House
Legislative
Analysis
Section

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RIGHT TO FOREST ACT

House Bill 5953 as enrolled
Public Act 676 of 2002
Second Analysis (12-30-02)

Sponsor: Rep. Ken Bradstreet
House Committee: Agriculture and Resource Management
Senate Committee: Hunting, Fishing, and Forestry

THE APPARENT PROBLEM:

Predominantly covering the northern two-thirds of the state, Michigan's forestland provides the state and its citizens with economic, environmental, and recreational benefits. The diversity and sheer abundance of the state's forestland provides plant and animal wildlife with a healthy and viable habitat, filtration for air and water quality, and protection against soil erosion. In addition, the state's forestland provides the serene backdrop for the 'crown jewel' of the state's tourism industry. Visitors and residents are provided with the opportunity to enjoy a myriad of recreational activities, including camping, hiking, cross country skiing, mountain biking, horseback riding, and canoeing, in addition to fishing and hunting. Such forest-based tourism and recreation provides for 50,000 jobs and injects over $3 billion into the state's economy. In addition, forest-related manufacturing industries – lumber, paper, and furniture companies - provide 150,000 jobs and contribute more than $9 billion to the state's economy.

A 1993 statewide inventory conducted by the United States Department of Agriculture-Forest Service (USDA-FS), the fifth such study since 1935, determined that approximately 19.3 million acres (53 percent) of the state's 36.4 million acres was forestland. Timberland (commercial forestland) accounted for 18.6 million acres of the forestland – the fifth largest state acreage in the U.S. These figures represent an increase of 933,000 acres (five percent) and 1.1 million acres (seven percent), respectively, from a previous inventory conducted in 1980.

According to the Michigan Land Resource Project, a recent report by Public Sector Consultants, three factors are inextricably linked to the future of Michigan's forest industry: forest health, forest fire protection, and second home development. The report projected land use changes for the years 2020 and 2040 and estimates total forestland lost by county, using 1995 as a baseline year. Using a "basic" scenario, which estimated direct loss of forestland due to conversion to another land use, the projected percentage of forestland lost would be one percent by 2020 and 2 percent by 2040. However, using a "sprawl" scenario, which estimated the loss of forestland by direct conversion to another use and forestland effectively withdrawn from timber production as a buffer around the new land use, the percentage decline would be 3.4 percent and 7.3 percent by 2020 and 2040, respectively.

The report projected modest declines in forestland in the Upper Peninsula, and more substantial losses of forestland in the southern Lower Peninsula. Under the sprawl scenario, the report projected a decline in forestland in the Southern Lower Peninsula of 12.9 percent and 24.6 percent by 2020 and 2040, respectively. Projected losses of forestland in the northern Lower Peninsula under the sprawl scenario were 2.9 percent and 6.6 percent by 2020 and 2040, respectively. To address the problem of continued declines in forestland in the state, legislation has been introduced that would create the Right to Forest Act.

THE CONTENT OF THE BILL:

House Bill 5953 would create the Right to Forest Act. Under the bill, forestry operations would not be considered to be a public or private nuisance if the operations alleged to be a nuisance conformed to generally accepted forestry management practices in accordance with the policies of the Department of Natural Resources (DNR). In addition, forestry operations voluntarily using sustainable forest practices as approved by the Natural Resources Commission would not be considered to be a nuisance if the operations existed before a change in land use or occupancy of land within one mile of the boundaries of the forestland, and if the operations

would not have been considered to be a nuisance before the change in land use or occupancy. Forestry operations that are in conformance with generally accepted forestry management practices would not be considered to be a public or private nuisance as a result of a change in ownership or size, the cessation or interruption of forestry operations, enrollment in governmental forestry or conversation programs, or adoption of new forestry technology. The act would not supercede, negate, or determine any protection of land, farms, or farming operations that are subject to the Right to Farm Act (Public Act 93 of 1981).

Under the bill, a public or private nuisance would be defined to include, but not be limited to, allegations based on any of the following:

- Visual changes due to the removal of vegetation or timber.

