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Seminars

# 2020 Environmental Law: Year in Review



*Cosponsored by the Environmental &  
Natural Resources Section*

Thursday, October 8, 2020  
8:30 a.m.–4:40 p.m.

6 General CLE credits and  
1 Ethics (Oregon specific) credit

## 2020 ENVIRONMENTAL LAW: YEAR IN REVIEW

### SECTION PLANNERS

**Maura Fahey, CLE Chair, Crag Law Center, Portland**  
**Alia Miles, Oregon Department of Justice, Portland**  
**Kate Moore, Dunn Carney LLP, Portland**  
**Ilene Munk, Foley & Mansfield PLLP, Portland**  
**Stephanie Regenold, Perkins Coie LLP, Portland**  
**Ryan Shannon, Center for Biological Diversity, Portland**  
**Avalyn Taylor, Attorney at Law, Portland**

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## SCHEDULE

### 8:30 Introductory Remarks

Maura Fahey, CLE Chair, *ENR Section Chair-Elect, Crag Law Center, Portland*  
Sarah Liljefelt, ENR Section Chair, *Schroeder Law Offices PC, Portland*

### 8:40 Crystal Balls and Tea Leaves: NEPA Implementation in a Changing Landscape

- ◆ July 2020 revisions to Council on Environmental Quality (CEQ) regulations implementing the National Environmental Policy Act of 1969 (NEPA)
- ◆ The potential effects of these revisions on national forestlands
- ◆ Filed and prospective litigation challenging CEQ and NEPA revisions
- ◆ What the future holds for the two agencies promulgating these rules

Susan Jane Brown, *Western Environmental Law Center, Portland*  
Elizabeth Rosso, *Jordan Ramis PC, Portland*

### 9:40 Transition

### 9:45 ESA Issues in Water Resources Management

- ◆ Irrigation and water management and the impact on species listed under the Endangered Species Act
- ◆ Intersection of the Endangered Species Act (ESA) and tribal reserved rights—*Baley v. United States* and *Klamath Irrigation District v. Bureau of Reclamation*
- ◆ Ongoing effort by Deschutes Basin Board of Control and City of Prineville to develop a habitat conservation plan

David Filippi, *Stoel Rives LLP, Portland*  
Thane Somerville, *Morisset Schlosser Jozwiak & Somerville, Seattle*

### 10:45 Transition

### 10:50 Superfund Legal Update and ADR Tools for Your Next Environmental Negotiation

- ◆ Recent developments in Superfund law
- ◆ Mediation and arbitration of multi-party environmental matters
- ◆ Allocation factors unique to environmental disputes and presenting them during allocation and mediation

Ashley Carter, *Portland Office of City Attorney, Portland*  
Mark Schneider, *Perkins Coie LLP, Seattle*

### 11:50 Lunch

### 12:20 Oregon Forest Law and Policy Update

- ◆ Litigation updates and recent legal and regulatory changes to forest management of Oregon's state, federal, and private forestlands
- ◆ Amendments to the Eastside Screens governing federal forest management

Ralph Bloemers, *Crag Law Center, Portland*  
Sara Ghafouri, *American Forest Resource Council, Portland*

### 1:20 Transition

## SCHEDULE (Continued)

### 1:25 1200-Z General Permit Rulemaking

- ◆ DEQ's revised rulemaking for the NPDES 1200-Z stormwater general permit, process, and expected timeline
- ◆ Draft provisions of the 1200-Z rulemaking
- ◆ Water quality-based effluent limitations

Justin Green, *Water Quality Division Administrator, Oregon Department of Environmental Quality, Portland*

Stacy Hibbard, *Environmental Program Manager, City of Portland, Portland*

James Saul, *Earthrise Law Center, Portland*

### 2:25 Transition

### 2:30 Ocean and Coastal Law: A Primer on Governance, Wind Development, Fisheries, and Pollution

- ◆ Fisheries management and plastics pollution
- ◆ Overview of Oregon's ocean and coastal regulatory program
- ◆ Regulatory framework that applies to offshore wind development

Tara Brock, *Oceana, Portland*

Josh Franklin, *Chief Development Officer, Progression Energy, San Diego*

Heather Wade, *Coastal Policy Specialist and Senior Planner, State of Oregon, Salem*

### 3:30 Transition

### 3:35 The Ethics of Storytelling in Environmental Advocacy

- ◆ How strong advocacy can inadvertently cross ethical lines
- ◆ Examples of ethical and unethical interactions with a fact finder or regulator
- ◆ ORPC rules 1.6, 3.3, 4.1, and 8.4

Steve Johansen, *Lewis and Clark Law School, Portland*

### 4:35 Closing Remarks

Maura Fahey, *CLE Chair, Crag Law Center, Portland*

### 4:40 Adjourn

## FACULTY

**Ralph Bloemers**, *Crag Law Center, Portland, OR*. Mr. Bloemers cofounded Crag Law Center in 2001. He has developed a specialty in public lands and natural resources law and has worked with dozens of clients throughout the Pacific Northwest since Crag's founding.

**Tara Brock**, *Oceana, Portland, OR*. Ms. Brock has worked on a variety of ocean and coastal issues over the last ten years, including plastic pollution, marine spatial planning, habitat protection and fisheries management. Prior to joining Oceana she worked at The Pew Charitable Trusts leading campaigns on ocean and coastal issues by providing legal analysis and policy development, stakeholder engagement, and legislative strategies.

**Susan Jane Brown**, *Western Environmental Law Center, Portland, OR*. Ms. Brown is a nationally recognized expert on forest law. She has been appointed by the Secretary of Agriculture to co-chair the Federal Advisory Committee on the National Forest Management Act. She is a recipient of the Wilburforce Foundation's Conservation Leadership Award, honoring her years of hard work protecting wildlife and wildlands in the western United States and recognizing her outstanding leadership in the conservation movement. She also served as executive director of the Gifford Pinchot Task Force from 2000-2003.

**Ashley Carter**, *Portland Office of City Attorney, Portland, OR*.

**Maura Fahey**, *Crag Law Center, Portland, OR*. Ms. Fahey's docket consists of a variety of work including land use challenges in Oregon and Washington, Clean Water Act enforcement and federal public lands law. She serves on the Executive Committee of the Environmental & Natural Resources Section of the Oregon State Bar.

**David Filippi**, *Stoel Rives LLP, Portland, OR*. Mr. Filippi's practice includes natural resources, environmental and land use law, and concentrates on water rights and water quality, fish and wildlife law, hydropower relicensing, and project facility siting and permitting. He has been closely involved in the development and implementation of numerous Endangered Species Act compliance strategies on behalf of both public and private clients.

**Josh Franklin**, *Chief Development Officer, Progression Energy, San Diego, CA*.

**Sara Ghafouri**, *American Forest Resource Council, Portland, OR*. Ms. Ghafouri joined AFRC after practicing almost three years as an associate at Haglund Kelley LLP. During her time at Haglund Kelley, she focused her practice on complex civil litigation, environmental and natural resources law, and Indian law. She is a board member and advocacy co-chair of the Oregon Asian Pacific American Bar Association and participates in the Lewis & Clark Law School mentorship program. She is the former co-chair of the Oregon Trial Lawyers Association's Amicus Curiae Committee.

**Justin Green**, *Water Quality Division Administrator, Oregon Department of Environmental Quality, Portland, OR*.

**Stacy Hibbard**, *Environmental Program Manager, City of Portland, OR*.

## FACULTY (Continued)

**Steve Johansen**, *Lewis & Clark Law School, Portland, OR*. Mr. Johansen has served on the Oregon Bench/Bar Commission on Professionalism since 2002. He served on the Board of Directors of the Legal Writing Institute from 1996 until 2008 and served as the Institute's President from 2002 to 2004. He is also a former Chair of the AALS Section on Legal Writing, Research, and Reasoning. He has published articles on the politics of legal writing, interpreting Oregon statutes, and most recently on the ethical limits of storytelling in the law.

**Sarah Liljefelt**, *Schroeder Law Offices PC, Portland, OR*. Ms. Liljefelt's areas of practice include: water rights due diligence review, permitting, extensions, transfers, mitigation, and cancellation; water-related real property issues, including easements, licenses, right-of-ways, and well share agreements; real property disputes, including prescription, adverse possession, and condemnation; public records, meetings, and contracting compliance; water quality and wetlands regulation compliance; administrative adjudications, judicial review of agency orders, and state and federal civil litigation and appeals. She is currently the Chair of the Environmental and Natural Resources Section of the Oregon State Bar.

**Elizabeth Rosso**, *Jordan Ramis PC, Portland, OR*. Ms. Rosso's practice includes environmental and natural resources law, water quality law, wetlands and drainage law, administrative law, and endangered species. She is the current Chair of the Oregon State Bar Bulletin Editorial Advisory Committee.

**James Saul**, *Earthrise Law Center, Portland, OR*. Mr. Saul is a staff attorney at the Earthrise Law Center and a clinical professor of law at Lewis & Clark Law School. In this capacity he represents clients in public-interest environmental cases in state and federal courts, focusing on clean air, clean water, and solid waste litigation.

**Mark Schneider**, *Perkins Coie LLP, Seattle, WA*. Mr. Schneider's practice includes the full range of environmental, energy, natural resource and land use issues. He assists clients with permitting, compliance and regulatory matters under federal and state laws, including the Clean Water Act, Clean Air Act, Endangered Species Act, National Environmental Policy Act and various state environmental policy acts. He is an elected Fellow of the American College of Environmental Lawyers and is rated as a Band One lawyer by *Chambers USA*.

**Thane Somerville**, *Morisset Schlosser Jozwiak & Somerville, Seattle, WA*. Mr. Somerville exclusively represents tribal governments. His practice includes all aspects of tribal government representation, with special emphasis on protection of natural and cultural resources. Mr. Somerville holds an LL.M. in Environmental and Natural Resources Law from Lewis and Clark Law School. He is licensed to practice law in Oregon, Washington, and Arizona.

**Heather Wade**, *Coastal Policy Specialist and Senior Planner, State of Oregon, Salem, OR*.

# Chapter 1

# Crystal Balls and Tea Leaves: NEPA Implementation in a Changing Landscape

**SUSAN JANE BROWN**

Western Environmental Law Center  
Portland, Oregon

**ELIZABETH ROSSO**

Jordan Ramis PC  
Portland, Oregon

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# Crystal Balls and Tea Leaves: NEPA Implementation in a Changing Landscape

Susan Jane M. Brown, Staff Attorney  
Western Environmental Law Center

Elizabeth Rosso, Shareholder  
Jordan Ramis, PC

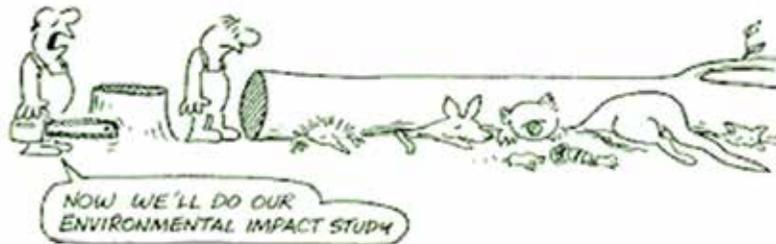
## National Environmental Policy Act

- “Magna Carta” of environmental laws
- Enacted into law in 1970
- Procedural law with substantive results
- Requires agency disclosure of environmental consequences and public involvement



## Council on Environmental Quality (CEQ)

- Created by NEPA
- Developed regulations in 1978 at the direction of President Carter



## CEQ Rulemaking

- 2017: Executive Order 13807
- 2018: Advanced Notice of Proposed Rulemaking
- 2020: Proposed Rule → Final Rule
- Litigation



## 2020 Final Rule

- No NEPA, ESA, or environmental justice compliance
  - Removal of iconic language
  - Limits the application of NEPA
  - Allows for the use of “functional equivalent”
  - Eliminates significance factors
  - Pay to play
  - Limits alternatives
- 

## 2020 Final Rule (cont.)

- Eliminates requirement to consider indirect and cumulative effects
  - Increased use of categorical exclusions
  - Institutionalizes applicant bias
  - Time & page limits
  - Comment content
  - Alters judicial review and exhaustion requirements
-

## Litigation Challenging Regulations

- *Alaska Community Action on Toxics et al. v. CEQ, et al.* (N.D. Cal., 20-cv-05199-RS)
- *State of California et al. v. CEQ et al.* (N.D. Cal., 20-cv-06057)
- *Wild Virginia et al. v. CEQ et al.* (W.D. VA, 20-cv-00045-JPJ-PMS)
- *Environmental Justice Health Alliance et al. v. CEQ et al.* (S.D. NY, 20-cv-06143)
- *Iowa Citizens for Community Improvement et al. v. CEQ* (D. D.C., 20-cv-02715)

## Early Action!

- Motions to intervene
- Preliminary injunction motion in SELC litigation
- Motion to dismiss in SELC litigation
- Other?



## ACAT Claims

- Procedural claims
  - NEPA on NEPA
  - ESA on NEPA
  
- “Substantive” claims
  - Environmental justice
  - Shift in agency position (*State Farm*, progeny)
  - Agency action in excess of delegated authority



## Future of the 2020 CEQ Rule



- Litigation
  
- Congressional Review Act
  
- Elections have consequences!

## Jealous??

Email [brown@westernlaw.org](mailto:brown@westernlaw.org) your best NEPA haiku and if the decisionmaker deems\* it worthy,\* one of these commemorative shirts could\* be yours!



\* Committed to decisionmaker's discretion

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The Council on Environmental Quality (CEQ) provides this redline for the convenience of reviewing the changes to its regulations. While CEQ has taken steps to ensure the accuracy of this redline, it is not an official version of the final rule. Please refer to the official final rule, available at <https://regulations.gov> in Docket No. CEQ–2019–0003.

**Council on Environmental Quality Regulations  
for Implementing the Procedural Provisions of the National Environmental Policy Act**

**SUBCHAPTER A—NATIONAL ENVIRONMENTAL POLICY ACT  
IMPLEMENTING REGULATIONS**

**PART 1500—PURPOSE, AND POLICY, AND MANDATE**

Sec.

1500.1 Purpose and policy.

1500.2 ~~[Reserved]~~ Policy.

1500.3 NEPA compliance ~~Mandate~~.

1500.4 Reducing paperwork.

1500.5 Reducing delay.

1500.6 Agency authority.

**Authority:** 42 U.S.C. 4321–4347; NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371–4375; et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609); and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902 Mar. 5, 1970, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123 May 24, 1977); and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

**§ 1500.1 Purpose and policy.**

(a) The National Environmental Policy Act (NEPA) is a procedural statute intended to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process our basic national charter for protection of the environment. It establishes policy, sets goals (Section 101 of NEPA establishes the national environmental policy of the Federal Government to use all practicable means and measures to foster and promote the general welfare, create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans), and provides means (section 102) for carrying out the policy. Section 102(2) of NEPA establishes the procedural requirements to carry out the policy stated in section 101 of NEPA. In particular, it requires Federal agencies to provide a detailed statement on proposals for major Federal actions significantly affecting the quality of the human environment contains “action forcing” provisions to make sure that federal agencies act according to the letter and spirit of the Act. The purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information, and the public has been informed regarding the decision-making process. NEPA does not mandate particular results or substantive outcomes regulations that follow implement section 102(2). NEPA’s purpose is not to generate paperwork or litigation, —even excellent paperwork— but to provide for informed decision making and foster excellent action. Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) The regulations in this subchapter implement section 102(2) of NEPA. They provide direction to Federal agencies to determine what actions are subject to NEPA’s procedural

~~requirements and the level of NEPA review where applicable. The regulations in this subchapter are intended to ensure that relevant environmental information is identified and considered early in the process in order to ensure informed decision making by Federal agencies. The regulations in this subchapter are also intended to ensure that Federal agencies conduct environmental reviews in a coordinated, consistent, predictable and timely manner, and to reduce unnecessary burdens and delays. Finally, the regulations in this subchapter promote concurrent environmental reviews to ensure timely and efficient decision making. NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.~~

~~(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.~~

#### § 1500.2 [Reserved] Policy.

~~Federal agencies shall to the fullest extent possible:~~

~~(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.~~

~~(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.~~

~~(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.~~

~~(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.~~

~~(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.~~

~~(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.~~

### § 1500.3 NEPA compliance ~~Mandate~~.

~~(a) Mandate. Parts 1500 through 1508 of this title provide regulations~~ This subchapter is applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91–190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act), except where compliance would be inconsistent with other statutory requirements. These regulations in this subchapter are issued pursuant to NEPA; the Environmental Quality Improvement Act of 1970, as amended (Pub. L. 91–224, 42 U.S.C. 4371 *et seq.*); section 309 of the Clean Air Act, as amended (42 U.S.C. 7609); and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970), as amended by Executive Order 11991, Relating to the Protection and Enhancement of Environmental Quality (May 24, 1977); and Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (August 15, 2017). ~~These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements).~~ The regulations in this subchapter apply to the whole of section 102(2) of NEPA. The provisions of the Act and ~~of these regulations in this subchapter~~ must be read together as a whole ~~in order~~ to comply with ~~the spirit and letter of~~ the law.

~~(b) Exhaustion. (1) To ensure informed decision making and reduce delays, agencies shall include a request for comments on potential alternatives and impacts, and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the human environment in the notice of intent to prepare an environmental impact statement (§ 1501.9(d)(7) of this chapter).~~

~~(2) The draft and final environmental impact statements shall include a summary of all alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters for consideration by the lead and cooperating agencies in developing the draft and final environmental impact statements (§ 1502.17 of this chapter).~~

~~(3) For consideration by the lead and cooperating agencies, State, Tribal, and local governments and other public commenters must submit comments within the comment periods provided, and comments shall be as specific as possible (§§ 1503.1 and 1503.3 of this chapter). Comments or objections of any kind not submitted, including those based on submitted alternatives, information, and analyses, shall be forfeited as unexhausted.~~

~~(4) Informed by the submitted alternatives, information, and analyses, including the summary in the final environmental impact statement (§ 1502.17 of this chapter) and the agency's response to comments in the final environmental impact statement (§ 1503.4 of this chapter), together with any other material in the record that he or she determines relevant, the decision maker shall certify in the record of decision that the agency considered all of the alternatives, information, and analyses, and objections submitted by States, Tribal, and local governments and other public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement (§ 1505.2(b) of this chapter).~~

~~(c) Review of NEPA compliance. It is the Council's intention that judicial review of agency compliance with these regulations in this subchapter not occur before an agency has issued the record of decision ~~filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the~~~~

environment), or takes other final agency action that will result in irreparable injury. It is the Council's intention that any allegation of noncompliance with NEPA and the regulations in this subchapter should be resolved as expeditiously as possible. Consistent with their organic statutes, and as part of implementing the exhaustion provisions in paragraph (b) of this section, agencies may structure their procedures to include an appropriate bond or other security requirement.

(d) Remedies. Harm from the failure to comply with NEPA can be remedied by compliance with NEPA's procedural requirements as interpreted in the regulations in this subchapter. It is the Council's intention that the regulations in this subchapter create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm. The regulations in this subchapter do not create a cause of action or right of action for violation of NEPA, which contains no such cause of action or right of action. It is the Council's intention that any actions to review, enjoin, stay, vacate, or otherwise alter an agency decision on the basis of an alleged NEPA violation be raised as soon as practicable after final agency action to avoid or minimize any costs to agencies, applicants, or any affected third parties. Furthermore, it is also the Council's intention that minor, non-substantive errors that have no effect on agency decision making shall be considered harmless and shall not invalidate an agency any trivial violation of these regulations not give rise to any independent cause of action.

(e) Severability. The sections of this subchapter are separate and severable from one another. If any section or portion therein is stayed or determined to be invalid, or the applicability of any section to any person or entity is held invalid, it is the Council's intention that the validity of the remainder of those parts shall not be affected, with the remaining sections to continue in effect.

#### § 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

(a) Using categorical exclusions to define categories of actions that normally which do not individually or cumulatively have a significant effect on the human environment and which are therefore do not exempt from requirements to preparation of an environmental impact statement (§ 15018.4 of this chapter).

(b) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore does not exempt from requirements to preparation of an environmental impact statement (§ 15018.6-13 of this chapter).

(c) Reducing the length of environmental documents impact statements (§ 1502.2(e)), by means such as setting appropriate page limits (§§ 1501.57(f)(1) and 1502.7 of this chapter).

(d) Preparing analytic and concise rather than encyclopedic environmental impact statements (§ 1502.2(a) of this chapter).

(e) Discussing only briefly issues other than significant ones (§ 1502.2(b) of this chapter).

(fd) Writing environmental impact statements in plain language (§ 1502.8 of this chapter).

(ge) Following a clear format for environmental impact statements (§ 1502.10 of this chapter).

(hf) Emphasizing the portions of the environmental impact statement that are useful to decision makers and the public (*e.g.*, §§ 1502.14 and 1502.15 of this chapter) and reducing emphasis on background material (§ 1502.16 of this chapter).

(ig) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§ 1501.97 of this chapter).

~~(jh) Summarizing the environmental impact statement (§ 1502.12 of this chapter) and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§ 1502.19).~~

(ki) Using programmatic, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§ 1501.11 and 1502.4 of this chapter ~~and 1502.20~~).

(lj) Incorporating by reference (§ 1501.24 of this chapter).

(mk) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.24 of this chapter).

(nl) Requiring comments to be as specific as possible (§ 1503.3 of this chapter).

(om) Attaching and ~~circulating~~ publishing only changes to the draft environmental impact statement, rather than rewriting and ~~circulating~~ publishing the entire statement when changes are minor (§ 1503.4(c) of this chapter).

(pn) Eliminating duplication with State, Tribal, and local procedures, by providing for joint preparation of environmental documents where practicable (§ 1506.2 of this chapter), and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3 of this chapter).

(qe) Combining environmental documents with other documents (§ 1506.4 of this chapter).

~~(p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§ 1508.4).~~

~~(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1508.13).~~

**§ 1500.5 Reducing delay.**

Agencies shall reduce delay by:

~~(ak) Using categorical exclusions to define categories of actions that normally which do not individually or cumulatively have a significant effect on the human environment (§ 1501.8.4 of this chapter) and which are therefore do not exempt from requirements to preparation of an environmental impact statement.~~

~~(bl) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1501.8.6-13 of this chapter) and is therefore does not exempt from requirements to preparation of an environmental impact statement.~~

(ca) Integrating the NEPA process into early planning (§ 1501.2 of this chapter).

(db) ~~Engaging in~~ **Emphasizing** interagency cooperation before ~~or as~~ the **environmental assessment or** environmental impact statement is prepared, rather than ~~awaiting~~ submission of ~~adversary~~ comments on a completed document (§§ 1501.7.6 and 1501.8 of this chapter).

(ee) ~~Ensuring~~ **E**nsuring the swift and fair resolution of lead agency disputes (§ 1501.7.5 of this chapter).

(fd) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.9.7 of this chapter).

(ge) ~~Meet~~ **Establish** appropriate time limits for the **environmental assessment and** environmental impact statement processes (§§ 1501.10 of this chapter ~~7(b)(2) and 1501.8~~).

(hf) Preparing environmental impact statements early in the process (§ 1502.5 of this chapter).

(ig) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.2.4.5 of this chapter).

(jh) Eliminating duplication with State, **Tribal**, and local procedures by providing for joint preparation **of environmental documents where practicable** (§ 1506.2 of this chapter); and with other Federal procedures by providing that ~~an agency~~ **iesy** may **jointly prepare or** adopt appropriate environmental documents prepared by another agency (§ 1506.3 of this chapter).

(ki) Combining environmental documents with other documents (§ 1506.4 of this chapter).

(lj) Using accelerated procedures for proposals for legislation (§ 1506.8 of this chapter).

~~(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.~~

~~(1) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.~~

**§ 1500.6 Agency authority.**

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view ~~traditional~~ policies and missions in the light of the Act’s national environmental objectives, to the extent consistent with its existing authority. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to ~~insure~~ full compliance with the purposes and provisions of the Act as interpreted by the regulations in this subchapter. The phrase “to the fullest extent possible” in section 102 of NEPA means that each agency of the Federal Government shall comply with that section, consistent with § 1501.1 of this chapter unless existing law applicable to the agency’s operations expressly prohibits or makes compliance impossible. Nothing contained in the regulations in this subchapter is intended or should be construed to limit an agency’s other authorities or legal responsibilities.

**PART 1501—NEPA AND AGENCY PLANNING**

Sec.

1501.1 NEPA thresholds~~Purpose.~~

1501.2 Apply NEPA early in the process.

1501.3 Determine the appropriate level of NEPA review.~~When to prepare an~~

1501.4 Categorical exclusions.

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1501.~~64~~ Findings of no significant~~Whether to prepare an environmental~~ impact ~~statement.~~

1501.~~75~~ Lead agencies.

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1501.~~97~~ Scoping.

1501.~~108~~ Time limits.

1501.~~1120~~ Tiering.

1501.~~124~~ Incorporation by reference.

**Authority:** 42 U.S.C. 4321–4347; NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371–4375; *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609;); and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902Mar. 5, 1970, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123May 24, 1977); and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

**§ 1501.1 NEPA thresholds**~~Purpose.~~

(a) In assessing whether NEPA applies or is otherwise fulfilled, Federal agencies should determine:

(1) Whether the proposed activity or decision is expressly exempt from NEPA under another statute;

(2) Whether compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute;

(3) Whether compliance with NEPA would be inconsistent with Congressional intent expressed in another statute;

(4) Whether the proposed activity or decision is a major Federal action;

(5) Whether the proposed activity or decision, in whole or in part, is a non-discretionary action for which the agency lacks authority to consider environmental effects as part of its decision-making process; and

(6) Whether the proposed action is an action for which another statute's requirements serve the function of agency compliance with the Act.

(b) Federal agencies may make determinations under this section in their agency NEPA procedures (§ 1507.3(d) of this chapter) or on an individual basis, as appropriate.

(1) Federal agencies may seek the Council's assistance in making an individual determination under this section.

(2) An agency shall consult with other Federal agencies concerning their concurrence in statutory determinations made under this section where more than one Federal agency administers the statute. The purposes of this part include:

~~(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.~~

~~(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.~~

~~(c) Providing for the swift and fair resolution of lead agency disputes.~~

~~(d) Identifying at an early stage the significant environmental issues deserving of study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.~~

~~(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.~~

### **§ 1501.2 Apply NEPA early in the process.**

(a) Agencies should~~all~~ integrate the NEPA process with other planning and authorization processes at the earliest ~~possible~~reasonable time to ~~ensure~~ that agencies consider environmental impacts in their planning and decisions ~~reflect environmental values~~, to avoid delays later in the process, and to head off potential conflicts.

(b)- Each agency shall:

~~(1a)~~ Comply with the mandate of section 102(2)(A) of NEPA to “utilize a systematic, interdisciplinary approach which will ~~i~~ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man’s environment,” as specified by § 1507.2(a) of this chapter.

~~(b2)~~ Identify environmental effects and values in adequate detail so they decision maker can appropriately consider such effects and values alongside~~be compared to~~ economic and technical analyses. Whenever practicable, agencies shall review and publish Eenvironmental documents and appropriate analyses ~~shall be circulated and reviewed~~ at the same time as other planning documents.

~~(3e)~~ Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal ~~that which~~ involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of NEPA~~the Act~~.

~~(4d)~~ Provide for ~~cases where~~ actions subject to NEPA that are planned by private applicants or other non-Federal entities before Federal involvement so that:

~~(i1)~~ Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

~~(ii2)~~ The Federal agency consults early with appropriate State, Tribal, and local ~~governments agencies and Indian tribes~~ and with interested private persons and organizations when ~~their own~~ involvement is reasonably foreseeable.

~~(iii3)~~ The Federal agency commences its NEPA process at the earliest ~~possireasonable~~ time (§§ 1501.5(d) and 1502.5(b) of this chapter).

### **§ 1501.3 Determine the appropriate level of NEPA review.**

(a) In assessing the appropriate level of NEPA review, Federal agencies should determine whether the proposed action:

(1) Normally does not have significant effects and is categorically excluded (§ 1501.4);

(2) Is not likely to have significant effects or the significance of the effects is unknown and is therefore appropriate for an environmental assessment (§ 1501.5); or

(3) Is likely to have significant effects and is therefore appropriate for an environmental impact statement (part 1502 of this chapter).

(b) In considering whether the effects of the proposed action are significant, agencies shall analyze the potentially affected environment and degree of the effects of the action. Agencies should consider connected actions consistent with § 1501.9(e)(1).

(1a) In considering the potentially affected environment, agencies should consider, as appropriate to the specific action, the affected area~~Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected regional, the affected interests, or and the local) and its resources, such as listed species and designated critical habitat under the Endangered Species Act.~~

Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend only upon the effects in the local area—rather than in the world as a whole.

(2) In considering the degree of the effects, agencies should consider the following, as appropriate to the specific action:

(i) Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(ii) Impacts that may be Both beneficial and adverse effects. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(iii) The degree to which the proposed action affects on public health and safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(iv) Whether the action threatens affects that would violate of Federal, State, Tribal, or local law or requirements imposed for the protecting of the environment.

#### **§ 1501.4 Categorical exclusions.**

(a) For efficiency, agencies shall identify in their agency NEPA procedures (§ 1507.3(e)(2)(ii) of this chapter) categories of actions that normally do not have a significant effect on the human environment, and therefore do not require preparation of an environmental assessment or environmental impact statement.

(b) If an agency determines that a categorical exclusion identified in its agency NEPA procedures covers a proposed action, the agency shall evaluate the action for extraordinary circumstances in which a normally excluded action may have a significant effect.

(1) If an extraordinary circumstance is present, the agency nevertheless may categorically exclude the proposed action if the agency determines that there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects.

(2) If the agency cannot categorically exclude the proposed action, the agency shall prepare an environmental assessment or environmental impact statement, as appropriate.

### **§ 1501.5 When to prepare an eEnvironmental assessments.**

(a) An agencyies shall prepare an environmental assessment for a proposed action that is not likely to have significant effects or when the significance of the effects is unknown unless (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency finds that a categorical exclusion (§ 1501.4) is applicable or has decided to prepare an environmental impact statement.

(b) An agencyies may prepare an environmental assessment on any action at any time in order to assist agency planning and decision making.

(c) An environmental assessment shall:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact; and

(2) Shall include bBriefly discussions of the purpose and need for the proposed al action, of alternatives as required by section 102(2)(E) of NEPA, and of the environmental impacts of the proposed action and alternatives, and include a listing of agencies and persons consulted.

(d) For applications to the agency requiring an environmental assessment, the agency shall commence the environmental assessment as soon as practicable after receiving the application.

(e) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The aAgenciesy shall involve the public, State, Tribal, and local governments, relevant environmental agencies, and any applicants, and the public, to the extent practicable, in preparing environmental assessments required by § 1508.9(a)(1).

(f) The text of an environmental assessment shall be no more than 75 pages, not including appendices, unless a senior agency official approves in writing an assessment to exceed 75 pages and establishes a new page limit.

(g) Agencies may apply the following provisions to environmental assessments:

(1) Section 1502.21 of this chapter—Incomplete or unavailable information;

(2) Section 1502.23 of this chapter—Methodology and scientific accuracy; and

(3) Section 1502.24 of this chapter—Environmental review and consultation requirements.

**§ 1501.64 Findings of no significant impact**~~Whether to prepare an environmental impact statement.~~

~~In determining whether to prepare an environmental impact statement the Federal agency shall:~~

~~(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:~~

~~(1) Normally requires an environmental impact statement, or~~

~~(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion);~~

~~(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).~~

~~(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.~~

~~(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.~~

~~(ae) An agency shall Pprepare a finding of no significant impact (§ 1508.13), if the agency determines, on the basis of the environmental assessment, not to prepare an environmental impact statement because the proposed action will not have significant effects.~~

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6**(b) of this chapter.**

(2) In **the following certain limited** circumstances, ~~which the agency may cover in its procedures under § 1507.3,~~ the agency shall make the finding of no significant impact available for public review ~~(including State and areawide clearinghouses)~~ for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. ~~The circumstances are:~~

(i) The proposed action is, or is closely similar to, one ~~that~~**which** normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3 **of this chapter;** or

(ii) The nature of the proposed action is one without precedent.

(b) The finding of no significant impact shall include the environmental assessment or incorporate it by reference a summary of it and shall note any other environmental documents related to it (§ 1501.97(fa)(35)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

(c) The finding of no significant impact shall state the authority for any mitigation that the agency has adopted and any applicable monitoring or enforcement provisions. If the agency finds no significant impacts based on mitigation, the mitigated finding of no significant impact shall state any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts.

### **§ 1501.75 Lead agencies.**

(a) A lead agency shall supervise the preparation of an environmental impact statement or a complex environmental assessment if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, sState, Tribal, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement or environmental assessment (§ 1506.2 of this chapter).

(c) If an action falls within the provisions of paragraph (a) of this section, the potential lead agencies shall determine, by letter or memorandum, which agency shwill be the lead agency and which shwill be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval or disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State, Tribal, or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the senior agency officials of the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a

lead agency designation within 45 days, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency. A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action; and

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) Any potential lead agency may file a response ~~may be filed by any potential lead agency concerned~~ within 20 days after a request is filed with the Council. As soon as possible, but not later than 20 days after receiving the request and all responses to it, ~~the~~ Council shall determine ~~as soon as possible but not later than 20 days after receiving the request and all responses to it~~ which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

(g) To the extent practicable, if a proposal will require action by more than one Federal agency and the lead agency determines that it requires preparation of an environmental impact statement, the lead and cooperating agencies shall evaluate the proposal in a single environmental impact statement and issue a joint record of decision. To the extent practicable, if a proposal will require action by more than one Federal agency and the lead agency determines that it requires preparation of an environmental assessment, the lead and cooperating agencies should evaluate the proposal in a single environmental assessment and, where appropriate, issue a joint finding of no significant impact.

(h) With respect to cooperating agencies, the lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(4) Determine the purpose and need, and alternatives in consultation with any cooperating agency.

(i) The lead agency shall develop a schedule, setting milestones for all environmental reviews and authorizations required for implementation of the action, in consultation with any applicant and all joint lead, cooperating, and participating agencies, as soon as practicable.

(j) If the lead agency anticipates that a milestone will be missed, it shall notify appropriate officials at the responsible agencies. As soon as practicable, the responsible agencies shall elevate the issue to the appropriate officials of the responsible agencies for timely resolution.

§ 1501.86 Cooperating agencies.

(a) The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any ~~other~~ Federal agency with which has jurisdiction by law shall be a cooperating agency. In addition, upon request of the lead agency, any other Federal agency with which has special expertise with respect to any environmental issue, ~~which should be addressed in the statement~~ may be a cooperating agency upon request of the lead agency. A State, Tribal, or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency by agreement with the lead agency. An agency may request that the lead agency ~~to~~ designate it a cooperating agency, and a Federal agency may appeal a denial of its request to the Council, in accordance with § 1501.7(e).

~~(a) The lead agency shall:~~

~~(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.~~

~~(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.~~

~~(3) Meet with a cooperating agency at the latter's request.~~

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest ~~poss~~practicable time.

(2) Participate in the scoping process (described ~~below~~ in § 1501.97).

(3) On request of the lead agency, ~~A~~assume on request of the lead agency responsibility for developing information and preparing environmental analyses, including portions of the environmental impact statement or environmental assessment concerning which the cooperating agency has special expertise.

(4) On request of the lead agency, ~~M~~make available staff support ~~at the lead agency's request~~ to enhance the lead agency~~latter~~'s interdisciplinary capability.

(5) Normally use its own funds. To the extent available funds permit, the lead agency shall, ~~to the extent available funds permit~~, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(6) Consult with the lead agency in developing the schedule (§ 1501.7(i)), meet the schedule, and elevate, as soon as practicable, to the senior agency official of the lead agency any issues relating to purpose and need, alternatives, or other issues that may affect any agencies' ability to meet the schedule.

(7) Meet the lead agency’s schedule for providing comments and limit its comments to those matters for which it has jurisdiction by law or special expertise with respect to any environmental issue consistent with § 1503.2 of this chapter.

(8) To the maximum extent practicable, jointly issue environmental documents with the lead agency.

(c) In response to a lead agency’s request for assistance in preparing the environmental documents (described in paragraph (b)(3), (4), or (5) of this section), a cooperating agency may in response to a lead agency’s request for assistance in preparing the environmental impact statement (described in paragraph (b) (3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement or environmental assessment. The cooperating agency shall submit a copy of this reply shall be submitted to the Council and the senior agency official of the lead agency.

**§ 1501.97 Scoping.**

(a) Generally. Agencies~~There~~ shall ~~use~~be an early and open process ~~to~~for determining the scope of issues ~~for analysis in an environmental impact statement, including to be addressed and for~~ identifying the significant issues and eliminating from further study non-significant issues~~related to a proposed action. This process shall be termed scoping. Scoping may begin~~ As soon as practicable after the proposal for action is sufficiently developed for agency consideration. Scoping may include appropriate pre-application procedures or work conducted prior to publication of the notice of intent~~its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§ 1508.22) in the FEDERAL REGISTER except as provided in § 1507.3(e).~~

(ab) Invite cooperating and participating agencies. As part of the scoping process, the lead agency shall:

(1) Invite the participation of likely affected Federal, State, Tribal, and local agencies and governments, any affected Indian tribe, the proponent of the action, and other likely affected or interested persons (including those who might not be in accord with the action ~~on environmental grounds~~), unless there is a limited exception under § 1507.3~~(f)~~(1) of this chapter. ~~An agency may give notice in accordance with § 1506.6.~~

(c4) Scoping outreach. As part of the scoping process the lead agency may ~~hold an early scoping meeting or meetings, publish scoping information, or use other means to~~ communicate with those persons or agencies who may be interested or affected, which the agency may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(d) Notice of intent. As soon as practicable after determining that a proposal is sufficiently developed to allow for meaningful public comment and requires an environmental impact statement, the lead agency shall publish a notice of intent to prepare an environmental impact statement in the Federal Register, except as provided in § 1507.3(f)(3) of this chapter. An

agency also may publish notice in accordance with § 1506.6 of this chapter. The notice shall include, as appropriate~~briefly:~~

(1) The purpose and need for the proposed action;

(2a) A preliminary ~~D~~description~~be~~ of the proposed action and possible alternatives the environmental impact statement will consider;

(3) A brief summary of expected impacts;

(4) Anticipated permits and other authorizations;

(5) A schedule for the decision-making process;

(6b) A ~~D~~description~~be~~ of the public~~agency's~~ proposed scoping process, including whether, when, and where any scoping meeting(s) will be held;

(7) A request for identification of potential alternatives, information, and analyses relevant to the proposed action (see § 1502.17 of this chapter); and

(8e) Contact information for~~State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.~~

(e2) *Determination of scope.* As part of the scoping process, the lead agency shall ~~D~~determine the scope (~~§ 1508.25~~) and the significant issues to be analyzed in depth in the environmental impact statement. To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(1a) Actions (other than unconnected single actions) ~~that~~which may be:

(1) ~~C~~connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions ~~that~~which may require environmental impact statements;

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously;  
or:

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to

~~analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.~~

~~(2b) Alternatives, which include:-~~

~~(1) the nNo action alternative:-~~

~~(2) Oother reasonable courses of actions; and:-~~

~~(3) Mmitigation measures (not in the proposed action).~~

~~(3e) Impacts, which may be: (1) direct; (2) indirect; (3) cumulative.~~

~~(f) Additional scoping responsibilities. As part of the scoping process, the lead agency shall:~~

~~(13) Identify and eliminate from detailed study the issues ~~that~~~~which~~ are not significant or ~~which~~ have been covered by prior environmental review(s) (§ 1506.3 of this chapter), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.~~

~~(24) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.~~

~~(35) Indicate any public environmental assessments and other environmental impact statements ~~that~~~~which~~ are being or will be prepared ~~and~~~~that~~ are related to but are not part of the scope of the impact statement under consideration.~~

~~(46) Identify other environmental review, authorization, and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently ~~with~~, and integrated with, the environmental impact statement, as provided in § 1502.245 of this chapter.~~

~~(57) Indicate the relationship between the timing of the preparation of environmental analyses and the agency~~ies~~'s tentative planning and decision-making schedule.~~

~~(b) As part of the scoping process the lead agency may:~~

~~(1) Set page limits on environmental documents (§ 1502.7).~~

~~(2) Set time limits (§ 1501.8).~~

~~(3) Adopt procedures under § 1507.3 to combine its environmental assessment process with its scoping process.~~

~~(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.~~

(ge) *Revisions.* An agency shall revise the determinations made under paragraphs (ba), (c), (e), and (fb) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

### § 1501.108 Time limits.

(a) ~~To ensure that agencies conduct~~ ~~Although the Council has decided that prescribed universal time limits for the entire NEPA reviews as efficiently and expeditiously as practicable~~ ~~process are too inflexible,~~ Federal agencies ~~should~~ ~~are encouraged to~~ set time limits appropriate to individual actions or types of actions (consistent with the time intervals required by § 1506.110 of this chapter). ~~When multiple agencies are involved the reference to agency below means lead agency.~~

(ba) To ensure timely decision making, agencies shall complete:

(1) Environmental assessments within 1 year unless a senior agency official of the lead agency approves a longer period in writing and establishes a new time limit. One year is measured from the date of agency decision to prepare an environmental assessment to the publication of an environmental assessment or a finding of no significant impact.

