

Public Regulation of Private Forest Practices

A Position of the Society of American Foresters

Originally adopted by the SAF Council on March 7, 1975 as *Criteria for State Forest Practices Acts*. Renewed on November 29, 1978 and November 18, 1981. Revised on November 12, 1984, and renewed on November 10, 1987, December 16, 1988, April 25, 1989, and April 25, 1992 with included revisions.

Renewed on December 11, 1995 and June 1, 1996, October 14, 2002, and March 8, 2008. Revised on June 13, 2010. This position statement will expire on March 8, 2013, unless, after subsequent review, the SAF Council decides otherwise.

Position

Depending on their design, which will determine how forest landowners react, regulations may have either positive or negative effects on forest productivity and environmental quality. While the Society of American Foresters neither advocates nor opposes public regulation of private forest practices, any such laws or regulations should reflect the Society's commitment to sustainable forest management. If states or localities choose to regulate such practices, the Society recommends specific criteria during their development, and for use in assessing their effectiveness.

Issue

Uncertainty exists between society's respect for forest landowners' property rights, and the landowners' stewardship responsibility to society. Balancing these two interests requires an understanding of the role and effects of various regulatory schemes. Although the constitutionality of forest regulations has not presented serious problems (Warren 1950, see also State v. Dexter), the goals, purposes, and numbers of new regulations have the potential to spark a new series of legal conflicts (Ellefson and others 1997, see also Boise Cascade v. State). Forest practices regulations must, therefore, be crafted with careful consideration and precision exercising prudence to avoid unintended consequences (Ellefson and others 1995).

A number of state and local governments regulate private forest practices in an effort to ensure public health, welfare, and safety by protecting private forest resources. Some states and localities have adopted forest practice regulations to sustain forest productivity and timber supplies. Others, responding to federal water quality legislation, have adopted regulations to control the levels of sediment from timber harvest activities (USDA Forest Service 2002, Ellefson and others 1995, Henly and Ellefson 1986). The effectiveness of these regulations depends both upon the extent to which they sustain forest productivity and prevent environmental harms, the extent to which states and localities are able to effectively enforce these regulations, and whether the regulations create conditions that reduce landowners' capacities to sustain these forest benefits.

Some states have eschewed forest practice regulation in favor of voluntary programs and a variety of forestry incentive programs (Ellefson and others 1995), including best management practices, tax incentives, fiscal incentives, educational programs and technical assistance. To date, these voluntary approaches have largely been effective when properly implemented, and have been commonly adopted (USDA Forest Service 2002, Ellefson and others 1997, Ellefson and others 1995).

Background

Forest practice regulations are one means to sustain forest productivity and protect environmental quality. Although they may express a broad public intent to achieve this objective, they should not be assumed to do so by virtue of intent alone. The effectiveness of forest practice regulations depends on their enforcement and ultimately on their impact. Their impact depends on landowners' responses to them, and rarely can these responses be expected to follow directly from the regulatory intent. These ideas are briefly reviewed in the first section below.

The second section below elaborates on the criteria listed in the Position paragraph. The Society of American Foresters (herein referred to as "Society") recommends these criteria be used to assess the potential effectiveness and results of forest practice regulations. Should states or localities choose to regulate private forest practices, the Society believes these criteria may enhance long-term forest resource opportunities while not overly encroaching upon or discouraging landowners from exercising their private property rights. The Society is willing and prepared to elaborate on any of these criteria and to contribute the knowledge of its members to deliberations regarding the effectiveness of alternative regulatory and other approaches to improving private forest practices. Such alternatives, which several states have undertaken, include adoption of voluntary best management practices (BMPs), and various forestry incentives programs.

Influences of Regulation on Private Forest Practices

Forests can provide private and public recreational opportunities, wildlife and fish habitat, timber, and forage. They can contribute to water supplies and riparian systems, open spaces, and other environmental qualities. They can provide any or all of these benefits at various levels and in various combinations. The level, mix, and sustainability of these benefits depend on the forest practices that landowners employ.

Landowners' choices of forest practices depend on the ecological characteristics of their forests, their interests in and capacities for forest management, and the market and policy influences that shape their choices (Johnson and others 1997). Forest practice regulations place planning and operational requirements on landowners who conduct certain forest management activities (e.g., timber harvest, forest improvement, road construction). These requirements, and the costs they involve, may modify landowners' choices and actions (USDA Forest Service 2002)

Regulations may have positive effects on forest productivity and environmental quality. They may also have negative effects if they impose a burden on landowners that reduces their incentives to manage their forest properties. Regulations that discourage productive timber

management practices may also erode the economic viability of forest enterprise sufficiently to promote forest conversion to uses which may pose greater problems elsewhere to the environment and produce undesirable outcomes (Mortimer and others 2003). Such outcomes could include high-grading (i.e., harvesting high value timber and favoring low value, poor quality trees), a reduction in bio-diversity, adverse future forest conditions and other deleterious effects. The results of these effects depend on how suitable a regulatory system is to the ecological and human circumstances in which it is applied.