- Noise from forestry equipment used in normal, generally accepted forestry practices.

- Removal of vegetation or timber on a forest adjoining the property of another landowner.

- The use of chemicals normally used in forestry operations, and applied under generally accepted forestry practices.

In a successful defense of a nuisance allegation, the defendant landowner or timber owner could recover from the plaintiff the actual amount of costs and expenses determined by the court to have been incurred in connection with the defense of the allegation, as well as the reasonable and actual attorney fees.

Among other definitions, the bill would define "forestry operations" to mean any activity related to the harvesting, reforestation, and other management activities, including, but not limited to, thinning, pest control, and fertilization, that are consistent with principles of sustainable forestry. In addition, "generally accepted forestry management practices" would be defined to mean those forest management practices as prescribed by the Natural Resources Commission in consultation with the Department of Agriculture; Michigan State University Extension; the U.S. Department of Agriculture agencies, services, and programs; college and university forestry programs; and professional, industry, and conservation organizations.

BACKGROUND INFORMATION:

The bill is modeled after the Right to Farm Act (Public Act 93 of 1981), which was enacted as a means of protecting the farming operations of farmers from nuisance lawsuits, generally from individuals (non-farmers or those who formerly lived in urbanized areas) who are not accustomed to the odors, sounds, and dust related to a farming operation.

In 1999, Public Act 261 (SB 205) amended the Right to Farm Act so that the act read, "it is the express legislative intent that this act preempt any local ordinance, regulation, or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices" (GAAMPs). Public Act 261 further amended the Right to Farm Act to prohibit a local unit of government from enacting, maintaining, or enforcing an ordinance, regulation, or resolution that conflicts with the act or the GAAMPs developed pursuant to the act. It should be noted, however, that House Bill 5953 does not contain this preemptive language.

FISCAL IMPLICATIONS:

According to the Senate Fiscal Agency, the bill would have no fiscal impact on state or local government. (12-11-02)

ARGUMENTS:

For:

The state's forestry industry is vital to the economic and environmental health of the state, and also serves as a foundation of the state's tourism industry, thereby enhancing the quality of life of residents and out-of-state tourists alike. Given this importance, it is imperative that the state seeks to ensure the long-term viability of the industry.

In many instances, urban expansion into state forestland – most notably through housing developments – is fraught with problems. These divergent land uses often result in conflicting views regarding forest uses and sound forest management techniques. To the average person, most forest management practices (and their results) are unnoticeable. However, conflict often arises when there are distinct visual changes and other noticeable externalities resulting from the forest management practices (noise, expanded road use, and impacted recreational activities). In many situations, the

adjacent landowner, who has an aversion to the more noticeable practices and who, perhaps, does not fully understand the reason for certain forestry practices (such as clear cutting), registers his or her disgust with the forester and local officials, and hints at possible legal action if the practices continue. These kinds of situations greatly hinder the ability of foresters to properly manage their forestland, especially if there is an underlying fear of retribution if he or she continues to engage in certain generally accepted and sound forest management practices that are essential to the health and viability of the forestland. These nuisance lawsuits often are economically disastrous and force the forester to cease operations or, at the very least, drive up production costs. In either case, the consumers are faced with higher costs of the goods produced from the forest industry.

To that end, the bill would protect those foresters engaged in forestry operations that conform to generally accepted forestry management practices from nuisance lawsuits.

Response:

During the course of the committee hearing, proponents of the bill were unable to cite specific instances where foresters engaged in generally accepted forestry management practices had to defend themselves from nuisance lawsuits. This bill, then, seems to be seeking to impose a solution to a problem that does not exist, and, therefore, the bill appears to be unnecessary.

Rebuttal:

An apparent lack of specific instances of legal action taken against a forester does not necessarily mean that no such situations have ever taken place, or will ever take place in the future. It is entirely possible that the mere threat of legal action against a forester – especially private landowners managing their own land – has served to effectively prohibit foresters from engaging in certain environmentally and economically sound forest management practices. Rather, this bill is a proactive attempt to ward off often-baseless nuisance lawsuits.