(2) Environmental impact statements within 2 years unless a senior agency official of the lead agency approves a longer period in writing and establishes a new time limit. Two years is measured from the date of the issuance of the notice of intent to the date a record of decision is signed ~~The agency shall set time limits if an applicant for the proposed action requests them: *Provided,* That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.~~

(cb) ~~The senior agency official may:~~

(1) ~~C~~ consider the following factors in determining time limits:

(1i) ~~P~~ Potential for environmental harm.

(2ii) ~~S~~ Size of the proposed action.

(3iii) ~~S~~ State of the art of analytic techniques.

(4iv) ~~D~~ Degree of public need for the proposed action, including the consequences of delay.

(5v) ~~N~~ Number of persons and agencies affected.

(6vi) Availability of ~~Degree to which relevant information is known and if not known the time required for obtaining it.~~

(vii) ~~Degree to which the action is controversial.~~

~~(7viii)~~ Other time limits imposed on the agency by law, regulations, or ~~E~~xecutive order.

~~(d2)~~ The senior agency official may Set overall time limits or limits for each constituent part of the NEPA process, which may include:

~~(1i)~~ Decision on whether to prepare an environmental impact statement (if not already decided).

~~(2ii)~~ Determination of the scope of the environmental impact statement.

~~(3iii)~~ Preparation of the draft environmental impact statement.

~~(4iv)~~ Review of any comments on the draft environmental impact statement from the public and agencies.

~~(5v)~~ Preparation of the final environmental impact statement.

~~(6vi)~~ Review of any comments on the final environmental impact statement.

~~(7vii)~~ Decision on the action based in part on the environmental impact statement.

~~(e3)~~ The agency may Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

~~(fe)~~ State, Tribal, or local agencies or members of the public may request a Federal agency to set time limits.

#### ~~§ 15012.1120~~ Tiering.

~~(a)~~ Agencies should~~are encouraged to~~ tier their environmental impact statements and environmental assessments when it would~~to~~ eliminate repetitive discussions of the same issues, and to focus on the actual issues ripe for decision, and exclude from consideration issues already decided or not yet ripe at each level of environmental review ~~(§ 1508.28).~~ Tiering may also be appropriate for different stages of actions. ~~-(Section 1508.28).~~

~~(b)~~ Whenever an agency has prepared an broad environmental impact statement or environmental assessment~~has been prepared (such as a program or policy statement) and then prepares~~ a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a project- or site-specific action), the tiered document~~subsequent statement or environmental assessment needs only to summarize and incorporate by reference the issues discussed in the broader document. statement and incorporate discussions from the broader statement by reference and~~ The tiered document shall concentrate on the issues specific to the subsequent action. The tiered~~subsequent~~ document shall state where the earlier document is available.

~~(c)~~ Tiering is appropriate when the sequence from an environmental impact~~of~~ statements or environmental assessment~~analyses is:~~

(1a) From a programmatic, plan, or policy environmental impact statement or environmental assessment to a program, plan, or policy statement or assessment analysis of lesser or narrower scope or to a site-specific statement or assessment analysis.

(2b) From an environmental impact statement or environmental assessment on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or assessment analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues that which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

### § 15012.121 Incorporation by reference.

Agencies shall incorporate material, such as planning studies, analyses, or other relevant information, into an environmental documents impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. Agencies shall cite the incorporated material shall be cited in the document statement and its content briefly described its content. Agencies No material may not be incorporated material by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Agencies shall not incorporate by reference mMaterial based on proprietary data that which is itself not available for review and comment shall not be incorporated by reference.

## **PART 1502—ENVIRONMENTAL IMPACT STATEMENT**

Sec.

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- 1502.2~~4~~<sup>5</sup> Environmental review and consultation requirements.

**Authority:** ~~42 U.S.C. 4321–4347; NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371–4375; *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609;)~~ and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902~~Mar. 5, 1970, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123~~May 24, 1977); and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

**§ 1502.1 Purpose of environmental impact statement.**

The primary purpose of an environmental impact statement prepared pursuant to section 102(2)(C) of NEPA ~~is to serve as an action forcing device to insure agencies consider the environmental impacts of their actions in decision making that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.~~ It shall provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of ~~the~~ reasonable alternatives ~~that~~which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is ~~more than a disclosure document that informs.~~ ~~It shall be used by~~ Federal agency officials in conjunction with other relevant material to plan actions and make decisions making and the public.

**§ 1502.2 Implementation.**

~~To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:~~

- (a) Environmental impact statements shall not be ~~analytic rather than~~ encyclopedic.
- (b) Environmental impacts statements shall ~~be discussed~~ impacts in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.
- (c) Environmental impact statements shall be analytic, kept concise, and ~~shall be~~ no longer than ~~absolutely~~ necessary to comply with NEPA and with these regulations in this subchapter. Length should be proportional to vary first with potential environmental ~~effects~~problems and ~~then with~~ project size.
- (d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of NEPA the Act as interpreted in the regulations in this subchapter and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ~~ultimate agency~~ decision maker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (see also § 1506.1 of this chapter).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

### § 1502.3 Statutory requirements for statements.

As required by ~~section~~ 102(2)(C) of NEPA, environmental impact statements (~~§ 1508.11~~) are to be included in every Federal agency recommendation or report:

~~O~~ on proposals (~~§ 1508.23~~).

~~F~~ for legislation and (~~§ 1508.17~~).

~~O~~ other major Federal actions (~~§ 1508.18~~).

~~S~~ ignificantly (~~§ 1508.27~~).

~~A~~ affecting (~~§§ 1508.3, 1508.8~~).

~~T~~ he quality of the human environment (~~§ 1508.14~~).

### § 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall ~~define~~make sure the proposal ~~that~~which is the subject of an environmental impact statement based on the statutory authorities for the proposed action is properly defined. Agencies shall use the criteria for scope (~~§ 15018.925(e) of this chapter~~) to determine which proposal(s) shall be the subject of a particular statement. Agencies shall evaluate in a single environmental impact statement ~~P~~ proposals or parts of proposals ~~that~~which are related to each other closely enough to be, in effect, a single course of action ~~shall be evaluated in a single impact statement~~.

(b) Environmental impact statements may be prepared, ~~and are sometimes required~~, for ~~programmatic~~broad Federal actions, such as the adoption of new agency programs ~~or regulations~~ (~~§ 1508.18~~). When Agencies shall prepare such statements, on broad actions so that they should bear relevant to the program decision ~~policy~~ and ~~are~~ timed to coincide with meaningful points in agency planning and decision making.

(~~1e~~) When preparing statements on ~~programmatic~~broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(~~1~~) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(ii~~2~~) Generically, including actions ~~that~~which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(iii~~3~~) By stage of technological development including ~~f~~Federal or federally assisted research, development or demonstration programs for new technologies ~~that~~which, if applied, could significantly affect the quality of the human environment. Statements ~~shall be prepared~~ on such programs ~~and should~~all be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(2~~d~~) Agencies shall as appropriate employ scoping (§ 1501.~~97~~97 of this chapter), tiering (§ 1501~~2.1120~~2.1120 of this chapter), and other methods listed in §§ 1500.4 and 1500.5 of this chapter to relate ~~programmatically~~broad and narrow actions and to avoid duplication and delay. Agencies may tier their environmental analyses to defer detailed analysis of environmental impacts of specific program elements until such program elements are ripe for final agency action.

### § 1502.5 Timing.

An agency ~~should~~all commence preparation of an environmental impact statement as close as ~~possible~~practicable to the time the agency is developing or ~~receives~~is presented with a proposal (~~§ 1508.23~~) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve ~~practically~~ as an important practical contribution to the decision-making process and will not be used to rationalize or justify decisions already made (§§ ~~1500.2(e)~~, 1501.2~~7~~7 of this chapter and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies, the agency shall prepare the environmental impact statement ~~shall be prepared~~ at the feasibility analysis (go/~~no~~--go) stage and may ~~be supplemented~~it at a later stage, if necessary.

(b) For applications to the agency requiring an environmental impact statement, the agency shall commence the~~appropriate environmental assessments or~~ statements ~~shall be commenced no later than immediately~~as soon as practicable after receiving the application ~~is received~~. Federal agencies should work with potential applicants and applicable State, Tribal, and local agencies and governments prior to receipt of the application~~are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.~~

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances, the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking, the draft environmental impact statement shall normally accompany the proposed rule.

**§ 1502.6 Interdisciplinary preparation.**

Agencies shall prepare ~~Environmental impact statements shall be prepared~~ using an interdisciplinary approach ~~that which~~ will ~~insure~~ the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of ~~NEPA the Act~~). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.97 of this chapter).

**§ 1502.7 Page limits.**

The text of final environmental impact statements (~~e.g.,~~ paragraphs ~~(a)~~(4) through ~~(g)~~ of § 1502.10) shall ~~normally be less than~~ 150 pages or fewer and, for proposals of unusual scope or complexity, shall ~~normally be less than~~ 300 pages or fewer unless a senior agency official of the lead agency approves in writing a statement to exceed 300 pages and establishes a new page limit.

**§ 1502.8 Writing.**

Agencies shall write ~~Environmental impact statements shall be written~~ in plain language and may use appropriate graphics so that decision makers and the public can readily understand such statements~~them~~. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which ~~wish~~ shall be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

**§ 1502.9 Draft, final, and supplemental statements.**

(a) Generally. Except for proposals for legislation as provided in § 1506.8 of this chapter, agencies shall prepare environmental impact statements ~~shall be prepared~~ in two stages and, where necessary, may be supplemented ~~them, as provided in paragraph (d)(1) of this section~~.

(ba) Draft environmental impact statements. Agencies shall prepare ~~D~~draft environmental impact statements ~~shall be prepared~~ in accordance with the scope decided upon in the scoping process (§ 1501.9 of this chapter). The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. To the fullest extent practicable, Tthe draft statement must meet/fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of NEPA as interpreted in the regulations in this subchapter~~the Act~~. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and publish/reulate a supplemental/revised draft of the appropriate portion. At appropriate points in the draft statement, Tthe agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(cb) Final environmental impact statements. Final environmental impact statements shall address/respond to comments as required in part 1503 of this chapter. At appropriate points in the final statement, Tthe agency shall discuss at appropriate points in the final statement any responsible opposing view ~~that which~~ was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(de) Supplemental environmental impact statements. Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if a major Federal action remains to occur, and:

(i) The agency makes substantial changes ~~to~~ the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

~~(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.~~

(34) Shall prepare, ~~publish~~circulate, and file a supplement to a statement ~~in the same fashion~~ (exclusive of scoping (§ 1501.9 of this chapter)) as a draft and final statement, as is appropriate to the stage of the statement involved, unless the Council approves alternative procedures (§ 1506.12 of this chapter)~~are approved by the Council~~.

(4) May find that changes to the proposed action or new circumstances or information relevant to environmental concerns are not significant and therefore do not require a supplement. The agency should document the finding consistent with its agency NEPA procedures (§ 1507.3 of this chapter), or, if necessary, in a finding of no significant impact supported by an environmental assessment.

#### § 1502.10 Recommended format.

(a) Agencies shall use a format for environmental impact statements that~~which~~ will encourage good analysis and clear presentation of the alternatives including the proposed action. Agencies should use ~~the~~ following standard format for environmental impact statements ~~should be followed~~ unless the agency determines that there is a more effective format for communication~~compelling reason to do otherwise~~:

(1a) ~~Cover sheet.~~

(2b) Summary.

(3e) Table of contents.

(4d) Purpose of and need for action.

(5e) Alternatives including the proposed action (sections 102(2)(C)(iii) and 102(2)(E) of NEPA~~the Act~~).

(6f) Affected environment; and

(g) ~~E~~environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA~~the Act~~).

(7) Submitted alternatives, information, and analyses.

~~(8h) List of preparers.~~

~~(i) List of agencies, organizations, and persons to whom copies of the statement are sent.~~

~~(j) Index.~~

~~(9k) Appendices (if any).~~

~~(b) If an agency uses a different format is used, it shall include paragraphs (a)(1) through (8), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§ 1502.11 through 1502.198, in any appropriate format.~~

### § 1502.11 Cover ~~sheet~~.

The cover ~~sheet~~ shall not exceed one page. ~~It and shall~~ include:

(a) A list of the responsible agencies, including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and, if appropriate, the titles of related cooperating agency actions), together with the ~~s~~State(s) and county(ies) (or other jurisdiction~~s~~), if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one-paragraph abstract of the statement.

(f) The date by which the agency must receive comments ~~must be received~~ (computed in cooperation with EPA under § 1506.110 of this chapter). ~~The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).~~

(g) For the final environmental impact statement, the estimated total cost to prepare both the draft and final environmental impact statement, including the costs of agency full-time equivalent (FTE) personnel hours, contractor costs, and other direct costs. If practicable and noted where not practicable, agencies also should include costs incurred by cooperating and participating agencies, applicants, and contractors.

### § 1502.12 Summary.

Each environmental impact statement shall contain a summary ~~that which~~ adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of ~~disputed controversy (including~~ issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives). The summary normally will ~~normally~~ not exceed 15 pages.

**§ 1502.13 Purpose and need.**

The statement shall briefly specify the underlying purpose and need ~~to which the agency is responding in proposing the alternatives including for~~ the proposed action. When an agency's statutory duty is to review an application for authorization, the agency shall base the purpose and need on the goals of the applicant and the agency's authority.

**§ 1502.14 Alternatives including the proposed action.**

~~The~~ alternatives section ~~should present~~ is the heart of the environmental impacts ~~of the proposed action and the alternatives in comparative form statement.~~ Based on the information and analysis presented in the sections on the Aaffected Eenvironment (§ 1502.15) and the Eenvironmental Consequences (§ 1502.16), ~~it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.~~ In this section, agencies shall:

(a) ~~Rigorously explore and objectively e~~valuate all reasonable alternatives to the proposed action, and, for alternatives that the agency which were eliminated from detailed study, briefly discuss the reasons for their having been eliminationed.

(b) Discusse~~vote substantial treatment to~~ each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits.

~~(c) Include reasonable alternatives not within the jurisdiction of the lead agency.~~

~~(cd) Include the no action alternative of no action.~~

~~(de) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.~~

~~(ef) Include appropriate mitigation measures not already included in the proposed action or alternatives.~~

(f) Limit their consideration to a reasonable number of alternatives.

**§ 1502.15 Affected environment.**

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration, including the reasonably foreseeable environmental trends and planned actions in the area(s). The environmental impact statement may combine the description with evaluation of the environmental consequences (§ 1502.16), and it shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected

environment are themselves no measure of the adequacy of an environmental impact statement.

**§ 1502.16 Environmental consequences.**

(a) ~~The~~ environmental consequences section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA ~~that~~which are within the scope of the statement and as much of section 102(2)(C)(iii) of NEPA as is necessary to support the comparisons. This section should not duplicate discussions in § 1502.14. The discussion ~~wi~~shall include:

(1) ~~¶~~The environmental impacts of the proposed action and reasonable alternatives ~~to~~including the proposed action and the significance of those impacts. The comparisons of the proposed action and reasonable alternatives under § 1502.14 wi~~shall~~ be based on this discussion of the impacts.

(2) ~~¶~~Any adverse environmental effects ~~that~~which cannot be avoided should the proposal be implemented.

(3) ~~¶~~The relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

(4) ~~and a~~Any irreversible or irretrievable commitments of resources ~~that~~which would be involved in the proposal should it be implemented. ~~This section should not duplicate discussions in § 1502.14. It shall include discussions of:~~

(a) ~~Direct effects and their significance (§ 1508.8).~~

(b) ~~Indirect effects and their significance (§ 1508.8).~~

(5) ~~e~~Possible conflicts between the proposed action and the objectives of Federal, regional, State, Tribal, and local ~~(and in the case of a reservation, Indian tribe)~~ land use plans, policies and controls for the area concerned. ~~(See § 1506.2(d) of this chapter.)~~

(d) ~~The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.~~

(6) ~~e~~Energy requirements and conservation potential of various alternatives and mitigation measures.

(7) ~~f~~Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(8) ~~g~~Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(9) ~~h~~Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(e)).

(10) Where applicable, economic and technical considerations, including the economic benefits of the proposed action.

~~(b) This means that e~~Economic or social effects are not intended by themselves do not~~to~~require preparation of an environmental impact statement. However, W~~when the agency determines that an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement w~~shall discuss and give appropriate consideration to~~all of these effects on the human environment.~~

**§ 1502.17 Summary of submitted alternatives, information, and analyses.**

(a) The draft environmental impact statement shall include a summary that identifies all alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters during the scoping process for consideration by the lead and cooperating agencies in developing the environmental impact statement.

(1) The agency shall append to the draft environmental impact statement or otherwise publish all comments (or summaries thereof where the response has been exceptionally voluminous) received during the scoping process that identified alternatives, information, and analyses for the agency's consideration.

(2) Consistent with § 1503.1(a)(3) of this chapter, the lead agency shall invite comment on the summary identifying all submitted alternatives, information, and analyses in the draft environmental impact statement.

(b) The final environmental impact statement shall include a summary that identifies all alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters for consideration by the lead and cooperating agencies in developing the final environmental impact statement.

**§ 1502.18 List of preparers.**

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (~~§§ 1502.6 and 1502.8~~). Where possible, the environmental impact statement shall identify the persons who are responsible for a particular analysis, including analyses in background papers, ~~shall be identified~~. Normally the list will not exceed two pages.

**§ 1502.198 Appendix.**

If an agency prepares an appendix, ~~the agency to an environmental impact statement the appendix~~ shall publish it with the environmental impact statement, and it shall consist of:

(a) ~~Consist of m~~Material prepared in connection with an environmental impact statement (as distinct from material ~~that~~which is not so prepared and ~~which~~ is incorporated by reference (§ 1502.12~~4~~ of this chapter)).

(b) ~~Normally consist of m~~Material ~~which~~ substantiatinges any analysis fundamental to the impact statement.

(c) ~~Normally be analytic and~~Material relevant to the decision to be made.

(d) For draft environmental impact statements, all comments (or summaries thereof where the response has been exceptionally voluminous) received during the scoping process that identified alternatives, information, and analyses for the agency's consideration.

(e) For final environmental impact statements, the comment summaries and responses consistent with § 1503.4 of this chapter.

~~(d) Be circulated with the environmental impact statement or be readily available on request.~~

### **§ 1502.2019 ~~Circul~~Publication of the environmental impact statement.**

Agencies shall ~~publish~~circulate the entire draft and final environmental impact statements ~~except for certain appendices as provided in § 1502.18(d)~~ and unchanged statements as provided in § 1503.4(c) ~~of this chapter. However, if the statement is unusually long, t~~The agency ~~shall transmit~~may circulate the summary instead, except that the entire statement ~~electronically (or in paper copy, if so requested due to economic or other hardship)~~shall be furnished to:

(a) Any Federal agency ~~that~~which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State, Tribal, or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement, any person, organization, or agency ~~that~~which submitted substantive comments on the draft.

~~If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.~~

### **~~§ 1502.20 Tiering:~~**

~~Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues~~

~~specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).~~

~~§ 1502.21 Incorporation by reference.~~

~~Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.~~

**§ 1502.21~~2~~ Incomplete or unavailable information.**

(a) When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement<sub>2</sub> and there is incomplete or unavailable information, the agency shall ~~always~~ make clear that such information is lacking.

(~~ba~~) If the incomplete but available information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives<sub>2</sub> and the overall costs of obtaining it are not unreasonable~~exorbitant~~, the agency shall include the information in the environmental impact statement.

(~~cb~~) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are unreasonable~~exorbitant~~ or the means to obtain it are not known, the agency shall include within the environmental impact statement:

- (1) ~~Aa~~ statement that such information is incomplete or unavailable;
- (2) ~~Aa~~ statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;
- (3) ~~Aa~~ summary of existing credible scientific evidence that~~which~~ is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and
- (4) ~~†~~The agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

(d) For the purposes of this section, “reasonably foreseeable” includes impacts that~~which~~ have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

~~(e) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or~~

after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

### § 1502.223 Cost-benefit analysis.

If the agency is considering a cost-benefit analysis for the proposed action relevant to the choice among ~~environmentally different~~ alternatives with different environmental effects~~is being considered for the proposed action~~, the agency~~it~~ shall ~~be incorporated~~ the cost-benefit analysis by reference or appended it to the statement as an aid in evaluating the environmental consequences. In such cases, ~~To~~ assess the adequacy of compliance with section 102(2)(B) of NEPA (ensuring appropriate consideration of unquantified environmental amenities and values in decision making, along with economical and technical considerations), ~~the Act~~ the statement shall, ~~when a cost-benefit analysis is prepared~~, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, agencies need not display the weighing of the merits and drawbacks of the various alternatives ~~need not be displayed~~ in a monetary cost-benefit analysis and should not ~~do so~~ be when there are important qualitative considerations. However~~In any event~~, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, that~~which~~ are likely to be relevant and important to a decision.

### § 1502.234 Methodology and scientific accuracy.

Agencies shall ~~ensure~~ the professional integrity, including scientific integrity, of the discussions and analyses in environmental ~~documents~~impact statements. Agencies shall make use of reliable existing data and resources. Agencies may make use of any reliable data sources, such as remotely gathered information or statistical models. They shall identify any methodologies used and shall make explicit reference ~~by footnote~~ to the scientific and other sources relied upon for conclusions in the statement. ~~An agency~~ may place discussion of methodology in an appendix. Agencies are not required to undertake new scientific and technical research to inform their analyses. Nothing in this section is intended to prohibit agencies from compliance with the requirements of other statutes pertaining to scientific and technical research.

### § 1502.245 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements ~~concurrently with~~ and integrated with environmental impact analyses and related surveys and studies required by all other Federal environmental review laws and Executive orders applicable to the proposed action, including the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (~~54~~16 U.S.C. ~~300101~~470 *et seq.*), and the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), ~~and other environmental review laws and executive orders.~~

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other authorizations ~~that entitlements which~~ must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other authorization~~entitlement~~ is necessary, the draft environmental impact statement shall so indicate.

**PART 1503—COMMENTING ON ENVIRONMENTAL IMPACT STATEMENTS**

Sec.

1503.1 Inviting comments and requesting information and analyses.

1503.2 Duty to comment.

1503.3 Specificity of comments and information.

1503.4 Response to comments.

**Authority:** ~~42 U.S.C. 4321–4347; NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371–4375; *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609); and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902 (Mar. 5, 1970), as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123 (May 24, 1977), and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.~~

**§ 1503.1 Inviting comments and requesting information and analyses.**

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency ~~that~~which has jurisdiction by law or special expertise with respect to any environmental impact involved or ~~which~~ is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State, Tribal, and local agencies ~~that~~which are authorized to develop and enforce environmental standards;

(ii) ~~State, Indian Tribes, or local governments that may be affected by the proposed action when the effects may be on a reservation; and~~

(iii) Any agency ~~that~~which has requested ~~that~~ it receive statements on actions of the kind proposed; ~~Office of Management and Budget Circular A–95 (Revised), through its system of clearinghouses, provides a means of securing the views of State and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing State and local reviews of the draft environmental impact statements.~~

~~(iv) Request comments from~~ the applicant, if any; and

~~(v) Request comments from~~ the public, affirmatively soliciting comments in a manner designed to inform ~~from~~ those persons or organizations who may be interested in or affected by the proposed action.

(3) Invite comment specifically on the submitted alternatives, information, and analyses and the summary thereof (§ 1502.17 of this chapter).

(b) An agency may request comments on a final environmental impact statement before the final decision and set a deadline for providing such comments is finally made. ~~In any case~~

~~Other agencies or persons may make comments consistent with the time periods before the final decision unless a different time is provided~~ under § 1506.110 of this chapter.

(c) An agency shall provide for electronic submission of public comments, with reasonable measures to ensure the comment process is accessible to affected persons.

### § 1503.2 Duty to comment.

~~Cooperating Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved~~ and agencies ~~that~~which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority. ~~Agencies shall comment~~ within the time period specified for comment in § 1506.110 of this chapter. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that the environmental impact statement adequately reflects its views ~~are adequately reflected in the environmental impact statement~~, it should reply that it has no comment.

### § 1503.3 Specificity of comments and information.

(a) ~~To promote informed decision making,~~ Comments on an environmental impact statement or on a proposed action shall be as specific as possible, and may address either the adequacy of the statement or the merits of the alternatives discussed or both, and shall provide as much detail as necessary to meaningfully participate and fully inform the agency of the commenter's position. Comments should explain why the issues raised are important to the consideration of potential environmental impacts and alternatives to the proposed action, as well as economic and employment impacts, and other impacts affecting the quality of the human environment. Comments should reference the corresponding section or page number of the draft environmental impact statement, propose specific changes to those parts of the statement, where possible, and include or describe the data sources and methodologies supporting the proposed changes.

(b) Comments on the submitted alternatives, information, and analyses and summary thereof (§ 1502.17 of this chapter) should be as specific as possible. Comments and objections of any kind shall be raised within the comment period on the draft environmental impact statement provided by the agency, consistent with § 1506.11 of this chapter. If the agency requests comments on the final environmental impact statement before the final decision, consistent with § 1503.1(b), comments and objections of any kind shall be raised within the comment period provided by the agency. Comments and objections of any kind not provided within the comment period(s) shall be considered unexhausted and forfeited, consistent with § 1500.3(b) of this chapter.

(c) When a ~~comment~~comment participating agency criticizes a lead agency's predictive methodology, the ~~comment~~comment participating agency should describe the alternative methodology ~~that~~which it prefers and why.

(~~e~~) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant site-specific effects

associated with the granting or approving by that cooperating agency of necessary Federal permits, licenses, or authorizationsentitlements.

(ed) When a cooperating agency with jurisdiction by law ~~objects to or expresses reservations about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation shall~~ specifies the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences, the cooperating agency shall cite to its applicable statutory authority.

#### § 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall ~~assess and~~ consider substantive comments timely submitted during the public comment period. The agency may ~~respond to both~~ individually comments or groups of commentsand collectively, and shall ~~respond by one or more of the means listed below, stating its response in the final statement~~. In the final environmental impact statement, the agency may respond byPossible responses are to:

(1) Modifying alternatives including the proposed action.

(2) Developing and evaluatinge alternatives not previously given serious consideration by the agency.

(3) Supplementing, improvinge, or modifying its analyses.

(4) Makinge factual corrections.

(5) Explaininging why the comments do not warrant further agency response, recognizing that agencies are not required to respond to each comment~~iting the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response~~.

(b) An agency shall append or otherwise publish all substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), ~~should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement~~.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, an agencyies may write any changes~~them~~ on errata sheets and attach them responses to the statement instead of rewriting the draft statement. In such cases, only the comments, the responses, and the changes and not the final statement need be publisheireulated (§ 1502.~~2019~~ of this chapter). The agency shall file the entire document with a new cover sheet with the Environmental Protection Agency~~shall be filed~~ as the final statement (§ 1506.~~109~~ of this chapter).

#### **PART 1504—PRE-DECISIONAL REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY**

- Sec.
- 1504.1 Purpose.
- 1504.2 Criteria for referral.
- 1504.3 Procedure for referrals and response.

**Authority:** ~~42 U.S.C. 4321–4347; NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371–4375; *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609); and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902 (Mar. 5, 1970), as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123 (May 24, 1977), and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.~~

### § 1504.1 Purpose.

(a) This part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements.

(b) ~~Under s~~Section 309 of the Clean Air Act (42 U.S.C. 7609), ~~is directed~~ **directs** the Administrator of the Environmental Protection Agency ~~is directed~~ to review and comment publicly on the environmental impacts of Federal activities, including actions for which **agencies prepare** environmental impact statements ~~are prepared~~. If, after this review, the Administrator determines that the matter is “unsatisfactory from the standpoint of public health or welfare or environmental quality,” section 309 directs that the matter be referred to the Council (hereafter “environmental referrals”).

(c) Under section 102(2)(C) of ~~NEPA (42 U.S.C. 4332(2)(C)), the Act~~ other Federal agencies may ~~prepare~~ **make** similar reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These reviews must be made available to the President, the Council, and the public.

### § 1504.2 Criteria for referral.

Environmental referrals should be made to the Council only after concerted, timely (as early as ~~possible~~ **practicable** in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental impacts, considering:

- (a) Possible violation of national environmental standards or policies;~~;~~
- (b) Severity;~~;~~
- (c) Geographical scope;~~;~~
- (d) Duration;~~;~~
- (e) Importance as precedents;~~;~~
- (f) Availability of environmentally preferable alternatives; ~~and~~

(g) Economic and technical considerations, including the economic costs of delaying or impeding the decision making of the agencies involved in the action.

**§ 1504.3 Procedure for referrals and response.**

(a) A Federal agency making the referral to the Council shall:

(1) ~~Notify~~Advise the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached;~~;~~

(2) Include such a notification whenever practicable~~advise~~ in the referring agency's comments on the environmental assessment or draft environmental impact statement, ~~except when the statement does not contain adequate information to permit an assessment of the matter's environmental acceptability;~~

(3) Identify any essential information that is lacking and request that the lead agency make it ~~be made~~ available at the earliest possible time;~~;~~ and

(4) Send copies of the referring agency's views~~such advice~~ to the Council.

(b) The referring agency shall deliver its referral to the Council not later than ~~twenty five~~ (25) days after the lead agency has made the final environmental impact statement ~~has been made~~ available to the Environmental Protection Agency, ~~common~~participating agencies, and the public, and in the case of an environmental assessment, no later than 25 days after the lead agency makes it available. Except when the lead agency grants an extension of this period ~~has been granted by the lead agency~~, the Council will not accept a referral after that date.

(c) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it; ~~and, and requesting that no action be taken to implement the matter until the Council acts upon the referral. The letter shall include a copy of the statement referred to in (c)(2) of this section.~~

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any disputed material facts ~~in controversy~~ and incorporate (by reference if appropriate) agreed upon facts;~~;~~

(ii) Identify any existing environmental requirements or policies that~~which~~ would be violated by the matter;~~;~~

(iii) Present the reasons for why the referring agency believes the matter is ~~environmentally unsatisfactory;~~

(iv) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason;~~;~~

(v) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time;<sup>2</sup> and

(vi) Give the referring agency's recommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(d) Not later than ~~twenty-five (25)~~ days after the referral to the Council,<sup>2</sup> the lead agency may deliver a response to the Council,<sup>7</sup> and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension. The response shall:

(1) Address fully the issues raised in the referral;<sup>7</sup>

(2) Be supported by evidence and explanations, as appropriate; and<sup>-</sup>

(3) Give the lead agency's response to the referring agency's recommendations.

(e) ~~Interested persons (including the aApplicants)~~ may ~~provided~~ deliver their views in writing to the Council. ~~Views in support of the referral should be delivered not later than the referral. Views in support of the response shall be delivered not later than~~ the response.

(f) Not later than ~~twenty-five (25)~~ days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) ~~Hold public meetings or hearings to e~~Obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the ~~referring and lead agencies~~issue should ~~be~~ further negotiated ~~by~~ the ~~issue, referring and lead agencies~~ and the issue is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including<sup>2</sup> where appropriate<sup>2</sup> a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(g) The Council shall take no longer than 60 days to complete the actions specified in paragraph (f)(2), (3), or (5) of this section.

(h) ~~The referral process is not intended to create any private rights of action or to be judicially reviewable because any voluntary resolutions by the agency parties do not represent final agency action and instead are only provisional and dependent on later consistent action by the action agencies. When the referral involves an action required by statute to be determined on the record after opportunity for agency hearing, the referral shall be conducted in a manner consistent with 5 U.S.C. 557(d) (Administrative Procedure Act).~~

## PART 1505—NEPA AND AGENCY DECISION MAKING

Sec.

1505.1 ~~[Reserved] Agency decisionmaking procedures.~~

1505.2 Record of decision in cases requiring environmental impact statements.

1505.3 Implementing the decision.

**Authority:** ~~42 U.S.C. 4321–4347; NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371–4375; *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609); and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902 (Mar. 5, 1970), as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123 (May 24, 1977); and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.~~

### § 1505.1 ~~[Reserved] Agency decisionmaking procedures.~~

~~Agencies shall adopt procedures (§ 1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act. Such procedures shall include but not be limited to:~~

~~(a) Implementing procedures under section 102(2) to achieve the requirements of sections 101 and 102(1).~~

~~(b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.~~

~~(c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.~~

~~(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.~~

~~(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.~~

**§ 1505.2 Record of decision in cases requiring environmental impact statements.**

(a) At the time of its decision (§ 1506.1~~10~~ of this chapter) or, if appropriate, its recommendation to Congress, each agency shall prepare and timely publish a concise public record of decision or joint record of decision. The record, which each agency may ~~be~~ integrated into any other record it prepares ~~by the agency, including that required by OMB Circular A-95 (Revised), part I, sections 6(c) and (d), and part II, section 5(b)(4)~~, shall:

(1~~a~~) State ~~what~~ the decision ~~was~~.

(2~~b~~) Identify ~~all~~ alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives ~~which were~~ considered ~~to be~~ environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors, including any essential considerations of national policy, that the agency ~~which were~~ balanced ~~by the agency~~ in making its decision and state how those considerations entered into its decision.

(3~~e~~) State whether the agency has adopted all practicable means to avoid or minimize environmental harm from the alternative selected ~~have been adopted~~, and if not, why they ~~agency did~~ were not. The agency shall adopt and summarize, where applicable, a monitoring and enforcement program ~~shall be adopted and summarized where applicable~~ for any enforceable mitigation requirements or commitments.

(b) Informed by the summary of the submitted alternatives, information, and analyses in the final environmental impact statement (§ 1502.17(b) of this chapter), together with any other material in the record that he or she determines to be relevant, the decision maker shall certify in the record of decision that the agency has considered all of the alternatives, information, analyses, and objections submitted by State, Tribal, and local governments and public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement. Agency environmental impact statements certified in accordance with this section are entitled to a presumption that the agency has considered the submitted alternatives, information, and analyses, including the summary thereof, in the final environmental impact statement (§ 1502.17(b)).

**§ 1505.3 Implementing the decision.**

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2~~(ae)~~(3)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits, or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or ~~common~~participating agencies on progress in carrying out mitigation measures ~~that~~which they have proposed and ~~which~~ were adopted by the agency making the decision.

(d) Upon request, publish~~make available to the public~~ the results of relevant monitoring.

## PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

1506.1 Limitations on actions during NEPA process.

1506.2 Elimination of duplication with State, Tribal, and local procedures.

1506.3 Adoption.

1506.4 Combining documents.

1506.5 Agency responsibility for environmental documents.

1506.6 Public involvement.

1506.7 Further guidance.

1506.8 Proposals for legislation.

1506.9 Proposals for regulations.

1506.10 Filing requirements.

1506.1~~10~~ Timing of agency action.

1506.1~~2~~4 Emergencies.

1506.1~~3~~2 Effective date.

**Authority:** ~~42 U.S.C. 4321–4347; NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371–4375; et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609;) and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902 Mar. 5, 1970, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123 May 24, 1977); and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.~~

### § 1506.1 Limitations on actions during NEPA process.

(a) ~~Except as provided in paragraphs (b) and (c) of this section, U~~ntil an agency issues a finding of no significant impact, as provided in § 1501.6 of this chapter, or record of decision, as provided in § 1505.2 of this chapter~~(except as provided in paragraph (c) of this section), no action concerning the proposal~~ may~~shall~~ be taken ~~that~~which would:

- (1) Have an adverse environmental impact; or
- (2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency’s jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to ~~i~~ensure that the objectives and procedures of NEPA are achieved. This section does not preclude development by applicants of plans or designs or performance of other activities work necessary to support an application for Federal, State, Tribal, or local permits or assistance. An agency considering a proposed action for Federal funding may authorize such activities, including, but not limited to, acquisition of interests in land (e.g., fee simple, rights-of-way, and conservation easements).

~~purchase of~~ ~~Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long lead-time equipment, and purchase options) made by applicants~~ ~~non-governmental entities seeking loan guarantees from the Administration.~~

(c) While work on a required program ~~matic~~ environmental ~~review~~ ~~impact statement~~ is in progress and the action is not covered by an existing program ~~matic~~ ~~review~~ ~~statement~~, agencies shall not undertake in the interim any major Federal action covered by the program ~~that~~ ~~which~~ may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental ~~review~~ ~~impact statement~~; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

~~(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.~~

#### § 1506.2 Elimination of duplication with State, Tribal, and local procedures.

(a) ~~Federal Agencies~~ are authorized ~~by law~~ to cooperate with State, Tribal, and local agencies that are responsible for preparing environmental documents, including those prepared of statewide jurisdiction pursuant to section 102(2)(D) of NEPA ~~the Act may do so.~~

(b) To the fullest extent practicable unless specifically prohibited by law, Agencies shall cooperate with State, Tribal, and local agencies ~~to the fullest extent possible~~ to reduce duplication between NEPA and State, Tribal, and local requirements, including through use of studies, analysis, and decisions developed by State, Tribal, or local ~~unless the agencies are specifically barred from doing so by some other law~~. Except for cases covered by paragraph (a) of this section, such cooperation shall ~~to the fullest extent possible~~ include, to the fullest extent practicable:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) To the fullest extent practicable unless specifically prohibited by law, Agencies shall cooperate with State, Tribal, and local agencies ~~to the fullest extent possible~~ to reduce duplication between NEPA and comparable State, Tribal, and local requirements, ~~unless the~~

~~agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, s~~Such cooperation shall include, to the fullest extent ~~possipracticable, include~~ joint environmental impact statements. In such cases, one or more Federal agencies and one or more State, Tribal, or local agencies shall be joint lead agencies. Where State ~~or Tribal~~ laws or local ordinances have environmental impact statement ~~or similar~~ requirements in addition to but not in conflict with those in NEPA, ~~f~~Federal agencies ~~mayshall~~ cooperate in fulfilling these requirements, as well as those of Federal laws, so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State, Tribal, or local planning processes, environmental impact statements shall discuss any inconsistency of a proposed action with any approved State, Tribal, or local plan ~~orand~~ laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law. ~~While the statement should discuss any inconsistencies, NEPA does not require reconciliation.~~

### § 1506.3 Adoption.

(a) Generally. An agency may adopt a Federal draft or final environmental impact statement, environmental assessment, or portion thereof, or categorical exclusion determination provided that the statement, assessment, or portion thereof, or determination meets the standards for an adequate statement, assessment, or determination under these regulations in this subchapter.

(b) Environmental impact statements. (1) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the ~~agency~~ adopting ~~another agency's statement shall republishis not required to reiregulate~~ it ~~except~~ as a final statement consistent with § 1506.10. ~~If the actions are not substantially the same, Otherwise~~ the adopting agency shall treat the statement as a draft and ~~republishreulate~~ it ~~(except as provided in paragraph (e) of this section), consistent with § 1506.10~~.

(2e) ~~Notwithstanding paragraph (b)(1) of this section, a~~ cooperating agency may adopt in its record of decision without ~~republishingreulating~~ the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(c) Environmental assessments. If the actions covered by the original environmental assessment and the proposed action are substantially the same, the adopting agency may adopt the environmental assessment in its finding of no significant impact and provide notice consistent with § 1501.6 of this chapter.

(d) Categorical exclusions. An agency may adopt another agency's determination that a categorical exclusion applies to a proposed action if the action covered by the original categorical exclusion determination and the adopting agency's proposed action are substantially the same. The agency shall document the adoption.

(e) Identification of certain circumstances. The adopting agency shall specify if one of the following circumstances is present:

~~(1d) When an~~The agency is ~~adoptings~~ an assessment or statement ~~that~~which is not final within the agency that prepared it.

~~(2), or when~~ †The action ~~it~~assesses in the assessment or statement is the subject of a referral under part 1504 of this chapter.

~~(3), or when~~ †The assessment or statement's adequacy is the subject of a judicial action ~~that~~which is not final, ~~the agency shall so specify~~.

#### § 1506.4 Combining documents.

~~Agencies should combine, to the fullest extent practicable, any environmental document in compliance with NEPA may be combined~~ with any other agency document to reduce duplication and paperwork.

