Washington's public forest land holdings.

NEW SECTION. **Sec. 2.** A new section is added to chapter 76.09 RCW to read as follows:

(1) The state may not require a small forest landowner to invest in upgrades, replacements, or other engineering of a forest road, and any fish passage barriers that are a part of the road, that do not threaten public resources or create a barrier to the passage of fish.

(2) Participation in the forests and fish agreement provides a benefit to both the landowner in terms of federal assurances, and the public in terms of aquatic habitat preservation and water quality enhancement; therefore, if conditions do threaten public resources or create a fish passage barrier, the road maintenance and abandonment planning process may not require a small forest landowner to take a positive action that will result in high cost without a significant portion of that cost being shared by the public.

(3) Some fish passage barriers are more of a threat to public resources than others; therefore, no small forest landowner should be required to repair a fish passage barrier until higher priority fish passage barriers on other lands in the watershed have been repaired.

(4) If an existing fish passage barrier on land owned by a small forest landowner was installed under an approved forest practices application or notification, and hydraulics approval, and that fish passage barrier becomes a high priority for fish passage based on the watershed ranking in section 7 of this act, one hundred percent public funding shall be provided.

(5) The preparation of a road maintenance and abandonment plan can require technical expertise that may require large expenditures before the time that the landowner plans to conduct any revenue-generating operations on his or her land; therefore, small forest landowners should be allowed to complete a simplified road maintenance and abandonment plan checklist, that does not require professional engineering or forestry expertise to complete, and that does not need to be submitted until the time that the landowner submits a forest practices application or notification for final or intermediate harvesting, or for salvage of trees. This act is intended to provide an alternate way for small forest landowners to comply with the road maintenance and abandonment plan goals identified in the forest practices rules.

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

~~((For purposes of this chapter:))~~ The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

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

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

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

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

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

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

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

(8) "Fish passage barrier" means any artificial instream structure that impedes the free passage of fish.

(9) "Forest land" means all land which is capable of supporting a merchantable stand of timber and is not being actively used for a use which is incompatible with timber growing. Forest land does not include agricultural land that is or was enrolled in the conservation reserve enhancement program by contract if such agricultural land was historically used for agricultural purposes and the landowner intends to continue to use the land for agricultural purposes in the future. As it applies to the operation of the road maintenance and abandonment plan element of the forest practices rules on small forest landowners, the term "forest land" excludes:

(a) Residential home sites, which may include up to five acres; and

(b) Cropfields, orchards, vineyards, pastures, feedlots, fish pens, and the land on which appurtenances necessary to the production, preparation, or sale of crops, fruit, dairy products, fish, and livestock exist.

~~((9))~~ (10) "Forest landowner" means any person in actual control of forest land, whether such control is based either on legal or equitable title, or on any other interest entitling the holder to sell or otherwise dispose of any or all of the timber on such land in any manner(~~(: PROVIDED, That)~~). However, any lessee or other person in possession of forest land without legal or equitable title to such land shall be excluded from the definition of "forest landowner" unless such lessee or other person has the right to sell or otherwise dispose of any or all of the timber located on such forest land.

~~((10))~~ (11) "Forest practice" means any activity conducted on or directly pertaining to forest land and relating to growing, harvesting, or processing timber, including but not limited to:

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

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

~~((11))~~ (12) "Forest practices rules" means any rules adopted pursuant to RCW 76.09.040.

~~((12))~~ (13) "Forest road," as it applies to the operation of the road maintenance and abandonment plan element of the forest practices rules on small forest landowners, means a road or road segment that crosses land that meets the definition of forest land, but excludes residential access roads.

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

~~((13))~~ (15) "Forests and fish report" means the forests and fish report to the board dated April 29, 1999.

~~((14))~~ (16) "Application" means the application required pursuant to RCW 76.09.050.

~~((15))~~ (17) "Operator" means any person engaging in forest practices except an employee with wages as his or her sole compensation.

~~((16))~~ (18) "Person" means any individual, partnership, private, public, or municipal corporation, county, the department or other state or local governmental entity, or association of individuals of whatever nature.

~~((17))~~ (19) "Public resources" means water, fish and wildlife, and in addition shall mean capital improvements of the state or its political subdivisions.

~~((18))~~ (20) "Small forest landowner" has the same meaning as defined in section 11 of this act.