For:

Enacting the Right to Forest Act will strengthen an individual's 'right to forest' and clear up any ambiguities that currently exist, with regard to forests, under the Right to Farm Act. Under the Right to Farm Act, a farm product includes, among others, "trees and tree products", and other similar products. On the surface, however, it appears that the provisions of the Right to Farm Act are more aimed at traditional 'agricultural' activities and do not adequately protect activities and situations that are unique to the forestry industry. Under the Right to Farm Act, in language substantially similar to this bill, a farm operation is not considered to be a nuisance if the farm operator follows generally accepted agricultural and management practices, as those practices are defined according to the Commission of Agriculture. In contrast, House Bill 5953 specifies that a forestry operation would not be considered to be a nuisance if the forester followed generally accepted forestry management practices, as those practices are defined by the Commission of Natural Resources, a body more suitable to develop a set of practices, in conjunction with other stakeholders, that take into account the environmental, economic, and social implications of the state forestland. Furthermore, the bill takes an added step, in that it defines a nuisance to mean any allegations based on visual changes, noise, the removal of vegetation or timber on forestland adjacent to the property of another landowner, and the use of normally utilized chemicals. The Right to Farm Act does not contain any provision defining what constitutes a nuisance.

Response:

While the bill seeks to distinguish itself from the Right to Farm Act and clarify the law with respect to an individual's right to manage forestland, the bill lacks a key provision of the Right to Farm Act. Under the Right to Farm Act (see Section 4 – MCL 286.474), the director of the Department of Agriculture (MDA) must investigate all complaints involving a farm or farm operation. The MDA acts as an intermediary to ameliorate any complaints and avoid the involvement of the court system wherever possible. However, this bill does not contain such a provision. Absent a similar provision, perhaps one in which the DNR would investigate complaints involving any forestry operation, it is not entirely clear as to how the purported intent of the bill - to avoid costly litigation - would be satisfied. As the bill is currently written, if a person has a complaint regarding the forestry operations of a forester, that individual's only course of action is through the court system, which would then ascertain whether the actions of the forester were in accordance with any generally accepted forest management practices. Again, apparently this is what the bill had set out to avoid altogether.

Against:

The provisions of the bill do not appear to be consistent. The bill seems to create a situation in which there are three separate levels of protection afforded to a forester. First, if a forester engages in

generally accepted forest management practices, he or she would be shielded from any nuisance suit. Second, following the definition of "forestry operations", a forester engaged in sustainable forestry practices would be shielded from any nuisance suit if the forestry operations were in existence prior to any change in land use or occupancy within one mile of the forestland – apparently without regard to whether the forestry operations were following generally accepted forestry management practices. Finally, if a forester does not engage in generally accepted forestry management practices, he or she would not be afforded any protection from a nuisance suit.

The differences among the first two instances are slight, though do merit some attention. Under the act, generally accepted forestry management practices are merely those practices devised by the Natural Resources Commission in conjunction with other stakeholders. These may or may not follow the principles of sustainable forestry (though it is generally assumed that they would follow those principles). The bill states that forestry operations that existed prior to a change in land use would be afforded protection from any nuisance suit. It is important to note that the bill does not explicitly state that such forestry operations would have to follow generally accepted forestry management practices.

If the intent is to protect those foresters who follow generally accepted forestry management practices, then it should make no difference whether the forestry operations were in existence prior to any change in land use or occupancy. However, if it is intended to make such a distinction, it hardly seems fair to prohibit a person from filing a nuisance suit. If a forester is engaged in certain forestry practices that are not generally accepted, and, for instance, are detrimental to the environment, it should not matter that the forestry operation was in existence prior to any change in land use or occupancy. The "who was there first" argument appears to be rather childish, at best, and serves to abrogate the right of an individual to seek recourse.

Analyst: M. Wolf

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