

**WHATCOM COUNTY PROSECUTING ATTORNEY
DAVID S. McEACHRAN**

CHIEF CRIMINAL DEPUTY
Mac D. Setter

ASST. CHIEF CRIMINAL DEPUTY
Warren J. Page

CRIMINAL DEPUTIES

Craig D. Chambers
Elizabeth L. Gallery
David A. Graham
Eric J. Richey
James T. Hulbert
Ann L. Stodola
Jeffrey D. Sawyer
Anna Gigliotti
Shannon Connor
Christopher D. Quinn
David E. Freeman
Kari Hathorn
Kyle Moore
Dona Bracke
Kristen Reid

Whatcom County Courthouse
311 Grand Avenue, Second Floor
Bellingham, Washington 98225-4079
(360) 676-6784 / FAX (360) 738-2532
COUNTY (360) 398-1310

CHIEF CIVIL DEPUTY
Randall J. Watts

ASST CHIEF CIVIL DEPUTY
Daniel L. Gibson

CIVIL DEPUTIES

Karen L. Frakes
Royce Buckingham

**CIVIL SUPPORT
ENFORCEMENT DEPUTIES**
Angela A. Cuevas
Dionne M. Clasen

APPELLATE DEPUTIES

Kimberly Thulin
Hilary A. Thomas

ADMINISTRATOR
Kathy Walker

Date: August 19, 2011

To: Tyler Schroeder, Sam Ryan
From: Royce Buckingham, Attorney for Whatcom County PDS

RE: Legal Opinion regarding application of:

**RCW 76.09.460 Notice of conversion to nonforestry use – Denial of
permits or approvals by the county, city, town, or
regional governmental entity – Enforcement.**

Issue: Whatcom County has received a Notice to Comply from the Washington State Department of Natural Resources regarding illegal clearing by SSA Marine (Pacific International Terminals) and must decide whether a “Denial of permits” (moratorium) is appropriate.

The Municipal Research and Services Center of Washington (MRSC) provides a helpful overview of the authority of the State and County under the Forest Practices Act.

Introduction

This page provides information about Washington's Forest Practices Act. The Forest Practices Act, originally adopted in 1974, is found in [Ch. 76.09, RCW](#). Forest practices are activities related to growing, harvesting, or processing timber, including, but not limited to, road and trail construction and maintenance, thinning, salvage, harvesting, reforestation, brush control, suppression of diseases and insects, and using fertilizers ([RCW 76.09.020\(11\)](#)). These practices are

regulated by the Washington Forest Practices Act and its corresponding rules, found in [Title 222, WAC](#), promulgated by the Department of Natural Resources (DNR).

This page focuses particularly on several amendments adopted in 2007 that address local government administration of forest practices for some types of forest practices permit applications. [SHB 1409](#) establishes a new mechanism for transferring a portion of DNR's responsibility for administration and enforcement of forest practices regulation to local governments. This amendment replaces the mechanism established by [SSB 5714](#) in 1997. In addition, [SSB 5883](#) amends the moratorium provisions related to the improper conversion of forest lands to other uses. Under the amended procedure, if a landowner begins conversion activities without an approved forest practices application or without stating in the forest practices application that the land will be converted, DNR must issue a notice of conversion to the Department of Ecology and the local government where the property is located. The local government must then deny a building or subdivision permit application on the subject property for a period of six years after receiving a DNR notice of conversion.

In the case of SSA Marine's illegal clearing, an August 12, 2011 "Notice to Comply" has been received by Whatcom County. The finding in the notice is that "DNR does not consider this timber clearing as conversion activities as defined in RCW 76.09.020."

"Conversion" is the trigger that gives the County both authority to act and an obligation to act under RCW 76.09.240 and RCW 76.09.460.

RCW 76.09.240(6)(a) indicates that "no county...shall adopt or enforce any law...pertaining to forest practice, except...That exercise of such authority may regulate forest practices only...Where...the lands have been or will be converted..." While reading this section requires some navigation, its intent is clear. Conversion is the trigger that gives a County authority to regulate forest practices.

The above section squares with and is affirmed by RCW 76.09.460, which states that if a County receives a "notice of conversion," then it must deny applications for six years (impose a moratorium). Again, the trigger is conversion.

It must be noted that the County's local ordinance, WCC 20.80.738(a)(iii), appears to give the County authority to issue a moratorium for less than a full "conversion." However, local ordinances cannot regulate where state ordinances have prohibited regulation, and such is the case here. The above state statutes are quite clear that the County may not regulate unless a full conversion has occurred. The County ordinance was passed prior to the 2007 amendments to the State statute regarding County authority and conversions, and the subsequent State statute controls.

I have spoken with attorney Phil Ferester at the Attorney General's Office. He represents the State Department of Natural Resources (DNR) and is knowledgeable in these matters. He explained the above to me with precisely the same analysis.

I have also received comments from attorneys for SSA Marine, who are proponents of the project and attorneys for Earth Justice, who have concerns about the project. Comments from both parties were reviewed and considered.

In sum, unless and/or until DNR finds that the activity is a conversion and the County "receives a notice of conversion" from DNR per 76.09.460, I do not advise the imposition of a moratorium under State and County law. However, if a notice of conversion is issued, a moratorium is mandatory.

Please feel free to call me if you need any clarification.

Sincerely,

Royce Buckingham

Attorney for Whatcom County PDS