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

~~((19))~~ (22) "Timber owner" means any person having all or any part of the legal interest in timber. Where such timber is subject to a contract of sale, "timber owner" shall mean the contract purchaser.

~~((20))~~ (23) "Board" means the forest practices board created in RCW 76.09.030.

~~((21))~~ (24) "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.

~~((22))~~ (25) "Unconfined avulsing stream" means generally fifth order or larger waters that experience abrupt shifts in channel location, creating a complex flood plain characterized by extensive gravel bars, disturbance species of vegetation of variable age, numerous side channels, wall-based channels, oxbow lakes, and wetland complexes.

Many of these streams have dikes and levees that may temporarily or permanently restrict channel movement.

NEW SECTION. **Sec. 4.** A new section is added to chapter 76.09 RCW to read as follows:

(1) The board must amend the forest practices rules relating to road maintenance and abandonment plans that exist on the effective date of this section to reflect the following:

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

(b) A landowner who satisfies the definition of a small forest landowner, but who does not qualify under (a) of this subsection, is only required to submit a checklist road maintenance and abandonment plan with the abbreviated content requirements provided for in subsection (3) of this section, and is not required to comply with annual reporting and review requirements; and

(c) Existing forest roads must be maintained only to the extent necessary to prevent damage to public resources.

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

(3)(a) A landowner who qualifies for a checklist road maintenance and abandonment plan under subsection (1)(b) of this section is only required to submit a checklist, designed by the department in consultation with the small forest landowner office advisory committee created in RCW 76.13.110, that confirms that the landowner is applying the checklist criteria to forest roads covered or affected by a forest practices application or notification. When developing the checklist road maintenance and abandonment plan, the department shall ensure that the checklist does not exceed current state law. Nothing in this subsection increases or adds to small forest landowners' duties or responsibilities under any other section of the forest practices rules or any other state law or rule.

(b) A landowner who qualifies for the checklist road maintenance and abandonment plan is not required to submit the checklist before the time that he or she submits a forest practices application or notification for final or intermediate harvesting, or for salvage of trees. The department may encourage and accept checklists prior to the time that they are due.

(4) The department must monitor the extent of the checklist road maintenance and abandonment plan approach and report its findings to the appropriate committees of the legislature by December 31, 2008, and December 31, 2013.

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

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

Sec. 5. RCW 76.09.055 and 2000 c 11 s 4 are each amended to read as follows:

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

(2) The forest practices board is authorized to adopt emergency rules amending the forest practices rules with respect to the protection of aquatic resources, in accordance with RCW 34.05.350, except: (a)(i) That the rules adopted under this section may remain in effect until permanent rules are adopted, or until June 30, 2001, whichever is sooner; (ii) that the rules adopted under section 4(5) of this act must remain in effect until permanent rules are adopted; (b) notice of the proposed rules must be published in the Washington State Register as provided in RCW 34.05.320; (c) at least one public hearing must be conducted with an opportunity to provide oral and written comments; and (d) a rule-making file must be maintained as required by RCW 34.05.370. In adopting (~~the~~) emergency rules consistent with this section, the board is not required to prepare a small business economic impact statement under chapter 19.85 RCW, prepare a statement indicating whether the rules constitute a significant legislative rule under RCW 34.05.328, prepare a significant legislative rule analysis under RCW 34.05.328, or follow the procedural requirements of the state environmental policy act, chapter 43.21C RCW. Except as provided in section 4 of this act, the forest practices board may only adopt recommendations contained in the forests and fish report as emergency rules under this section.

Sec. 6. RCW 76.09.390 and 1999 sp.s. c 4 s 707 are each amended to read as follows:

(1) Except as provided in subsection (2) of this section, prior to the sale or transfer of land or perpetual timber rights subject to continuing forest land obligations under the forest practices rules adopted under RCW 76.09.370, as specifically identified in the forests and fish report the seller shall notify the buyer of the existence and nature of such a continuing obligation and the buyer shall sign a notice of continuing forest land obligation indicating the buyer's knowledge thereof. The notice shall be on a form prepared by the department and shall be sent to the department by the seller at the time of sale or transfer of the land or perpetual timber rights and retained by the department. If the seller fails to notify the buyer about the continuing forest land obligation, the seller shall pay the buyer's costs related to such continuing forest land obligation, including all legal costs and reasonable attorneys' fees, incurred by the buyer in enforcing the continuing forest land obligation against the seller. Failure by the seller to send the required notice to the department at the time of sale shall be prima facie evidence, in an action by the buyer against the seller for costs related to the continuing forest land obligation, that the seller did not notify the buyer of the continuing forest land obligation prior to sale.