#### § 1506.5 Agency responsibility for environmental documents.

(a) Responsibility. The agency is responsible for the accuracy, scope (§ 1501.9(e) of this chapter), and content of environmental documents prepared by the agency or by an applicant or contractor under the supervision of the agency.

(b) Information. ~~If a~~An agency may ~~requires~~ an applicant to submit environmental information for possible use by the agency in preparing an environmental ~~document~~impact statement, ~~then~~ An agency also may direct an applicant or authorize a contractor to prepare an environmental document under the supervision of the agency.

(1) ~~†~~The agency should assist the applicant by outlining the types of information required or, for the preparation of environmental documents, shall provide guidance to the applicant or contractor and participate in their preparation.

(2)- The agency shall independently evaluate the information submitted or the environmental document and shall be responsible for its accuracy, scope, and contents.

(3)- ~~If~~†The agency shall include~~chooses to use the information submitted by the applicant in the environmental document~~impact statement, either directly or by reference, then the names and qualifications of the persons preparing environmental documents, and conducting~~responsible for~~ the independent evaluation of any information submitted or environmental documents prepared by an applicant or contractor, such as~~shall be included~~ in the list of preparers for environmental impact statements (§ 1502.187 of this chapter). It is the intent of this paragraph (b)(3) that acceptable work not be redone, but that it be verified by the agency.

~~(b) Environmental assessments. If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.~~

(4e) Contractors or applicants preparing environmental assessments or environmental impact statements shall submit a disclosure statement to the lead agency that specifies any

~~financial or other interest in the outcome of the action. Such statement need not include privileged or confidential trade secrets or other confidential business information.~~ Environmental impact statements. Except as provided in §§ 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents.

(5) Nothing in this section is intended to prohibit any agency from requesting any person, including the applicant, to submit information to it or to prohibit any person from submitting information to any agency for use in preparing environmental documents.

### § 1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures (§ 1507.3 of this chapter).

(b) Provide public notice of NEPA-related hearings, public meetings, and other opportunities for public involvement, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected by their proposed actions. When selecting appropriate methods for providing public notice, agencies shall consider the ability of affected persons and agencies to access electronic media.

(1) In all cases, the agency shall ~~mail-~~notify ~~ee to~~ those who have requested ~~notice~~ on an individual action.

(2) In the case of an action with effects of national concern, notice shall include publication in the *Federal Register* ~~FEDERAL REGISTER~~ and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the ~~102 Monitor~~. An agency engaged in rulemaking may provide notify ~~ee by mail to national organizations that~~ who have requested ~~regular~~ that notice ~~regularly be provided~~. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern, the notice may include:

(i) Notice to State, Tribal, and local agencies that may be interested or affected by the proposed action ~~are~~ ~~wide clearinghouses pursuant to OMB Circular A-95 (Revised)~~.

(ii) Notice to interested or affected State, ~~Indian~~ ~~Tribal~~ ~~es~~, and local governments ~~when effects may occur on reservations~~.

(iii) Following the affected ~~s~~State or Tribe's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(x) Notice through electronic media (e.g., a project or agency website, email, or social media).

(c) Hold or sponsor public hearings, ~~or~~ public meetings, or other opportunities for public involvement whenever appropriate or in accordance with statutory requirements applicable to the agency. Agencies may conduct public hearings and public meetings by means of electronic communication except where another format is required by law. When selecting appropriate methods for public involvement, agencies shall consider the ability of affected entities to access electronic media. Criteria shall include whether there is:

~~(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.~~

~~(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).~~

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act, as amended (5 U.S.C. 552), ~~without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.~~

**§ 1506.7 Further guidance.**

~~(a) The Council may provide further guidance concerning NEPA and its procedures consistent with Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (August 5, 2017), Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents (October 9, 2019), and any other applicable Executive orders, including:~~

~~(b) To the extent that Council guidance issued prior to September 14, 2020 is in conflict with this subchapter, the provisions of this subchapter apply.~~

~~(a) A handbook which the Council may supplement from time to time, which shall in plain language provide guidance and instructions concerning the application of NEPA and these regulations.~~

~~(b) Publication of the Council's Memoranda to Heads of Agencies.~~

~~(c) In conjunction with the Environmental Protection Agency and the publication of the 102 Monitor, notice of:~~

~~(1) Research activities;~~

~~(2) Meetings and conferences related to NEPA; and~~

~~(3) Successful and innovative procedures used by agencies to implement NEPA.~~

**§ 1506.8 Proposals for legislation.**

~~(a) When developing legislation, agencies shall integrate T~~the NEPA process for proposals for legislation ~~(§ 1508.17)~~ significantly affecting the quality of the human environment ~~shall be integrated~~ with the legislative process of the Congress. Technical D~~rafting assistance does not by itself constitute a legislative proposal~~significant cooperation. Only the agency that~~which~~ has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

~~(b)~~ A legislative environmental impact statement is the detailed statement required by law to be included in an agency's recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement ~~that~~which can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

~~(c)~~ Preparation of a legislative environmental impact statement shall conform to the requirements of ~~these~~ regulations in this subchapter, except as follows:

(1) There need not be a scoping process.

(2) Agencies shall prepare Tthe legislative statement ~~shall be prepared~~ in the same manner as a draft environmental impact statement and need not prepare a final statement unless any of

~~the following conditions exist, but shall be considered the “detailed statement” required by statute; *Provided*, That when any of the following conditions exist both the draft and final environmental impact statement on the legislative proposal. In such cases, the agency shall be prepared and publish the statements consistent with~~ regulated as provided by §§ 1503.1 of this chapter and 1506.110:-

(i) A Congressional committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 *et seq.*) ~~and the Wilderness Act (16 U.S.C. 1131 *et seq.*)~~).

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects ~~that~~ which the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

~~(de)~~ (de) Comments on the legislative statement shall be given to the lead agency, which shall forward them along with its own responses to the Congressional committees with jurisdiction.

#### **§ 1506.9 Proposals for regulations.**

Where the proposed action is the promulgation of a rule or regulation, procedures and documentation pursuant to other statutory or Executive order requirements may satisfy one or more requirements of this subchapter. When a procedure or document satisfies one or more requirements of this subchapter, the agency may substitute it for the corresponding requirements in this subchapter and need not carry out duplicative procedures or documentation. Agencies shall identify which corresponding requirements in this subchapter are satisfied and consult with the Council to confirm such determinations.

#### **§ 1506.10 Filing requirements.**

(a) Agencies shall file E ~~Environmental~~ impact statements together with comments and responses ~~shall be filed~~ with the Environmental Protection Agency (EPA), ~~attention~~ Office of Federal Activities, consistent with EPA’s procedures ~~EIS Filing Section, Ariel Rios Building (South Oval Lobby), Mail Code 2252 A, Room 7220, 1200 Pennsylvania Ave., NW., Washington, DC 20460. This address is for deliveries by US Postal Service (including USPS Express Mail).~~

(b) ~~For deliveries in person or by commercial express mail services, including Federal Express or UPS, the correct address is: US Environmental Protection Agency, Office of Federal Activities, EIS Filing Section, Ariel Rios Building (South Oval Lobby), Room 7220, 1200 Pennsylvania Avenue, NW., Washington, DC 20004.~~

~~(e) Agencies shall file S~~statements ~~shall be filed~~ with the EPA no earlier than they are also transmitted to ~~commonparticipating~~ agencies and made available to the public. ~~EPA shall deliver one copy of each statement to the Council, which shall satisfy the requirement of availability to the President.~~ EPA may issue guidelines to agencies to implement its responsibilities under this section and § 1506.110.

**§ 1506.110 Timing of agency action.**

(a) The Environmental Protection Agency shall publish a notice in the *Federal Register*~~FEDERAL REGISTER~~ each week of the environmental impact statements filed since its prior notice~~during the preceding week~~. The minimum time periods set forth in this section ~~are~~shall be calculated from the date of publication of this notice.

(b) Unless otherwise provided by law, including statutory provisions for combining a final environmental impact statement and record of decision, Federal agencies may not make or issue a record of~~No~~ decision under § 1505.2 of this chapter for~~on~~ the proposed action ~~shall be made or recorded under § 1505.2 by a Federal agency~~ until the later of the following dates:

(1) ~~Ninety (90)~~ days after publication of the notice described ~~above~~ in paragraph (a) of this section for a draft environmental impact statement.

(2) ~~Thirty (30)~~ days after publication of the notice described ~~above~~ in paragraph (a) of this section for a final environmental impact statement.

~~(c) An agency may make an exception to the rule on timing set forth in paragraph (b) of this section for a proposed action in the following circumstances: An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal.~~

(1) Some agencies have a formally established appeal process after publication of the final environmental impact statement that~~which~~ allows other agencies or the public to take appeals on a decision and make their views known, ~~after publication of the final environmental impact statement~~. In such cases, where a real opportunity exists to alter the decision, the agency may make and record the decision ~~may be made and recorded~~ at the same time it publishes the environmental impact statement ~~is published~~. This means that the period for appeal of the decision and the 30-day period ~~set forth~~prescribed in paragraph (b)(2) of this section may run concurrently. In such cases, the environmental impact statement shall explain the timing and the public's right of appeal and provide notification consistent with § 1506.10; or-

(2) An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this section, ~~and~~ publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement, and provide notification consistent with § 1506.10, as described in paragraph (a) of this section.

~~(de) If an agency files~~ the final environmental impact statement ~~is filed~~ within ~~ninety (90)~~ days of the filing of the~~after a~~ draft environmental impact statement ~~is filed~~ with the Environmental Protection Agency, the ~~decision-making~~minimum thirty (30) day period and the ~~minimum ninety (90)~~ day period may run concurrently. However, subject to

paragraph (ed) of this section, agencies shall allow ~~at least~~<sup>not less than</sup> 45 days for comments on draft statements.

(ed) The lead agency may extend ~~the minimum prescribed~~ periods ~~in paragraph (b) of this section and provide notification consistent with § 1506.10. Upon a showing by the lead agency of compelling reasons of national policy.~~ The Environmental Protection Agency may ~~upon a showing by the lead agency of compelling reasons of national policy~~ reduce the ~~minimum prescribed~~ periods and, ~~may~~ upon a showing by any other Federal agency of compelling reasons of national policy, also ~~may~~ extend ~~the minimum prescribed~~ periods, but only after consultation with the lead agency. ~~The lead agency may modify the minimum periods when necessary to comply with other specific statutory requirements. (Also see § 1507.3(f)(2) of this chapter.)~~ Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

### § 1506.1~~2~~<sup>1</sup> Emergencies.

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of ~~these~~ regulations ~~in this subchapter~~, the Federal agency taking the action should consult with the Council about alternative arrangements ~~for compliance with section 102(2)(C) of NEPA~~. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

### § 1506.1~~3~~<sup>2</sup> Effective date.

The ~~effective date of these~~ regulations ~~in this subchapter apply to any NEPA process begun after September 14, 2020. An agency may apply the regulations in this subchapter to ongoing activities and environmental documents begun before September 14, 2020~~ ~~is July 30, 1979, except that for agencies that administer programs that qualify under section 102(2)(D) of the Act or under section 104(h) of the Housing and Community Development Act of 1974 an additional four months shall be allowed for the State or local agencies to adopt their implementing procedures.~~

~~(a) These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date. These regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of these regulations. No completed environmental documents need be redone by reasons of these regulations. Until these regulations are applicable, the Council's guidelines published in the FEDERAL REGISTER of August 1, 1973, shall continue to be applicable. In cases where these regulations are applicable the guidelines are superseded. However, nothing shall prevent an agency from proceeding under these regulations at an earlier time.~~

~~(b) NEPA shall continue to be applicable to actions begun before January 1, 1970, to the fullest extent possible.~~

**PART 1507—AGENCY COMPLIANCE**

Sec.

1507.1 Compliance.

1507.2 Agency capability to comply.

1507.3 Agency NEPA procedures.

1507.4 Agency NEPA program information.

**Authority:** ~~42 U.S.C. 4321–4347; NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371–4375; *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609); and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902 Mar. 5, 1970, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123 May 24, 1977); and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.~~

**§ 1507.1 Compliance.**

All agencies of the Federal Government shall comply with ~~these~~ regulations in this subchapter. ~~It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by § 1507.3 to the requirements of other applicable laws.~~

**§ 1507.2 Agency capability to comply.**

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements of NEPA and the regulations in this subchapter enumerated below. Such compliance may include use of ~~the other's~~ resources of other agencies, applicants, and other participants in the NEPA process, but the ~~using~~ agency using the resources shall itself have sufficient capability to evaluate what others do for it and account for the contributions of others. Agencies shall:

(a) Fulfill the requirements of section 102(2)(A) of ~~NEPA the Act~~ to utilize a systematic, interdisciplinary approach ~~that which~~ will ~~ensure~~ the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making ~~that which~~ may have an impact on the human environment. Agencies shall designate a senior agency official person to be responsible for overall review of agency NEPA compliance, including resolving implementation issues.

(b) Identify methods and procedures required by section 102(2)(B) of NEPA to ~~ensure~~ that presently unquantified environmental amenities and values may be given appropriate consideration.

(c) Prepare adequate environmental impact statements pursuant to section 102(2)(C) of NEPA and cooperate comment on the development of statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.

(d) Study, develop, and describe alternatives to recommended courses of action in any proposal ~~that which~~ involves unresolved conflicts concerning alternative uses of available resources, consistent with. ~~This requirement of section 102(2)(E) of NEPA extends to all such~~

~~proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements.~~

(e) Comply with the requirements of section 102(2)(H) of NEPA that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects.

(f) Fulfill the requirements of sections 102(2)(F), 102(2)(G), and 102(2)(I), of NEPA, the Act and of Executive Order 11514, Protection and Enhancement of Environmental Quality, Section 2, as amended by Executive Order 11991, Relating to Protection and Enhancement of Environmental Quality, and Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting for Infrastructure Projects.

**§ 1507.3 Agency NEPA procedures.**

(a) Where existing agency NEPA procedures are inconsistent with the regulations in this subchapter, the regulations in this subchapter shall apply, consistent with § 1506.13 of this chapter, unless there is a clear and fundamental conflict with the requirements of another statute. The Council has determined that the categorical exclusions contained in agency NEPA procedures as of September 14, 2020 are consistent with this subchapter.

(b) ~~Not more later than 12eight months after September 14, 2020publication of these regulations as finally adopted in the FEDERAL REGISTER, or 9five months after the establishment of an agency, whichever shall comes later, each agency shall develop or revise, as necessary, proposedadopt procedures to supimplement these regulations in this subchapter, including to eliminate any inconsistencies with the regulations in this subchapter.~~ When the agency is a department, it may be efficient for major subunits are encouraged (with the consent of the department) to adopt their own procedures. Except for agency efficiency (see paragraph (c) of this section) or as otherwise required by law, agency NEPA procedures shall not impose additional procedures or requirements beyond those set forth in the regulations in this subchapter. Such procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures.

(1) Each agency shall consult with the Council while developing or revising its proposed procedures and before publishing them in the Federal Register~~FEDERAL REGISTER~~ for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants.

(2) ~~AgenciesThe procedures shall providebe adopted only after~~ an opportunity for public review and ~~after~~ review by the Council for conformity with the Act and ~~these~~ regulations in this subchapter before adopting their final procedures. The Council shall complete its review within 30 days of the receipt of the proposed final procedures. Once in effect, the agency they shall publish its NEPA proceduresbe filed with the Council and ensure that they aremade readily available to the public. ~~Agencies are encouraged to publish explanatory guidance for these regulations and their own procedures. Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.~~

(c) Agencies shall adopt, as necessary, agency NEPA procedures (§ 1507.3) to improve agency efficiency and ensure that agencies make decisions are made in accordance with the policies and purposes of the Act's procedural requirements. Such procedures shall include but not be limited to:

(a) Implementing procedures under section 102(2) to achieve the requirements of sections 101 and 102(1):

(1b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process begins at the earliest reasonable time, consistent with § 1501.2 of this chapter, and aligns with the correspondings decision points with them.

(2e) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

(3d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that decision makers agency officials use the statement in making decisions.

(4e) Requiring that the alternatives considered by the decision maker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decision maker consider the alternatives described in the environmental documents impact statement. If another decision document accompanies the relevant environmental documents to the decision maker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

(5) Requiring the combination of environmental documents with other agency documents. Agencies may designate and rely on one or more procedures or documents under other statutes or Executive orders as satisfying some or all of the requirements in this subchapter, and substitute such procedures and documentation to reduce duplication. When an agency substitutes one or more procedures or documents for the requirements in this subchapter, the agency shall identify the respective requirements that are satisfied.

(d) Agency procedures should identify those activities or decisions that are not subject to NEPA, including:

(1) Activities or decisions expressly exempt from NEPA under another statute;

(2) Activities or decisions where compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute;

(3) Activities or decisions where compliance with NEPA would be inconsistent with Congressional intent expressed in another statute;

(4) Activities or decisions that are non-major Federal actions;

(5) Activities or decisions that are non-discretionary actions, in whole or in part, for which the agency lacks authority to consider environmental effects as part of its decision-making process; and

(6) Actions where the agency has determined that another statute's requirements serve the function of agency compliance with the Act.

(~~eb~~) Agency procedures shall comply with these regulations in this subchapter except where compliance would be inconsistent with statutory requirements and shall include:

(1) Those procedures required by §§ 1501.2(~~b~~)(4) (assistance to applicants), ~~1502.9(e)(3), 1505.1, and~~ 1506.6(e) of this chapter (status information), ~~and 1508.4.~~

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment and do not have a significant effect on the human environment (categorical exclusions (§ 15018.4 of this chapter)). Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect. Agency NEPA procedures shall identify when documentation of a categorical exclusion determination is required.

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

(3) ~~Shall adopt~~ Procedures for introducing a supplement to an environmental assessment or environmental impact statement into its formal administrative record, if such a record exists.

(~~fe~~) Agency procedures may:

(1) ~~Include~~ specific criteria for providing limited exceptions to the provisions of these regulations in this subchapter for classified proposals. ~~These~~ are proposed actions ~~that~~ which are specifically authorized under criteria established by an Executive ~~O~~order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive ~~O~~order or statute. Agencies may safeguard and restrict from public dissemination ~~Environmental assessments and environmental impact statements that~~ which address classified proposals ~~may be safeguarded and restricted from public dissemination~~ in accordance with agencies' own regulations applicable to classified information. Agencies should organize ~~These documents may be organized~~ so that classified portions ~~are~~ can be included as annexes, so that the agencies can make ~~in order that~~ the unclassified portions ~~can be made~~ available to the public.

(~~2d~~) ~~Agency procedures may~~ provide for periods of time other than those presented in § 1506.11 of this chapter when necessary to comply with other specific statutory requirements, including requirements of lead or cooperating agencies.

~~(3e) Agency procedures may provide that, where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the agency may publish the notice of intent required by § 1501.97(d) of this chapter may be published at a reasonable time in advance of preparation of the draft statement. Agency procedures shall provide for publication of supplemental notices to inform the public of a pause in its preparation of an environmental impact statement and for any agency decision to withdraw its notice of intent to prepare an environmental impact statement.~~

~~(43) Adopt procedures under § 1507.3 to combine its environmental assessment process with its scoping process.~~

~~(5) Establish a process that allows the agency to use a categorical exclusion listed in another agency's NEPA procedures after consulting with that agency to ensure the use of the categorical exclusion is appropriate. The process should ensure documentation of the consultation and identify to the public those categorical exclusions the agency may use for its proposed actions. Then, the agency may apply the categorical exclusion to its proposed actions.~~

#### **§ 1507.4 Agency NEPA program information.**

~~(a) To allow agencies and the public to efficiently and effectively access information about NEPA reviews, agencies shall provide for agency websites or other means to make available environmental documents, relevant notices, and other relevant information for use by agencies, applicants, and interested persons. Such means of publication may include:~~

~~(1) Agency planning and environmental documents that guide agency management and provide for public involvement in agency planning processes;~~

~~(2) A directory of pending and final environmental documents;~~

~~(3) Agency policy documents, orders, terminology, and explanatory materials regarding agency decision-making processes;~~

~~(4) Agency planning program information, plans, and planning tools; and~~

~~(5) A database searchable by geographic information, document status, document type, and project type.~~

~~(b) Agencies shall provide for efficient and effective interagency coordination of their environmental program websites, including use of shared databases or application programming interface, in their implementation of NEPA and related authorities.~~

#### **PART 1508—DEFINITIONS, TERMINOLOGY, AND INDEX**

Sec.

1508.1 ~~Definitions~~ Terminology.

1508.2 ~~[Reserved]~~ Aet.

~~1508.3 Affecting.~~

~~1508.4 Categorical exclusion.~~

- ~~1508.5 Cooperating agency.~~
- ~~1508.6 Council.~~
- ~~1508.7 Cumulative impact.~~
- ~~1508.8 Effects.~~
- ~~1508.9 Environmental assessment.~~
- ~~1508.10 Environmental document.~~
- ~~1508.11 Environmental impact statement.~~
- ~~1508.12 Federal agency.~~
- ~~1508.13 Finding of no significant impact.~~
- ~~1508.14 Human environment.~~
- ~~1508.15 Jurisdiction by law.~~
- ~~1508.16 Lead agency.~~
- ~~1508.17 Legislation.~~
- ~~1508.18 Major Federal action.~~
- ~~1508.19 Matter.~~
- ~~1508.20 Mitigation.~~
- ~~1508.21 NEPA process.~~
- ~~1508.22 Notice of intent.~~
- ~~1508.23 Proposal.~~
- ~~1508.24 Referring agency.~~
- ~~1508.25 Scope.~~
- ~~1508.26 Special expertise.~~
- ~~1508.27 Significantly.~~
- ~~1508.28 Tiering.~~

**Authority:** ~~42 U.S.C. 4321–4347; NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371–4375; *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609;)~~ and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902~~Mar. 5, 1970, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123~~May 24, 1977); and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

**§ 1508.1 DefinitionsTerminology.**

The following definitions apply to the regulations in this subchapter. Federal agency terminology of this part shall use these terms be uniformly throughout the Federal Government.

**§ 1508.2 Act.**

(a) Act or NEPA means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*) ~~which is also referred to as “NEPA.”~~

**§ 1508.3 Affecting.**

(b) Affecting means will or may have an effect on.

(c) Authorization means any license, permit, approval, finding, determination, or other administrative decision issued by an agency that is required or authorized under Federal law in order to implement a proposed action.

**§ 1508.4 Categorical exclusion.**

*(d) Categorical exclusion* means a category of actions that which the agency has determined, in its agency NEPA procedures (§ 1507.3 of this chapter), normally do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. ~~An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.~~

**§ 1508.5 Cooperating agency.**

*(e) Cooperating agency* means any Federal agency (and a State, Tribal, or local agency with agreement of the lead agency) other than a lead agency ~~that which~~ has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action that may significantly affecting the quality of the human environment. ~~The selection and responsibilities of a cooperating agency are described in § 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.~~

**§ 1508.6 Council.**

*(f) Council* means the Council on Environmental Quality established by title II of the Act.

**§ 1508.7 Cumulative impact.**

*Cumulative impact* is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. ~~Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.~~

**§ 1508.8 Effects.**

*(g) Effects or impacts* means changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives, including those effects that occur at the same time and place as the proposed action or alternatives and may include effects that are later in time or farther removed in distance from the proposed action or alternatives. ~~include:~~

*(1a) Direct effects*, which are caused by the action and occur at the same time and place.

*(b) Indirect effects*, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. ~~Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population~~

~~density or growth rate, and related effects on air and water and other natural systems, including ecosystems.~~

~~Effects and impacts as used in these regulations are synonymous.~~ Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic (such as the effects on employment), social, or health effects, whether direct, indirect, or cumulative. Effects may also include those resulting from actions that which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

(2) A “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.

(3) An agency’s analysis of effects shall be consistent with this paragraph (g). Cumulative impact, defined in 40 CFR 1508.7 (1978), is repealed.

#### **§ 1508.9 Environmental assessment.**

(h) Environmental assessment:

(a) Mmeans a concise public document prepared by for which a Federal agency is responsible that serves to:

~~(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.~~

(2) Aid an agency’s compliance with the Act and support its determination of whether to prepare an when no environmental impact statement or a finding of no significant impact, as provided in § 1501.6 of this chapter is necessary.

~~(3) Facilitate preparation of a statement when one is necessary.~~

~~(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.~~

#### **§ 1508.10 Environmental document.**

(i) Environmental document ~~means includes the documents specified in § 1508.9 (an~~ environmental assessment), ~~§ 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), or and § 1508.22 (notice of intent).~~

#### **§ 1508.11 Environmental impact statement.**

(j) Environmental impact statement means a detailed written statement as required by section 102(2)(C) of NEPA the Act.

**§ 1508.12 Federal agency.**

(k) *Federal agency* means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. For the purposes of the regulations in this subchapter, Federal agency~~It~~ also includes ~~for purposes of these regulations~~ States, and units of general local government, ~~and Indian Tribes~~ tribal governments assuming NEPA responsibilities from a Federal agency pursuant to statute under section 104(h) of the Housing and Community Development Act of 1974.

**§ 1508.13 Finding of no significant impact.**

(l) *Finding of no significant impact*<sup>22</sup> means a document by a Federal agency briefly presenting the reasons why an action, not otherwise categorically excluded (§ 1501.8.4 of this chapter), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. ~~It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.~~

**§ 1508.14 Human environment.**

(m) *Human environment* ~~means~~ shall be interpreted comprehensively ~~to include~~ the natural and physical environment and the relationship of present and future generations of Americans ~~people~~ with that environment. (See also the definition of “effects” in paragraph (g) of this section (§ 1508.8).) ~~This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.~~

**§ 1508.15 Jurisdiction by law.**

(n) *Jurisdiction by law* means agency authority to approve, veto, or finance all or part of the proposal.

**§ 1508.16 Lead agency.**

(o) *Lead agency* means the agency or agencies, in the case of joint lead agencies, preparing or having taken primary responsibility for preparing the environmental impact statement.

**§ 1508.17 Legislation.**

(p) *Legislation* ~~means~~ includes a bill or legislative proposal to Congress developed by ~~or with the significant cooperation and support of~~ a Federal agency, but does not include requests for appropriations or legislation recommended by the President. ~~The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for~~

~~legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.~~

**~~§ 1508.18 Major Federal action.~~**

~~(q) Major Federal action or action means and includes activity or decisions with effects that may be major and which are potentially subject to Federal control and responsibility, subject to the following:— Major reinforces but does not have a meaning independent of significantly (§ 1508.27).~~

~~(1) Major Federal action does not include the following activities or decisions:~~

~~(i) Extraterritorial activities or decisions, which means agency activities or decisions with effects located entirely outside of the jurisdiction of the United States;~~

~~(ii) Activities or decisions that are non-discretionary and made in accordance with the agency's statutory authority;~~

~~(iii) Activities or decisions that do not result in final agency action include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other statute that also includes a finality requirement; applicable law as agency action.~~

~~(iv) Actions do not include bringing judicial or administrative civil or criminal enforcement actions;—~~

~~(v) Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds;~~

~~(vi) Non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency does not exercise sufficient control and responsibility over the outcome of the project; and~~

~~(vii) Loans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of such assistance (for example, action does not include farm ownership and operating loan guarantees by the Farm Service Agency pursuant to 7 U.S.C. 1925 and 1941 through 1949 and business loan guarantees by the Small Business Administration pursuant to 15 U.S.C. 636(a), 636(m), and 695 through 697g).~~

~~(2a) Major Federal Actions may include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17 of this chapter). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control~~

~~over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.~~

(3b) Major Federal actions tend to fall within one of the following categories:

(i1) Adoption of official policy, such as rules, regulations, and interpretations adopted ~~underpursuant to~~ the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* or other statutes; implementation of treaties and international conventions or agreements, including those implemented pursuant to statute or regulation; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(ii2) Adoption of formal plans, such as official documents prepared or approved by ~~f~~Federal agencies, which ~~guide or~~ prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(iii3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(iv4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as ~~f~~Federal and federally assisted activities.

#### ~~§ 1508.19 Matter.~~

(r) *Matter* includes for purposes of ~~P~~part 1504 of this chapter:

(1a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(2b) With respect to all other agencies, any proposed major ~~f~~Federal action to which section 102(2)(C) of NEPA applies.

#### ~~§ 1508.20 Mitigation.~~

(s) Mitigation means measures that avoid, minimize, or compensate for effects caused by a proposed action or alternatives as described in an environmental document or record of decision and that have a nexus to those effects. While NEPA requires consideration of mitigation, it does not mandate the form or adoption of any mitigation. Mitigation includes:

(1a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(2b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(3e) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(4d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(5e) Compensating for the impact by replacing or providing substitute resources or environments.

**~~§ 1508.21 NEPA process.~~**

~~(t) NEPA process means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.~~

**~~§ 1508.22 Notice of intent.~~**

~~(u) Notice of intent means a public notice that an agency will prepare and consider an environmental impact statement will be prepared and considered. The notice shall briefly:~~

~~(a) Describe the proposed action and possible alternatives.~~

~~(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.~~

~~(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.~~

~~(v) Page means 500 words and does not include explanatory maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial information.~~

~~(w) Participating agency means a Federal, State, Tribal, or local agency participating in an environmental review or authorization of an action.~~

**~~§ 1508.23 Proposal.~~**

~~(x) Proposal means a proposed action exists at that stage in the development of an action when an agency subject to the Act has a goal, and is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and the effects can be meaningfully evaluated its effects. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.~~

~~(y) Publish and publication mean methods found by the agency to efficiently and effectively make environmental documents and information available for review by interested persons, including electronic publication, and adopted by agency NEPA procedures pursuant to § 1507.3 of this chapter.~~

~~(z) Reasonable alternatives means a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant.~~

(aa) Reasonably foreseeable means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.

**§ 1508.24 Referring agency.**

(bb) Referring agency means the Federal agency that~~which~~ has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

**§ 1508.25 Scope.**

(cc) Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 15012.1120 of this chapter and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

~~(a) Actions (other than unconnected single actions) which may be:~~

~~(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:~~

~~(i) Automatically trigger other actions which may require environmental impact statements.~~

~~(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.~~

~~(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.~~

~~(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.~~

~~(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.~~

~~(b) Alternatives, which include:~~

~~(1) No action alternative.~~

~~(2) Other reasonable courses of actions.~~

~~(3) Mitigation measures (not in the proposed action).~~

~~(c) Impacts, which may be: (1) direct; (2) indirect; (3) cumulative.~~

**§ 1508.26 Special expertise.**

(dd) Senior agency official means an official of assistant secretary rank or higher (or equivalent) that is designated for overall agency NEPA compliance, including resolving implementation issues.

(ee) Special expertise means statutory responsibility, agency mission, or related program experience.

**§ 1508.27 Significantly.**

Significantly as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short and long term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

~~(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.~~

~~(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.~~

**§ 1508.28 Tiering.**

(ff) Tiering refers to the coverage of general matters in broader environmental impact statements or environmental assessments (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basin-wide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. ~~Tiering is appropriate when the sequence of statements or analyses is:~~

~~(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.~~

~~(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.~~

**§ 1508.2 [Reserved]**

**Links to Discussion Material**

1. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (Federal Register, Vol. 85, No. 137, Thursday, July 16, 2020)  
<https://www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-15179.pdf>
2. Complaint for Declaratory and Injunctive Relief in *Alaska Community Action on Toxics et al. v. Council on Environmental Quality et al.*, N.D. Cal. Case 3:20-cv-05199, Filed 7/20/2020  
[https://oregonstatebar.s3-us-west-2.amazonaws.com/Seminars/2020/ENV20-1-Complaint\\_3-20-cv-05199.pdf](https://oregonstatebar.s3-us-west-2.amazonaws.com/Seminars/2020/ENV20-1-Complaint_3-20-cv-05199.pdf)



## Chapter 2A

# The Klamath Basin: Intersection of the Endangered Species Act and Tribal Water Rights

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## **UNITED STATES SUPREME COURT**

**Bennett v. Spear**, 520 U.S. 154 (1997)

**Background:** Lost River Sucker and Shortnose Suckers listed as endangered in 1988. In 1992, Bureau of Reclamation notified U.S. Fish and Wildlife Service (USFWS) that operation of Klamath Project might affect those species. USFWS prepared Biological Opinion, which imposed restrictions on Klamath Project operations, including maintenance of minimum water levels in Project reservoirs, for protection of species.

**Issue:** Whether irrigation districts have standing to seek judicial review of Biological Opinion related to Klamath Project operations under either of the citizen suit provision of the Endangered Species Act, 16 U.S.C. 1540(g)(1), or the Administrative Procedure Act (APA)?

**Ruling:** (1) The Plaintiff irrigators had standing to sue under the ESA citizen suit provision even though they sought to prevent application of environmental restrictions rather than to implement them, because the citizen suit provision applies not only to actions alleging “underenforcement” of the ESA, but also to actions alleging “overenforcement” of the ESA;

(2) Although the irrigators had standing to sue under the ESA, the ESA citizen suit provision does not provide a cause of action to challenge the Secretary of Interior (or Commerce’s) “maladministration” of the ESA – in other words, the challenge to the Biological Opinion could not be brought as an ESA citizen suit;

(3) The ESA citizen suit provision permits claims against the Secretaries alleging failure to perform non-discretionary duties under Section 4 of the ESA, 16 U.S.C. 1533 (the listing process), but does not broadly authorize claims that the Secretaries are “in violation of” the ESA;

(4) Issuance of Biological Opinion is final agency action and challenges to Biological Opinions issued by NMFS and/or USFWS may be filed under APA.

## **FEDERAL APPELLATE COURTS**

**Baley v. United States**, 942 F.3d 1312 (Fed. Cir. 2019), cert. denied, 2020 U.S. LEXIS 3364 (June 22, 2020)

**Background:** In 2001, a drought year, USFWS issued Biological Opinion requiring maintenance of minimum lake levels in Upper Klamath Lake for protection of endangered suckers and thus restricting diversions for irrigation. NMFS issued Biological Opinion requiring minimum water releases through Klamath Project facilities and downstream into the Klamath River for protection of threatened SONCC coho. Bureau of Reclamation operated Project in conformance with Biological Opinions, which resulted in limited and untimely water deliveries for irrigation. Irrigators filed suit alleging that Reclamation’s action had taken their property without just compensation in violation of Fifth Amendment to U.S. Constitution.

Issue: Whether the Court of Federal Claims correctly ruled that Reclamation’s action of limiting water deliveries to Klamath Basin irrigators in 2001 did not constitute a compensable taking of property rights in violation of the Fifth Amendment to the U.S. Constitution?

Ruling: (1) Indian tribes of the Klamath Basin, including the Klamath Tribes, Hoopa Valley Tribe, and Yurok Tribe, have reserved fishing rights and reserved water rights that are senior to those of Plaintiffs.

(2) Those Tribes hold rights to an amount of water that is at least equal to what was needed to satisfy the Bureau of Reclamation’s ESA obligations in 2001.

(3) Because the irrigators’ water rights are junior to the Tribes, the irrigators lacked a compensable takings claim because the available water in 2001 was required for the Tribes’ senior rights.

***Pacific Coast Federation of Fishermen’s Associations v. U.S. Bureau of Reclamation***, 426 F.3d 1082 (9<sup>th</sup> Cir. 2005)

Background: NMFS prepared “Reasonable and Prudent Alternatives” (RPA) in 2002 Biological Opinion that covered Klamath Project operations from 2002 – 2012. The RPA concluded that since the Klamath Project irrigates 57% of the land in the Klamath Basin, the Bureau of Reclamation would be responsible for providing 57% of the total water needed by ESA-listed coho and 43% would come from other sources. Under the RPA, NMFS concluded that 100% of the salmon’s flow needs would be met in years 9 and 10 of the plan.

Issue: Were the short-term flow requirements in the BiOp that failed to provide all necessary flow for ESA-listed coho arbitrary and capricious?

Ruling: (1) NMFS decision to delay the provision of the full quantity of water for eight years is not supported by the administrative record and the no-jeopardy conclusion in the BiOp cannot be supported by implicit reasoning. The BiOp failed to adequately explain how providing only 57% of coho’s flow needs would not result in jeopardy to threatened coho.

(2) The Ninth Circuit remanded for entry of appropriate injunctive relief. “It is not enough to provide water for the coho to survive in five years, if in the meantime, the population has been weakened or destroyed by inadequate water flows.”

***Klamath Water Users Protective Association v. Patterson***, 204 F.3d 1206 (9<sup>th</sup> Cir. 2000), cert denied, 531 U.S. 812 (2000)

Background: Pursuant to contract, PacifiCorp operates Link River Dam for the United States, Bureau of Reclamation. In 1997, Reclamation and PacifiCorp agreed upon a short-term modification to the contract for purposes of implementing an operating plan that would meet Reclamation’s ESA and tribal trust obligations. Irrigators challenged the contract modification, arguing that they were third-party beneficiaries of contract and entitled to enforce contract’s terms. PacifiCorp filed counterclaim and request for declaratory judgment as to Reclamation’s rights to direct Project operations under the contract.

Issue: (1) Are Klamath Basin irrigators third-party beneficiaries to the operating contract between Reclamation and PacifiCorp that governs management of Link River Dam?

(2) Did Reclamation have authority to direct operations of Link River Dam for purposes of complying with ESA and fulfillment of tribal rights?

Ruling: (1) The Klamath Basin irrigators are not intended third-party beneficiaries of the contract to operate Link River Dam.

(2) Reclamation retains overall authority to control Dam operations.

(3) Reclamation has responsibilities under Endangered Species Act that include taking control of the Link River Dam when necessary to meet the requirements of the ESA, requirements that override the water rights of the Irrigators.

(4) Reclamation also is a trustee for Klamath Basin tribes and has a responsibility to protect their rights and resources. “Because Reclamation maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes’ rights, rights that take precedence over any alleged rights of the Irrigators.” “Accordingly, we hold that the district court did not err in concluding that Reclamation has authority to direct operation of the Dam to comply with tribal water requirements.”

**Klamath Water Users Protective Ass’n v. DOI**, 189 F.3d 1034 (9<sup>th</sup> Cir. 1999)

Background: In 1995, Reclamation announced intention to prepare a plan for long-term operation of Klamath Project. Klamath Water Users Association made FOIA requests for documents exchanged between Interior Department and Klamath Basin Tribes regarding water resource issues. Interior withheld certain documents and District Court found such non-disclosure was proper under the inter-agency document exemption; which excludes from FOIA “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”

Issue: Whether documents submitted by Klamath Basin tribes at request of Department of Interior in course of consultation over ongoing administrative and adjudicative proceedings involving water rights and allocations affecting the Tribes’ interests are exempt from FOIA under inter-agency memorandum exemption?

Ruling: The inter-agency exemption does not apply: documents submitted to an agency by persons outside the government as part of an administrative proceeding are not internal agency documents exempt from disclosure. The fact that the Department had requested the input of the Tribes did not change the character of the documents into inter-agency documents.

**Parravano v. Babbitt**, 70 F.3d 539 (9<sup>th</sup> Cir. 1995)

Background: Pursuant to the Magnuson Stevens Fishery Conservation and Management Act, the Secretary of Commerce issued emergency ocean fishing regulation that reduced ocean harvest rate of Klamath River Chinook in part to ensure sufficient fish available for Indian tribes of Klamath River. Commercial fishermen challenged the restrictions as unlawful.

Issue: (1) Whether the Secretary of Commerce was authorized to rely on Indian fishing rights as a basis for restricting ocean fishing?

(2) “Whether the Hoopa Valley and Yurok Tribes retain federally reserved fishing rights that constitute ‘any other applicable law’ within the meaning of the Magnuson Act?”

Ruling: (1) The Hoopa Valley Tribe and Yurok Tribe have reserved fishing rights in the Klamath River. The United States created a reservation for the Hoopa Valley and Yurok people for “Indian purposes” along the main course of the Klamath River and the “Tribes’ traditional salmon fishing was necessarily included as one of those Indian purposes.”

(2) The federal government has a trust obligation to protect the Yurok and Hoopa Valley Tribes’ rights to harvest salmon in Klamath River and the Secretary of Commerce acted properly by preventing ocean overharvesting that threatened the Tribes’ rights to harvest fish.

(3) Given the anadromous nature of the salmon that are subject of the tribal fishing right, it was lawful for the Secretary of Commerce to take action extending outside of Indian reservation boundaries to protect the Tribe’s ability to harvest anadromous salmon within their reservations.

**United States v. Adair**, 723 F.2d 1394 (9<sup>th</sup> Cir. 1983)

Background: United States filed suit for declaration of water rights within area whose boundaries roughly coincide with former Klamath Indian Reservation. Klamath Tribes obtained reservation of land in 1864, which was substantially allotted to individuals in late 1800’s. In mid-1900’s Klamath reservation was terminated and its lands were purchased by United States.

