

# Small Forest Landowner (SFL) Background and Legal Standards for Alternate Plans

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*The views presented herein are solely the author's and do not necessarily reflect the opinions of the Attorney General or the Office of the Attorney General of Washington.*

# Presentation Overview

## Key Topics Covered

- Forests and Fish Commitments/Understandings
- Review of Alternate Plans/Alternate Harvest Restrictions
- Alternate Plan “Templates” vs. “Rules”
- Other Statutory or Rule Provisions Unique to SFLs
  - SFL Office
  - Forest Riparian Easement Program (FREP)
  - 20-acre “exempt” parcel provisions
  - SFLs and Road Maintenance and Abandonment Plans (RMAPs)
  - Family Forest Fish Passage Program (FFFPP - “Triple F, Two P”)
  - Long Term Forest Practices Applications

# What's a Small Forest Landowner (SFL)?

- Originally focused on landowners with  $\leq 500$  acres of forestland in WA.
- 2003 – passage of RCW 76.09.450. Definition includes all landowners harvesting an average of  $\leq 2$  million board feet per year, for the three prior years.
- Definition consistent with tax statutes. See, e.g., “small harvester,” RCW 84.33.035(15) and RCW 84.33.074.

# Forests & Fish Report (F&F) Background

- F&F Collaborators knew that the proposed forest practices restrictions would have economic costs to landowners.
- Background, ¶ E (“Economic Impacts”) said in part, “The authors recognize that such changes in the rules and statutes will impose substantial additional financial burdens on forest landowners. The authors further acknowledge that such financial impacts may be experienced disproportionately by different landowners. The Report recommends *acquisition* in certain situations and allows for the development of *alternate plans* as means of addressing such impacts *while still maintaining a level of protection for public resources at least equal in overall effectiveness to the protection provided by the basic rules.*”

# F&F Background

- Key SFL Provisions in F&F
  - App. H – Alternate Plans
    - “Equal in Overall Effectiveness” -- mentioned three additional times as the approval standard, in discussion of future alternate plan rules.
  - App. I – Small Landowners
    - Intro, ¶ (a): “This is a program for small forest landowners. It is designed to achieve both full riparian resource protection and to provide financial incentives to those small landowners who volunteer to participate in the Forestry Riparian Easement Program to be established by statute and administered by a ‘Small Forest Landowner Office’ within the DNR.”

# F&F Background

- App. I – Small Landowners, cont.
  - Intro ¶ (b): “*This is not a small landowner ‘exemption’ that sets lower standards of resource protection for small landowners.* Instead, it applies the same riparian and related buffers to small landowners as is applied to all other forest landowners, and provides partial compensation to those small landowners who volunteer to enter into easements covering riparian areas.”
  - Intro ¶ (c): “DNR’s obligations under the Forest Riparian Easement [P]rogram are subject to the availability of funding.”
- F&F primarily used FREP to offset riparian buffer costs to participating small landowners.
- SFLs would not be exempted from providing protection for riparian functions because of their status as SFLs.

# What Are “Alternate Plans”

- An alternate plan is a rule-based way to deviate from the ordinary rules that would apply to a permit.
- Forests & Fish Report – two plan types – federally-approved conservation plans and state-approved plans.
  - “A landowner may propose, through an alternate plan, a site-scale management strategy different from the basic rules that implement this Report....” (App. H, H.2(a)(i).)
  - Board Manual Section 21 (at M21-1): “In alternate plans, landowners develop management prescriptions that will achieve resource protection through alternative methods from those prescribed in the forest practices rules.”

# What are “Alternate Plans”

- WACs 222-12-040 to -0405 (six rules) address alternate plans.
- FFR and WAC 222-12-040 say:
  - “The alternate plan process can be used as a tool to deal with a variety of situations, including where the cumulative impacts of regulations disproportionately impact a landowner. In some instances an alternate plan may be used to make minor on-the-ground modifications, which result in significant operation efficiencies. The alternate plan process may be used to address circumstances where a landowner has an economically inaccessible unit. The alternate plan process may also be used to facilitate voluntary landscape, riparian or stream restoration.”



# Alternate Plan Approval Standard

- Approval Standard: "*at least equal in overall effectiveness.*"
  - FFR, App. H, H.2(a), (e) and (f).
  - RCW 76.09.370(3) – provides required *statutory* minimum standard. It *cannot* be changed by the FPB or DNR.
  - WAC 222-12-0401(6) (conforms to statutory standard).
- Litigated challenge to SFL alternate plan
  - *Quinault Indian Nation v. DNR and Esses Daman Family*, PCHB No. 12-118c.
  - Conclusions of Law 14-21 apply the legal standard in RCW 76.09.370(3), found Esses Daman Family's proposed alternate plan inadequate, and even found that DNR's conditioned alternate plan inadequate to protect riparian resources at the site.