(2) Subsection (1) of this section does not apply to checklist road maintenance and abandonment plans created by section 4 of this act.

NEW SECTION. **Sec. 7.** A new section is added to chapter 76.13 RCW to read as follows:

(1) The legislature finds that a state-led cost-sharing program is necessary to assist small forest landowners with removing and replacing fish passage barriers that were added to their land prior to the effective date of this section, to help achieve the goals of the forests and fish report, and to assist small forest landowners in complying with the state's fish passage requirements.

(2) The small forest landowner office must, in cooperation with the department of fish and wildlife, establish a program designed to assist small forest landowners with repairing or removing fish passage barriers and assist lead entities in acquiring the data necessary to fill any gaps in fish passage barrier information. The small forest landowner office and the department of fish and wildlife must work closely with lead entities or other local watershed groups to make maximum use of current information regarding the location and priority of current fish passage barriers. Where additional fish passage barrier inventories are necessary, funding will be sought for the collection of this information. Methods, protocols, and formulas for data gathering and prioritizing must be developed in consultation with the department of fish and wildlife. The department of fish and wildlife must assist in the training and management of fish passage barrier location data collection.

(3) The small forest landowner office must actively seek out funding for the program authorized in this section. The small forest landowner office must work with consenting landowners to identify and secure funding from local, state, federal, tribal, or nonprofit habitat restoration organizations and other private sources, including the salmon recovery funding board, the United States department of agriculture, the United States department of transportation, the Washington state department of transportation, the United States department of commerce, and the federal highway administration.

(4)(a) Except as otherwise provided in this subsection, the small forest landowner office, in implementing the program established in this section, must provide the highest proportion of public funding available for the removal or replacement of any fish passage barrier.

(b) In no case shall a small forest landowner be required to pay more than the lesser of either: (i) Twenty-five percent of any costs associated with the removal or replacement of a particular fish passage barrier; or (ii) five thousand dollars for the removal or replacement of a particular fish passage barrier. No small forest landowner shall be required to pay more than the maximum total annual costs in (c) of this subsection.

(c) The portion of the total cost of removing or replacing fish passage barriers that a small forest landowner must pay in any calendar year shall be determined based on the average annual timber volume harvested from the landowner's lands in this state during the three preceding calendar years, and whether the fish passage barrier is in eastern or western Washington.

(i) In western Washington (west of the Cascade Crest), a small forest landowner who has harvested an average annual timber volume of less than five hundred thousand board feet shall not be required to pay more than a total of eight thousand dollars during that calendar year, a small forest landowner who has harvested an annual average timber volume between five hundred thousand and nine hundred ninety-nine thousand board feet shall not be required to pay more than a total of sixteen thousand dollars during that calendar year, a small forest landowner who has harvested an average annual timber volume between one million and one million four hundred ninety-nine thousand board feet shall not be required to pay more than a total of twenty-four thousand dollars during that calendar year, and a small forest landowner who has harvested an average annual timber volume greater than or equal to one million five hundred thousand board feet shall not be required to pay more than a total of thirty-two thousand dollars during that calendar year, regardless of the number of fish passage barriers removed or replaced on the landowner's lands during that calendar year.

(ii) In eastern Washington (east of the Cascade Crest), a small forest landowner who has harvested an average annual timber volume of less than five hundred thousand board feet shall not be required to pay more than a total of two thousand dollars during that calendar year, a small forest landowner who has harvested an annual average timber volume between five hundred thousand and nine hundred ninety-nine thousand board feet

shall not be required to pay more than a total of four thousand dollars during that calendar year, a small forest landowner who has harvested an average annual timber volume between one million and one million four hundred ninety-nine thousand board feet shall not be required to pay more than a total of twelve thousand dollars during that calendar year, and a small forest landowner who has harvested an average annual timber volume greater than or equal to one million five hundred thousand board feet shall not be required to pay more than a total of sixteen thousand dollars during that calendar year, regardless of the number of fish passage barriers removed or replaced on the landowner's lands during that calendar year.

(iii) Maximum total annual costs for small forest landowners with fish passage barriers in both western and eastern Washington shall be those specified under (c)(i) and (ii) of this subsection.