Issue: Whether water rights had been reserved for Klamath reservation in 1864 treaty and, if so, whether those rights passed to persons who subsequently took title to reservation lands?

Ruling: (1) “At the time the Klamath Reservation was established, the [United States] and the Tribe intended to reserve a quantity of the water flowing through the reservation not only for the purpose of supporting Klamath agriculture, but also for the purpose of maintaining the Tribe’s treaty right to hunt and fish on reservation land. This right to water is non-consumptive and “the entitlement consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies.”

(2) These water rights to support the exercise of treaty hunting and fishing rights were not abrogated by the Klamath Termination Act in 1954 and the water rights have a priority date of time immemorial.

### **FEDERAL DISTRICT COURTS**

**Hoopa Valley Tribe v. National Marine Fisheries Service, et al.**, 230 F. Supp. 3d 1106 (N.D. Cal. 2017)

Background: A new Biological Opinion for Klamath Project operations was issued in 2013. The associated Incidental Take Statement set a maximum permissible fish disease (*C. shasta*) infection rate at 49%. In 2014 and 2015, relevant infection rates were measured at 81% and

91%, which triggered duty to re-initiate consultation under Biological Opinion. Reclamation failed to re-initiate leading to lawsuit by Hoopa Valley Tribe and related lawsuit filed by Yurok Tribe. During the litigation, Reclamation and NMFS re-initiated consultation and then argued case should be dismissed on grounds of mootness.

Issue: Whether failure to re-initiate consultation lawsuit must be dismissed as moot once agency commences re-initiation; and whether injunction should issue based on failure to re-initiate?

Ruling: (1) Failure to re-initiate consultation claim does not become moot upon re-initiation if there remains other effective relief that can be granted; i.e., injunctive relief;

(2) Plaintiffs sought and were entitled to injunctive relief in the form of increased flows and water supply for fish pending completion of re-initiated consultation.

**Pacific Coast Federation of Fishermen’s Associations et al. v. U.S. Bureau of Reclamation**, 2005 U.S. Dist. LEXIS 36035 (N.D. Cal. 2005) (Order dismissing Yurok Tribe’s fourth claim for relief)

Background: In September 2002, approximately 34,000 fall Chinook salmon (by some estimates, double that number) were found dead in lower-Klamath River. Yurok Tribe filed suit against Reclamation alleging that Reclamation violated Yurok’s federally reserved fishing rights by failing to provide flow levels in its 2002 operating plan to support productive fishery habitat and salmon populations. Yurok also sought an injunction requiring additional flows in Klamath River for protection of anadromous fish. Reclamation and Klamath water users filed motions to dismiss.

Issue: Whether Yurok’s claim should be dismissed on grounds of mootness, failure to join indispensable parties, and for lack of jurisdiction under the APA?

Ruling: (1) Yurok claim was moot because two years had passed since fish die-off with no recurrence of such event, because the new Biological Opinion (2002) called for increased releases for fish, and because BOR had made supplemental late-summer releases in 2003-2004 to prevent risk to fish; thus, there was not an imminent threat of another die-off; (2) Yurok failed to establish a cause of action against BOR for breach of trust duties.

**Kandra v. United States**, 145 F. Supp. 2d 1192 (D. Or. 2001)

Background: This case arises out of the same 2001 operating plan at issue in *Baley v. United States* litigation. Reclamation operating plan proposed no irrigation water deliveries to majority of land within Klamath Project. Plaintiff irrigators sought an order to enjoin Reclamation from implementing the plan and to release unspecified ‘historic’ amounts of irrigation water or in the alternative to release 262,000 acre-feet of water to Project irrigators.

Issue: Whether Plaintiffs were entitled to preliminary injunction to enjoin Reclamation 2001 operating plan?

Ruling: Plaintiffs not entitled to preliminary injunction because: (1) the balance of hardships tips in favor of protection ESA-listed species; (2) plaintiffs’ contract irrigation rights are subservient

to ESA and tribal trust requirements; (3) even if 2001 operating plan was set aside, Reclamation would “remain subject to the requirements of the ESA and Reclamation’s tribal trust obligations, which would preclude the delivery of any irrigation water if the 2001 Plan is set aside.”

**Pacific Coast Federation of Fishermen’s Associations v. U.S. Bureau of Reclamation**, 138 F. Supp. 2d 1228 (N.D. Cal. 2001)

**Background:** Bureau of Reclamation prepared and began implementing operations plan for water year 2000 without consulting with the Services pursuant to Section 7 of the ESA.

**Issue:** Whether Reclamation violated the consultation requirements of the ESA with regard to its 2000 operating plan and whether an injunction should issue to govern Klamath Project flows pending completion of consultation?

**Ruling:** (1) Where an activity may affect an ESA-listed species, formal consultation pursuant to Section 7 of the ESA is required. Here, Reclamation operated the Klamath Project in 2000 without such required consultation.

(2) Given a substantial procedural violation of the ESA in connection with a federal project, the remedy must be an injunction of the project pending compliance with the ESA. Failure to consult is a substantial procedural violation justifying an injunction. Thus, the Court entered an order enjoining Reclamation from sending irrigation deliveries from Klamath Project whenever Klamath River flows dropped below certain minimum protective levels until NMFS issued new Biological Opinion and Reclamation complies with that Biological Opinion.

**CURRENTLY PENDING LITIGATION (as of October 2020)**

**Klamath Irrigation District/Shasta View Irrigation District et al. v. United States Bureau of Reclamation**, Consolidated Case Nos. 19-cv-451, 19-cv-531 (D. Or., May 15, 2020) (Magistrate Findings and Recommendation) (approved by U.S. District Court on September 25, 2020)

**Background:** In 2019, Reclamation issued new operating plan for Klamath Project for years 2019 – 2024. NMFS and USFWS issued new Biological Opinions that found the new operating plan would not jeopardize listed species if implemented. Plaintiff irrigation districts sued to set aside and declare the new operating plan unlawful on grounds that Reclamation lacked legal authority to release water into the Klamath River for instream fish flows or to limit water deliveries for irrigation to which Plaintiff irrigators had contractual entitlement.

**Issue:** Whether Plaintiff irrigators’ suit should be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(7) and 19 for failure to join required Klamath Basin Indian tribes?

**Magistrate Ruling (5/15/20) (adopted by District Court on 9/25/20):** (1) Hoopa Valley Tribe and the Klamath Tribes are required parties because their legally protected treaty water and fishing rights are at a minimum coextensive with Reclamation’s obligations to provide water for instream purposes under the ESA and the Tribes’ interests would be significantly impaired if Plaintiffs’ claims prevail; and because the Tribes’ interest would not be adequately represented by the Bureau of Reclamation, a federal agency with multiple and competing interests.

(2) Tribal sovereign immunity prevents Hoopa and the Klamath Tribes from being joined and that immunity weighs heavily in favor of dismissal

(3) Analyzing the factors in Rule 19(b), the Court recommends that the case be dismissed in entirety due to the prejudice that the case would cause to the Tribes and because the irrigators have alternative forums to pursue their claims, such as seeking money damages in Court of Federal Claims.

***Klamath Irrigation District v. Oregon Water Resources Department***, Case No. 20-cv-17922 (Marion County) (Letter ruling issued July 30, 2020; entry of final order/judgment pending)

**Background:** KID argues that it has an adjudicated secondary use right that allows it the use of Stored Water in Upper Klamath Lake for irrigation purposes. KID further argues that the Bureau of Reclamation lacks a water right under Oregon state law that would authorize release of Stored Water. KID sought and obtained an Alternative Writ of Mandamus directing OWRD to take exclusive charge of Upper Klamath Lake for purpose of “dividing or distributing the water therefrom in accordance with the respective and relative rights of the various users of water from the ditch or reservoir . . . .” OWRD commenced an investigation in accordance with the Alternative Writ; however, KID argues that Reclamation continued to release Stored Water without an Oregon state-law water right and that OWRD had not satisfied its duties to determine whether such releases were lawful.

**Issue:** Whether OWRD has satisfied its duties under Oregon state law to determine whether Reclamation’s releases are lawful under state law and, if not, to take appropriate action?

**Letter Ruling (7/30/20):** “Respondents [OWRD] are ordered to stop releasing Stored Water from the UKL without determining that the release is for a permitted purpose by users with an established right, license or permit to use the Stored Water in the UKL.”

***Yurok Tribe v. U.S. Bureau of Reclamation***, Case No. 19-cv-4405 (N.D. Cal., May 29, 2020) (case currently stayed pending implementation of Interim Operating Plan)

**Background:** Yurok Tribe filed suit challenging the 2019 Biological Opinion, which evaluated Bureau’s 2019-2024 Project operations plan. After moving for preliminary injunction, Yurok, the Bureau, and KWUA agreed to stay litigation provided that the Bureau complied with an agreed-upon interim operating plan that prescribed certain additional flows for fish. However, in May 2020, Yurok alleged that the interim plan was not complied with and filed a motion to lift the stay and for temporary restraining order.

**Issue:** Whether the stay should be lifted and whether a temporary restraining order should be issued to require additional flow releases?

**Ruling:** The Court finds that the Bureau did not violate interim plan, that it properly re-evaluated the water allocation in light of the available water forecasts and that it adequately consulted with the parties. The Court found that the Bureau’s actions, as challenged by Yurok, did not result in a violation of interim plan and did not warrant lifting stay of litigation.



# The Klamath Basin: Intersection of the Endangered Species Act and Tribal Water Rights

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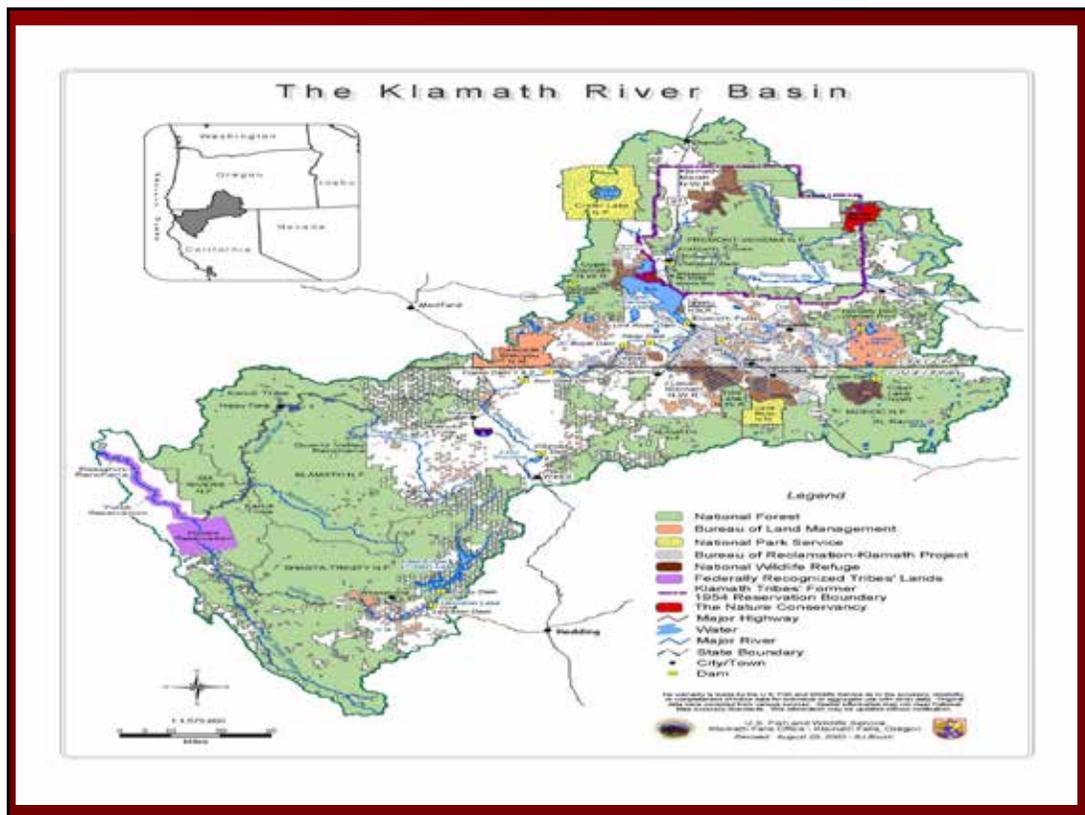
October 8, 2020

## Baley v. United States, 942 F.3d 1312 (Fed. Cir. 2019)

- 2001 Claim: Klamath Basin irrigators seek compensation under 5<sup>th</sup> Amendment based on Bureau of Reclamation's release of water from Klamath Project reservoirs for ESA-compliance
- 2019 Ruling: Claim denied, because Klamath Basin tribes have senior water rights and those water rights are at least equal to amount of water necessary for ESA compliance. Water released by BOR satisfied both ESA and senior tribal rights.

## Klamath Reclamation Project

- Authorized in 1905; United States appropriated available water in Klamath Basin in Oregon for Project
- Water used by farmers (beneficial owners of water) to irrigate approximately 200,000 acres in Oregon
- Federally owned Link River Dam (1917) modified natural storage capacity of Upper Klamath Lake; regulates downstream flow in Klamath River



## ESA-Listed Species in Klamath Basin

- 1988: Lost River/Shortnose Suckers (endangered)
- 1997: SONCC Coho (threatened)
- Result: Minimum lake levels must be maintained in Upper Klamath Lake for suckers year-round; and minimum flows must be released downstream from Link River Dam for coho

## ESA Compliance

- Section 7 – BOR, in operating Klamath Project, may not jeopardize listed species
- BOR must consult with NMFS and FWS to obtain biological opinion (BiOp) re Project
- If BiOp finds jeopardy, NMFS/FWS present reasonable/prudent alternatives and conditions
- Incidental Take Statement – authorizes limited take so long as BOR complies with conditions

## Twenty Years of ESA Litigation

- Bennett v. Spear, 520 U.S. 154 (1997)
- Klamath Water Users Ass’n v. Patterson, 204 F.3d 1206 (9<sup>th</sup> Cir. 2000)
- PCFFA v. BOR, 138 F. Supp. 2d 1228 (N.D. Cal. 2001)
- Kandra v. U.S., 145 F. Supp. 2d 1192 (D. Or. 2001)
- PCFFA v. BOR, 426 F.3d 1082 (9<sup>th</sup> Cir. 2005)
- Hoopa Valley Tribe v. BOR/NMFS, 230 F. Supp. 3d 1106 (N.D. Cal. 2017)

## 2001 – Water Restrictions Lead to Fifth Amendment Takings Claims

- 2001 – Designated a “Critically Dry” water year
- Inflows to Upper Klamath Lake during April – September time-period lowest on record.
- BOR operations plan allocates nearly all water for purposes of maintaining lake levels for suckers and minimum downstream flows for coho – irrigation season effectively cancelled.
- Farmers sue for compensation in Baley.

Baley v. U.S., 134 Fed. Cl. 619 (2017)

- Court finds that BOR's action in 2001 was consistent with its trust obligation to supply water to satisfy the Tribes' senior water rights.
- ESA seeks to avoid species extinction – whereas Tribal water right is intended to support viable tribal harvest.
- Amount of water necessary to satisfy senior tribal water right in 2001 was at least equal to quantity needed to prevent extinction under ESA. Thus, junior irrigators had no legal entitlement to any water in 2001.

Baley v. U.S., 134 Fed. Cl. 619, 679 (2017)

“ . . . because the Tribes held water rights to Klamath Project water that were senior to those held by all remaining plaintiff class members, and because the Tribes water rights were at least co-extensive to the amount of water that was required by defendant to satisfy its obligations under the [ESA] . . . , plaintiffs had no entitlement to receive any water before the government had satisfied what it determined to be its obligations under the [ESA] and its Tribal Trust responsibilities.”

## Arguments by Water Users on Appeal

Dozens of farm bureaus, irrigation districts, and other water users filed amici briefs in support of the Baley plaintiffs.

### Their arguments included:

- Tribes can't claim rights in off-reservation Project water
- Tribes must protect their rights using state law processes
- Tribes waived their rights by not making claims in Klamath Basin Adjudication, ongoing in Oregon state court
- Water rights are not self-executing; Tribes must make a call
- No right to satisfy tribal rights with stored Project water
- Unquantified rights can't be enforced against water users
- More junior water users should have been cut off first

## Foundations of the Baley Opinion

- The United States Reserved the Hoopa Valley Reservation as a Permanent Homeland for Hoopa Indians in 1864; Confirmed by Executive Order in 1876.
- Downstream Tribes Retain Federal Reserved Rights to Take Fish From Klamath River for Ceremonial, Subsistence, and Commercial Purposes to Support a Moderate Livelihood for Tribal People.
- Downstream Tribes Retain Federal Reserved Rights to Instream Flow of Water Sufficient to Support and Maintain the Tribe's Fishing Rights in the River.
- BOR Has Authority and Duty to Protect Tribal Rights.

### The Federal Reserved Fishing Right

- Parravano v. Babbitt, 70 F.3d 539 (9<sup>th</sup> Cir. 1995) (salmon fishing was one of the “Indian purposes” for which Hoopa Valley Reservation was created)
- U.S. v. Eberhardt, 789 F.2d 1354 (9<sup>th</sup> Cir. 1986) (right to take fish from Klamath “includes fishing for ceremonial, subsistence, and ceremonial purposes”)
- Solicitor Opinion M-36979 (1993) (U.S. intended to reserve right to harvest sufficient share of fish to sustain moderate standard of living)

### Reserved Water Right for Fish

- Arizona v. California, 373 U.S. 546 (1963) (creation of Indian reservation by U.S. includes implied reservation of water sufficient to fulfill purposes for which reservation created).
- Winters v. United States, 207 U.S. 564 (1908) (finding implicit reservation of water for Indian reservation and protecting those unquantified rights against upstream irrigators)
- U.S. v. Adair, 723 F.2d 1394 (9<sup>th</sup> Cir. 1983) (reservation for Klamath Tribes included water to maintain tribal fishing rights)

## Federal Agency Duty and Authority to Protect Tribal Reserved Rights

- Patterson, 204 F.3d at 1214 (9<sup>th</sup> Cir. 2000) (BOR has a responsibility to divert the water and resources needed to fulfill tribal rights that take precedence over irrigators).
- Parravano, 70 F.3d at 546 (9<sup>th</sup> Cir. 1995) (tribal reserved rights are applicable federal law that can support regulation of non-Indians off-reservation).

### Questions Following the *Baley* Opinion

- Does the existence of unadjudicated/unquantified senior tribal water rights provide Reclamation with an independent source of authority, separate from ESA, to manage water for species protection?
- Will Reclamation rely on the existence of senior tribal water rights as basis for water management in conjunction with ESA?
- Will reliance on senior tribal rights insulate Reclamation from takings liability in similar contexts?

## Meanwhile ... more litigation

- *Yurok Tribe v. BOR* (19-cv-4405, N.D. Cal.) (suit re 2019 BiOp leads to interim operations plan through 2022).
- *KID v. BOR*, (19-cv-451, D. Or.) (irrigators' suit challenging BOR's management of Klamath Project dismissed for failure to join Klamath Basin tribes)
- *KID v. OWRD*, (20-cv-17922, Marion County) (court finds that OWRD has duty to ensure BOR does not release stored water without proper legal authority)

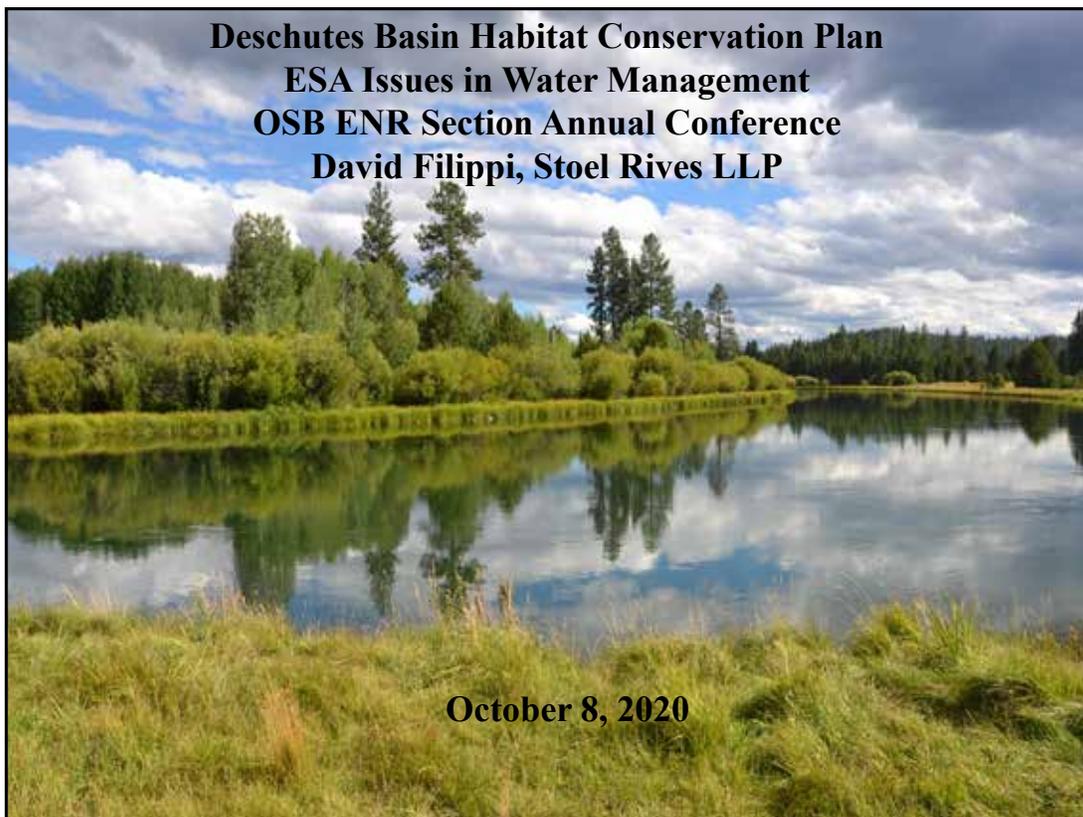


## Chapter 2B

# **Presentation Slides: Deschutes Basin Habitat Conservation Plan— ESA Issues in Water Management**

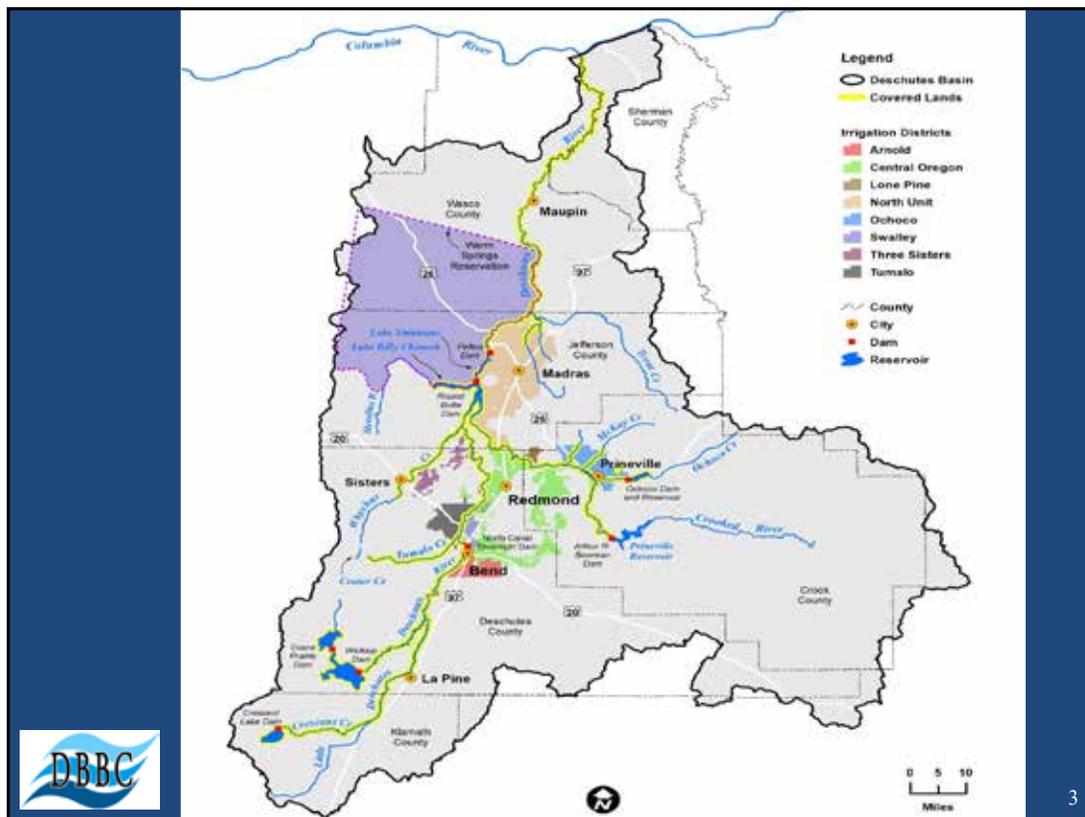
**DAVID FILIPPI**  
Stoel Rives LLP  
Portland, Oregon





## Summary of Today's Presentation

- How did the DBBC districts and City of Prineville get on the path of an HCP?
- Where are we now?
- What's next?



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## How did we get here?

- FERC relicensing of Pelton Round Butte by PGE/CTWS
- Reintroduction of Mid-Columbia River steelhead above the Project
- Unlisted hatchery stock, until the Alsea Valley decision included MCR steelhead in the ESA-listed ESU
- Choice ... fight the reintroduction or “run into the fire”
- Factors: Klamath, ongoing funding of conservation/piping projects, relationship with PGE/CTWS, etc.
- DBBC/PGE/CTWS meeting with Bob Lohn, NMFS RA

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## How did we get here?

- 3-pronged approach ... based on early/ongoing conservation
- Prosecutorial discretion letters from NMFS
  - No third-party protection
- Section 10(j) experimental population designation
  - Above/below Pelton Round Butte, no NMFS rules, sunset
- HCP and section 10 permits for non-federal actions
  - MCR steelhead (NMFS) and bull trout (USFWS)
  - Section 6 grant monies, with match requirements
  - Studies ... Covered species, covered lands, covered activities, natural/current stream flows, stream temperature, effects on water quality, effects on fish habitat, etc.
  - Develop proposed conservation measures to address effects of covered activities: storage, release, diversion, distribution of water, but NOT patron or on-farm activities

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## How did we get here?

- Parallel Section 7 consultation for federal/USBOR activities
  - Interrelated and interdependent effects
- Curve ball ... Oregon spotted frog listing in 2014
  - CBD sued USFWS to list, then sued USBOR for failing to consult
  - WaterWatch of Oregon sued USBOR and districts for Sec. 9 take
- Motion for injunctive relief ... stop storing water in upper Deschutes basin on the eve of irrigation season in 2016
- Motion defeated, with CTWS and USFWS supporting the Districts/HCP for long-term solution
- Settlement for interim consultation (covering I&I) to provide bridge until HCP completion/long-term consultation

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## Where are we now?

- 12 years and counting ...
- Draft HCP/DEIS public comment closed Dec. 2019
- Final HCP/FEIS to be published in FR in early Nov. 2020
- Proposed conservation measures
  - OSF: Minimize use of Crane Prairie, bypass/release water from Wickiup in winter (increase over time as measures implemented), minimum flows in Crescent Creek, etc.
  - Piping is a means to enabling winter release, but HCP doesn't mandate piping as the specific measure to achieve instream flows
  - MCR SH and bull trout ... flows in summer/winter, funding of habitat projects (but not selecting or implementing those projects), etc.
    - Whychus Creek: Three Sisters Irrigation District ... piping
    - Crooked River Act of 2014 ... specific allocations for Prineville Reservoir storage, move W&SR designation, RRA early pay-out, etc.
- 1703 comments
  - Some say do more, and do it faster; others, say committing to too much
  - Consider/respond to all comments

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## HCP Chapters

- HCP scope: parties, activities, species, lands/waters
- Current conditions of covered lands/waters
- Current conditions of covered species
  - Bull trout, MCR steelhead, Sockeye, OSF
- Habitat conservation biological goals/objectives:
  - Crane Prairie, Wickiup, Crescent Creek, Whychus Creek, and Crooked River
- Monitoring, reporting and adaptive management
- Effects of proposed incidental take on covered species
- Changed and unforeseen circumstances
- Cost and funding of conservation measures

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## What's next?

- Final HCP/FEIS published early November
- USFWS/NMFS to issue ITPs by end of year
- Parallel section 7 to be completed on similar schedule
  - NHPA section 106 compliance also in process
- Implementation (30-year ITP term)
  - Efforts beyond the HCP
  - Continue to work with CTWS ... sustainable, harvestable fishery, regardless of ESA requirements
  - More litigation ?
- Parting thoughts ... Section 7 vs. Section 10

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## Questions?

Thank you.

David Filippi  
Stoel Rives LLP

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## **Chapter 3A**

# **Presentation Slides: Superfund Legal Update**

**ASHLEY CARTER**

Portland Office of City Attorney  
Portland, Oregon



# Superfund Legal Update

Ashley Carter, Deputy City Attorney  
City of Portland, OR  
OSB ENR Section Annual CLE 2020

## CERCLA Basics

- ▶ Purposes of CERCLA: “prompt cleanup of hazardous waste sites and imposition of cleanup costs on the responsible party.” *Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990).
- ▶ Potentially Responsible Parties - Section 107(a)
  - ▶ Current owners and operators of a facility
  - ▶ Prior owners and operators of a facility at the time of disposal
  - ▶ Generator/Arrangers (arrange for disposal)
  - ▶ Transporters
- ▶ Elements of Liability
  - ▶ Release or threatened release of a hazardous substance
  - ▶ From a facility into the environment
  - ▶ Causing the incurrence of response costs
  - ▶ National Contingency Plan burden of proof

## CERCLA Basics

### ▶ Claims

#### ▶ Cost recovery - Section 107

- ▶ Enables parties to recover their directly incurred cleanup costs from those liable for contamination.
- ▶ Statute of limitations:
  - ▶ Actions must be commenced within 6 years of initiation of remediation actions.
  - ▶ Actions must be commenced within 3 years from completion of a removal action.

#### ▶ Contribution - Section 113

- ▶ Right to recover expenses paid under a settlement agreement or judgment from those liable for contamination.
- ▶ Statute of limitations
  - ▶ Actions must be commenced within 3 years of judicially approved settlement with respect to the costs at issue.

## Recent Decisions

### ▶ *Atlantic Richfield Co., LLC v. Christian et al*, 140 S. Ct. 1335 (2020).

- ▶ CERCLA does not strip state courts of jurisdiction over State law claims.
- ▶ Section 113(b) deprives state courts of jurisdiction over cases “arising under” CERCLA while section 113(h) deprives federal courts of jurisdiction over certain challenges to Superfund remedial actions. The sections work independently of each other.

### ▶ *Meritor, Inc. v. EPA*, 966 F.3d 864 (D.C. Cir. 2020).

- ▶ EPA’s listing of site on the NPL was not arbitrary and capricious.

### ▶ *United States v. United Park City Mines Co.*, \_\_\_\_ Fed. Appx. \_\_\_\_, 2020 WL 5542481 (10th Cir. 2020).

- ▶ EPA’s 104(e) requests fell within the purposes authorized by statute.

## Recent Decisions

- ▶ *PPG Industries Inc v. United States*, 957 F.3d 395 (3rd Cir. 2020).
  - ▶ Government was not liable as an “operator” because it did not control operations related to pollution; knowledge of waste disposal activities is insufficient to establish CERCLA operator liability.
- ▶ *Valbruna Slater Steel Corp. v. Joslyn Mfg. Co.*, 934 F.3d 553 (7th Cir. 2019).
  - ▶ Cleanup performed by intervening owner at site was removal, not remediation. Action for cleanup costs was timely because it was brought within six years of a remediation that began in 2005.
- ▶ *MPM Silicones, LLC v. Union Carbide Corp.*, 966 F.3d 200 (2nd Cir. 2020).
  - ▶ Good discussion contrasting removal actions and remediations.

## Recent Decisions

- ▶ *Cranbury Brick Yard, LLC v. United States*, 943 F.3d 701 (3rd Cir. 2019).
  - ▶ Party could not bring a cost recovery action against other PRPs after settling its CERCLA liability with government and receiving contribution protection.
- ▶ *ASARCO LLC V. Union Pacific R.R. Co.*, 778 F. App’x 423 (9th Cir. 2019).
  - ▶ Settlement agreement between UPRR and Asarco encompassed Asarco’s contribution claim.

## Recent Decisions

- ▶ *Refined Metals Corp. v. NL Industries*, 937 F.3d 928 (7th Cir. 2019).
  - ▶ Consent decree “start[ed] the clock” on contribution action even though it did not resolve CERCLA-specific liability.
- ▶ *Government of Guam v. United States*, 950 F.3d 104 (D.C. Cir. 2020).
  - ▶ Agreed with the 3rd, 7th, and 9th Circuits in determining that section 113(f)(3)(B) does not require a CERCLA-specific settlement. A non-CERCLA settlement agreement can trigger contribution actions.
  - ▶ Guam’s CWA CD triggered section 113(f)(3)(B), precluding it from seeking cost-recovery under section 107.

## Recent Decisions

- ▶ *Arconic Inc v. APC Investment Co.*, 969 F.3d 945 (9th Cir. 2020).
  - ▶ Settlement resolving Plaintiffs’ claims against de minimis polluters did not trigger CERCLA’s three-year statute of limitations period for the party-group to seek contribution from other entities.
- ▶ *New Jersey Dept. of Environmental Protection v. American Thermoplastics Corp.*, \_\_\_ F.3d \_\_\_, 2020 WL 5360998 (3rd Cir. 2020).
  - ▶ Party’s settlement with the state agency did not protect it from contribution actions by other PRPs related to federal liability because of the scope of the matters addressed.

## Recent Decisions

- ▶ *ASARCO, LLC v. Atlantic Richfield Co., LLC*, \_\_\_ F.3d \_\_\_, 2020 WL 5509748 (9th Cir. 2020).
  - ▶ Speculative, potential future costs are not recoverable in a CERCLA contribution action, even if the party seeking contribution has already made an outlay for such costs pursuant to a settlement.
  
- ▶ *United States v. Dico, Inc.*, 920 F.3d 1174 (8th Cir. 2019).
  - ▶ Punitive damages were awarded under 42 U.S.C. Section 8607(c)(3). Defendants failed to comply with EPA's order to address PCB contamination in its buildings.



## **Chapter 3B**

# **Presentation Slides: Resolution of Environmental Contamination Disputes**

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**PERKINS**coie

COUNSEL TO GREAT COMPANIES

# Resolution of Environmental Contamination Disputes

Mark Schneider

Date: October 8, 2020

Perkins Coie LLP

## Claims

- CERCLA (Superfund)
- O.R.S. § 465.200 et seq
- Nuisance, trespass, negligence
- Other

## Government Enforcement Actions

- Federal, state, and local governments authorized to take action against:
  - current and former owners
  - current and former lessees
  - entities causing pollution
  - lenders
  - other “potentially responsible parties”

## Settling Government Enforcement Actions

- Government will settle through:
  - administrative orders
  - consent decrees
- If settlement not reached, government may seek resolution through litigation or administrative action
- In each case, settling parties have the right to assert claims against non-settling parties

## Non-Governmental Disputes

- Non-governmental actions often arise from:
  - contamination migrating from or onto nearby property
  - purchase/sale of property
  - dispute among current and past owners/lessees
- Contamination often discovered during due diligence or redevelopment

## Processes for Resolution

- Settlement negotiations
- Mediation
- Non-judicial allocation
- Arbitration
- Litigation



# Chapter 4A

## Forest Litigation and Policy Review

**RALPH BLOEMERS**  
Crag Law Center  
Portland, Oregon

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## Potential Forest & Wildfire Bills for 2021 Session

The following list is a roundup of possible forest policy changes that have been discussed by various legislators for the upcoming session.

### 1) Eliminate OFRI and Dedicate Resources to Critical Needs

- Eliminate OFRI and redirect its revenues. The Oregonian, OPB and ProPublica documents how OFRI violated the public interest, suppressed science on drinking water impacts from industrial logging and climate change: <https://www.propublica.org/article/what-happened-when-a-public-institute-became-a-de-facto-lobbying-arm-of-the-timber-industry>
- Redirect portion of Harvest Tax that had supported OFRI to critical needs, including: enforcement of OFPA, drinking water protection, fire & life safety, pesticide regulation and climate change adaptation-mitigation

### 2) Restoration of Forest Severance Tax - Fair Taxation Bills

- **Timber Tax Fairness, Revenue Restoration, Water, Wildfire Security Act.** This concept was submitted by a group of doctors, nurses, teachers, foresters, water managers to restore the severance tax so that it is comparable to neighboring states.
- The Timber Tax Fairness would concept would provide significant money to counties for essential services. Timber Tax Fairness also redirects funding from OFRI to provide for watershed protection, home safety from wildfire.
- <https://www.oregonlive.com/politics/2020/09/oregon-gov-kate-brown-calls-for-audit-after-our-reporting-on-a-state-institute-that-lobbied-for-the-timber-industry.html>
- Harvest Tax adjusted and/or extended. This concept would lengthen or eliminate the sunset to create greater certainty and independence for agency funding, transparency in budget making, and reduces the influence of third parties.
- Reboot of HB 2495 - Rep. Holvey Presentation

### 3) Wildfire Related Bills - Focus on Public Safety Solutions, Home Ignition Zone

- *Policy:* Wildfire council recommendations and associated concepts. See 2019 Legislation SB 1536B Engrossed - Home Hardening, Smoke, Utilities, First Response
- *Budget: Ensure that* ODF resources are not all reallocated to fire suppression activities in the wake of 2020 fire season, expand prioritization of home hardening, infrastructure hardening and community preparedness activities.
- *Revenue:* Implement a wildfire insurance premium assessment to generate funding for wildfire preparedness in at risk areas (Eg. WA legislative concept from 2019).
- *Revenue:* Lift the cap on the Oregon Forest Land Protection Fund or create a separate fund for additional revenue beyond the \$13.5 million cap so that funds will be able to invest in alternative management, preparedness, and mitigation approaches.

### 4) Post-Fire Recovery and Planning

- Insurance markets and liability issues - Class Action Lawsuit against Pacificorp
- Site recovery and public safety: landslides, flooding, drinking water, replanting, etc.
- Future land use and community resiliency planning and rebuilding considerations



**KATE BROWN**  
GOVERNOR



*SENT ELECTRONICALLY TO CAMERON.SMITH@OREGON.GOV AND JESSICA.ELLIOTT@OREGON.GOV*

August 31, 2020

Secretary of State Bev Clarno  
900 Court Street NE  
Capitol Room 136  
Salem OR 97310-0722

Dear Secretary Clarno:

With this letter the Governor requests a timely audit by the Secretary of State. Facts recently disclosed in public records indicate that activities at the Oregon Forest Resources Institute (OFRI) warrant investigation, and media reports allege a variety of statutory and ethical concerns. Moreover, allegations that OFRI employees engaged in partisan political activity while on the job remain deeply disturbing.

The Governor requests that the Secretary of State conduct a thorough performance audit of OFRI. An audit is necessary to bring transparency to whether OFRI conducts its mission in keeping with its statutory authority, including the clear prohibition on OFRI influencing, or attempting to influence state policy, but also to determine whether there is any public benefit to OFRI. ORS 526.640 states OFRI shall enhance the practice of forestry by providing education and cooperative efforts to practice good stewardship and protect water and other public resources to the maximum extent practicable. ORS 526.645 states OFRI may disseminate reliable information based on research. Media reports raise questions on how OFRI is pursuing this mission. The Governor trusts the audit will reveal whether and how OFRI complies with its statutory charge.

Sincerely,

  
Jason D. Miner  
Natural Resource Policy Director  
Office of the Governor



## **Timber Fairness, Revenue Restoration for Rural Oregon Jobs, Water & Wildfire Security Act**

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*Restores the contribution that large Wall Street and privately-owned timber companies once paid to support rural Oregon communities and public services like schools, roads, job training and drinking water infrastructure in those communities.*

*A forestland owner may reduce the severance tax by managing its lands in a way that protects public health, safety drinking water supplies, fish, and wildlife. Redirects public funds from timber industry marketing and promotion to support outdoor education, job training and scientific study.*

### **Background**

Prior to 2000, large corporate and privately held timber companies in Oregon paid what was known as a privilege or severance tax. The tax was based on the value of the trees large timber companies logged. In the late 1990s, large corporate owned and privately-held timber companies hired lobbyists who successfully pushed for the tax to be eliminated, creating a huge windfall for executives, Wall-street investors and wealthy landowners and creating a significant hole in local government budgets. Schools suffered from a lack of adequate support, roads fell apart, Oregon's social services infrastructure collapsed, water infrastructure is decaying and investments in needed infrastructure, like rural broadband internet, became impossible.