# What are alternate plan “templates”? How are they different from “rules”?

- WAC 222-12-0403 provides that Board Manual Section 21 “should include . . . [t]emplate prescriptions designed to meet resource objectives to address common situations that are repeatedly addressed in alternate plans or strategies to simplify the development of future plans or strategies, including low impact situations and site-specific physical features.”
- Template alternate plans do not require an interdisciplinary team site visit prior to approval. WAC 222-12-0401(5)(b).
- Example: Template #2, Board Manual at M21-15, Fixed Width RMZs for Type S and F Waters for W WA Small Forest Landowners (101 foot RMZ for site class III vs. 140 foot RMZ in WAC 222-30-021(1)(b)(ii)).

# What are alternate plan “templates”?

## How are they different from “rules”?

- Alternate plans remain site-specific deviations from the rules. Template alternate plans may not be adequate at *all* sites.
- DNR approvals of any alternate plan, even a template, can be legally challenged before the PCHB as inappropriate for a site.
- In contrast, a Board rule sets the minimum standard for compliance. It can be used at all locations governed by that rule.
- New Board rules and a site-specific alternate plan follow vastly different approval processes.
  - Rules related to aquatic species require a recommendation from the Adaptive Management Program. RCW 76.09.370(6) & (7).
  - Rules must follow APA rulemaking process. CR 101, 102, 103....
  - Template alternate plan options become part of Board Manual Guidance in Section 21.
  - Board Manual guidance is advisory only.

# What Are “Alternate Harvest Restrictions?”

- RCW 76.09.368 and RCW 76.13.100(2) both mention “alternate harvest restrictions” in addition to “alternate plans.”
- “Alternate harvest restrictions” were not discussed in the FFR. Only “alternate plans” were discussed.
- No separate approval standard in statute for “alternate harvest restrictions,” but no basis in FFR or Forest Practices Act to use something other than “equal in overall effectiveness” for purposes of FP Habitat Conservation Plan compliance.
- HB 1665/SB 5690 (2009) – proposed definition of “alternate harvest restriction,” but neither passed out of houses of origin.
- Bill definition would have included state-approved alternate plans, federally-approved HCPs, or a proposed HCP for Lewis County forestry that never gained federal approval.

# Other Statutory or Rule Provisions Designed to Aid SFLs

- RCW 76.13.110 (SFL Office created).
- RCW 76.13.120 (Forestry Riparian Easement Program (FREP) created).
- RCW 76.13.130 (20-acre exempt parcels).
  - Parcel must be  $\leq 20$  acres.
  - Landowner must own  $< 80$  total forested acres.
  - If conditions are met, WAC 222-30-023 specifies reduced buffer widths (e.g., 29' – 115' for W WA Type F streams, depending on stream width).
  - Per 2019 UW data, 72% of SFL parcels are  $\leq 20$  acres.

# Other Statutory or Rule Provisions Designed to Aid SFLs

- WAC 222-20-016 – long term SFL applications can go to 15 years, allowing flexibility in market timing.
- RCW 76.09.410 (adopted 2003) – SFLs exempt from F&F Road Maintenance & Abandonment Planning deadlines.
  - Per WAC 222-24-0511, 20-acre exempt criteria exempt those SFLs from ANY Road Maintenance and Abandonment Plan (RMAP) burdens.
  - Other SFLs perform “checklist” RMAP at time of harvest.
  - Prioritization of barrier replacement may follow Family Forest Fish Protection Program (FFFPP).

# Other Statutory or Rule Provisions Designed to Aid SFLs

- RCW 76.13.150 (adopted 2003) – creates FFFPP.
- FFFPP is “a state-led cost-sharing program ... necessary to assist small forestland owners with removing and replacing fish passage barriers.”
- SFL works with WDFW and Recreation and Conservation Office on funding and assistance.
- Reminder – barrier culverts can violate Indian Treaty rights to fish. *US v. WA “Culvert Case,”* 853 F.3d 946 (9<sup>th</sup> Cir. 2017), *aff’d by equally divided court,* 138 S. Ct. 1832 (2018).

# Conclusions

- FFR anticipated higher compliance costs for SFLs.
- SFL Office and FREP were key tools in addressing riparian costs.
- Alternate plans (including “template” alternate plans) may allow for site-specific rule deviations, where the “equal in overall effectiveness” standard can be met.
- “Alternate harvest restrictions” = “alternate plan” when it comes to state-approved rule deviations.
- Many (most?) SFLs may avail themselves of the 20-acre exempt rule.
- SFLs face reduced RMAP requirements when compared to other landowners.



# Conclusions

- Several statutes and Board rules provide unique benefits to SFLs.
- The Board has implemented what was required in F&F.
- Nothing in F&F or the statutory scheme supports the creation of SFL riparian buffers that fail to meet the “equal in overall effectiveness” *statutory* standard for alternate plans.
- The Forest Practices Board and DNR have each followed state law as it concerns SFL statutes and/or alternate plans.

# Questions?