Recommendations

Criteria for Public Regulation of Private Forest Practices

Representative Governance

- Forest practice regulations should be authorized by bodies that represent the broad public interest, private ownership interests, and the full range of forest users. The effectiveness of regulations requires their acceptance by the diverse interests they are intended to protect and influence. To the extent that regulations are not developed through processes that represent these interests, they are vulnerable to conflict, to increasing costs of implementation and enforcement, and to a weakening of the authorities for regulation.
- Forest practice regulations should embody the interests of all citizens they are likely to affect. Forestland owners, resource dependent communities and industries, farmers, water districts, environmentalists, anglers, and hunters, for example, should feel that regulatory boards or commissions welcome their participation in rule-making activities.

Knowledgeable Design

- Forest practice regulations should be based on the application of scientific knowledge, forest management principles, and their impacts on landowners' objectives and rights. The effectiveness of forest practice regulations depends on how well they affect objectives in a manner that fulfills the regulatory intent (Mortimer and others 2003).
- Forest practices embodied in regulations should clearly state the goal(s) they are attempting to achieve. Regulations should address a legitimate state interest in private forest property, and any substantive standards should be rationally related to meeting those identifiable state interests. Arbitrary or capricious practice standards should be avoided at all times (Mortimer and others 2003, Ellefson and others 1995). Regeneration of stands of trees should be part of all forest practice regulations.
- Forest practice regulations should assure the productivity of forestlands and prevent environmental harms. Careful application of forest management practices can increase tree growth, maintain water quality, preserve soil productivity, and provide for wildlife habitat and recreational opportunities. Regulatory schemes, however, should avoid establishing legally mandated goals or forest management objectives. Such decisions remain with landowners. Any such regulations should instead focus on ensuring

landowner compliance with minimum forest management standards such as preventing water quality degradation.

- An effective regulatory system should include means to obtain and incorporate the best information about its consequences. These means may include available involvement of forestry professionals in rule-making, enforcement, and monitoring procedures; techniques for monitoring physical impacts and public responses; and research on relationships between forest practices and their consequences.

Flexibility

- Forest practices regulation should recognize variations in forest conditions and forest derived values within a state. Forestland conditions as well as landowner interests and uses vary greatly over even short distances. Conditions under which forest ownerships are managed change significantly over time. Inflexible or inappropriately rigid regulations are unlikely to achieve or maintain their stated objectives. Laws and regulations should establish minimum standards, but encourage innovation and professional judgment to ensure compliance. Regulations should avoid prescribing specific ways to meet the standards.
- To be adaptable, a regulatory system should emphasize rule-making rather than legislative functions. This emphasis increases the responsiveness of regulatory standards to new and diverse information about actual regulatory impacts (Kerwin 1999, Ellefson and others 1997). However, frequent amendment of regulatory standards should be avoided. Frequent amendment can produce an unpredictable regulatory environment reducing incentives for long-term management, and undermining confidence in the regulatory approach.
- A regulatory system should place rule-making responsibilities in representative bodies that have direct access to the information they require. For example, many states establish separate forest districts to develop rules that suit their conditions and constituencies, and virtually all states have administrative bodies implementing existing forest practices laws (Cubbage and others 1993).
- When several means can achieve the same regulatory goal, a landowner should have the discretion to choose the means that best suits his or her particular circumstances.

Predictable Application and Effective Enforcement

- Forest practice regulations should be enforced with respect to (1) the lands and practices to which they apply; (2) the governmental jurisdictions that exercise authority for them; and (3) the processes through which this authority is exercised and appealed. Sound forest management requires long-term commitments by landowners. An unpredictable policy environment discourages such commitments. This is a particularly crucial component as the modern trend is towards increasing numbers of local county and municipal forest regulations. Ambiguous and inconsistent standards, application and

enforcement erodes the security of owners' commitments to the future quality and productivity of their forests, and erodes public confidence in regulatory standards and processes.

- Forest practice laws and rules should clearly define the land they cover, terms used, and standards for acceptable practices.
- Any enactment of forest practices laws and rules should occur at the highest possible level of state government to maximize uniformity and consistency across geo-political boundaries.
- If overlapping levels of governmental jurisdiction enact regulations, the precedence among jurisdictions should be clearly established.
- Enforcement must be consistent among ownerships with similar characteristics and for the same ownerships at different times.

Clarity and Simplicity

- A regulatory system should inform those it affects. Timely notification is important for informing landowners, timber operators, foresters, and the public about regulatory objectives they are asked to satisfy, the means they may apply to do so, and processes through which they can adjust these provisions. Accountability of enforcement agencies to those they regulate should be apparent and consistent.
- Authority and responsibility for forest practice regulation should be clearly defined and as uncomplicated as possible. The best regulations are ineffective if owners and other public interests in forest resources misunderstand the processes through which regulations are designed, appealed, and modified. Similar problems arise if owners and other public interests, although understanding the system, find it too complicated to allow them to appeal or modify its provisions.
- The processes of rule-making and appeal should be readily accessible, responsive, and equitable for all who may wish to use them.