The total value of timber logged on private lands since 1991 is approximately \$67 billion when adjusted for inflation, according to an analysis of data from Oregon's Department of Forestry. If the state's privilege tax had not been phased out, corporate timber companies and Wall-street backed real estate trusts would have paid an estimated \$3 billion during the same period. Instead, cities and counties collected less than a third of that amount, or roughly \$871 million, and the rest went into the pockets of wealthy landowners, timber executives and Wall Street investors. The reduction in revenue has caused significant damage to Oregon communities. These community impacts are detailed in the recent story by OPB and the Oregonian (June 11, 2020). <https://www.opb.org/news/article/oregon-investigation-timber-logging-forests-policy-taxes-spotted-owl/> and <https://projects.oregonlive.com/timber/>

**For example, in fiscal year 1999–2000, the state collected \$32,843,222 in timber severance taxes. In fiscal year 2010–2011, the state collected \$252,687 a decline of 99.3 percent.** Not only did the timber industry executives profit mightily, they also eliminated local jobs because they over cut Oregon forests, mechanized factories and moved operations to other states to avoid Oregon's worker protections.

Today, instead of paying the tax, timber companies pay a small harvest tax and almost all of the money is now directed to programs that directly benefit the companies, many of which are owned by Wall Street investors or closely held by wealthy individuals, families and investment trusts that shield them from paying their fair share. In addition, a significant amount of money is taken from rural communities

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and directed towards the annual marketing campaigns of the Oregon Forest Resources Institute to further benefit large corporate and privately held companies who sit on and control the Oregon Forest Resources Institute's operations.

In 2019, OFRI had a budget of nearly 5 million dollars and in 2020 it has an approved budget of nearly 5.5 million dollars. OFRI is entirely controlled by the timber industry, and by law that the industry wrote no member of OFRI's board may have a known affiliation with an environmental or conservation organization. OFRI spends public money to promote Oregon's timber industry with marketing focused on convincing the public that Oregon's forest laws are the most advanced in the nation, when in fact they fall far behind those of Oregon's neighboring states. Recently, OPB and the Oregonian investigated OFRI's activities and found it had engaged in extensive political activity in violation of its charter.

**Overview:**

The intent of this legislation is to ensure fairness and to restore revenues to rural Oregon by reinstating the privilege/severance tax to an amount that is derived from or equivalent to the formula that was applied between 1990-1996. The money will be directed to benefit local communities, job creation, rural workforce training, drinking water protection and job creation focused upon addressing the harms caused by decades of excessive clearcutting, aerial spray of toxic chemicals and landslides so as to ensure the greatest permanent value of Oregon's forests for all Oregonians.

This act reinstates the privilege/severance tax for all large forestland owners who own more than 1,000 acres of land so as to provide revenues for all Oregonians and support rural habitat restoration focused job creation focused on protection for drinking water, public health, safety and welfare. This Act would direct the millions of dollars that currently go to the Oregon Forest Resources Institute to support K-12 outdoor education and rural job training programs.

**Drinking Water, Public Health & Safety Conservation Measures**

1. All large forestland owners who own more than 1,000 acres of forestland shall pay a privilege/severance tax in the form of a yield tax on the value of the harvested timber derived from or equivalent to the formula that produced the levels of revenue from 1990-1996. The funds collected shall be collected by and distributed by the State of Oregon to benefit the people of Oregon as follows:

a. Half of the severance tax collected from timber harvest shall be applied to pay for drinking water protection and watershed assessments, drinking water infrastructure, rural broadband expansion, K-12 teacher training, rural college scholarships and rural job training programs. The funds shall be distributed on a pro rata basis to benefit the residents of the County from which the privilege tax is

**Timber Fairness, Revenue Restoration  
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collected. Drinking water assessment may include, but shall not be limited to, programs and actions to monitor, test, and address the impacts of industrial forestry operations, including the impacts on public health, waters supplies, fish, and wildlife from the application of chemicals, landslides and water quality and quantity.

b. One-quarter of the severance tax collected from timber harvest within that county shall be applied to pay for the acquisition of available forestland by the State of Oregon specifically for watershed protection, fisheries enhancement, wildlife, recreation, air quality and the maintenance of old forests that retain the highest amount of living biomass in the trees and the soil.

c. One quarter of the severance tax collected from timber harvest within that county shall be applied to pay for school revitalization, teacher training, rural social services investment, 911 expansion, road and water and sewer infrastructure redevelopment, expanded fire protection and essential fire equipment purchases, home hardening and smoke adaptation.

2. All the costs of enforcement of the Oregon Forest Practices Act shall be borne by the General Fund, to avoid the appearance of a conflict of interest on the part of the Oregon Department of Forestry.

3. The Oregon Forest Land Protection Fund and firefighting associated with protecting private timber land shall not receive funding from the privilege tax and instead shall be funded exclusively with assessment of private timberland owners.

4. Any large forestland owner who owns more than 1,000 acres of land may receive a discount of 50% off the privilege tax, if and only if they agree to:

a. Employ local people to control competing vegetation by manual or mechanical means without the use of toxic chemicals, including herbicides, pesticides, rodenticides which may drift, migrate or otherwise impact people, pets, livestock schools and drinking water supplies; and

b. Grow older forests that are at least 80-years old prior to harvest on wet forest types and grow older forests that are at least 80 years-old combined with variable retention harvest to preserve forest productivity on dry forest types; and

c. Protect rivers, streams from pollution and the ensure the safety of homes and communities by not logging on steep, unstable slopes or landslide prone areas; and

d. For large forest landowners, including all parents, subsidiaries, affiliates, that own 25% or more of a sub watershed, defined as a Hydrologic Unit

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Code 12, commit to retaining at least 50% of the land in the sub watershed in a forested age class greater than 60 years old.

5. A large forestland owner may secure a discount of half off the severance tax if the large forestland owner commits and restrains the property, through a deed restriction, binding covenant or other legally binding agreement that runs with the land, to the foregoing drinking water, public health and safety conservation measures set forth in subsection (4) above.

6. For purposes of collecting this tax and ensuring compliance, all forestland owners in the state shall disclose their ownership structures and all parent, subsidiary companies into a public database for purpose of calculating the 1,000 acres. All large forestland owners shall report their annual harvest revenue on a quarterly basis for purposes of collecting the tax and budgeting. Forestland owners may not break out the ownership into separate entities to avoid the severance tax.

**Redirection of Revenues to Fund Fire Resiliency and Forest Waters Protection**

7. The timber industry shall no longer benefit from the marketing efforts of the Oregon Forest Resources Institute or from the power of taxation by the State for their budget and, specifically this Act amends ORS 321.017 to redirect the revenues that are allocated to the Oregon Forest Resources Institute so that:

a. one-third of the balance of the additional tax imposed under ORS 321.017 shall support outdoor education for K-12 students throughout Oregon.

b. one-third of the balance of the additional tax imposed under ORS 321.017 shall be redirected to the Department of Forestry for the purposes of enforcing and administering the provisions of this Act and for technical assistance

c. one-third of the balance of the additional tax imposed under ORS 321.017 shall be allocated to the Department of Forestry to reduce or eliminating hazards to critical built infrastructure as well as homes and public buildings that rely on forest waters as their drinking water source areas in wildfire hazard zones identified by the Department of Forestry. These measures may include the provision of information, technical assistance and financial assistance by the Department of Forestry for property owners and residents in wildfire hazard zones to undertake home hardening, smoke adaptation and reducing fuels within 100 feet of existing homes and otherwise following the guidance on fire safety issues by the Oregon Building Codes Division of the Department of Consumer and Business Services.

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**ORS 173.140** provides that:

The Legislative Counsel shall cooperate with the proponents of an initiative measure in its preparation when:

- (1) Requested in writing so to do by 50 or more electors proposing the measure; and
- (2) In the judgment of the committee there is reasonable probability that the measure will be submitted to the electors of the state under the laws relating to the submission of initiative measures.

I am a registered voter (elector) in the State of Oregon and I do hereby join with other electors to submit this concept to Oregon’s Office of Legislative Counsel and the Legislative Counsel Committee for preparation into an initiative under ORS 173.140. I appoint Pat Himes, Mary McGinnis and any other person(s) they shall designate as my representatives to work with Legislative Counsel to prepare statutory language:

**Signed and submitted by:**

| <u>Name</u> | <u>Signature</u> | <u>Date</u> | <u>Address</u> | <u>County of Residence</u> |
|-------------|------------------|-------------|----------------|----------------------------|
|-------------|------------------|-------------|----------------|----------------------------|





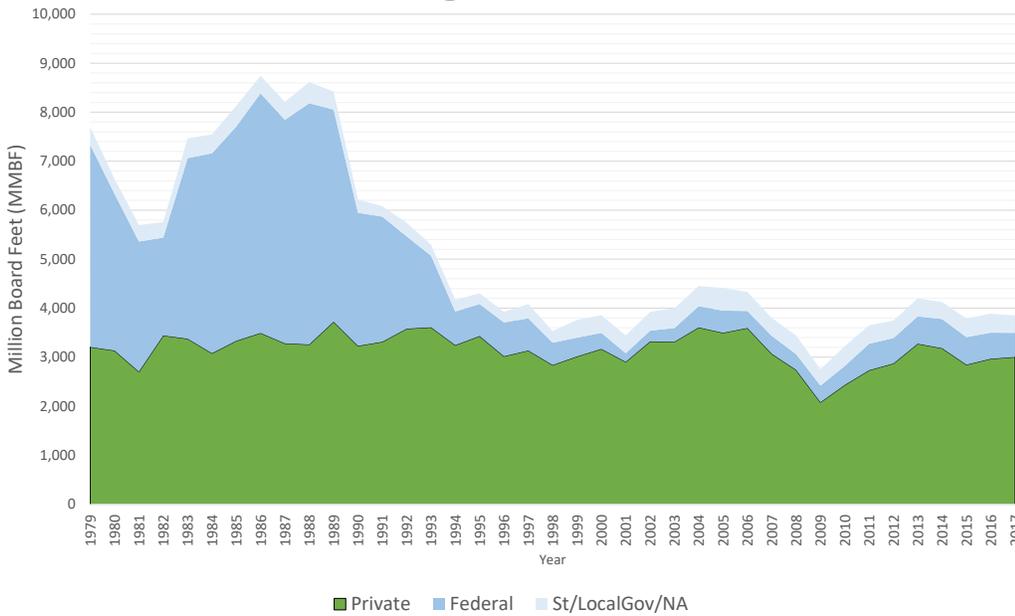
# HB 249

Representative  
Paul Holvey

April 17<sup>th</sup>, 2019

## Revenue

## Oregon Timber Harvest



### Factors Impacting Timber Harvest levels:

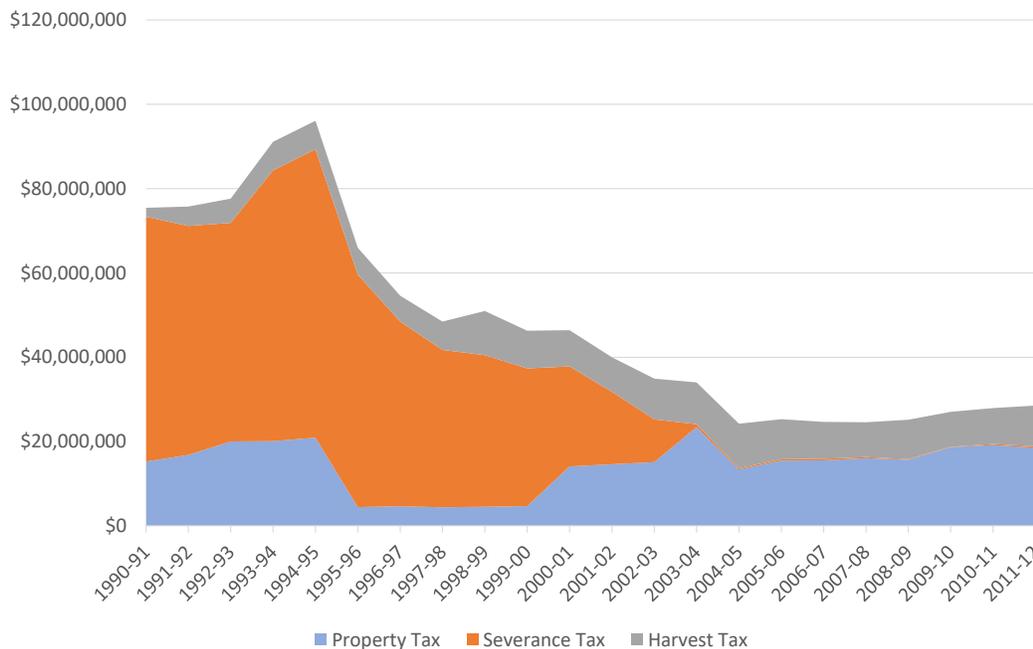
- **1990:** Endangered Species Act
- **1994:** Northwest Forest Plan
- **2007-2009:** Economic recession

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Data retrieved from Legislative Revenue Office

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## Private Timber Tax Revenue 1990-2012



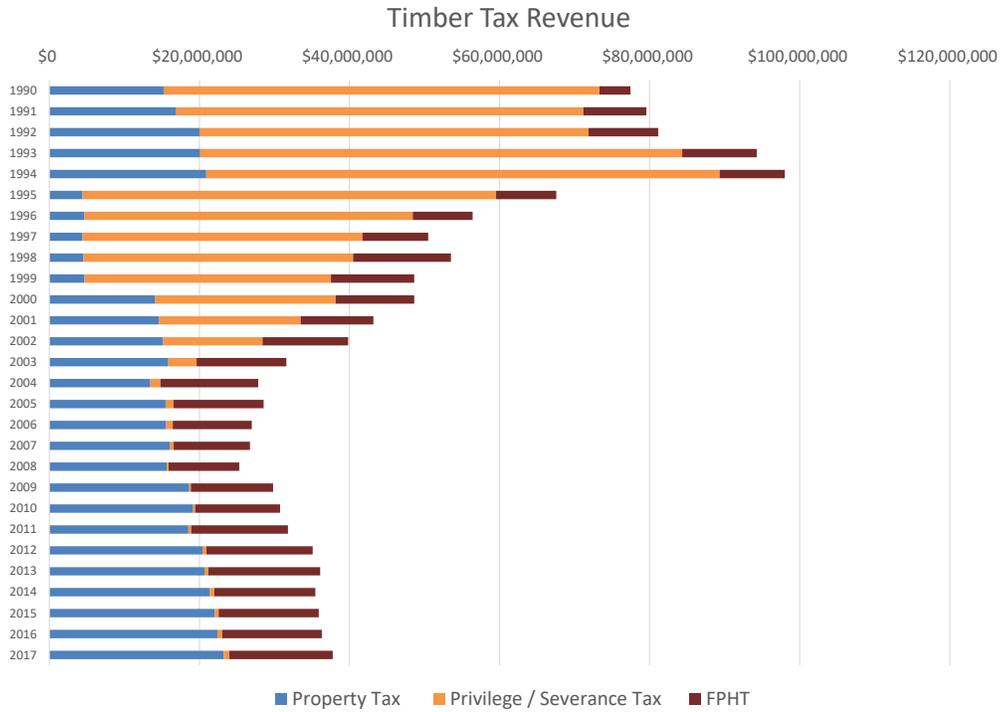
### Factors Impacting Timber Tax Revenue:

- **1997:** Passage of Measure 50
- **1999:** HB 3575 phased out of severance tax

4/17/2019

Data retrieved from Legislative Revenue Office

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4/17/2019

Data retrieved from Legislative Revenue Office

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| Period                     | Eastern Oregon |               | Western Oregon |               |
|----------------------------|----------------|---------------|----------------|---------------|
|                            | Regular        | Reforestation | Regular        | Reforestation |
| <b>Initial</b>             | 5.00%          | 12.50%        | 6.50%          | 12.50%        |
| <b>1991-92</b>             | 4.35%          | 8.00%         | 5.85%          | 8.30%         |
| <b>1992-93</b>             | 3.90%          | 7.20%         | 5.30%          | 7.50%         |
| <b>1993 2<sup>nd</sup></b> | 3.50%          | 6.40%         | 4.70%          | 6.60%         |
| <b>1994</b>                | 3.30%          | 5.61%         | 4.40%          | 5.75%         |
| <b>1995</b>                | 2.90%          | 4.78%         | 3.80%          | 4.82%         |
| <b>1996-99</b>             | 1.80%          | 1.80%         | 3.20%          | 3.20%         |
| <b>2000</b>                | 1.10%          | -             | 1.90%          | -             |
| <b>2001</b>                | 1.10%          | -             | 1.90%          | -             |
| <b>2002</b>                | 0.80%          | -             | 1.40%          | -             |
| <b>2003</b>                | 0.00%          | -             | 0.00%          | -             |

4/17/2019

Data retrieved from Legislative Revenue Offices

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# Fire Budget

4/17/2019

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## OR Department of Forestry (ODF)

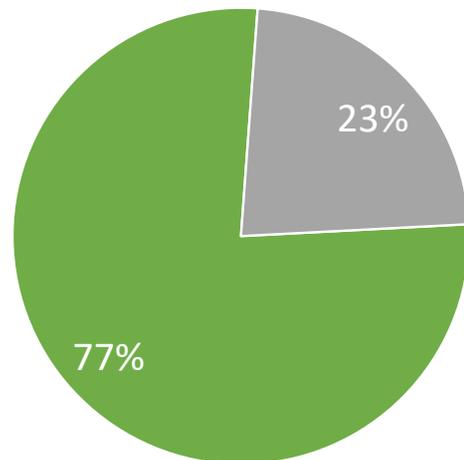
- Protects approximately 16 million out of Oregon’s 30 million acres of forestland
- Cost associated with Base Fire Protection is allocated on a per-acre analysis
- Emergency fire costs are covered by:
  - General Fund
  - Other public funding
  - Federal funding
  - Insurance\*
  - Private landowners

\*Insurance only kicked in during the 2013 and 2014 fire season

## Acres Protected by ODF

\*Based on Per-Acre Analysis

■ Private Acres ■ Public Acres



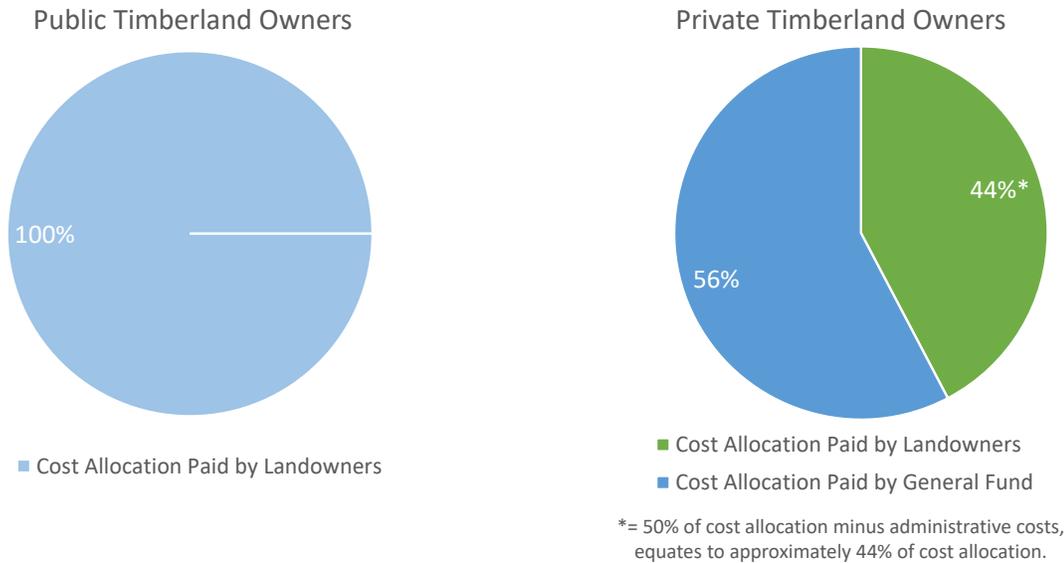
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Data retrieved from Legislative Fiscal Office

8



## Who Pays What for **Base** Fire Budget 2017-2019 Biennium



4/17/2019

Data retrieved from Legislative Fiscal Office

9

## Base Fire Protection Funding

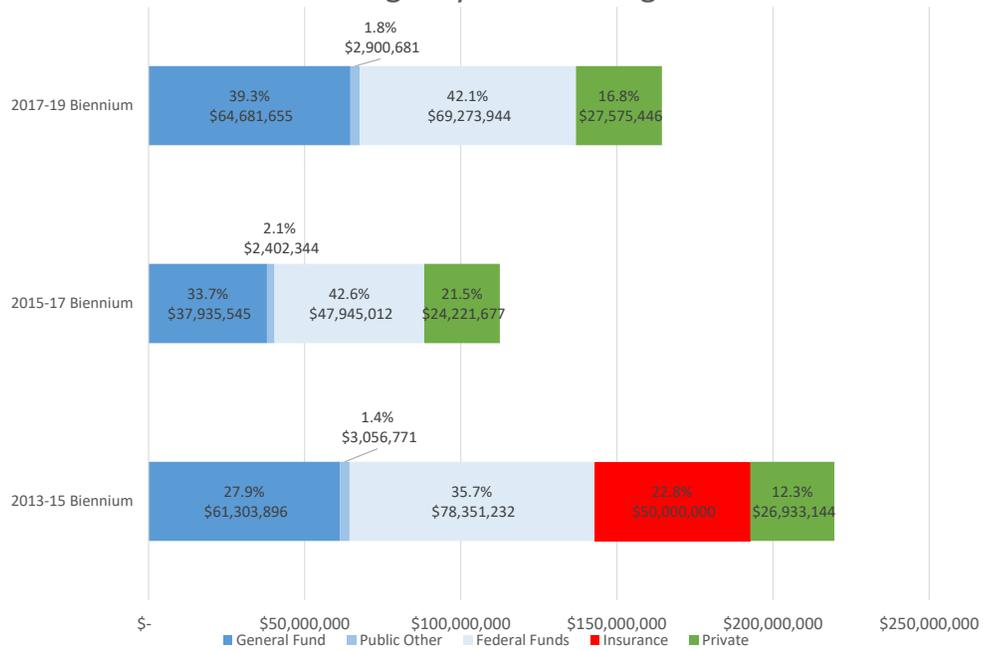


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### Emergency Fire Funding

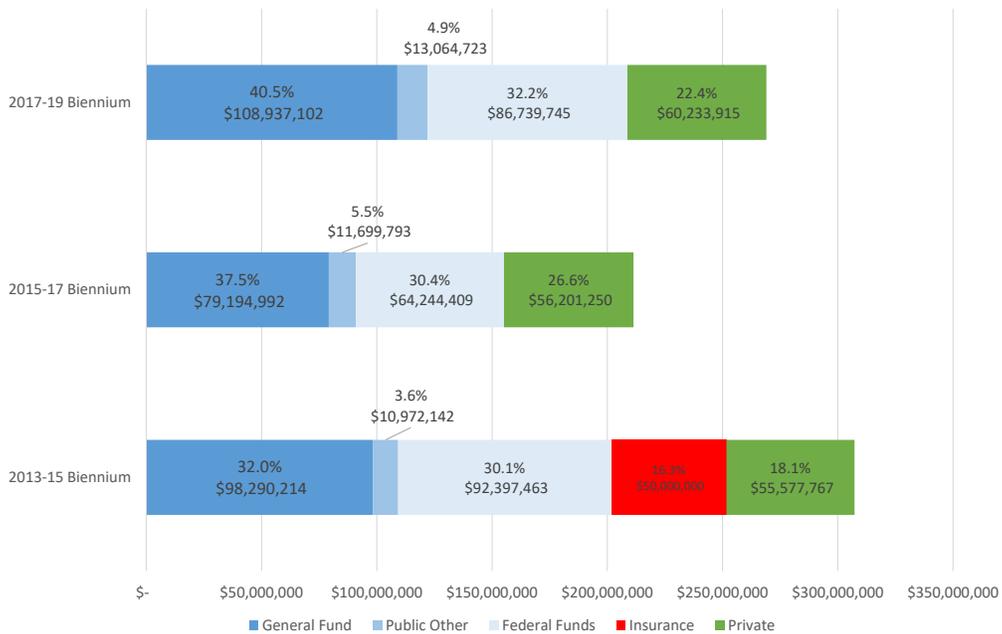


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### Total Fire Funding

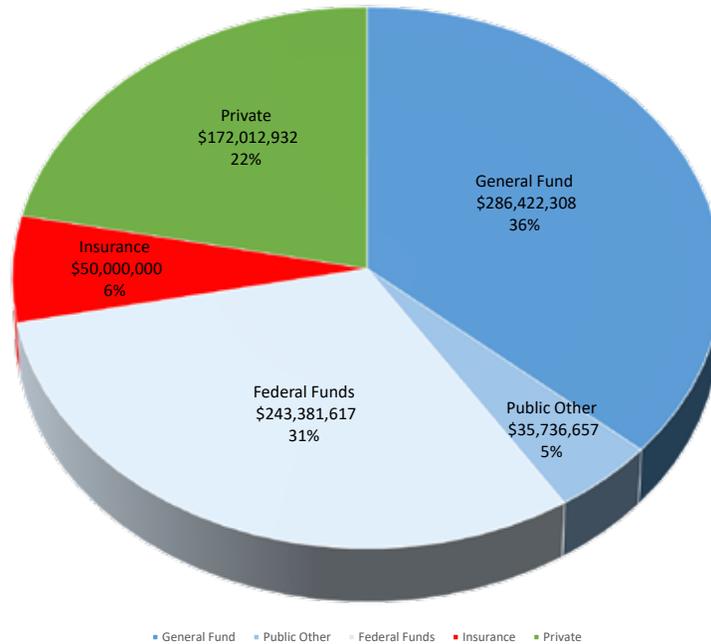


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### Total Fire Funding 2013-2018



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Data retrieved from Legislative Fiscal Office

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| FOREST PRODUCTS HARVEST TAX |              |                 |                  |        |        |
|-----------------------------|--------------|-----------------|------------------|--------|--------|
| Year                        | OSU Research | Protection Fund | Forest Practices | OFRI   | Other  |
| 1990-91                     | \$0.2100     | \$0.300         | \$0.1600         | -      | -      |
| 1991-92                     | \$0.3000     | \$0.500         | \$0.5300         | \$0.31 | -      |
| 1992-93                     | \$0.3000     | \$0.660         | \$0.5300         | \$0.31 | -      |
| 1993.2,3                    | \$0.4000     | \$0.660         | \$0.7700         | \$0.31 | -      |
| 1994                        | \$0.4000     | \$0.660         | \$0.7700         | \$0.31 | -      |
| 1995                        | \$0.4000     | \$0.660         | \$0.7700         | \$0.31 | -      |
| 1996                        | \$0.5000     | \$0.500         | \$0.6000         | \$0.51 | -      |
| 1997                        | \$0.5000     | \$0.500         | \$0.6000         | \$0.51 | -      |
| 1998                        | \$0.5500     | \$0.500         | \$0.7000         | \$0.51 | \$1.75 |
| 1999                        | \$0.5500     | \$0.500         | \$0.7000         | \$0.79 | -      |
| 2000                        | \$0.6700     | \$0.500         | \$1.0800         | \$0.79 | \$0.15 |
| 2001                        | \$0.6700     | -               | \$1.0800         | \$0.79 | \$0.15 |
| 2002                        | \$0.6700     | \$0.500         | \$0.9100         | \$0.79 | -      |
| 2003                        | \$0.6700     | \$0.500         | \$0.9100         | \$0.79 | -      |
| 2004                        | \$0.6700     | \$0.500         | \$0.7900         | \$0.99 | -      |
| 2005                        | \$0.6700     | \$0.500         | \$0.7900         | \$0.89 | -      |
| 2006                        | \$0.6700     | \$0.500         | \$0.5500         | \$0.89 | -      |
| 2007                        | \$0.6700     | \$0.500         | \$0.5500         | \$0.89 | -      |
| 2008                        | \$0.9200     | \$0.625         | \$1.1456         | \$0.89 | -      |
| 2009                        | \$0.9200     | \$0.625         | \$1.1456         | \$0.89 | -      |
| 2010                        | \$0.9200     | \$0.625         | \$1.1400         | \$0.89 | -      |
| 2011                        | \$0.9200     | \$0.625         | \$1.1400         | \$0.89 | -      |
| 2012                        | \$0.8739     | \$0.625         | \$1.2952         | \$0.89 | -      |
| 2013                        | \$0.8739     | \$0.625         | \$1.2952         | \$0.89 | -      |
| 2014                        | \$0.8439     | \$0.625         | \$0.9727         | \$0.89 | -      |
| 2015                        | \$0.8439     | \$0.625         | \$0.9727         | \$0.99 | \$0.10 |
| 2016                        | \$0.9000     | \$0.625         | \$1.1037         | \$1.00 | \$0.10 |
| 2017                        | \$0.9000     | \$0.625         | \$1.5661         | \$1.04 | \$0.10 |
| 2018                        | \$0.9000     | \$0.625         | \$1.5700         | \$1.04 | \$0.10 |

Forest Products Harvest Tax  
Per MBF

4/17/2019

Data retrieved from Legislative Revenue Office

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# How Oregon compares to Washington

Similar forests  
Similar climate

4/17/2019

Data retrieved from Legislative Revenue and Fiscal Offices

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## 2017 Timber Harvest: OR vs WA

|                                     | Oregon          | Washington    |
|-------------------------------------|-----------------|---------------|
| Total Forest Acres in the State     | 8,618,948       | 6,213,349     |
| <b>Harvest Volume (MBF) in 2017</b> | 3,851,000       | 2,644,425     |
| Harvest Value (\$) in 2017          | \$1,944,755,000 | \$897,705,614 |

MBF – Thousand Board Feet

4/17/2019

Data retrieved from Legislative Revenue Office

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## 2017 Cutting Taxes per Thousand Board Feet

| Oregon     | Washington  |
|------------|-------------|
| \$3.77/mbf | \$16.97/mbf |

MBF – Thousand Board Feet

4/17/2019

Data retrieved from Legislative Revenue Office

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## 2017 Timber Taxes: OR vs WA

|   | Oregon              | Washington          |
|---|---------------------|---------------------|
| <i>Cutting Taxes</i>                                | \$14,504,236        | \$44,885,265        |
| <i>Property Taxes</i>                               | \$23,258,388        | \$25,800,000        |
| <b>TOTAL Tax in 2017<br/>(Property and Cutting)</b> | <b>\$37,762,624</b> | <b>\$70,685,265</b> |
| <b>Taxes per acre in 2017</b>                       | <b>\$2.70</b>       | <b>\$4.15</b>       |

MBF – Thousand Board Feet

\* – estimate

Data is *annual*

4/17/2019

Data retrieved from Legislative Revenue Office

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## 2017 Timber Taxes: OR vs WA

|   | Oregon              | Washington          | Taxing by MBF        | Taxing on Value       |
|---|---------------------|---------------------|----------------------|-----------------------|
| <b>Tax/MBF</b>                                      | <b>\$3.77</b>       | <b>\$16.97</b>      | <b>\$16.97</b>       | <b>\$25.25</b>        |
| <i>Cutting Taxes</i>                                | <i>\$14,504,236</i> | <i>\$44,885,265</i> | <i>\$65,365,119*</i> | <i>\$97,237,750*</i>  |
| <i>Property Taxes</i>                               | <i>\$23,258,388</i> | <i>\$25,800,000</i> | <i>\$23,258,388</i>  | <i>\$35,768,634*</i>  |
| <b>TOTAL Tax in 2017<br/>(Property and Cutting)</b> | <b>\$37,762,624</b> | <b>\$70,685,265</b> | <b>\$88,623,507*</b> | <b>\$133,006,384*</b> |
| <b>Taxes per acre in 2017</b>                       | <b>\$2.70</b>       | <b>\$4.15</b>       | <b>\$2.70</b>        | <b>\$4.15</b>         |

MBF – Thousand Board Feet

\* – estimate

Data is *annual*

4/17/2019

Data retrieved from Legislative Revenue Office

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## A new proposal— a Fire Suppression Fund

HB 2495 (with amendments)

- Increases the Forest Products Harvest Tax to \$16.00/MBF
- Directs increased tax to a newly created Wildfire Suppression Fund within the FPHT

OR

Apply a Severance Tax (while keeping the current FPHT)

- 3% Severance Tax would increase timber revenues by \$58.3 million, to equal \$96.1 million
- Supplements the outrageous costs that our GF is experiencing due to the large costs of forest fires

4/17/2019

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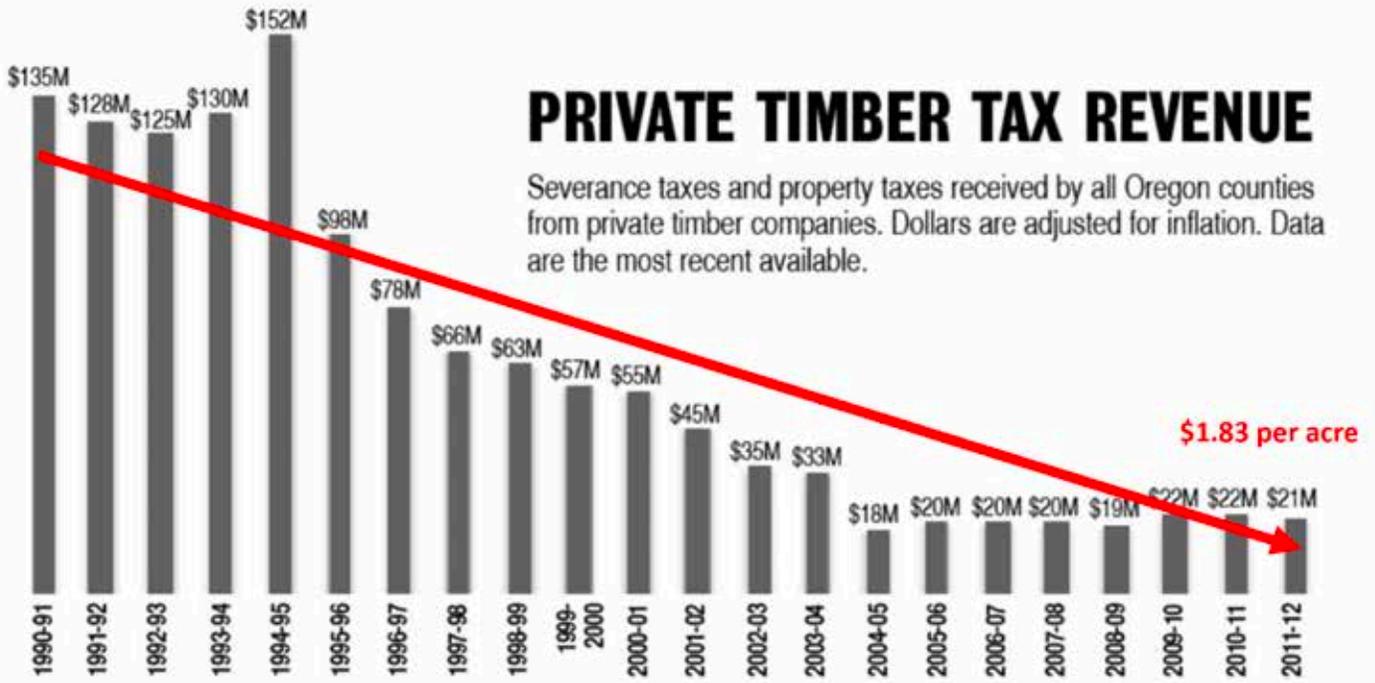
The End

4/17/2019

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Street Roots, September 2018





80th OREGON LEGISLATIVE ASSEMBLY--2020 Regular Session

**B-Engrossed**  
**Senate Bill 1536**

Ordered by the Senate March 3  
Including Senate Amendments dated February 14 and March 3

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with pre-session filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Governor Kate Brown for Office of the Governor)

**SUMMARY**

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Requires electric company to operate in compliance with risk-based wildfire protection plan approved by Public Utility Commission. Requires periodic submission of new plan. Specifies minimum required contents for plan. Creates plan exception. Requires submission of initial plan no later than December 31, 2020.

Requires consumer-owned utility to operate in compliance with risk-based wildfire mitigation plan approved by governing body of utility. Requires periodic submission of new plan. Creates plan exception. Requires submission of initial plan no later than December 31, 2021.

Requires consumer-owned utility to conduct wildfire risk assessment of utility facilities. Requires review and revision of assessment as required by governing body of utility.

Requires Public Utility Commission workshops to develop and share information for best practices regarding wildfire.

Authorizes insurer to use maps and data of, and work in cooperation with, Department of Land Conservation and Development and State Fire Marshal.

Requires State Forestry Department to develop and maintain statewide map of wildfire risk. **Requires State Forestry Department to report regarding map development to legislative committee no later than February 1, 2021.**

*[Requires State Fire Marshal to establish minimum defensible space requirements. Allows local government to adopt local defensible space requirements in excess of State Fire Marshal requirements.]*

*[Authorizes State Fire Marshal to contract for local government enforcement of minimum defensible space requirements. Requires contracting local government to periodically report to State Fire Marshal regarding compliance with defensible space requirements. Requires State Fire Marshal to maintain map of defensible space requirements and compliance.]*

*[Requires State Fire Marshal to administer and enforce program to provide assistance to local governments for administration and enforcement of defensible space requirements. Establishes Wildfire Defensible Space Fund. Establishes creation of defensible space on lands of certain underserved populations as priority use of financial assistance.]*

*[Requires Oregon Health Authority to establish standards for smoke filtration systems in certain buildings. Requires authority to establish program to increase availability of systems among vulnerable persons residing in areas susceptible to wildfire smoke. Authorizes authority to issue grants to increase availability of systems. Creates Wildfire Smoke Abatement Fund.]*

*[Establishes task force to identify barriers to installation of smoke filtration systems in areas susceptible to wildfire smoke and provide advice to Oregon Health Authority. Requires task force report no later than September 15, 2021. Sunsets task force December 31, 2021.]*

*[Requires Office of Emergency Management to establish personnel positions related to wildfire.]*

*[Expresses state policy and goals for reduction of fuel loads on forestlands and rangelands. Requires State Forestry Department to establish program for reducing fuel load on forestlands and rangelands. Establishes Forestland and Rangeland Treatment Fund.]*

*[Requires State Forester to establish baseline levels of wildfire protection for lands susceptible to wildfire.]*

*[Authorizes county, State Forester and State Fire Marshal to assist landowners and jurisdictions to form, expand or change boundaries of jurisdiction that provides wildfire protection and assist jurisdiction in developing adequate wildfire protection facilities, equipment, training and other resources. Requires that county ensure lands susceptible to wildfire are provided with wildfire protection meeting or exceeding baseline level no later than January 1, 2025.]*

*[Requires State Forestry Department to contract for services of private consultant to evaluate and make recommendations on specified issues regarding wildfires. Requires consultant to report to Governor and legislative committee no later than September 15, 2022.]*

*[Allows Governor to authorize joint state-federal partnerships to direct wildfire strategy based on*

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

*recommendations of Governor's Council on Wildfire Response. Authorizes council duties. Requires council to report recommendations for stable funding to implement council wildfire strategy no later than October 31, 2020.]*

**Creates Land Use and Wildfire Policy Advisory Committee.**

**Requires State Forestry Department and Oregon State University, in consultation with Department of Land Conservation and Development, to conduct study of regional wildfire risk within state.**

**Requires State Forestry Department, in collaboration with Department of Land Conservation and Development and advisory committee, to report to interim committee of Legislative Assembly no later than February 1, 2021, regarding possible means for implementing final recommendations produced by Governor's Council on Wildfire Response. Requires inclusion of regional wildfire risk information in report.**

**Requires State Forestry Department to establish projects for reducing wildfire risk on forestlands and rangelands. Requires department to report findings and recommendations based on project information.**

**Appropriates moneys to Department of Land Conservation and Development and State Forestry Department for biennium ending June 30, 2021, to carry out department activities under Act.**

Declares emergency, effective on passage.

#### A BILL FOR AN ACT

Relating to wildfires; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

#### UTILITIES

**SECTION 1.** Sections 2 to 8 of this 2020 Act are added to and made a part of ORS chapter 757.

**SECTION 2.** (1) As used in this section, "electric company" has the meaning given that term in ORS 757.600.

(2) An electric company must have and operate in compliance with a risk-based wildfire protection plan approved by the Public Utility Commission.

(3) An electric company shall submit a risk-based wildfire protection plan to the commission every three years. The plan must, at a minimum:

(a) Identify areas within the service territory of the electric company that are subject to a heightened risk of wildfire.

(b) Identify a means for mitigating wildfire risk that is cost effective and reflects a reasonable balancing of mitigation costs with the resulting reduction of wildfire risk.

