

# **Non-Federal Public Forest Timber and Timber Export Restrictions**

## **Addressing “Substitution” and Other Issues in California**

The federal Forest Resources Conservation and Shortage Relief Act of 1990 (16 USCA 620c *et seq.*) and related regulations promulgated there-under by the Department of Commerce prohibit the export of unprocessed timber from nonfederal public lands in Western states. This regulatory construct also places significant controls on the “substitution” of unprocessed public timber for unprocessed private timber that has been or will be exported by a given party. In addition, there is a provision for the Secretary of Commerce to designate certain species as “surplus to the needs of timber manufacturing facilities in the United States,” and remove these species from export restrictions [16 USCA 620c(j)].

The small number of timber purchasers in California, exerts downward pressure on demand for timber from Demonstration State Forests and public community forests in California. For example, the City of Arcata’s Community Forest has encountered significant problems in successfully selling the logs from its one timber sale per year, because their usual log buyer is now involved in the export market for private logs. The major species sold by Arcata is redwood, but their usual purchaser of these logs does not export redwood; rather, they export other conifer species that are not a product substitute for redwood. Also, Arcata has had difficulty selling grand fir and Sitka spruce logs because of a lack of purchasers interested in domestic processing; however, there are export markets for these logs. Based on Arcata’s market experience, these species are “surplus to the needs of timber manufacturing facilities in the United States.”

Sales from the Demonstration State Forests could be reduced because of the market situation described above. The Department manages approximately 71,000 acres of timberland in the state. The Department’s two forests in coastal areas, Jackson Demonstration State Forest in Mendocino County and Soquel Demonstration State Forest in Santa Cruz County, are most susceptible to reduced demand effects due to the substitution restrictions. Taken together, these two forests comprise 51,330 acres, or 72 percent of the Demonstration State Forest system. Since they are predominantly high-value redwood timber forests, they produce by far the majority of timber sale revenues for the Department. Hence, the factors of strict substitution restrictions, active export markets, and a limited number of timber buyers to begin with, can have a very significant impact on demand and prices for timber from these forests.

At one level, this is a small problem, because non-federal public timber sales account for less than an estimated 3 percent of all timber sales in the state. On the other hand, the public entities selling this timber are highly dependent upon timber sales for the revenues to continue the management of their lands and the operation of their related

programs, such as research, demonstration of sustainable forest management techniques, and public recreation.

The states of Oregon and Washington have formal, Secretary-of-Commerce-approved programs in place that provide further definition of and flexibility regarding what constitutes substitution of public timber for exported private timber. These programs also include designated sourcing areas, with provisions that substitution is not considered to occur between public timber and private timber between the sourcing areas. Further, the State of Washington applies a restrictive, three-part test to determine whether a public timber purchaser may be subject to substitution restrictions [WAC 240-15-010(4)(h)(i)].

The federal law provides that there is a two-year look-back from the date of a public timber sale for substitution effects. Federal law does not specify a period for looking forward from the date of a public timber sale; i.e., how long after a public timber sale purchase must a buyer refrain from exporting unprocessed private logs to avoid substitution? Washington State has a two-year forward-looking policy [WAC 240-15-010(4)(h)(ii)(B)]; Oregon has a forward-looking policy that terminates at the time that a purchaser's state timber sale contracts end [OAR 141-016-0010(1)(d)].

### **Pursuing an Advisory Opinion from the Department of Commerce**

Specific flexibilities to explore are:

1. A provision that substitution does not occur between hardwood and softwood logs, since they produce distinctly different products and move in different markets;
2. A provision that substitution does not occur between redwood and other softwood logs, since they produce distinctly different products that do not substitute for one another in markets;
3. Provision for a three-part test similar to Washington as to whether substitution restrictions apply:

"Substitution" means the purchase of export restricted timber or possession of an active sale contract for export restricted timber by (A) a person who owns and operates a processing facility (B) where the person owning the processing facility also exports or sells for export from the United States unprocessed timber originating from private lands in the state of Washington and (C) where such lands are owned by the person, or the person has exclusive rights to harvest timber from such lands, where such rights may be exercised at any time during a period of more than seven years. Substitution can occur only when all three above noted conditions are met. Exceptions to this seven year restriction may be

considered on a case by case basis by the department of revenue in exceptional circumstances. [WAC 240-15-010(4)(h)(i)]

4. Provision for a forward-looking substitution restriction similar to Oregon's; i.e., that terminates at the time that a purchaser's public timber sale contracts end.
5. A determination by the Secretary of Commerce that grand fir and Sitka spruce logs from California are "surplus to the needs of timber manufacturing facilities in the United States."
6. Establishing at least two "sourcing areas," such as Coastal and Interior California, where substitution is not considered to occur between public and private timber between the two areas.