Incentives

- Forest practice regulations and related programs should provide incentives that both promote desired private practices and support the viability of the ownerships the regulations are intended to affect. Regulations should enhance landowners' incentives to improve forest practices, directly or through associated programs, cost-shared investments, research and technology development, taxation, or education. Regulations may also discourage improvements and may even reduce management quality if they impose costs or sources of insecurity that owners cannot afford. Overly restrictive regulation may cause landowners to forgo opportunities for long-term management and utilization of their forest resources. It may also make desirable management practices

uneconomical. Such effects may greatly reduce the productivity of forestlands, and the environmental services that productive and viable forest ownerships provide (Mortimer and others 2003, USDA Forest Service, 2002).

- A regulatory system should be designed and administered to produce incentives that have the greatest net beneficial effect on the forest resources it is intended to improve. The system's capacity to do so should be evaluated in terms of (1) the physical impacts and public responses it produces and (2) the compatibility of other forest policies and programs with regulatory intent.

Authority Consistent with Governmental Support

- Forest practice regulations should not exceed what a government can finance and staff adequately to satisfy the preceding criteria. A regulatory system should be consistent with the resources a government can commit to the regulatory system's application and enforcement. Enforcement of regulations requires time, data, and funding. In other words, the effectiveness of forest practice regulations depends not only on their development but also on the resources that support them. Excessive or inadequate authority or financial support can cause unpredictable application, inequitable treatment, and conflict. These effects may reduce private investment in forest productivity and environmental protection or increase the public expense of attaining a particular standard.
- A regulatory system should provide clear information to the public about the legal and financial costs that regulation of private forest management may entail. To minimize the threat of legal challenges and complications, diminutions in the value of private forestland as a result of regulations should be avoided when possible (Ellefson and others 1995), and laws and ordinances should be closely tailored to legitimate state interests in forest regulation (Mortimer and others 2003, Ellefson and others 1995).

References Cited

- Boise Cascade v. State, 164 Or. App. 114, 991 P.2d 563 (1999), *appeal denied*, 331 Or. 244, 18 P.3d 1099 (2000), *and cert. denied* 532 U.S. 923 (2001)
- Cubbage, F.W., J. O’Laughlin, C.S. Bullock, III. 1993. *Forest Resource Policy*. New York, NY: John Wiley & Sons, Inc.
- Ellefson, P.V., A. S. Cheng, R. J. Moulton. 1997. State Forest Practice Regulatory Programs: An Approach to Implementing Ecosystem Management on Private Forest Lands in the United States. *Environmental Management* 21:421-432.
- Ellefson, P.V., A. Cheng, R. Moulton. 1995. Regulation of Private Forestry Practices by State Governments, Bulletin 605-1995. University of Minnesota Agricultural Experiment Station, St. Paul Minnesota.
- Henly, R.K., P. Ellefson. 1986. State Forest Practice Regulation in the U.S.: Administration, Cost, and Accomplishment, Bulletin AD-SB-3001. University of Minnesota Agricultural Experiment Station, St. Paul Minnesota.
- Johnson, R.L, R.J. Alig, E. Moore, and R. Moulton. 1997. NIPF Landowner’s View of Regulation. *Journal of Forestry* 95:23-28.
- Kerwin, C.M. 1999. Rulemaking: How Government Agencies Write Law and Make Policy. *CQ Press*. Washington D.C.
- Mortimer, M.J., H. L. Haney Jr., J. J. Spink. 2003. When Worlds Collide: Science and Policy at Odds in the Regulation of Virginia’s Private Forests. *Journal of Natural Resources and Environmental Law*. (*forthcoming*).
- State v. Dexter, 32 Wash.2d 551, 202 P.2d 906 (1949) *judgment affirmed*, 338 U.S. 863 (1949).
- U.S.D.A Forest Service. 2002. Southern Forest Resource Assessment, Final Report. Southern Research Station, Asheville, NC.
- Warren, H.D. 1950. Constitutionality of Reforestation or Forest Conservation Legislation. *American Law Reports* 2d 13:1095.

About the Society of American Foresters

The Society of American Foresters, with over 15,000 members, is the national organization that represents all segments of the forestry profession in the United States. It includes public and private practitioners, researchers, administrators, educators, and forestry students. The Society was established in 1900 by Gifford Pinchot and six other pioneer foresters.

The mission of the Society of American Foresters is to advance the science, education, technology, and practice of forestry; to enhance the competency of its members; to establish professional excellence; and to use the knowledge, skills, and conservation ethic of the profession to ensure the continued health and use of forest ecosystems and the present and future availability of forest resources to benefit society.

The Society is the accreditation authority for professional forestry education in the United States. The Society publishes the *Journal of Forestry*; the quarterlies, *Forest Science*, *Southern Journal of Applied Forestry*, *Northern Journal of Applied Forestry*, and *Western Journal of Applied Forestry*; *The Forestry Source*, and the annual *Proceedings of the Society of American Foresters national convention*.