(c) Identify preventive actions and programs that the electric company will carry out to minimize the risk of company facilities causing a wildfire.

(d) Identify a protocol for the deenergizing of power lines and adjusting power system operations to mitigate wildfires, promote the safety of the public and first responders and preserve health and communication infrastructure.

(e) Describe the procedures, standards and time frames that the electric company will use to inspect company infrastructure in areas that the company identifies under paragraph (a) of this subsection.

(f) Describe the procedures, standards and time frames that the electric company will use to carry out vegetation management in areas that the company identifies under paragraph (a) of this subsection.

(g) Identify the development, implementation and administration costs for the plan.

(h) Identify the community outreach and public awareness efforts that the electric company will use before, during and after a wildfire season.

(4) The commission, in consultation with the State Forestry Department and local

emergency services agencies, shall review a wildfire protection plan that an electric company submits under this section. The commission shall:

(a) Approve the submitted plan; or

(b) Disapprove the submitted plan and inform the electric company of the modifications necessary to obtain approval.

(5) The commission shall adopt rules for the implementation of this section.

(6) Nothing in this section prohibits the recovery of costs deferred under ORS 757.259.

**SECTION 3.** (1) As used in this section, “consumer-owned utility” and “governing body” have the meanings given those terms in ORS 757.600.

(2) A consumer-owned utility must have and operate in compliance with a risk-based wildfire mitigation plan approved by the governing body of the utility. The utility shall regularly update the risk-based wildfire mitigation plan on a schedule the governing body deems consistent with prudent utility practices.

(3) A consumer-owned utility shall conduct a wildfire risk assessment of utility facilities. The utility shall review and revise the assessment on a schedule the governing body deems consistent with prudent utility practices.

(4) A consumer-owned utility shall submit a copy of the risk-based wildfire mitigation plan approved by the utility governing body to the Public Utility Commission to facilitate commission functions regarding statewide wildfire mitigation planning and wildfire preparedness.

**SECTION 4.** The Public Utility Commission shall periodically convene workshops for the purpose of helping electric companies as defined in ORS 757.600, consumer-owned utilities as defined in ORS 757.600 and operators of electrical distribution systems to develop and share information for the identification, adoption and carrying out of best practices regarding wildfires, including but not limited to risk-based wildfire protection and risk-based wildfire mitigation procedures and standards.

**SECTION 5.** An electric company shall submit the first risk-based wildfire protection plan required of the company under section 2 of this 2020 Act no later than December 31, 2020.

**SECTION 6.** A consumer-owned utility shall submit the first risk-based wildfire mitigation plan required under section 3 of this 2020 Act to the utility governing body no later than December 31, 2021.

**SECTION 7.** (1) As used in this section, “electric utility” has the meaning given that term in ORS 757.600.

(2) The provisions of sections 2 and 3 of this 2020 Act do not affect the terms or conditions of easements held by an electric utility over private land as of the effective date of this 2020 Act.

**SECTION 8.** (1) As used in this section, “electric utility” has the meaning given that term in ORS 757.600.

(2) Sections 9 and 16 of this 2020 Act do not affect the terms or conditions of easements held by an electric utility over private land as of the effective date of this 2020 Act.

#### INSURANCE

**SECTION 9.** (1) Insurers may adopt coverage provisions and underwriting standards to encourage property protection approaches that:

- (a) Harden structures against wildfire damage;
- (b) Provide for the establishment and maintenance of defensible spaces;
- (c) Create access for emergency vehicles responding to wildfires; or
- (d) Create wildfire evacuation routes.

(2) Issuers of property insurance policies may use maps and data developed by the State Forestry Department or the State Fire Marshal for the purpose of determining terms and conditions of the policies.

(3) The Department of Consumer and Business Services may work with the State Fire Marshal and issuers of property insurance policies to develop property protection approaches reflecting best practices for wildfire risk mitigation.

#### DEFENSIBLE SPACE

**SECTION 10.** The State Forestry Department shall oversee the development and maintenance of a comprehensive statewide map of wildfire risk. The map must be sufficiently detailed to allow the assessment of wildfire risk at the property-ownership level. The department shall collaborate with the State Fire Marshal, other state and local governments and officials, other public bodies, insurance companies and any other information sources that the State Forestry Department deems appropriate to develop and maintain the map. The department shall make the map described in this section accessible to the public in electronic form.

**SECTION 11.** The State Forestry Department shall report regarding the development of the comprehensive statewide map described in section 10 of this 2020 Act to a committee of the Legislative Assembly related to natural resources in the manner provided in ORS 192.245 no later than February 1, 2021.

#### LAND USE AND WILDFIRE POLICY ADVISORY COMMITTEE

**SECTION 12.** (1) The Director of the Department of Land Conservation and Development, in consultation with counties and cities, shall organize a Land Use and Wildfire Policy Advisory Committee. The committee shall consist of members appointed as described in subsections (2) to (5) of this section.

(2) The director and the State Forester, in consultation with counties and cities, shall jointly appoint the following to be voting members of the committee:

(a) One member who is a representative of a city government serving a population of less than 10,000.

(b) One member who is a representative of a city government serving a population of 10,000 or more but less than 25,000.

(c) One member who is a representative of a city government serving a population of 25,000 or more.

(d) One member who is a representative of a county government serving a population of less than 30,000.

(e) One member who is a representative of a county government serving a population of 30,000 or more but less than 100,000.

(f) One member who is a representative of a county government serving a population of

**100,000 or more.**

- (g) One member who is a city land use planning director.**
- (h) One member who is a county land use planning director.**
- (i) One member who is a representative of a utility company.**
- (j) One member who is a representative of environmental interests.**
- (k) One member who is a representative of special districts.**
- (L) One member who is a representative of farming landowners.**
- (m) One member who is a representative of ranching landowners.**
- (n) One member who is a representative of realty interests.**
- (o) One member who is a representative of land and housing development firms.**
- (p) One member who is a representative of citizen land use planning organizations.**
- (q) One member who is a representative of state or regional land use planning organizations.**
- (r) One member who is a representative of public health interests.**
- (s) One member who is a representative of small forestland owners.**
- (t) One member who is a representative of large forestland owners.**
- (u) One member who is a representative of economic development organizations.**
- (v) One member who is a representative of federally recognized Indian tribes.**
- (w) One member who is a representative of the Oregon Fire Chiefs Association.**
- (x) Additional members as determined by the director in consultation with counties and cities.**

**(3) The director and the State Forester shall make the joint appointments under subsection (2) of this section from nominations submitted by entities related to the represented interest or entities. The related entities for appointments:**

- (a) Under subsection (2)(a), (b), (c) and (g) of this section is the League of Oregon Cities.**
- (b) Under subsection (2)(d), (e), (f) and (h) of this section is the Association of Oregon Counties.**
- (c) Under subsection (2)(i) of this section is any one or more of the investor-owned utilities and consumer-owned utilities in this state.**
- (d) Under subsection (2)(j) of this section is the Oregon League of Conservation Voters.**
- (e) Under subsection (2)(k) of this section is the Special Districts Association of Oregon.**
- (f) Under subsection (2)(L) of this section is the Oregon Farm Bureau.**
- (g) Under subsection (2)(m) of this section is the Oregon Cattlemen's Association.**
- (h) Under subsection (2)(n) of this section is the Oregon Association of Realtors.**
- (i) Under subsection (2)(o) of this section is the Oregon Home Builders Association.**
- (j) Under subsection (2)(p) of this section is the Oregon Property Owners Association.**
- (k) Under subsection (2)(q) of this section is 1000 Friends of Oregon.**
- (L) Under subsection (2)(r) of this section is the Oregon Health Authority.**
- (m) Under subsection (2)(s) of this section is the Oregon Small Woodlands Association.**
- (n) Under subsection (2)(t) of this section is the Oregon Forest & Industries Council.**
- (o) Under subsection (2)(u) of this section is Business Oregon.**
- (p) Under subsection (2)(v) of this section is one or more of the tribal governing bodies for Indian tribes in this state.**
- (q) Under subsection (2)(w) of this section is the State Fire Marshal.**
- (4) In addition to the members described under subsection (2) of this section, the fol-**

lowing shall serve as nonvoting members of the committee:

- (a) One member appointed by the State Forester.
- (b) One member appointed by the State Fire Marshal.
- (c) One member appointed by the Director of the Oregon Health Authority.
- (d) One member appointed by the Environmental Justice Task Force.
- (e) One member appointed by the director of the Institute for Natural Resources.
- (f) One member appointed by the Director of the Department of Land Conservation and

Development.

(g) One member appointed by the Director of the Department of Consumer and Business Services from the Division of Financial Regulation of the Department of Consumer and Business Services.

(h) One member appointed by the Director of the Department of Consumer and Business Services from department staff having expertise in building codes.

(5)(a) The President of the Senate, in consultation with the Senate Minority Leader, shall appoint two members from among the members of the Senate to be nonvoting members of the committee. The two members appointed under this paragraph may not be from the same political party.

(b) The Speaker of the House of Representatives, in consultation with the House Minority Leader, shall appoint two members from among the members of the House of Representatives to be nonvoting members of the committee. The two members appointed under this paragraph may not be from the same political party.

(6) Members of the Legislative Assembly appointed to the committee are nonvoting members of the committee and may act in an advisory capacity only.

(7) The members of the committee shall elect a voting member to be chair of the committee and a voting member to be vice-chair, with all powers appropriate to those offices.

(8) The committee shall meet at times and places determined by the chair or by the Director of the Department of Land Conservation and Development. A majority of the voting members shall be a quorum for the conducting of business. Official actions by the committee require approval by a majority of the voting members.

(9) The Department of Land Conservation and Development shall provide staff services for the committee.

(10) Notwithstanding ORS 171.072, members of the committee who are members of the Legislative Assembly are not entitled to mileage expenses or a per diem and serve as volunteers on the committee. Other members of the committee are not entitled to reimbursement for expenses and serve as volunteers on the committee. However, the Director of the Department of Land Conservation and Development may, in the discretion of the director, reimburse voting members of the committee for unforeseen expenses from moneys available for purposes of carrying out the functions of the committee.

**SECTION 13.** All agencies of state government as defined in ORS 174.111 are directed to assist the Land Use and Wildfire Policy Advisory Committee and the Department of Land Conservation and Development in the performance of committee and department duties under sections 14 and 15 of this 2020 Act.

#### REGIONAL WILDFIRE RISK

**SECTION 14.** (1) The State Forestry Department and Oregon State University, in consultation with the Department of Land Conservation and Development, shall for each wildfire risk region of this state jointly consult with fire protection agencies and districts, fire officials and personnel and cities and counties in the region. The departments and the university shall analyze the wildfire risk for each region to develop recommendations for reducing the wildfire risk to people, public and private property, businesses, infrastructure and natural resources in that region.

(2) The State Forestry Department and the university, in consultation with the Department of Land Conservation and Development, shall report the recommendations for regional wildfire risk reduction to the Land Use and Wildfire Policy Advisory Committee no later than October 1, 2020.

(3) The departments and the committee shall analyze and evaluate the material to develop recommendations regarding possible means for implementing the final recommendations produced by the Governor's Council on Wildfire Response through the statewide land use planning program and local governments to minimize the risks from wildfires to people, public and private property, businesses, infrastructure and natural resources.

#### IMPLEMENTATION OF COUNCIL RECOMMENDATIONS

**SECTION 15.** (1) The State Forestry Department, in collaboration with the Department of Land Conservation and Development and the Land Use and Wildfire Policy Advisory Committee, shall report to an interim committee of the Legislative Assembly relating to natural resources in the manner provided under ORS 192.245 no later than February 1, 2021, regarding possible means for implementing the final recommendations produced by the Governor's Council on Wildfire Response.

(2) The report must include, but need not be limited to, the following:

(a) The recommendations developed under section 14 of this 2020 Act.

(b) Existing state and local maps that identify wildfire risk.

(c) To the extent the Land Use and Wildfire Policy Advisory Committee and the departments deem appropriate, new map resources that account for regional differences in program information.

(d) Identification of state and local resources needed to develop, maintain and update wildfire risk maps.

(e) Multiple recommendations regarding possible means for using the statewide planning program and local governments including, but not limited to, recommendations regarding revisions and updates to the statewide land use planning program and local zoning codes.

(f) Planning goals related to natural hazards, including but not limited to Goal 7.

(g) Existing state and local programs that minimize wildfire risk, including, but not limited to, programs that identify wildlife risk through mapping or that define minimum defensible space.

(h) Identification of revisions to the statewide land use planning program and to local building codes appropriate to minimize wildfire risks, including, but not limited to, provisions regarding sufficient defensible space, safe evacuation, adequate access for wildfire fighting equipment and personnel, and considerations regarding development in areas of high wildfire risk that allow for regional differences in topography, vegetation, soil types and other rele-

vant factors.

(i) Funding, staffing and other administrative resources necessary for state, county and city governments to implement wildfire reduction programs, including, but not limited to, the costs of program development, implementation and ongoing operations and the need for stable long-term funding for the programs.

(j) A description of areas of agreement and disagreement among the departments and members of the Land Use and Wildfire Policy Advisory Committee.

#### TREATMENT PROGRAM

**SECTION 16.** (1) The State Forestry Department shall establish not more than 15 projects designed to reduce wildfire danger on public or private forestlands and rangelands through the restoration of landscape resiliency and the reduction of hazardous fuel levels. The department shall identify, design and oversee the implementation, administration, maintenance and evaluation of the projects. In carrying out its functions regarding the projects, the department shall, to the extent practicable, consult and cooperate with state and federal agencies, counties, cities and other units of local government, public and private forestland and rangeland owners, forest collaboratives and other relevant community organizations.

(2) The State Forestry Department shall:

(a) In collaboration with the Oregon State University Extension Service and other entities, identify strategic landscapes that are ready for treatment under the projects, giving priority to projects:

(A) On lands currently approved for treatment projects under the National Environmental Policy Act (42 U.S.C. 4321 et seq.);

(B) On lands within areas identified as high fire risk areas in the Governor's Council on Wildfire Response November 2019: Report and Recommendations; and

(C) That focus on treatments protective of human life, property, critical infrastructure or other public values;

(b) To the extent practicable, design the projects to:

(A) Evaluate varying types of fuel treatment methods;

(B) Leverage the collective power of public-private partnerships, federal funding and state funding; and

(C) Optimize the receipt of federal government investments that equal or exceed department investments;

(c) Design the projects to involve existing forest-based contracting entities;

(d) Design the projects to involve the Oregon Watershed Enhancement Board or other state agencies as needed;

(e) Affirmatively seek, and enhance opportunities for, collaboration from stakeholders holding a wide variety of perspectives regarding forest management and opportunities for significant involvement by communities in proximity to project sites; and

(f) Engage in careful monitoring of the project sites to produce useful information on which to base recommendations to the Legislative Assembly.

(3) A project under this section may not include commercial thinning on:

(a) Inventoried roadless areas;

(b) Riparian reserves identified in the Northwest Forest Plan or in Bureau of Land Management resource management plans;

(c) Late successional reserves, except to the extent consistent with the 2011 United States Fish and Wildlife Service Revised Recovery Plan for the Northern Spotted Owl (*Strix occidentalis caurina*);

(d) Areas protected under the federal Wild and Scenic Rivers Act (P.L. 90-542), national recreation areas, national monuments or areas protected under ORS 390.805 to 390.925;

(e) Designated critical habitat for species listed as threatened or endangered under the Endangered Species Act of 1973 (P.L. 93-205) or by the State Fish and Wildlife Commission under ORS 496.172, unless commercial thinning is already allowed under an existing environmental review or recognized habitat recovery plan; or

(f) Federally designated areas of critical environmental concern or federally designated wilderness study areas.

(4) The department shall give public notice, and allow reasonable opportunity for public input, when identifying and selecting projects under this section.

**SECTION 17.** Section 16 of this 2020 Act does not expand, diminish or otherwise affect any rights, privileges, duties or functions otherwise established under federal, state or local laws, rules or regulations that pertain to the management of private lands in this state.

**SECTION 18.** (1) The State Forestry Department shall complete the operation of projects under section 16 of this 2020 Act no later than June 30, 2021.

(2) The department shall report regarding progress in carrying out projects under section 16 of this 2020 Act and prescribed fire activities to an interim committee of the Legislative Assembly related to natural resources, in the manner provided by ORS 192.245, and to the Governor no later than December 1, 2020. The report shall include, but need not be limited to:

(a) A summary of project selection, the initial outcome of project implementation activities, anticipated time frames for project completions and any initial findings or recommendations resulting from project identification, design or implementation activities;

(b) A description of the funding source types and amounts secured by the department as matching funds to implement projects; and

(c) A summary of forestland and rangeland treatment activities using prescribed fire to reduce wildfire danger, the initial outcome of the prescribed fire activities, disincentives or other factors affecting the carrying out of the prescribed fire activities, management of the prescribed fire activities and any initial findings or recommendations resulting from the prescribed fire activities.

(3)(a) The department shall report its findings and recommendations regarding wildfire danger reduction on forestland and rangeland, based on information obtained from the projects described in section 16 of this 2020 Act and from prescribed fire activities to an interim committee of the Legislative Assembly related to natural resources, in the manner provided by ORS 192.245, and to the Governor no later than September 15, 2021. The report shall include, but need not be limited to:

(A) A qualitative and quantitative summary of the project outcomes that, at a minimum, states the number of acres treated, the treatment actions carried out, the amount and commercial value of timber harvested if not exempt from public disclosure and any resulting or anticipated changes in landscape conditions related to enhanced resiliency or the miti-

gation of wildfire risk to public values;

(B) The identification of barriers to more efficient implementation and achievement of goals in future wildfire danger reduction projects;

(C) Recommendations for creating optimal working relationships with forest collaboratives and other relevant community organizations regarding design, implementation and cost recovery for future wildfire danger reduction projects;

(D) A description of the funding source types and amounts secured by the department as matching funds to carry out projects;

(E) Recommendations for investment in future wildfire danger reduction projects;

(F) A qualitative and quantitative summary of the use of prescribed fire activities for wildfire danger reduction that, at a minimum, states the number of acres burned and any resulting or anticipated changes in landscape conditions related to enhanced resiliency or the mitigation of wildfire risk to public values;

(G) The identification of existing disincentives to the use of prescribed fire;

(H) Recommendations regarding the appropriate standard of care for the use of prescribed fire;

(I) Recommendations for facilitating the establishment of a statewide voluntary Prescribed Burn Manager Certificate program; and

(J) Recommendations regarding means for increasing the quantity of wildfire danger reduction projects to achieve the scale of reduction envisioned as a 20-year goal in the Governor's Council on Wildfire Response November 2019: Report and Recommendations.

(b) In developing the report required under this subsection, the department shall work in coordination with federal land management agencies, institutions of higher education and third parties to develop consistent performance measurements and condition-based metrics for monitoring and communicating the effectiveness of state investments, project actions and prescribed fire activities in reducing wildfire danger on public or private forestlands and rangelands.

#### APPROPRIATIONS

**SECTION 19.** In addition to and not in lieu of any other appropriation, there is appropriated to the Department of Land Conservation and Development, for the biennium ending June 30, 2021, out of the General Fund, the amount of \$350,000, which may be expended by the department for carrying out department activities under this 2020 Act.

**SECTION 20.** In addition to and not in lieu of any other appropriation, there is appropriated to the State Forestry Department, for the biennium ending June 30, 2021, out of the General Fund, the amount of \$24,438,279, which may be expended by the department for carrying out department activities under this 2020 Act.

#### CAPTIONS

**SECTION 21.** The unit captions used in this 2020 Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this 2020 Act.

**EMERGENCY**

**SECTION 22. This 2020 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2020 Act takes effect on its passage.**

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## State Forest Litigation & Policy Changes

### ***Center for Biological Diversity et al v. Daugherty et al. (Coastal Coho)***

- Alleges that State of Oregon is logging too much, on steep slopes and without adequate buffers causing take of Oregon Coastal Coho
- Case is currently pending in Federal District Court before Judge Mosman

“Oregon Department of Forestry has been promising they’re going to do more to take care of streams and coho salmon for a long time, and they’ve just really not come through,” he said. “They continue to do a lot of logging on steep steep, landslide-prone slopes that lead to serious sediment problems in streams for coho salmon.”

<https://www.opb.org/news/article/coho-salmon-logging-oregon-forests-lawsuit/>

### ***Linn County et al. v. State of Oregon (Linn County Suit) (Filed 2017)***

- Alleges that the State of Oregon breached a contract with the Counties for not logging enough on state forest land. (2017)
- Linn County Jury awarded ~\$1 billion against the state. (2019)
- Appeal filed (2020), opening brief expect to be filed November 2020

“Bottom line, if the verdict is upheld, the obligation ***falls to Oregon taxpayers...*** on a per-capita basis ***the damage award would effectively transfer money from Oregon’s populous urban counties to their rural counterparts.***”

“Washington County’s taxpayers...[are] the third largest recipient of damages. ***But counting taxpayers’ liability, Washington County ends up \$90 million in the hole. Taxpayers in Benton, Clackamas, Douglas, Josephine, Lane, Marion and Polk counties would also be contributing more to the judgement than the county would receive in damages.***”

Environmental groups are currently suing the Department of Forestry to enjoin 68 timbers sales under the endangered species act. One result of the lawsuit, some predict, could be an ongoing flow of such lawsuits as conservationists look to protect the state forests from any change in management plans. In the meantime, conservation advocates said they were disappointed by the verdict.

“Since Oregon acquired these logged over lands in the Great Depression, Oregonians have invested millions of our tax dollars in fixing them up to benefit all Oregonians,” said Ralph Bloemers, senior staff attorney for the Crag Law Center, a non-profit law center that works with local communities throughout Oregon. “While we all use and enjoy wood products, state law recognized that our forests provide us with clean drinking water, fish and wildlife. The State’s attorneys vigorously contested these legal questions being put to a jury, and I expect this verdict will be overturned on appeal.”

During the trial, the counties’ legal team made the case that the state should have been managing the state forests according to the same rules that apply to private forestlands, treating the trees as crops, and harvesting them on 50 year rotations. Instead, their experts testified that the state was going above and beyond what was required to protect endangered species and native wildlife by actively creating older forest tracts that would attract such species and put that timber off limits to future harvests.

Expert witnesses called by the counties lawyers testified that the state could have cut an additional 3.6 billion board feet of timber from the state forests since 2004. The counties asked the jury for some \$1.1 billion in damages, including future lost revenue assuming the state continues to manage the forests in the same fashion.

<https://www.oregonlive.com/politics/2019/11/failing-forestry-with-1-billion-timber-lawsuit-not-all-14-counties-are-big-winners.html>

### State of Oregon Habitat Conservation Plan (September 2020)

- The goal of the HCP is to improve both financial and conservation outcomes over a 75-year permit term. The state has a duty to both provide sustainable timber harvest revenues to counties where state forests are located while also protecting habitat used by threatened and endangered species.

[https://www.capitalpress.com/state/oregon/oregon-forest-habitat-conservation-plan-worries-counties/article\\_f544bc40-e191-11ea-84c2-6f1c725ceeb6.html](https://www.capitalpress.com/state/oregon/oregon-forest-habitat-conservation-plan-worries-counties/article_f544bc40-e191-11ea-84c2-6f1c725ceeb6.html)

### Memorandum of Agreement - Private Forest Lands (February 2020)

- Included passage of new legislation in 2020 special session that provided for (1) a real-time notification for aerial spraying and (2) expanded protected spray buffers around drinking water, homes, and schools.

- Rule change to expand no cut buffers in the Rogue-Siskiyou region along salmon, steelhead, and bull trout streams, aligning forest practices with the rest of western Oregon.

#### State will seek a Habitat Conservation Plan (Through Negotiation)

- Negotiation of HRCP will lead to an update the Oregon Forest Practices Act
- For the first time, Oregon will seek endorsement of federal wildlife agencies that the state's forest practices are protective of threatened and endangered species, including salmon.

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**NEWS**

## Senate GOP leader: Timber deal with environmentalists demoralizing to caucus



Sen. Herman Baertschiger, Jr., Senate Minority Leader, R-Grants Pass, sits at his desk on the last day of the 2019 legislative session at the Oregon State Capitol in Salem on June 30, 2019. STATESMAN JOURNAL FILE

## ***Supplemental Materials – Linn County v. State of Oregon***

### **State Forests Acquisitions Acts**

From the first Acquisition Act in 1925 to the last one in 1967, the Oregon State Legislature identified the various multiple-use purposes and values to be provided by state forestlands:

- The 1925 Acquisition Act cited “forestry purposes or for the conservation of water or watershed protection, or for public parks or campgrounds.”
- From the 1931 Act provided for “any or all of the following purposes: growing forest crops, water conservation, watershed protection, recreation.”
- From the 1939 Act: for the “production of forest crops, watershed protection and development, erosion control, grazing, recreation or forest administration.”
- From the 1941 Act: that the state forests are resources of statewide concern and are to be managed for the greatest permanent value to the state, including growing forest crops, protecting waters and watersheds, and recreation.
- Additionally from the 1967 Act: for fish and wildlife environment, landscape effect, and protection of water supplies.

### ***Linn County v. State of Oregon - Selected Issues:***

- Whether the State has been and currently is in compliance with the Endangered Species Act and the Clean Water Act with respect to its forest practices on state land is a significant contested issue.

- Plaintiffs did not and cannot demonstrate across hundreds of thousands of acres of forestland, thousands of watersheds and for multiple species that the State could have and should have logged more.

- Oregon State law presents a classic multiple use mandate, there is no particular management approach that is required except that the State must meet the requirements of federal law (ESA, CWA),

- The approach the Oregon Department of Forestry has taken is inherently a site-specific determination based on where the threatened and endangered species are located, what activities are proposed, what best management practices are utilized, and when the activities are planned. It is not possible to go back in time and reconstruct the entirety of the State’s logging program to show that the State could have logged more volume and still have been in compliance with the ESA and the CWA. This would require a person to retrospectively redesign dozens of timber sales that were situated in watersheds that provide habitat for Oregon Coast coho (as well as Marbled Murrelet and the Spotted Owl) and provide an analysis on a site-by-site, subwatershed-by-subwatershed basis for the entirety of the State forest system,

***Supplemental Materials – Linn County v. State of Oregon***

**Relevant References:**

- In its briefing, Linn County stated that it “accounts for Federal Law, including the Endangered Species Act.” (Page 21-22 of Reply to MTD):

“At trial, Linn County will offer evidence that the State’s decision to harvest at lower than anticipated levels constitutes a breach of contract with direct monetary consequences to the Counties and local taxing districts that rely on those revenues – even after taking environmental laws into account. Linn County will offer expert testimony showing the State’s management produced substantially lower harvests across the board than would have resulted in [sic] a wood products emphasis model which complied with all federal and state regulatory requirements.”

- The Fish and Wildlife Service, National Marine Fisheries Service *both* disagree that the State of Oregon has complied with its obligations under Section 9 of the ESA. Here are a few passages from the Listing decision retaining Threatened Status for Oregon Coast Coho (from 2011) 76 FR 35755 which discusses the efforts by the Oregon Department of Forestry to prepare an ESA section 10 habitat conservation plan and the response from NMFS who is charged with protecting fish as a trust resource. The decision states that: “On July 19, 2009, we notified the Oregon Department of Forestry that “we are unable to conclude the strategies would meet the conservation needs of our trust resources and provide for the survival and recovery of Oregon Coast (OC) coho salmon.” (Letter from Kim Kratz, NMFS to Jim Young, Oregon Department of Forestry, dated July 19, 2009). The decision goes on to state:

“There is still significant disagreement over whether the proposed protective measures are sufficient to conserve OC coho salmon and their habitat. Since publication of our proposed rule, no additional progress has been made on this habitat conservation plan. We are as yet unable to conclude that the Elliot State and the Northwest Oregon Forest Management Plans provide for OC coho salmon habitat that is capable of supporting populations that are viable during both good and poor marine conditions.”

With respect to the Clean Water Act, NMFS has the following to say and the Oregon Coast Coho Ecologically Significant Unit:

“Despite the existing and enforcement of this law, a significant percentage of stream reaches in the range of the Oregon Coast coho salmon do not meet current water quality standards. For instance many of the populations of this ESU have degraded water quality identified as a secondary limiting factor. Forty percent of the stream miles inhabited by OC Salmon ESU are classified as temperature impaired. Although program carried out under the Clean Water Act are well funded and enforcement of this law occurs, it is unlikely that programs are sufficient to protect salmon habitat in a condition that

***Supplemental Materials – Linn County v. State of Oregon***

would provide for viable populations during good and poor marine conditions.”

- In 2014, the State of Oregon received a notice of intent to sue from another conservation group alleging violations of the Endangered Species Act with respect to Oregon Coast Coho and the State is still operating without a safe harbor for its activities with respect to Coho.

- In 2017, the State of Oregon received a petition to list the Marbled Murrelet under the State Endangered Species Act.

- In a 2012 decision issued by Chief Judge Ann Aiken of the Federal District Court for the District of Oregon issued an injunction against multiple timber sales in the Elliot State Forests in response to an Endangered Species Act lawsuit filed by a coalition of conservation groups. In enjoining the timber sales, the Court stated that District Foresters and State Foresters can be held liable for take or for proximately causing take when they sell timber sale units that do not comply with the ESA. (The citation is *Cascadia Wildlands v. Kitzhaber*, 911 F. Supp. 2d 1075 (2012).

- It is unprecedented for the counties to ask a jury to implicitly rule on a federal ESA issue in the context of a class action breach of contract claim. Compliance with the ESA and the CWA is in the province of experts at the FWS, NOAA, among others. The Federal Courts are the gatekeepers for this determination, not the ODF or the State Courts.



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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

CENTER FOR BIOLOGICAL DIVERSITY,  
ET AL,

Case No: 18-CV-1035 (MM)

Plaintiffs,

FIRST AMENDED COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF

v.

DAUGHERTY, ET AL,

Defendants,

and

OREGON FOREST INDUSTRIES  
COUNCIL, ET AL,

Defendant-Intervenors.

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INTRODUCTION

1. In this citizen suit under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 [hereinafter the “ESA” or “Act”], *id.* § 1540(g) (citizen-suit provision), several conservation organizations seek relief for the unlawful take of a federally threatened population of coho

salmon from logging, log-hauling, and the construction, improvement, use, and maintenance of logging roads authorized by Defendants in the Tillamook and Clatsop State Forests of northwestern Oregon [hereinafter “State Forests”]. Plaintiffs seek declaratory and injunctive relief against Defendants Peter Daugherty, in his capacity as the State Forester of the Oregon Department of Forestry [hereinafter “ODF”], and the district foresters for the Tillamook, Forest Grove, and Astoria ODF districts [hereinafter the “District Foresters”], in their official capacities [collectively hereinafter the “Foresters” or “Defendants”], to remedy Defendants’ ongoing authorizations of timber sales on the State Forests that are reasonably certain to proximately cause the unpermitted take of Oregon Coast coho salmon, a protected species under the ESA, in violation of Sections 4(d) and 9 of the Act, *see id.* §§ 1533(d), 1538(a)(1)(B), (G).

2. Implementing their own multi-year management plans, Defendants sell approximately 180 million board feet of timber from the State Forests every year. The overwhelming majority of this volume is Douglas-fir that is cleared from the very remote, steep, and erosion-prone slopes of the Tillamook State Forest and Clatsop State Forests. These sales provide a steady stream of revenue that funds substantial portions of the Foresters’ budgets. However, as will be made evident by the exhaustively studied consequences of similar activities, these sales also unlock a series of events that ultimately cause the take of protected coho salmon, which at this time has not been authorized by the federal government through the lone legal mechanism for doing so under Section 10 of the Act, 16 U.S.C. § 1539.

3. Thus, by and through their planning, authorization, and sale of the 68 timber sales identified in Table 1 below, which align with Defendants’ decades-long and ongoing approach to management of the Tillamook, Forest Grove, and Astoria ODF Districts, Defendants directly authorize timber companies to clear-cut thousands of acres of State forestlands and to haul the

logs along roads that act as conduits for surface water runoff to enter streams. And, as conclusively documented in the relevant scientific literature and as Plaintiffs will prove in this case, these activities: increase flooding and the frequency and magnitude of landslides and debris flows; deliver fine sediment via hydrologically connected road segments to streams that are known to be utilized by coho salmon for spawning, rearing, and sheltering; and deplete large trees and woody debris that would otherwise form a critical component of their freshwater habitat.

4. The 68 timber sales listed in Table 1, below, have units and/or haulage routes that are adjacent to and/or upstream from stream reaches that are known to be occupied by coho salmon. In the last column (entitled “Impact”), sales that authorize the use of hydrologically connected roads for hauling logs and heavy equipment are denoted with the acronym “HCR.” Timber sales that present an increased risk of landslides and/or debris flows are denoted with the acronym “LS.” Use of “ALT” in the timber sale name refers to an “alternative” timber sale, i.e., one to be sold when primary sales threaten to fall short of the Foresters’ timber revenue objectives. “AOP” refers to the pertinent Annual Operating Plan. ODF Districts are abbreviated as follows: AST (Astoria); FG (Forest Grove); and TILL (Tillamook).

| <b>Timber Sale</b> | <b>District</b> | <b>AOP</b> | <b>Acres Total</b> | <b>Acres Clear-Cut</b> | <b>Acres Partial-Cut</b> | <b>Road Const. (Miles)</b> | <b>Road Imprvd. (Miles)</b> | <b>Impact</b> |
|--------------------|-----------------|------------|--------------------|------------------------|--------------------------|----------------------------|-----------------------------|---------------|
| Greasy Hawk        | AST             | 2015       | 152                | 152                    |                          | 0.2                        | 1.8                         | HCR           |
| Green Olive        | AST             | 2015       | 134                | 134                    |                          | 0.2                        | 10.4                        | HCR           |
| Homesteader        | AST             | 2015       | 437                | 203                    | 234                      | 1.1                        | 7.9                         | HCR           |
| Lost Pony          | AST             | 2015       | 159                | 159                    |                          | 0.2                        | 5.3                         | LS, HCR       |
| Nowhere Land       | AST             | 2015       | 137                | 137                    |                          | 0.4                        | 0.7                         | HCR           |
| Packy              | AST             | 2015       | 213                | 213                    |                          | 0.6                        | 12.4                        | HCR           |
| Quarter Mile       | AST             | 2015       | 68                 | 68                     |                          | 1.9                        | 0.8                         | LS            |

| <b>Timber Sale</b>  | <b>District</b> | <b>AOP</b> | <b>Total Acres</b> | <b>Acres Clear-Cut</b> | <b>Acres Partial -Cut</b> | <b>Road Const. (Miles)</b> | <b>Road Imprvd. (Miles)</b> | <b>Impact</b> |
|---------------------|-----------------|------------|--------------------|------------------------|---------------------------|----------------------------|-----------------------------|---------------|
| Mor Nor Wolf        | FG              | 2015       | 189                | 189                    |                           | 1.42                       | 4.93                        | HCR           |
| Round House         | FG              | 2015       | 297                | 157                    | 140                       | 2.45                       | 4.68                        | HCR           |
| Ax Ridge            | TILL            | 2015       | 302                | 237                    | 65                        | 5.3                        | 1.6                         | LS            |
| Emerald Isle        | AST             | 2016       | 148                | 148                    |                           |                            |                             | HCR           |
| Nehalem Breaks      | FG              | 2016       | 145                | 145                    |                           | 1.04                       | 2.71                        | HCR           |
| Fireworks           | TILL            | 2016       | 330                | 330                    |                           | 0                          | 15                          | LS            |
| Lobo Canyon         | TILL            | 2016       | 194                | 194                    |                           | 0.99                       | 4.19                        | LS, HCR       |
| Old Bungee          | TILL            | 2016       | 610                | 335                    | 275                       | 4                          | 0                           | LS, HCR       |
| The Simms           | TILL            | 2016       | 949                | 949                    |                           | 3.36                       | 3.4                         | LS, HCR       |
| Three Little Ridges | TILL            | 2016       | 348                | 348                    |                           | 3                          | 8                           | HCR           |
| Moving Music        | FG              | 2017       | 119                | 119                    |                           | 1.42                       | 1                           | HCR           |
| My Mulligan         | FG              | 2017       | 108                | 108                    |                           | 0                          | 0                           | HCR           |
| Voltaires Flair     | FG              | 2017       | 363                |                        | 363                       | 0                          | 0.5                         | HCR           |
| Woods Way           | FG              | 2017       | 110                | 110                    |                           | 0.87                       | 2.3                         | HCR           |
| Brimstone           | TILL            | 2017       | 27                 | 27                     |                           | 0.98                       | 3.16                        | LS            |
| High Standards      | TILL            | 2017       | 110                | 110                    |                           | 1.96                       | 3.53                        | LS, HCR       |
| Knot Berry          | TILL            | 2017       | 193                | 193                    |                           | 1.67                       | 2.6                         | LS            |
| Rocky Rd            | TILL            | 2017       | 613                | 298                    | 315                       | 6.25                       | 2.85                        | LS, HCR       |
| Broken Arrow        | TILL            | 2018       | 405                | 405                    |                           | 2.11                       | 7.4                         | LS, HCR       |
| Clam Bake           | TILL            | 2018       | 402                | 402                    |                           | 2.22                       | 18.1                        | LS            |
| Coast Bill          | TILL            | 2018       | 222                | 222                    |                           | 1.95                       | 8.27                        | LS            |
| Double Bypass       | TILL            | 2018       | 77                 | 77                     |                           |                            | 9.1                         | LS, HCR       |
| Franken Fir         | TILL            | 2018       | 313                | 313                    |                           | 1.54                       | 7.1                         | LS, HCR       |
| General Lee         | TILL            | 2018       | 157                | 157                    |                           | 0.94                       | 10.9                        | LS, HCR       |
| Hopscotch           | TILL            | 2018       | 111                | 0                      |                           | 0.9                        | 6.1                         | LS            |
| Kilchis Sddl        | TILL            | 2018       | 225                | 225                    |                           | 1.57                       | 13.2                        | LS, HCR       |
| Lost Hill           | TILL            | 2018       | 236                | 236                    |                           | 1.9                        | 6.5                         | LS            |
| Southern Steamer    | TILL            | 2018       | 209                | 209                    |                           | 3.25                       | 13.8                        | LS, HCR       |
| Thor's Summit       | TILL            | 2018       | 107                | 107                    |                           | 2.4                        | 12                          | LS, HCR       |
| Clean Slate         | AST             | 2019       | 66                 | 66                     |                           |                            | 7.4                         | HCR           |

| <b>Timber Sale</b>   | <b>District</b> | <b>AOP</b> | <b>Total Acres</b> | <b>Acres Clear-Cut</b> | <b>Acres Partial -Cut</b> | <b>Road Const. (Miles)</b> | <b>Road Imprvd. (Miles)</b> | <b>Impact</b> |
|----------------------|-----------------|------------|--------------------|------------------------|---------------------------|----------------------------|-----------------------------|---------------|
| Upper Horsehawk      | AST             | 2019       | 92                 | 92                     |                           | 0.6                        | 0.4                         | LS            |
| Wild Bill            | AST             | 2019       | 56                 | 56                     |                           | 0.3                        | 17.3                        | HCR           |
| Woody Woodpecker     | AST             | 2019       | 297                | 100                    | 197                       |                            |                             | LS            |
| BD7                  | FG              | 2019       | 150                | 150                    |                           | 0.74                       | 11.37                       | LS, HCR       |
| Big Louie            | FG              | 2019       | 90                 | 90                     |                           | 0.37                       | 7.2                         | LS            |
| Duchess and the Duke | FG              | 2019       | 83                 | 83                     |                           | 0.52                       | 9.18                        | LS            |
| Hanns Down           | FG              | 2019       | 104                | 104                    |                           |                            | 9.97                        | HCR           |
| Lou's Leftovers      | FG              | 2019       | 123                | 123                    |                           | 0.3                        | 8.89                        | HCR           |
| More Cow Bell        | FG              | 2019       | 96                 | 96                     |                           | 1.14                       | 11.14                       | LS            |
| Power Trip           | FG              | 2019       | 70                 | 70                     |                           | 0.14                       | 3.87                        | LS            |
| Sloopy               | FG              | 2019       | 69                 | 69                     |                           |                            | 16.85                       | LS            |
| Willy Nilly          | FG              | 2019       | 189                | 189                    |                           | 0.59                       | 21.19                       | LS            |
| Clam Bake (ALT)      | TILL            | 2019       | 402                | 402                    |                           | 2.23                       | 18.12                       | LS            |
| Coast Bill (ALT)     | TILL            | 2019       | 222                | 222                    |                           | 1.95                       | 9.35                        | LS            |
| East Foley           | TILL            | 2019       | 226                | 226                    |                           |                            | 10.4                        | LS            |
| Gold Rush            | TILL            | 2019       | 180                | 180                    |                           | 2.17                       | 6.3                         | LS, HCR       |
| Jethro Toll          | TILL            | 2019       | 333                | 333                    |                           | 1.75                       | 6.97                        | LS            |
| Kilchis Saddle (ALT) | TILL            | 2019       | 225                | 225                    |                           | 1.57                       | 13.24                       | LS, HCR       |
| South Bushong        | TILL            | 2019       | 222                | 222                    |                           | 0.81                       | 9.88                        | LS            |
| Buck Shot            | AST             | 2020       | 177                | 177                    |                           | 0                          | 10.4                        | HCR           |
| Clean Slate          | AST             | 2020       | 226                | 226                    |                           | 0                          | 17.2                        | HCR           |
| Dragons Roost        | AST             | 2020       | 202                | 202                    |                           | 0.1                        | 23.9                        | HCR           |
| Forgotten Shorts     | AST             | 2020       | 67                 | 67                     |                           | 0                          | 1.9                         | LS            |
| Old Bungee           | TILL            | 2020       | 225                | 225                    |                           | 0.91                       | 9.62                        | LS, HCR       |
| Smith & Archers      | TILL            | 2020       | 205                | 205                    |                           | 1.97                       | 8.81                        | LS            |
| Kilchis Saddle       | TILL            | 2020       | 220                | 220                    |                           | 2.16                       | 13.24                       | LS            |

| <b>Timber Sale</b> | <b>District</b> | <b>AOP</b> | <b>Total Acres</b> | <b>Acres Clear-Cut</b> | <b>Acres Partial -Cut</b> | <b>Road Const. (Miles)</b> | <b>Road Imprvd. (Miles)</b> | <b>Impact</b> |
|--------------------|-----------------|------------|--------------------|------------------------|---------------------------|----------------------------|-----------------------------|---------------|
| Wooley Grade       | TILL            | 2020       | 102                | 102                    |                           | 0                          | 7.77                        | LS            |
| Hembre Falls (ALT) | TILL            | 2020       | 181                | 181                    |                           | 0.51                       | 9.3                         | LS            |
| Coast Bill (ALT)   | TILL            | 2020       | 331                | 331                    |                           | 2.25                       | 10.46                       | LS            |
| Jordan Ridge (ALT) | TILL            | 2020       | 176                | 176                    |                           | 0.63                       | 1.15                        | LS            |
| ZZ Tops (ALT)      | TILL            | 2020       | 126                | 126                    |                           | 1.38                       | 6.2                         | LS            |

5. As evident from the well-documented effects of similar activities in the past, it is reasonably certain—indeed, all but guaranteed—that Defendants’ authorization of the timber sales in Table 1 and all similar timber sales on the State Forests trigger a chain of entirely foreseeable consequences that causes death and injury of coho salmon and significantly impairs their ability to successfully spawn, forage for food, and take refuge from predators. By disrupting these essential behaviors, Defendants cause “take” of Oregon Coast coho salmon within the meaning of the Act in ways that have been exhaustively studied, are known to ODF as well as other State agencies, and were specifically identified by the National Marine Fisheries Service [hereinafter “NMFS”], the expert federal agency, as forms of prohibited take of this species. 50 C.F.R. § 223.203 [hereinafter “Special Rule”]; 73 Fed. Reg. 7816, 7830 (Feb. 11, 2008) (“[a]ctivities that . . . could potentially ‘harm’ salmon” include logging, “road construction in riparian areas” and areas that are “susceptible to mass wasting and surface erosion,” and the “removal of large woody debris and ‘sinker logs’ or riparian shade canopy”).