## Regulations

A General Order is a rule (**not a regulation**) which contains various procedures:

"the Secretary of Commerce issued a General Order prohibiting the export of unprocessed timber originating from public lands located west of the 100th meridian in the contiguous United States. In addition, the Order prohibits certain unprocessed timber substitutions between public and private lands, **provides certain exemptions from this prohibition**, and includes definitions and contract sanctity provisions for certain prior contracts."

The GO provides for an exemption:

"(d) Exemption. Pursuant to section 491(b)(3)(B) (16 U.S.C. 620c(b)(3)(B)) of the Forest Resources Conservation and Shortage Relief Act of 1990, as amended, the prohibitions in section (c) of this Order do not apply in a state on or after the date on which: (1) The Governor of that state provides the Secretary of Commerce with notification of a prior state program under section 491(d)(2)(C) (16 U.S.C. 620c(d)(2)(C)) of the Act; [FNI] (2) **the Secretary of Commerce approves a state program under section 491(d)(2)(A) (16 U.S.C. 620c(d)(2)(A)) of the Act**, or (3) the Secretary of Commerce issues implementing regulations under the Act, whichever occurs first."

In sum, there are no regulations, except for those specific to Western Red Cedar, and a state program could be moved to the Secretary.

### **(d) Authorized State programs**

#### **(1) Authorization of new State programs**

Notwithstanding subsection (c) of this section, the Governor of any State may submit a program to the Secretary of Commerce for approval that—

**(A)** implements, with respect to unprocessed timber originating from public lands in that State, the prohibition on exports set forth in the Secretary's order under subsection (a) of this section; and

**(B)** ensures that the species, grades, and geographic origin of unprocessed timber prohibited from export within the State is representative of the species, grades, and geographic origin of timber comprising the total timber sales program of the State.

**(2) Approval of State programs**

**(A) Program approval**

Not later than 30 days after the submission of a program under paragraph (1), the Secretary of Commerce shall approve the program unless the Secretary finds that the program will result in the export of unprocessed timber from public lands in violation of sections [620](#) to [620j](#) of this title and publishes that finding in the Federal Register.

**(B) State program in lieu of Federal program**

If the Secretary of Commerce approves a program submitted under paragraph (1), the Governor of the State for which the program was submitted, or such other official of that State as the Governor may designate, may administer and enforce the program, which shall apply in that State in lieu of the regulations issued under subsection (c) of this section.

Or:

**h) Removal or modifications of State restrictions**

Based upon a determination that it is in the national economic interest, the President may remove or modify any prohibition on exports from public lands in a State if that State petitions the President to remove or modify such prohibition.

**(j) Surplus timber**

The prohibitions on exports contained in orders of the Secretary of Commerce issued under subsection (a) of this section shall not apply to specific quantities of grades and species of unprocessed timber originating from public lands which the Secretary concerned determines by rule to be surplus to the needs of timber manufacturing facilities in the United States. Any such determination may, by rule, be withdrawn by the Secretary concerned if the Secretary determines that the affected timber is no longer surplus to the needs of timber manufacturing facilities in the United States.

**(k) Suspension of prohibitions**

Notwithstanding any other provision of this section, beginning on January 1, 1998, and annually thereafter, if the President finds, upon review of the purposes and implementation of sections [620](#) to [620j](#) of this title, that the prohibitions on exports required by subsection (a) of this section no longer promote the purposes of sections [620](#) to [620j](#) of this title, then the President may suspend such prohibitions, except that such suspension shall not take effect until 90 days after the President notifies the Congress of such finding.