(d) If an existing fish passage barrier on land owned by a small forest landowner was installed under an approved forest practices application or notification, and hydraulics approval, and that fish passage barrier becomes a high priority for fish passage based on the watershed ranking in section 7 of this act, one hundred percent public funding shall be provided.

(5) If a small forest landowner is required to contribute a portion of the funding under the cost-share program established in this section, that landowner may satisfy his or her required proportion by providing either direct monetary contributions or in-kind services to the project. In-kind services may include labor, equipment, materials, and other landowner-provided services determined by the department to have an appropriate value to the removal of a particular fish passage barrier.

(6)(a) The department, using fish passage barrier assessments and ranked inventory information provided by the department of fish and wildlife and the appropriate lead entity as delineated in section 10 of this act, must establish a prioritized list for the funding of fish passage barrier removals on property owned by small forest landowners that ensures that funding is provided first to the known fish passage barriers existing on forest land owned by small forest landowners that cause the greatest harm to public resources.

(b) As the department collects information about the presence of fish passage barriers from submitted checklists, it must share this information with the department of fish and wildlife and the technical advisory groups established in RCW 77.85.070. If the addition of the information collected in the checklists or any other changes to the scientific instruments described in section 10 of this act alter the analysis conducted under section 10 of this act, the department must alter the funding order appropriately to reflect the new information.

(7) The department may accept commitments from small forest landowners that they will participate in the program to remove fish passage barriers from their land at any

time, regardless of the funding order given to the fish passage barriers on a particular landowner's property.

NEW SECTION. **Sec. 8.** A new section is added to chapter 76.09 RCW to read as follows:

Section 7 of this act applies to road maintenance and abandonment plans under this chapter.

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

The department shall not disapprove a forest practices application filed by a small forest landowner on the basis that fish passage barriers have not been removed or replaced if the small forest landowner filing the application has committed to participate in the program established in section 7 of this act for all fish passage barriers existing on the block of forest land covered by the forest practices application, and the fish passage barriers existing on the block of forest land covered by the forest practices application are lower on the funding order list established for the program than the current projects that are capable of being funded by the program.

NEW SECTION. **Sec. 10.** A new section is added to chapter 77.12 RCW to read as follows:

In coordination with the department of natural resources and lead entity groups, the department must establish a ranked inventory of fish passage barriers on land owned by small forest landowners based on the principle of fixing the worst first within a watershed consistent with the fish passage priorities of the forest and fish report. The department shall first gather and synthesize all available existing information about the locations and impacts of fish passage barriers in Washington. This information must include, but not be limited to, the most recently available limiting factors analysis conducted pursuant to RCW 77.85.060(2), the stock status information contained in the department of fish and wildlife salmonid stock inventory (SASSI), the salmon and steelhead habitat inventory and assessment project (SSHIAP), and any comparable science-based assessment when available. The inventory of fish passage barriers must be kept current and at a minimum be updated by the beginning of each calendar year. Nothing in this section grants the department or others additional right of entry onto private property.

NEW SECTION. **Sec. 11.** A new section is added to chapter 76.09 RCW to read as follows:

For the purposes of this chapter and sections 7 and 10 of this act, "small forest landowner" means an owner of forest land who, at the time of submission of required documentation to the department, has harvested from his or her own lands in this state no more than an average timber volume of two million board feet per year during the three years prior to submitting documentation to the department and who certifies that he or

she does not expect to harvest from his or her own lands in the state more than an average timber volume of two million board feet per year during the ten years following the submission of documentation to the department. However, any landowner who exceeded the two million board feet annual average timber harvest threshold from their land in the three years prior to submitting documentation to the department, or who expects to exceed the threshold during any of the following ten years, shall still be deemed a "small forest landowner" if he or she establishes to the department's reasonable satisfaction that the harvest limits were, or will be, exceeded in order to raise funds to pay estate taxes or for an equally compelling and unexpected obligation, such as for a court-ordered judgment or for extraordinary medical expenses.

NEW SECTION. **Sec. 12.** The existing policy committees of the senate and house of representatives that deal with natural resources issues must review and study the implementation of this act, including checklist preparation and the meaning of both defined and undefined words in chapters 76.09 and 76.13 RCW, and report to the legislature by January 2004.

NEW SECTION. **Sec. 13.** This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

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