6. While ODF has taken some initial steps in the past toward securing an Incidental Take Permit [hereinafter “ITP”] from NMFS pursuant to ESA Section 10(a)(1)(B), *see* 16 U.S.C. § 1539(a)(1)(B), ODF has never completed a final “Habitat Conservation Plan” [hereinafter

“HCP”] that would allow the Foresters to incidentally take Oregon Coast coho salmon in accordance with an ITP and the ESA. As of the date of this Amended Complaint, the State of Oregon and Defendants have yet to decide to do so.

7. Therefore, unless and until the Foresters obtain lawful authorization for such activities pursuant to an ITP from NMFS, Plaintiffs respectfully seek declaratory relief and an injunction to halt and prevent logging and logging-related activities on the Tillamook and Clatsop State Forests that are reasonably certain, as represented by the sales in Table 1 and all the evidence to be submitted in this case, to cause take of Oregon Coast coho salmon.

#### JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to the ESA citizen-suit provision, 16 U.S.C. § 1540(g), which also empowers the Court to enjoin Defendants from further violations of the ESA and its implementing regulations, *id.* § 1540(g)(1)(A).

9. As required by 16 U.S.C. § 1540(g)(2)(A)(i), Plaintiffs provided Defendants with formal notice of the violations embodied in this complaint. The Center for Biological Diversity submitted a notice of intent to sue by letter dated February 13, 2014 to the State Forester (Doug Decker, Peter Daugherty’s predecessor) and the District Foresters for the Tillamook, Forest Grove, and Astoria districts. Plaintiffs supplemented their notice by additional notice letters dated April 5, 2017 and April 3, 2018.

10. Venue in this district is proper under 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(b)(2).

#### PARTIES

11. Plaintiff the CENTER FOR BIOLOGICAL DIVERSITY [hereinafter “the Center”] is a non-profit organization that is dedicated to the preservation, protection, and

restoration of biological diversity, native species, and ecosystems. The Center is incorporated in California and headquartered in Tucson, Arizona with offices throughout the United States and Mexico. The Center has long advocated for coho salmon protection. The Center has previously brought litigation to ensure development of a plan to recover the Oregon Coast population of coho salmon. The Center has worked for conservation of streams occupied by coho salmon from development in California. The Center's Portland, Oregon office and Endangered Species Program have advocated for protections for old-growth and private and Oregon forestlands by attending and testifying at Board of Forestry and State Land Board meetings, and by bringing litigation to secure greater protections for imperiled species on State forestlands. The Center has more than 63,000 members, including over 1,600 in Oregon, many of whom enjoy exploring Oregon's forestlands and observing, studying, fishing for and photographing coho salmon. The Center's members are injured by logging and road construction, improvement, use, and maintenance, and related activities, as authorized by Defendants and represented by the timber sales in Table 1, on high-risk or landslide hazard locations, erosion-prone slopes, or hydrologically connected areas, which causes sediment and debris to be delivered to coho salmon-bearing streams and take of Oregon Coast coho salmon.

12. Representing approximately 10,000 members and supporters, Plaintiff CASCADIA WILDLANDS is a Eugene, Oregon-based non-profit organization that is devoted to conservation of the Cascadia Bioregion, which extends from northern California to southeastern Alaska. Cascadia Wildlands uses a combination of education, organizing, outreach, litigation, advocacy, and collaboration to defend wild places and promote sustainable, restoration-based forestry. Cascadia Wildlands has long advocated for improved management of forests, for the protection of older forests, and for the recovery of imperiled species dependent on older forest

habitats such as Oregon Coast coho salmon. For over a decade, Cascadia Wildlands has campaigned for better protections for the Tillamook and Clatsop State Forests and imperiled species there, including Oregon Coast coho salmon. Cascadia Wildlands has members who regularly enjoy, view, study, and/or fish for coho salmon on the Clatsop and Tillamook State Forests, and who are injured by logging and road construction, improvement, use, and maintenance, and related activities, as authorized by Defendants and represented by the timber sales in Table 1, on high-risk or landslide hazard locations, erosion-prone slopes, or hydrologically connected areas, which causes sediment and debris to be delivered to coho salmon-bearing streams and causes take of Oregon Coast coho salmon.

13. Plaintiff NATIVE FISH SOCIETY is the leading science-based native fish conservation organization in the Pacific Northwest, with over 3,700 members and supporters and 87 River Stewards. Dedicated to utilizing the best science available, Native Fish Society is a 501(c)(3) non-profit corporation that advocates for the recovery and protection of wild, native fish, including Oregon Coast coho salmon, and promotes the stewardship of the habitats that sustain them. Native Fish Society has members who regularly enjoy, view, study, and/or fish for coho salmon on the Tillamook and Clatsop State Forests and who are injured by logging and road construction, improvement, use, and maintenance, and related activities, as authorized by Defendants and represented by the timber sales in Table 1, on high-risk or landslide hazard locations, erosion-prone slopes, or hydrologically connected areas, which causes sediment and debris to be delivered to coho salmon-bearing streams and causes take of Oregon Coast coho salmon.

14. Defendant PETER DAUGHERTY, Ph.D., is the State Forester of Oregon. The State Forester: develops, reviews, and approves written plans; and develops, reviews, authorizes,

and sells timber sales that allow logging, road construction, improvement, use, and maintenance, and related activities, on the State Forests. Defendant Daugherty is sued in his official capacity.

15. Defendant KATHERINE SKINNER is the District Forester for the Tillamook District, which includes a large portion of the Tillamook State Forest. District Forester Skinner: develops, reviews, and approves written plans that govern the Tillamook District; and develops, reviews, authorizes, and sells timber sales that allow logging, road construction, improvement, use, and maintenance, and related activities, on the Tillamook District. Ms. Skinner is sued in her official capacity.

16. Defendant MICHAEL CAFFERATA is the District Forester for the Forest Grove District, which includes a portion of the Tillamook State Forest. District Forester Cafferata: develops, reviews, and approves written plans that govern the Forest Grove District; and develops, reviews, authorizes, and sells timber sales that allow logging, road construction, improvement, use, and maintenance, and related activities, on the Forest Grove District. Mr. Cafferata is sued in his official capacity.

17. Defendant DANIEL GOODY is the District Forester for the Astoria District, which includes the Clatsop State Forest. District Forester Goody: develops, reviews, and approves written plans that govern the Astoria District; and develops, reviews, authorizes, and sells timber sales that allow logging, road construction, improvement, use, and maintenance, and related activities, on the Astoria District. Mr. Goody is sued in his official capacity.

**Good Bills**

**Mixed Bills**

**Bad Bills**

**Summary of Fire-Related Senate Bills 9/19/2020**

| Name  | Link to Bill   | Quick Summary   | Pros  | Cons   |
|---|--|---|---|--|
| <p>S. 2882<br/>Community<br/>Defense Bill</p> <p>Sponsor:<br/>Senator<br/>Kamala<br/>Harris</p>             | <p><a href="https://www.congress.gov/116/bills/s2882/BILLS-116s2882is.pdf">https://<br/>www.congress.g<br/>ov/116/bills/<br/>s2882/<br/>BILLS-116s2882i<br/>s.pdf</a></p> <p>Introd.<br/>1/20</p>  | <p>Invest \$1 billion/year to establish guidelines for communities on creating Wildfire Defense Plans. Plans focus on: improving emergency response, home hardening, defensible space, land use planning and education.</p>   | <p>Focused on emergency response, home and community defense.</p> | <p>None, these are the solutions that work to deal with large wind and drought driven fire events.</p> |
| <p>National<br/>Prescribed<br/>Fire Act</p> <p>Sponsors:<br/>Senators<br/>Wyden<br/>Manchin<br/>Cantell</p> | <p><a href="https://www.wyden.senate.gov/imo/media/doc/National%20Prescribed%20Fire%20Act%20of%202020%20Bill%20Text.pdf">https://<br/>www.wyden.sen<br/>ate.gov/imo/<br/>media/doc/<br/>National%20Pres<br/>cribed%20Fire%<br/>20Act%20of%202<br/>020%20Bill%20Te<br/>xt.pdf</a></p> <p>Introd. 9/20</p> | <p>Provides \$300 million to FS/BLM to facilitate controlled burns on federal, state and private land. Establishes a \$10 million collaborative program based on successful CFLRP to implement prescribed burning on state, county and private lands. Establishes a FS/BLM workforce development program.</p> | <p>Includes measures for air issues and human resources.</p>      | <p>May promote Thinning-logging before burning and chaparral burning could be abused.</p>              |

|  |   |   |   |  |
|--|---|---|---|--|
| <p>S. 3684<br/>21st Century<br/>CCC Bill</p> <p>Sponsors:<br/>Senator<br/>Wyden</p>  | <p><a href="https://www.congress.gov/116/bills/s3684/BILLS-116s3684is.pdf">https://<br/>www.congress.g<br/>ov/116/bills/<br/>s3684/<br/>BILLS-116s3684i<br/>s.pdf</a></p> <p>Introd.<br/>5/20</p> | <p>Provides \$5.5 billion for FS/BLM fuels/thinning, prioritizing NEPA-ready projects. \$7 billion for rec. guides with permits. \$9 billion fund for conservation corps &amp; job training. \$150 million more for Collaborative Forest Landscape Restoration Program, \$6 billion for FS capital improvements &amp; maintenance backlog and \$500 million to FS State/Private Forestry program, including \$100 million for Firewise. \$10 billion for on farm water/habitat and \$100 million for PPE.</p> | <p>Retains environmental law. Includes job training. funds firewise work.</p> | <p>Spends limited funds on logging-thinning projects that may not have any affect on fire behavior.</p> <p>May be used to fund questionable commercial logging.</p>  |
| <p>S. 4431<br/>Emergency<br/>Wildfire and<br/>Public Safety<br/>Act</p> <p>Sponsors:<br/>Senators<br/>Daines<br/>Feinstein</p> | <p><a href="https://www.congress.gov/116/bills/s4431/BILLS-116s4431is.pdf">https://<br/>www.congress.g<br/>ov/116/bills/<br/>s4431/<br/>BILLS-116s4431i<br/>s.pdf</a></p> <p>Introd.<br/>8.20</p> | <p>Establishes massive landscape pilot projects through proceed through expedited environmental and judicial processes. Establish a new categorical exclusion to create large “linear fuel breaks” up to 1,000 feet wide and 3,000 acres in size, including in currently protected areas. Gives “emergency” legal authority to bypass public review. Undermines the National Forest Management and Endangered Species Acts.</p>   | <p>No conservation benefits. Benefits timber corporations.</p>                | <p>Eviscerates conservation law</p> <p>Directs agencies to do widespread backcountry logging far away from homes, communities.</p> <p>Increases fire risk to communities.</p> <p>Degrades older forests, more roads as vectors for fire.</p> |

| <b>Impacts on Conservation Safeguards</b>        |                          |                                 |                |             |            |                           |
|--|--------------------------|---------------------------------|----------------|-------------|------------|---------------------------|
| <b>Name</b>                                      | <b>Increases logging</b> | <b>Focused Near Communities</b> | <b>Funding</b> | <b>NEPA</b> | <b>ESA</b> | <b>Impacts other laws</b> |
| S. 2882 Community Defense Bill                   | No                       | Yes                             | Yes            | No          | No         | No                        |
| National Prescribed Fire Act                     | No                       | No                              | Yes            | No          | No         | CAA                       |
| S. 3684 21st Century CCC Bill                    | Yes                      | No                              | Yes            | No          | No         | No                        |
| S. 4431 Emergency Wildfire and Public Safety Act | Yes                      | No.                             | No             | Yes         | Yes        | Yes                       |



KAMALA D. HARRIS  
U.S. Senator for California



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## Wildfire Defense Act

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As our country faces the climate crisis, we must speak the truth that widespread catastrophic wildfires are a growing threat to the safety of our communities. Over the past two decades alone, California has seen 15 of the 20 largest wildfires in its history, some of which have wiped out entire communities. The federal government has a responsibility to treat these wildfires with the same level of seriousness as hurricanes and other natural disasters and to empower communities to implement science-based methods for mitigating wildfire damage and defending life and property.

We cannot stop the threat of wildfires entirely, but we can do much more to prepare our communities for worst-case scenarios while working to address the structural issues that have caused these fires to burn more quickly and more intensely than ever before. In the long term, California must address its history of mismanaging fire, the expansion of residential communities into natural areas, the greed and misplaced priorities of corporations, and the pumping of greenhouse gases into the atmosphere. We must also acknowledge that not all wildfires burn in the forest. Wildfires are also burning through shrubland across Southern California and the oak woodlands that stretch across the state. In all environments, the best way to protect communities from wildfire is to focus on the communities themselves.

U.S. Senator Kamala D. Harris (D-CA) is introducing the *Wildfire Defense Act* to ensure that local communities are able to defend themselves from the growing danger of wildfires. This responsibility should not fall on any one individual, but should instead be shared among entire communities with the understanding that a threat to any one home is a threat to every neighbor.

Specifically, the *Wildfire Defense Act* will invest \$1 billion per year to:

- Establish guidelines for communities to conceptualize new Community Wildfire Defense Plans (CWDP) that are developed in coordination with community members, first responders, and relevant state agencies. CWDPs will focus on implementing strategies and activities relating to:
  - Improving evacuations and access for first responders
  - Addressing vulnerable populations, including the elderly, those with disabilities, and the homeless
  - Hardening critical infrastructure and homes
  - Applying defensible space projects to create a buffer between communities and the forest
  - Building local capacity to implement and oversee the plan
  - Deploying distributed energy resources like microgrids with battery storage
  - Implementing strategic land use planning
  - Educating community members
  - Coordinating with existing wildfire plans like a Community Wildfire Protection Plan
- Provide grants of up to \$250,000 to develop a CWDP and grants of up to \$10 million to implement a CWDP
  - Grants will be prioritized for low-income communities that are in a wildfire hazard area and communities recently impacted by a major wildfire
- Study how a CWDP could be used as certification for insurance companies assessing a community resilience.
- Complete a report on all federal authorities and programs to protect communities from wildfires.
- Continuously update wildfire hazard maps.
- Assess impediments to emergency radio communications across departments and agencies.



**AMENDMENT TO**  
**RULES COMMITTEE PRINT 116-63**  
**OFFERED BY MR. SCHRADER OF OREGON**

At the end of subtitle H of title I, add the following:

1 **SEC. 1806. HOME WILDFIRE RISK REDUCTION REBATE PRO-**  
2 **GRAM.**

3 (a) IN GENERAL.—The Secretary of Energy shall es-  
4 tablish a program, to be known as the “Home Wildfire  
5 Risk Reduction Rebate Program”, to provide rebates to  
6 homeowners to defray the costs of retrofitting an existing  
7 home to be wildfire-resistant.

8 (b) AMOUNT OF REBATE.—In carrying out the Home  
9 Wildfire Risk Reduction Rebate Program, the Secretary  
10 shall provide a homeowner a rebate of up to—

11 (1) \$10,000 for the retrofitting of roof features,  
12 including the roof covering, vents, soffit and fascia,  
13 and gutters, to be wildfire-resistant;

14 (2) \$20,000 for the retrofitting of exterior wall  
15 features, including sheathing and siding, doors, and  
16 windows, to be wildfire-resistant;

17 (3) \$5,000 for the retrofitting of a deck, includ-  
18 ing the decking, framing, and fascia, to be wildfire-  
19 resistant; and

1           (4) \$1,500 for the retrofitting of near-home  
2           landscaping, including mulch and landscape fabric in  
3           a 5-foot zone immediately around the home and  
4           under all attached decks, to be wildfire-resistant.

5           (c) INCLUSION.—For purposes of this section, the  
6           cost of a retrofit shall include all costs associated with the  
7           retrofit, including the purchase and installation of wild-  
8           fire-resistant products and components.

9           (d) LIMITATION.—The amount of the rebate under  
10          this section shall not exceed 50 percent of the cost of the  
11          retrofit.

12          (e) PROCESS.—

13               (1) FORMS; REBATE PROCESSING SYSTEM.—  
14               Not later than 90 days after the date of enactment  
15               of this Act, the Secretary, in consultation with the  
16               Secretary of the Treasury, shall—

17                       (A) develop and make available rebate  
18                       forms required to receive a rebate under this  
19                       section;

20                       (B) establish a Federal rebate processing  
21                       system which shall serve as a database and in-  
22                       formation technology system that will allow  
23                       homeowners to submit required rebate forms;  
24                       and

1                   (C) establish a website that provides infor-  
2                   mation on rebates provided under this section,  
3                   including how to determine whether particular  
4                   measures qualify for a rebate under this section  
5                   and how to receive such a rebate.

6                   (2) SUBMISSION OF FORMS.—In order to re-  
7                   ceive a rebate under this section, a homeowner shall  
8                   submit the required rebate forms, and any other in-  
9                   formation the Secretary determines appropriate, to  
10                  the Federal rebate processing system established  
11                  under paragraph (1).

12                  (f) MODERATE-INCOME HOUSEHOLDS.—

13                  (1) CERTIFICATIONS.—The Secretary shall es-  
14                  tablish procedures for certifying that the household  
15                  of a homeowner is moderate-income for purposes of  
16                  this section.

17                  (2) LIMITATION FOR MODERATE INCOME  
18                  HOUSEHOLDS.—Notwithstanding subsection (d), for  
19                  households of homeowners that are certified pursu-  
20                  ant to the procedures established under paragraph  
21                  (1) as moderate-income, the amount of the rebate  
22                  under this section shall not exceed 80 percent of the  
23                  cost of the retrofit.

24                  (3) OUTREACH.—The Secretary shall establish  
25                  procedures to—

1 (A) provide information to households of  
2 homeowners that are certified pursuant to the  
3 procedures established under paragraph (1) as  
4 moderate-income regarding other programs and  
5 resources relating to assistance for upgrades of  
6 homes, including the weatherization assistance  
7 program implemented under part A of title IV  
8 of the Energy Conservation and Production Act  
9 (42 U.S.C. 6861 et seq.); and

10 (B) refer such households, as applicable, to  
11 such other programs and resources.

12 (g) DEFINITION.—In this section, the term “wildfire-  
13 resistant” means meeting or exceeding the specifications  
14 of the International Code Council’s 2018 International  
15 Wildland-Urban Interface Code (IWUIC).

16 (h) AUTHORIZATION OF APPROPRIATIONS.—There is  
17 authorized to be appropriated to carry out this section  
18 \$500,000,000 for each of fiscal years 2021 through 2025.



**Key Scientific Findings on Forests, Fire, Carbon and Climate (April 26, 2019)**

Dr. Beverly Law, Professor Global Change Biology & Terrestrial Systems Science, Oregon State University  
Dr. Mark E. Harmon, Emeritus Professor, Forest Ecosystems & Society, Oregon State University  
Dr. Tara Hudiburg, Assoc. Professor, Dept. Forest, Rangeland and Fire Sciences, University of Idaho

**Carbon in forests is carbon that is not in the atmosphere.**

- Young forests do not take up more carbon from the atmosphere annually than older forests (Luysaert et al. 2008). The first 10 to 20 years after harvest or stand-replacing disturbance, young forests are a net emission to the atmosphere (Amiro et al. 2010, Law et al. 2001).
- Forest harvest results in net carbon emissions versus leaving forests unharvested. Significant amounts of carbon are lost at each stage of timber harvest, manufacturing, and the end of useful product life (Hudiburg et al. 2011, Law et al. 2018). Whereas, forests actively withdraw carbon from the atmosphere and store and conserve it more effectively and for longer periods of time than do products derived from harvested trees (Hudiburg et al. 2009, 2013, Law & Harmon 2011, Harmon et al. 1990). Forest carbon can be increased by reducing harvest, i.e. increasing harvest cycle, forest carbon reserves (Law et al. 2018).

**Fires:**

- **Wildfire is an essential ecological process.** The dominant fire regime is mixed severity (Law & Waring 2015). Such burned landscapes have shown prolific recovery and diversity of species (Tingley et al. 2016, Fontaine et al. 2009).
- Most Oregon fires release a small fraction (~5%-10%) of the biomass carbon (Law & Waring 2015). Fire emissions are <10% of OGWC reported non-forest emissions (Law et al. 2018).
- **Broad-scale thinning of forests conflicts with carbon sequestration goals** and would result in higher emissions (Law et al. 2013, Hudiburg et al. 2011). The amount of carbon removed is often much larger than that saved, and more area is harvested than would actually burn (Mitchell et al. 2009, Rhodes et al. 2009, Law & Harmon 2011).
- **Post-fire logging** frequently damages ecosystems, particularly on steep slopes. Impacts include soil erosion and degraded river hydrology (Karr et al. 2004).

**Summary:**

- **First priority is to protect the public in the wildland-urban interface** (Radeloff et al. 2005). Studies suggest focusing on residential loss in the home ignition zone rather than treating the larger WUI, because home materials, design and maintenance in relation to surroundings were main factors in residential losses (Calkin et al. 2014).
- **To meet climate mitigation goals and conserve forest carbon and the co-benefits to forest ecosystems,** there is the potential to keep carbon in existing forests and store more carbon in forests by reducing harvest and afforestation of areas that used to be forests long ago. Forests play an important role in offsetting fossil fuel emissions.

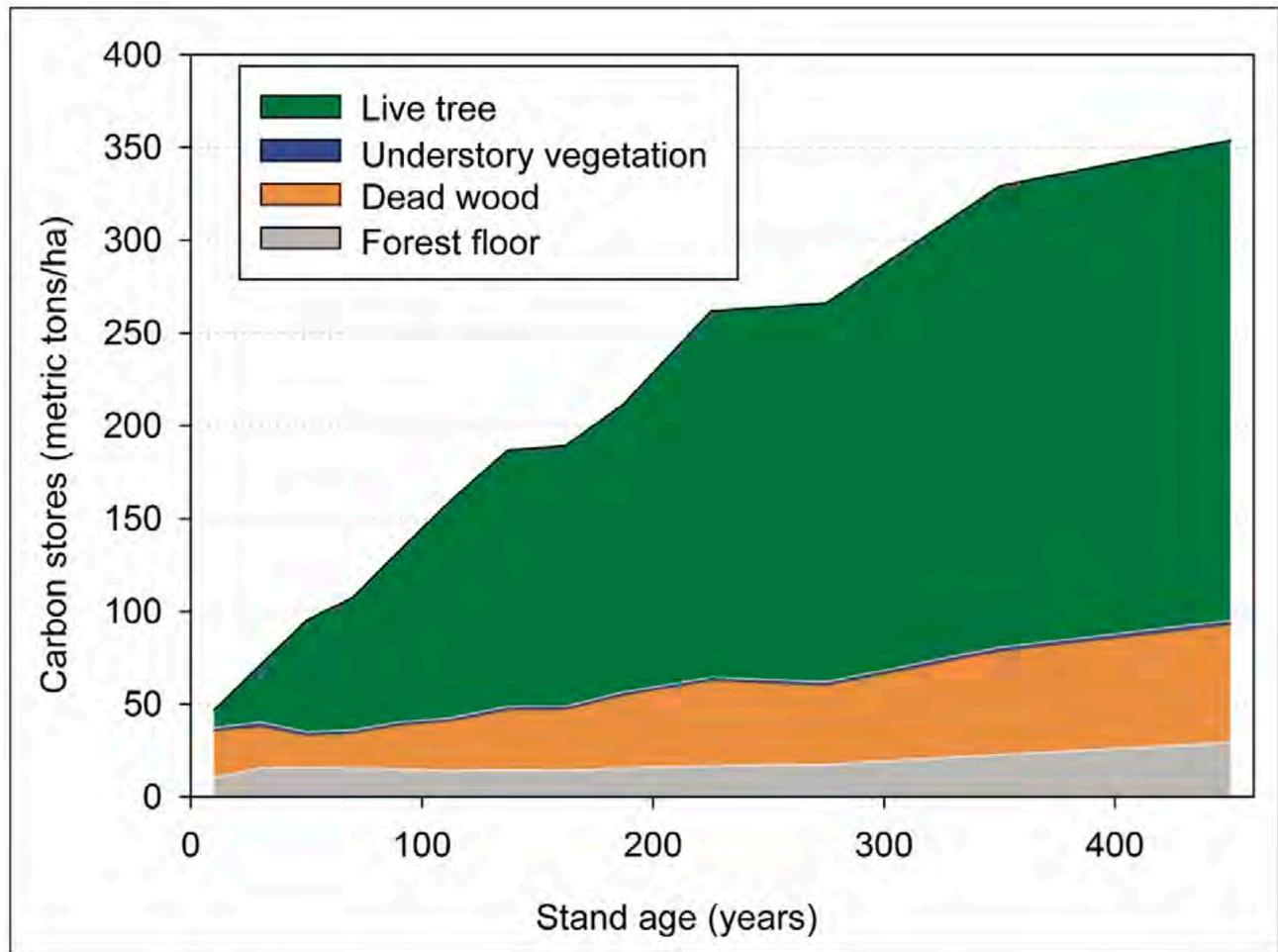
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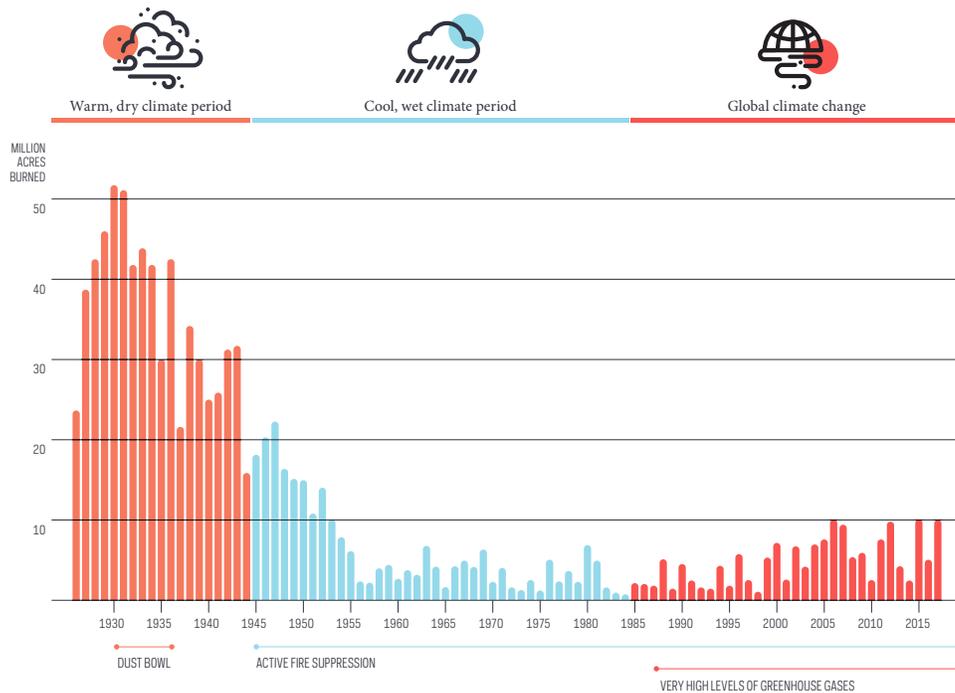
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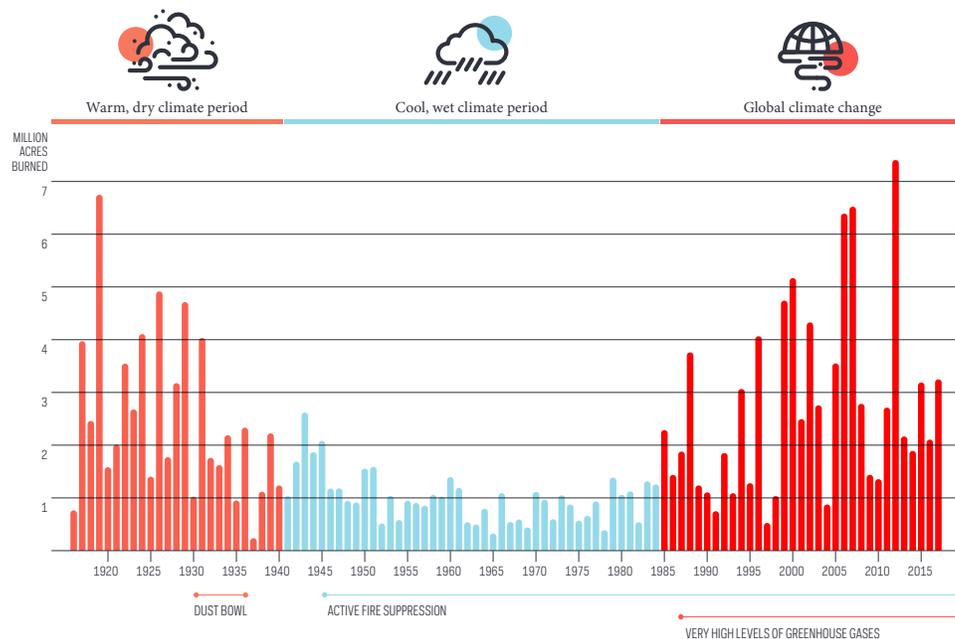
## TOTAL U.S. WILDFIRE ACRES 1926-2017

Source: National Interagency Fire Center; nifc.gov

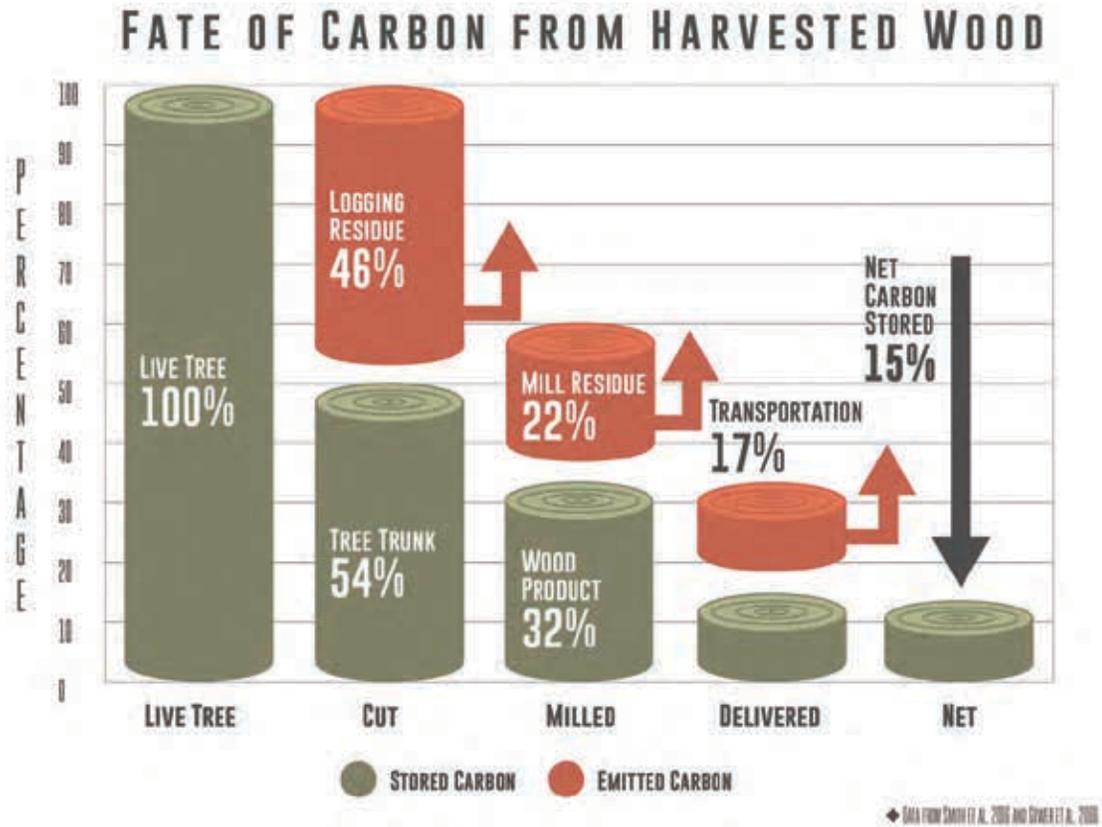


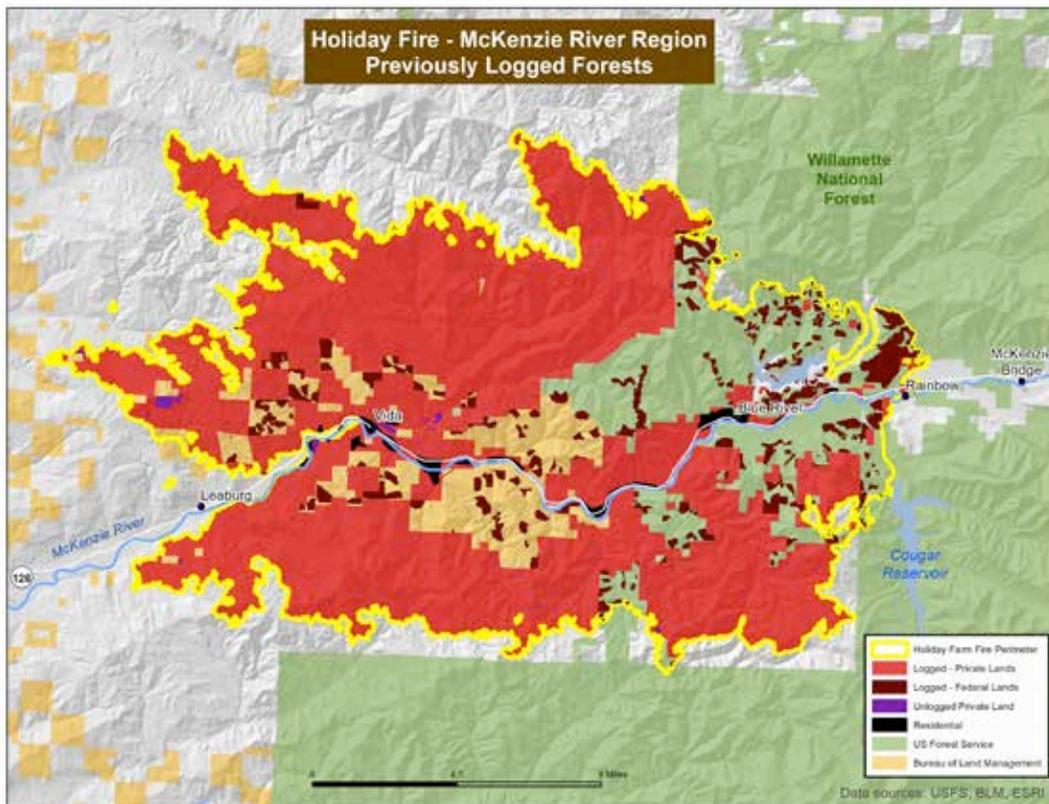
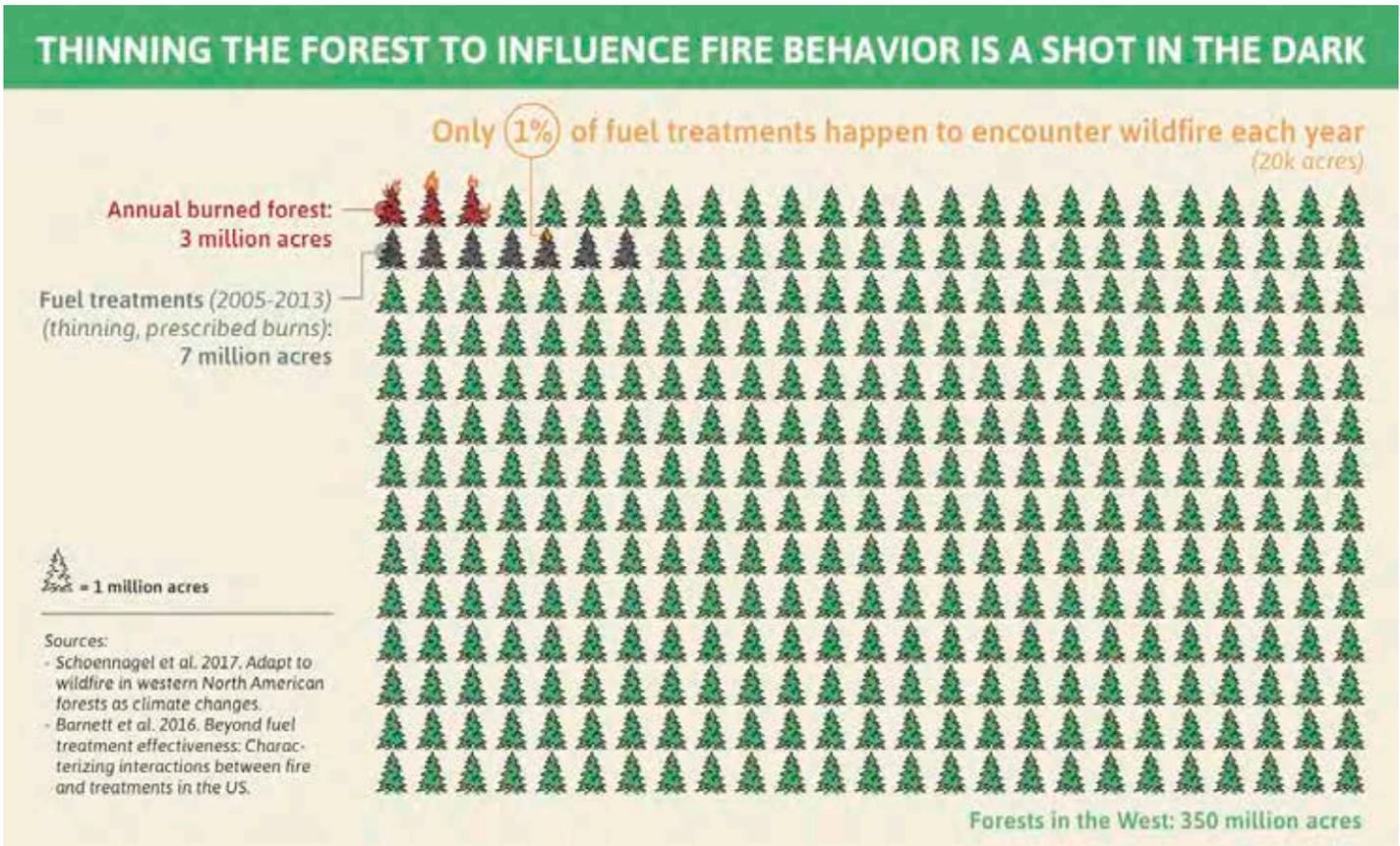
## FIRE SUPPRESSION GOT A HELPING HAND

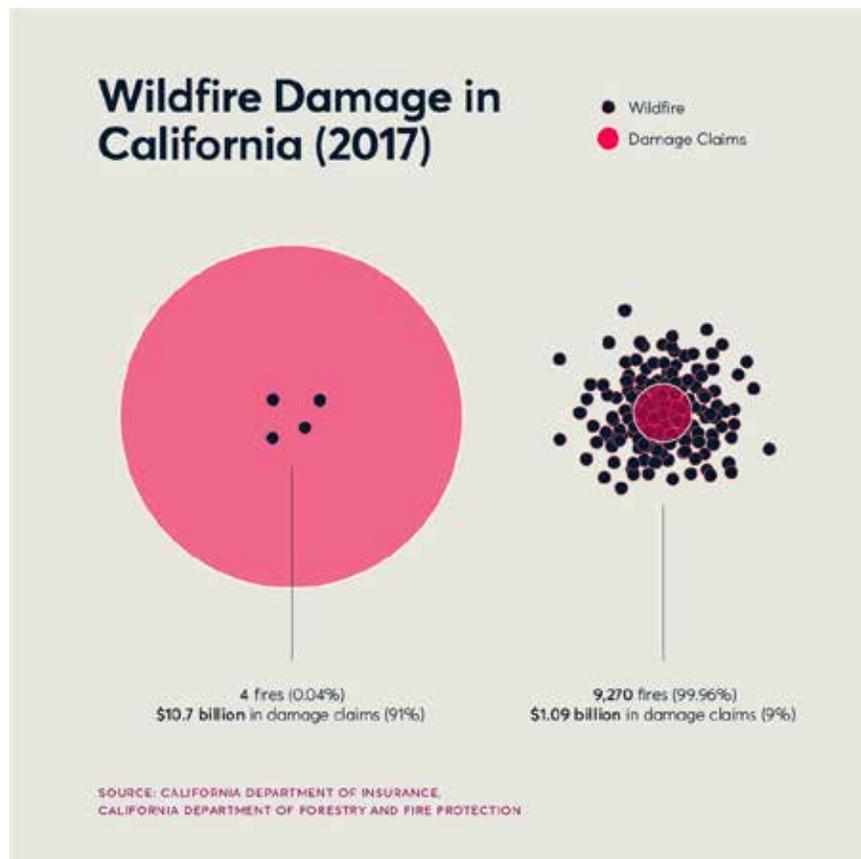
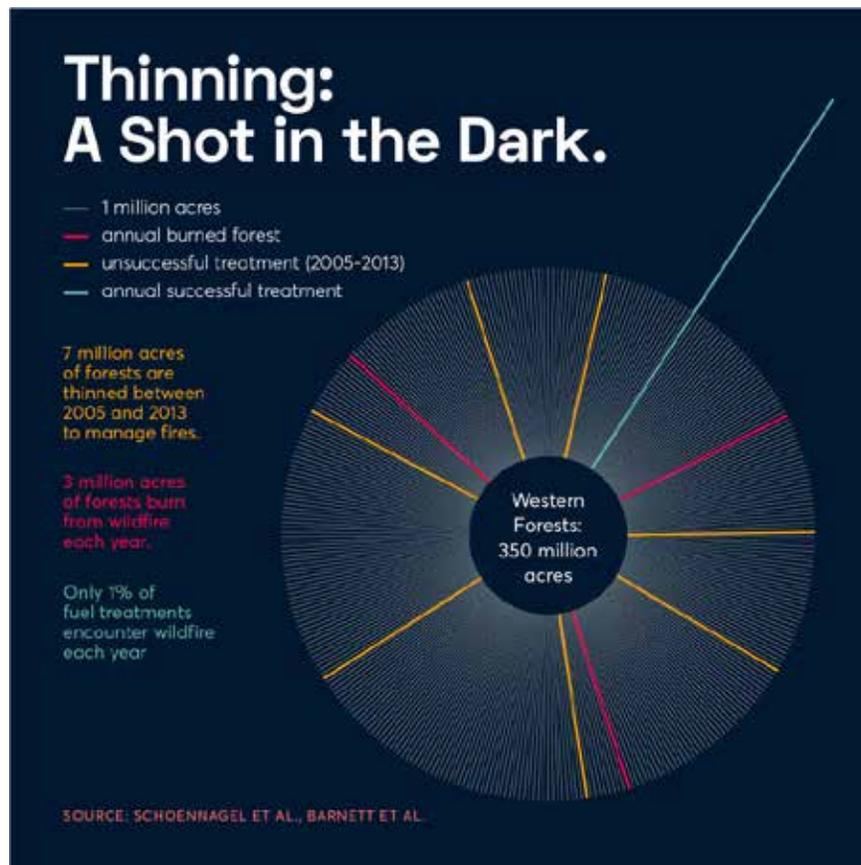
WESTERN U.S. Arizona California Colorado Idaho Montana Oregon New Mexico Nevada Utah Washington Wyoming

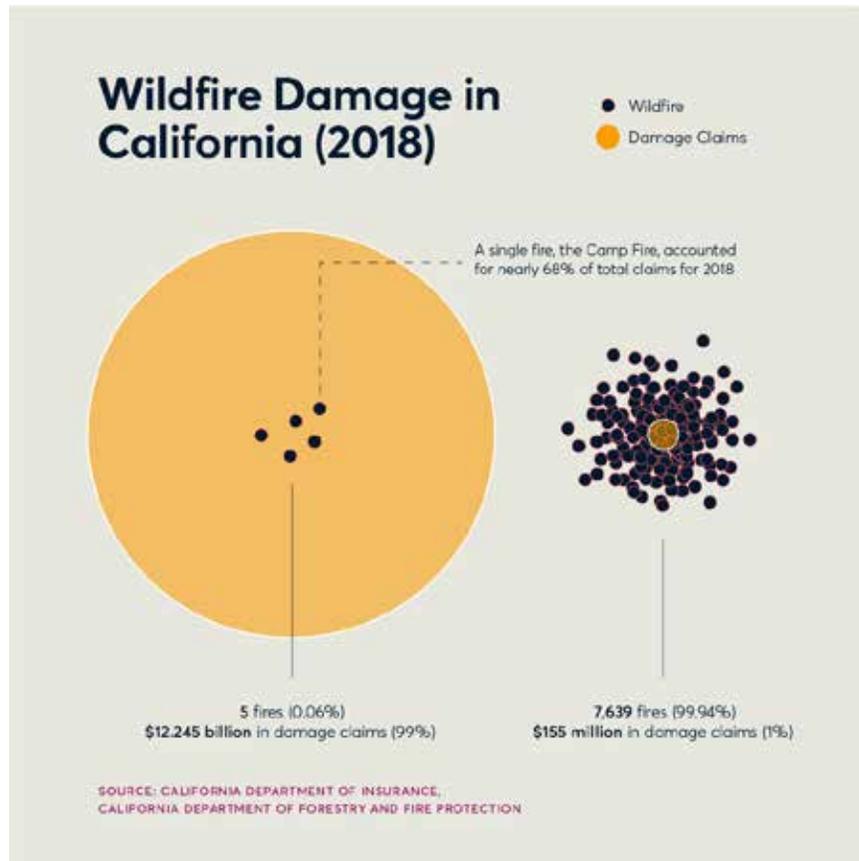


Source: National Interagency Fire Center; nifc.gov, ncdc.noaa.gov/teleconnections/pdo/; Dr. Paul Hessburg, May 2019 testimony to Oregon's Wildfire Response Council











To: Rep. Kathy Castor, Chair, House Select Committee on the Climate Crisis  
Rep. Frank Pallone, Chair, House Energy and Commerce Committee  
Rep. Raúl Grijalva, Chair, House Natural Resources Committee  
Rep. Collin Peterson, Chair, House Agriculture Committee  
Sen. Lisa Murkowski, Chair, Senate Committee on Energy and Natural Resources  
Sen. John Barrasso, Chair, Senate Committee on Environment and Public Works

From: Scientists concerned about climate and biodiversity impact of logging

Date: June 2020

Dear Members of Congress,

As forest and climate change scientists and experts, we are writing to urge you to oppose legislative proposals that would promote logging and wood consumption, ostensibly as a natural climate change solution, based on claims that these represent an effective carbon storage approach, or claims that biomass logging, and incinerating trees for energy, represents renewable, carbon-neutral energy.

We find no scientific evidence to support increased logging to store more carbon in wood products, such as dimensional lumber or cross-laminated timber (CLT) for tall buildings, as a natural climate solution. The growing consensus of scientific findings is that, to effectively mitigate the worst impacts of climate change, we must not only move beyond fossil fuel consumption but must also substantially *increase* protection of our native forests in order to absorb more CO<sub>2</sub> from the atmosphere and store more, not less, carbon in our forests (Depro et al. 2008, Harris et al. 2016, Woodwell 2016, Erb et al. 2018, IPCC 2018, Law et al. 2018, Harmon 2019, Moomaw et al. 2019).

Furthermore, the scientific evidence does not support the burning of wood in place of fossil fuels as a climate solution. Current science finds that burning trees for energy produces even more CO<sub>2</sub> than burning coal, for equal electricity produced (Sterman et al. 2018), and the considerable accumulated carbon debt from the delay in growing a replacement forest is not made up by planting trees or wood substitution (noted below). We need to increase growing forests to more rapidly close the gap between emissions and removal of CO<sub>2</sub> by forests, while we simultaneously lower emissions from our energy, industrial and agricultural sectors.

In your deliberations on this serious climate change issue, we encourage you to consider the following:

- The logging and wood products industries suggest that most of the carbon in trees that are logged and removed from forests will simply be stored in CLT and other wood products for buildings instead of being stored in forest ecosystems. However, this is clearly incorrect. Up to 40% of the harvested material does not become forest products and is burned or decomposes quickly, and a majority of manufacturing waste is burned for heat. One study found that 65% of the carbon from Oregon forests logged over the past 115 years remains in the atmosphere, and just 19% is stored in long-lived products. The remainder is in landfills (Hudiburg et al. 2019).
- Logging in U.S. forests emits 617 million tons of CO<sub>2</sub> annually (Harris et al. 2016). Further, logging involves transportation of trucks and machinery across long distances between the forest and the mill. For every ton of carbon emitted from logging, an additional 17.2% (106 million tons of CO<sub>2</sub>) is emitted from fossil fuel consumption to support transportation, extraction, and processing of wood (Ingerson 2007). In fact, the annual CO<sub>2</sub> emissions from logging in U.S. forests are comparable to yearly U.S. emissions from the residential and commercial sectors



combined.<sup>1</sup> The cumulative climate change impact of logging in the U.S. is even higher, since logging causes substantial reductions in carbon sequestration and storage potential in forests due to soil compaction and nutrient removal, and these combined impacts can often reduce forest carbon storage potential by 30% or more (e.g., Elliott et al. 1996, Walmsley et al. 2009).

- The wood products industry claims that substituting wood for concrete and steel reduces the overall carbon footprint of buildings. However, this claim has been refuted by more recent analyses that reveal forest industries have been using unrealistic and erroneous assumptions in their models, overestimating the long-term mitigation benefits of substitution by 2 to 100-fold (Law et al. 2018, Harmon 2019). The climate impact of wood is even worse if the reduced forest carbon sequestration and storage caused by nutrient loss and soil compaction from logging is included, as discussed above.

In countless public communications, and at numerous Congressional hearings, industry representatives have advocated for increased logging in the context of reducing wildland fire and related emissions. While small-tree thinning can reduce fire intensity when coupled with burning of slash debris (e.g., Perry et al. 2004, Strom and Fulé 2007) under very limited conditions, recent evidence shows intensive forest management characterized by young trees and homogenized fuels burn at higher severity (Zald & Dunn 2018). Further, the extremely low probability (less than 1%, Schoennagel et al. 2017) of thinned sites encountering a fire where thinning has occurred limits the effectiveness of such activities to forested areas near homes. Troublingly, to make thinning operations economically attractive to logging companies, commercial logging of larger, more fire-resistant trees often occurs across large areas.

Importantly, mechanical thinning results in a substantial net loss of forest carbon storage, and a net increase in carbon emissions that can substantially exceed those of wildfire emissions (Hudiburg et al. 2013, Campbell et al. 2012). Reduced forest protections and increased logging tend to make wildland fires burn *more* intensely (Bradley et al. 2016). This can also occur with commercial thinning, where mature trees are removed (Cruz et al. 2008, Cruz et al. 2014). As an example, logging in U.S. forests emits 10 times more carbon than fire and native insects combined (Harris et al. 2016). And, unlike logging, fire cycles nutrients and helps increase new forest growth.

We are hopeful that a new and more scientifically sound direction will be considered by Members that emphasizes increased forest protections, and a shift away from consumption of wood products and forest biomass energy, to help mitigate the climate crisis. We believe having a dialogue now would be productive, and we could help members of your Committees to be more effective in achieving the conservation and climate change goals that we share. We look forward to hearing from you and are available to provide additional scientific sources and serve as a resource for your Committees as you consider policy proposals on the climate crisis.

Sincerely,

***Lead Signatories***

*\* Affiliations listed for identification purposes only*

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<sup>1</sup> <https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks>

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## Chapter 4B

# Amendments to the Eastside Screens Governing Federal Forest Management

**SARA GHAFOURI**  
American Forest Resource Council  
Portland, Oregon

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June 8, 2020

Shane Jeffries, Forest Supervisor  
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**In Reply To:** Eastside Screens Plan Amendment

Dear Mr. Jeffries:

American Forest Resource Council (AFRC) is a regional trade association whose purpose is to advocate for sustained yield timber harvests on public timberlands throughout the West to enhance forest health and resistance to fire, insects, and disease. We do this by promoting active management to attain productive public forests, protect adjoining private forests, and assure community stability. We work to improve federal and state laws, regulations, policies and decisions regarding access to and management of public forest lands and protection of all forest lands. AFRC represents over 50 forest product businesses and forest landowners throughout the West. Many of our members have their operations in communities adjacent to the six eastern Oregon/ southeast Washington National Forests that this amendment will impact, and the management on these lands ultimately dictates not only the viability of their businesses, but also the economic health of the communities themselves. Oregon's forest sector employs approximately 61,000 Oregonians, with AFRC's membership constituting a large percentage of those jobs. Rural communities, such as the ones affected by this project, are particularly sensitive to the forest products sector in that more than 50% of all manufacturing jobs are in wood manufacturing. Timber provided by these Forests supports jobs not only in Oregon but also in Idaho and Washington.

AFRC is pleased that the Forest Service is proposing to amend the 21" dbh limit (21" rule) from the Eastside Screens. We are encouraged that the Forest Service recognizes the flaws of attempting to manage complex forest ecosystems under the constraints of a firm one-size-fits-all limitation. Those flaws are evident after a quarter-century of management that has yielded results that fall short of the very forest conditions that the rule was intended to create. Rather than accelerate the trajectory of forests toward a late-seral structure, this rule has instead created forest conditions that are unnaturally dense and exacerbate risk to wildfire, insect and disease infestations, and drought. This creates ripple effects to adjacent forests all of which retard the

ability of the forests in eastern Oregon to provide for the predictable and sustainable timber supplies that our members and the communities they help support depend on.

As early as 2003, the Forest Service recognized that the Eastside Screens presented management challenges, including those resulting from the 21" rule. A letter dated June 11, 2003 from then-Regional Forester Linda Goodman noted that ***“screens direction, including the 21-inch diameter limitation, is limiting the ability to meet the screens objectives of providing LOS stands.”*** The letter went on to outline several reasons why the Eastside Screens presented a barrier to attaining desired end results and suggested that more flexibility was needed. One excerpt from the letter is particularly appropriate at this time--***“Previous interpretations that site specific Forest Plan amendments were not allowed in rare cases (Regional Forester’s letters on screens, October 2 and December 23, 1993), coupled with a nine-year body of practical experience, suggests a need for more flexibility in implementation of screens direction. Some flexibility in implementing 21” diameter limitations, harvest under Scenario A, and connectivity corridors is appropriate.”***

In addition to the detriments to the ecological qualities in eastern Oregon, the Eastside Screens had significant impacts to the socioeconomic well-being of local communities that depend on the proper management of the National Forests in the region. Following the adoption of the Eastside Screens and the 21” rule, the forest products industry went through immediate downsizing and the economic impacts to rural communities and counties are still being felt today. An amendment to the flawed 21" rule is necessary not only to address ecological needs but also because its rigid application has resulted in tragic consequences to the industry and local communities, who had no time to adjust to the quick implementation of the Eastside Screens, while providing marginal benefits to wildlife and other resources and impeding the practice of sound forestry. We urge the Forest Service to recognize and highlight the potential socioeconomic benefits that could result from amending this rule.

The Forest Service and other land managers are moving toward treating forests on a landscape scale, which is very appropriate from an ecological perspective. It is important to recognize that forests and vegetation at this scale are multidimensional across space and time, and characterized by horizontal, vertical, and temporal components. Although treatments are being applied at the landscape level, the amount of resources available to trees is very site specific and carrying capacity is defined at the ground level. One-size-fits-all templates such as the 21" rule and, although not specifically at issue here, leaving all trees 150 years and greater, eventually become self-defeating. Please refer to the attached statement prepared by Stephen A. Fitzgerald, Professor of Silviculture, Oregon State University, for the United States Senate in 2010. Professor Fitzgerald articulates the potential ramifications of the 21" rule which are now manifesting themselves in the nation’s forests. In this testimony, Professor Fitzgerald stated that ***“Permanent, fixed diameter limits are not based on ecology and forest science but rather political science. These artificial limits remain static while forests, and larger ecosystems, are invariably dynamic: that is, they grow, compete for resources, and are continually affected by disturbance.”***

AFRC and its members actively participated in the public workshops facilitated by the Forest Service in early May. Those workshops were designed to allow the public to share their

perspectives on the proposed amendment. Although AFRC attended each workshop, our ability to effectively share our perspectives and provide substantive feedback to the Forest Service was limited due to the virtual nature of the workshops and the high attendance by interested stakeholders. Therefore, this letter is meant to supplement what limited feedback we were able to convey during the workshops and allow us to expand on our thoughts from a scientific, social, and technical perspective. We also would like the Forest Service to consider our ideas for realistic and implementable alternatives to the current wildlife standard that we believe will enable the Forests to more effectively attain the desired outcomes described in that standard. Alternatives that we describe in this letter are designed to create a more effective guideline that can be adapted to the multitude of unique forest ecosystems in eastern Oregon. What we will propose is meant to align with the current standard direction to **“maintain and/or enhance Late Old Structure (LOS) components in stands subject to timber harvest as much as possible.”** The current guideline of a diameter limit (21" rule) was simply the vehicle that the Forest Service believed to be the best instrument to attain the “LOS components” described above. **There is a diverse array of forest cohorts, ecosystems, and seral stages across eastern Oregon. This undermines the utility and effectiveness of a firm one-size-fits-all restriction as a means to a desired end. Instead, a one-size fits-all approach is flawed and counterproductive.** We applaud the Forest Service’s approach to remedy this flawed standard and we hope to both support what you develop as an alternative and to assist by providing our own alternatives.

It is important to note how the Eastside Screens define LOS. The ecosystem standard states that “LOS, a term used in the interim wildlife standard, refers to the structural stages where large trees are common, i.e. Multi-stratum with Large Trees, and Single-stratum with Large Trees.” Those two stages are described in a table that includes the “components” to each stage. Since the existing 21" rule is simply meant as a vehicle to “maintain” those components, it is important to note how they are described. That table includes the following forest conditions for both stages that the standard should be designed to maintain or develop:

- Two or more cohorts of trees
- Medium and large sized trees dominate the overstory
- Trees of all sizes may be present
- Horizontal and vertical stand structure and tree sizes are diverse
- The single dominant canopy stratum consists of medium sized or large trees

Our assumption is that the existing 21" rule was meant to “maintain and/or enhance” the “large tree” component described in the Table. We also assume, since the cohort in question is described as both “late” and “old”, that tree size is being used as a surrogate for tree age. Further, while the “minimum” standards for LOS are described, there is no provision for addressing the scenario when stands reach a “maximum” or condition where intervention is needed to prevent the loss of desired structure.

The term “large tree” is a relative term. What constitutes a “large tree” is dependent on what type of forest stand is in question. A forest ecologist would apply a different standard to determine what is “large” to an eastern deciduous forest in New Hampshire than they would to a

giant sequoia forest in California. The New Hampshire forest may contain “large” oak trees that are 18" dbh while the California forest may contain “large” sequoia trees that are 300" dbh. Developing a single metric for what constitutes large for those two forests is impractical. The same applies, although to a lesser degree of extremes, to the forests of eastern Oregon. How can a single standard be developed to determine what is a large tree in both dry ponderosa pine forests on the Deschutes National Forest and moist mixed-conifer forests on the Umatilla National Forest? How can a single standard be developed to determine what is a large and/or old tree in a single forest with multiple overstory species? We believe that such a standard to replace the current DBH limit cannot and should not be created. Instead, we believe that an effective replacement needs to be descriptive rather than prescriptive and malleable enough to allow professional foresters the ability to adapt it to a broad spectrum of forest conditions.

We also believe that the Forest Service should consider a wide range of alternatives that provides the decision-maker with an appropriate spectrum from which to choose. To be clear, the options we outline below are simply alternatives to the 21" dbh limit described in the Wildlife Standard, Scenario A, 2a. **The direction to design treatments to *develop LOS* in 2b of this Scenario are assumed to remain in place.**

## **ALTERNATIVES TO CONSIDER**

### **Option 1:**

Replace “maintain all remnant late and old seral and/or structural live trees > 21" dbh that currently exist within stands proposed for harvest activities” with:

**“Determine, based on tree characteristics, those trees in each stand that represent a “remnant” cohort, and exclude them from harvest. Identification of remnant trees may be based on any of a variety of methods, such as evaluation of bark, limb, trunk, or crown characteristics, or increment coring, at the discretion of the Forest Service.”**

Since the underlying objective of the Eastside Screens is to maintain and develop late old structure, using the language above would better equip the Forest Service to focus on older/legacy trees rather than only large trees. Similar language was recently adopted by the Bureau of Land Management to protect remnant trees of all species across a wide range of ecosystems. BLM Northwest/Central Oregon ROD and RMP, at p. 59-69 (2016).

### **Option 2:**

Replace “maintain all remnant late and old seral and/or structural live trees > 21” dbh that currently exist within stands proposed for harvest activities” with:

**“Maintain all remnant late and old seral and/or structural live trees that a Forest Service silviculturist and/or wildlife biologist determines to be integral to meeting the desired LOS conditions outlined in Table 1.”**

This type of descriptive language would permit Forest Service professionals the flexibility to determine which trees are integral to the condition that they are managing toward. It still makes reference to “remnant” trees but allows the professionals to determine what those are and which should be retained.

### **Option 3:**

Mimic the standard language that was recently adopted into the Colville Forest Plan that maintains a diameter limit but provides flexible and adaptable exemptions:

*Large Tree Management activities should retain and generally emphasize recruitment of individual large trees (larger than 20 inches diameter at breast height) across the landscape. Exceptions where individual large trees may be removed or destroyed include the following:*

- *Trees need to be removed for public health or safety (such as, but not limited to, danger/hazard trees along roads or in developed or administrative sites)*
- *Trees need to be removed to facilitate management of emergency situations such as wildfire response.*

*The following exemptions apply only to situations where removal of smaller trees alone cannot achieve the stated desired conditions:*

- *Trees need to be removed to meet, promote, or maintain desired conditions for structural stages (see FW-DC-VEG-03. Forest Structure).*
- *Trees need to be removed to control or limit the spread of insect infestation or disease.*
- *Trees need to be removed where strategically critical to reinforce, facilitate, or improve effectiveness of fuel reduction in wildland-urban interfaces.*
- *Trees need to be removed to promote special plant habitats (such as, but not limited to, aspen, cottonwood, whitebark pine).*

### **Option 4:**

Remove the Wildlife Standard, Scenario A, 2a and rely on the direction to design treatments to *develop LOS* in 2b of this Scenario to meet desired end results.

We understand that some may desire the Forest Service to *replace* the 21" rule with a new set of limitations, rather than remove the rule. However, we think the Forest Service should consider this option for several reasons:

1. To provide the decisionmaker with a full range of alternatives (we assume that there will be a “no action” alternative; that alternative should be balanced with one that considers a straightforward removal).
2. The existing language in 2b can be viewed as a viable “replacement” despite its existing inclusion.
3. More professional discretion will lead to more efficient planning and projects would be less likely to be subject to litigation over compliance with the amended language.

### **STATUTORY AND REGULATORY CONSIDERATIONS**

The amendment to the Eastside Screens should not be considered “significant” under NFMA, NEPA, or the 2012 planning rule. The 2012 Planning Rule applies since this amendment is initiated after 2015. 36 C.F.R. § 219.17(b)(2). Forest Plans may generally be amended “in any manner whatsoever after final adoption after public notice.” NFMA § 6(f)(4), 16 U.S.C. § 1604(f)(4). However, amendments that would “result in a significant change in such plan” are subject to additional procedural requirements. *Id.* Determining significance under NFMA is within the discretion of the responsible Forest Service official. *Umpqua Watersheds v. U.S. Forest Serv.*, 725 F.Supp.2d 1232, 1244 (D. Or. 2010); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 900 (9th Cir. 2002). An amendment is only significant if it justifies “requiring, in essence, the Forest Service ‘to conduct the same complex planning process applicable to promulgation of the original plan.’” *Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1032 (10th Cir. 2002) (quoting *Sierra Club v. Cargill*, 11 F.3d 1545, 1551 (10th Cir.1993) (Seymour, J., dissenting)).

Although the Forest Service Handbook has since been amended, former Handbook 1909.12, ch. 5.31 directed the responsible official to consider “timing; location and size; goals, objectives, and outputs; and ‘management prescription’ (defined as whether the change applies only to a specific situation or will affect future decisions as well).” *Lands Council v. Martin*, 529 F.3d 1219, 1227 (9th Cir. 2008). The Planning Rule only indicates that an amendment that is significant under NEPA is also significant under NFMA: “Except for an amendment that applies only to one project or activity, a proposed amendment that may create a significant environmental effect and thus requires preparation of an environmental impact statement is considered a significant change in the plan for the purposes of the NFMA.” 36 C.F.R. § 219.13(b)(3). The 1982 Planning Rule “expressly commend[ed] the determination of the significance of an amendment to the Forest Supervisor’s judgment.” *Sierra Club v. Cargill*, 11 F.3d 1545, 1548 (10th Cir. 1993). Since the 2012 Planning Rule and Handbook have been amended to delete most guidance on NFMA significance, the Supervisor’s discretion has only increased.

The Ninth Circuit has upheld a NFMA non-significance determination which “does not alter multiple-use goals or objectives for long-term land and resource management, nor significantly change the planned annual outputs for the forest.” *Dombeck*, 304 F.3d 886, 900 (9th Cir. 2002). Amending or eliminating the 21” rule would not alter multiple-use goals or objectives but is necessary to achieve those objectives. The 21” rule is only a portion of one

subset, the wildlife standard, of the overall Eastside Screens, so it pales in significance to the original decisions to implement the Eastside Screens. With the amendment of a plan late in the planning period, as here, the timing factor weighs heavily against significance. *Wyoming Sawmills Inc. v. U.S. Forest Serv.*, 383 F.3d 1241, 1251 (10th Cir. 2004).

When the Eastside Screens were first implemented, the U.S. District Court agreed that decision was not a significant Forest Plan amendment. *Prairie Wood Prod. v. Glickman*, 971 F.Supp. 457, 463 (D. Or. 1997).<sup>1</sup> This finding was based in part on the labeling of the Eastside Screens as an “interim” measure. *See id.* at 461, 464–65. The government expected to release a draft EIS in June 1997, and a final EIS in 1998, for the Interior Columbia Basin Ecosystem Management Project. *Id.* at 461; 62 Fed. Reg. 2176 (Jan. 1997). The DEIS was released on time. 62 Fed. Reg. 32,076 (June 12, 1997). The FEIS, however, was not issued until late 2000. 65 Fed. Reg. 79,069 (Dec. 18, 2000). The planning process concluded with the 2003 Memorandum of Understanding to cooperatively implement the “The Interior Columbia Basin Strategy” which continued the Eastside Screens.<sup>2</sup> If imposition of the Eastside Screens as an “interim” measure was not significant, then returning to a small part of the previous *status quo* can’t be significant either.

The Forest Service should not be deterred by the 2014 Snow Basin decision. In that case, the court rejected a site-specific Forest Plan amendment because it found the project did not present unique aspects or characteristics. The court agreed with the plaintiffs’ argument that “the decision to use a site-specific amendment to address a forest-wide problem is not rational.” *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, No. 3:12-CV-02271-HZ, 2014 WL 6977611, at \*28 (D. Or. Dec. 9, 2014). Here, by contrast, the agency is aiming to address forest-wide problems with a forest-wide amendment, so it will not fall afoul of Snow Basin.

Amendment or elimination of the Eastside Screens would not be significant under NEPA either. “An EIS is not necessary where a proposed federal action would not change the status quo,” because long-range aims are “quite different from concrete plans,” and “NEPA does not require an agency to consider the environmental effects that speculative or hypothetical projects might have on a proposed project.” *Ctr. for Biological Diversity v. Ilano*, 928 F.3d 774, 780 (9th Cir. 2019) (*Northcoast Env'tl. Ctr. v. Glickman*, 136 F.3d 660, 668 (9th Cir. 1998)). *See* 36 C.F.R. § 220.4(a), 40 C.F.R. § 1508.27 (significance factors). This is particularly true of long-range plans that will be subject to future site-specific analysis and can tier to the ICBEMP FEIS. “When a programmatic EIS has already been prepared, ... site-specific impacts need not be fully evaluated until a ‘critical decision’ has been made to act on site development.” *State of Cal. v. Block*, 690 F.2d 753, 761 (9th Cir. 1982); *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1049 (9th Cir. 2013) (upholding BLM plan to fully evaluate site-specific impacts of future actions).

Based on some of the statements during the public workshops, we expect that some members of the public will claim that any change to the Eastside Screens is “highly uncertain” or

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<sup>1</sup> One of AFRC’s predecessor organizations was a plaintiff in this case, as were a number of member companies, some of which have since gone out of business.

<sup>2</sup> *Interagency Memorandum of Understanding*, Feb. 15, 2003, FS Agreement No. 03-RMU-11046000-007 <https://www.fs.fed.us/r6/icbemp/html/mou.pdf>.

“highly controversial,” such that an EIS would be required. 40 C.F.R. §§ 1508.27(b)(4), (b)(5). Ideological opposition to forest management, or an ideological position that “[e]very large tree now matters because most are gone,” does not create high levels of uncertainty or controversy. *See* Science Panel, May 11, 2020, Presentation Slides, at p. 51 ([https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd738444.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd738444.pdf)). Certain stakeholders’ mistrust of the Forest Service doesn’t create highly uncertain or controversial circumstances either. *See id.*, p. 52 (“FOREST SERVICE HISTORY OF WANTING ‘FLEXIBILITY’ & DISCRETION HAS BEEN ABUSED”).

“A project is ‘highly controversial’ if there is a substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use.” *WildEarth Guardians v. Provencio*, 923 F.3d 655, 673 (9th Cir. 2019) (cleaned up). And a substantial dispute requires that “evidence, raised prior to the preparation of an EIS or FONSI casts serious doubt upon the reasonableness of an agency’s conclusions.” *Id.* NEPA does not “anticipate the need for an EIS anytime there is some uncertainty, but only if the effects of the project are ‘highly’ uncertain.” *Env’tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1011 (9th Cir. 2006). These factors will generally not be triggered when actions do not concern “forest management techniques are new, unique to the region, or experimental such that the results are unpredictable.” *Conservation Cong. v. United States Forest Serv.*, 235 F.Supp.3d 1189, 1204 (E.D. Cal. 2017), *aff’d*, 775 F. App’x 298 (9th Cir. 2019).

## **SCIENTIFIC REVIEW**

The genesis of the 21" rule was not a function of an exhaustive scientific synthesis and review. Regardless, we understand that any modified version of the existing 21" dbh limitation must be supported by current science. Therefore, we would like to ensure the Forest Service consider the full spectrum of science that is applicable to the underlying objectives of the Eastside Screens. Please review and consider the following pieces of literature in your ensuing analysis and incorporate them into your decision-making process.

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*Johnston, J. D., C. J. Dunn, M. J. Vernon, J. D. Bailey, B. A. Morrissette, and K. E. Morici. 2018. Restoring historical forest conditions in a diverse inland Pacific Northwest landscape. Ecosphere 9(8):e02400. 10.1002/ecs2.2400*

## **Findings**

- Research indicates a 60.2% increase in density in ponderosa pine dominated stands and a 176% increase in density in grand fir stands over the past 140 years. These findings suggest that if restoration of historical conditions is a goal of managers, then treatments in moister mixed conifer stands should be a priority.
- The results of this study indicate that restoring historical conditions will require removal of a significant portion of contemporary stand basal area, especially in moister and more productive stands.

- Retaining all trees >53 cm (21") dbh may handicap restoration of historical forest conditions for two reasons: First, many stands, particularly moister and more productive stands, currently have more trees >53 cm (21") dbh than were historically present. Second, many trees >53 cm (21") in contemporary stands are a different species than was present historically and retaining these trees will exacerbate compositional shifts from shade-intolerant to shade-tolerant species.
- Achieving compositional targets (i.e., restoring stands to the historical proportion of different species) is likely to be more important to achieving resiliency objectives than structural targets (i.e., restoring stands to historical basal area or density).
- Reducing forest density to historical levels while maintaining a higher proportion of shade-tolerant species than was historically present will likely result in higher stand water use, greater drought stress, and increased risk of mortality from fire and insect disturbance than desired

### **Assessment**

We believe that the findings in this paper support the notion that a firm one-size-fits-all guideline to attaining desired end results across a broad spectrum of forest types is flawed. It also supports the notion that such a guideline will likely undermine the diverse mix of species present across these forest types. Further, it may be necessary to remove a substantial portion of stand basal area to achieve long-term restoration objectives in stands where shade tolerant tree species, including individual trees with diameters >21", dominate the stand.

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*Merschel, Andrew, Vora, Robin S., and Spies, Tom. 2019. Conserving Dry Old Growth Forest in Central Oregon USA. Journal of Forestry. 117(2):128–135*

### **Findings**

- Results suggest there is approximately a one in five chance of allowing harvest of a tree older than 125 years using the 21" rule as a guide. However, the rule limits harvest of large young shade-tolerant trees that have developed following fire exclusion. For large trees, 62 percent of grand fir and 50 percent of Douglas-fir were less than 125 years old. In contrast, only seven percent of large ponderosa pine were less than 125 years old.
- Overall, the 21" rule protects large old-growth ponderosa pine, but fails to protect smaller old-growth individuals of all species, and does not allow for removal of large younger shade-tolerant grand fir and Douglas-fir that have developed following fire exclusion.
- New guidelines could incorporate how age structure varies with environment and development history and include morphological indicators of tree age that can easily be applied by managers and technicians.

### **Assessment**

This document further supports the notion that tree dbh is often a poor surrogate for determining tree age, especially across the strong productivity gradients that exist in eastside

forests. In particular, it highlights the flawed nature of the 21" dbh limitation on the effectiveness of protecting old grand fir and Douglas-fir. Likelihood of success in achieving the stated goal of protecting *older* large trees increases if they are released from the competition brought by shade tolerant conifers that were promoted through fire suppression.

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*Stine et al. 2014. The Ecology and Management of Moist Mixed-Conifer Forests in Eastern Oregon and Washington: a Synthesis of the Relevant Biophysical Science and Implications for Future Land Management. USDA General Technical Report PNW-GTR-897.*

### **Findings**

- Strict age or size limits on tree harvest that are not sensitive to site conditions, disturbance history, and topo-edaphic settings can hinder some restoration efforts and may reduce resiliency. Rules of thumb provide helpful guidelines but departures from these may be allowed with well-reasoned explanations.
- Tree diameter was used (in the Eastside Screens) as a rapid and conservative but crude surrogate for old growth to limit removal of larger and older trees—because analyses had not been completed to characterize old forests and old trees—across the variety of forest types and productivities.
- Restoration guided by size alone will not remove all of the individuals of species and ages of trees that are products of the altered disturbance regimes of these forests.
- The limits on removing any tree larger than about 53 cm (21") whatsoever, regardless of geographic context, or age, or species, or relative abundance, or other considerations (e.g., forest health) within a patch can inhibit regeneration in some stands, lack any real landscape objectives, and impede landscape-level management and restoration.

### **Assessment**

This report addresses the utility of adopting the option we outlined above from the Colville Forest Plan in its flexibility on providing for “departures” from “rules of thumb.” It also reemphasizes the same points made in the prior two papers cited regarding the flawed nature of abiding by a one-size-fits-all limitation.

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*Hessburg et al. 2020. The 1994 Eastside Screens—Large Tree Harvest Limit: Synthesis of Science Relevant to Forest Planning 25 years Later.*

### **Findings**

- A lower-end size limit of 21 inches was negotiated with the plaintiffs included in the NRDC petition.

- Recent research has shown, however, that old trees are not always large, and large trees are not always old (Van Pelt 2008, Brown et al. 2019).
- Combining age- and size-based metrics to retain adequate densities of large trees along with old trees featuring desirable traits could allow younger large trees to be managed more flexibly.
- The 21" rule does not provide protection for older, but smaller trees that may play an important ecological role. Neither does it allow for removal of young but large shade-tolerant trees that are maladapted to the existing fire regime.
- Tree diameter alone is an insufficient guide for restoration.
- Focusing on a single scale (the tree) does not address stand and landscape scale considerations.
- Simplistic rules and standards will, over time, generate unintended consequences, making it more rather than less difficult to manage for resilience to climate change and other threats, and to provide for multiple ecosystem services.

### **Assessment**

This synthesis further supports the flawed nature of relying solely on tree diameter as a surrogate for age.

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*Skog, K.E.; McKeever, D.B.; Ince, P.J.; Howard, J.L.; Spelter, H.N.; Schuler, A.T. 2012. **Status and trends for the U.S. forest products sector: a technical document supporting the Forest Service 2010 RPA assessment.** Gen. Tech. Rep. FPL-GTR-207. Madison, WI: U.S. Department of Agriculture, Forest Service, Forest Products Laboratory. 35 p.*

### **Findings**

- Consumption of wood products in the United States has risen in recent decades. U.S. lumber production is projected to increase through 2040.
- The forest products sector helps sustain the social, economic, and ecological benefits of forestry in the United States.

### **Assessment**

We understand that the Forest Service is dedicated to making this Plan Amendment “socially durable.” In order to properly gauge whether your proposal is socially durable you must consider the full spectrum of social values that the public receives from these forests.

One of the panels on the Science Workshop hosted by the Forest Service included scientists who provided a review of science relevant to “social values” of eastside forests. Following that presentation, AFRC asked the scientists why their assessment of “social values” to eastern forests did not include the public need for wood products manufactured from timber

resources harvested from public forests. Their response was that their assessment was limited to the science they had available. Therefore, we assume that those scientists did not have access to the technical report cited above from the Department of Agriculture. This report clearly indicates a growing need for wood products by the American public.

We would like the Forest Service to include this need as a “social value” by the public in your analysis of the Eastside Screens Plan Amendment. If the social values in your assessment are limited to, as the workshop scientists outlined, “economics” you will have oversimplified the value that the American public ascertains from National Forests.

### **CLOSING REMARKS**

We appreciate the efforts that the Forest Service is making to include the public in the development of this plan amendment. We understand that some level of social acceptance is critical to the viability of the amendment. During the Science Workshop, one scientist was asked how they would advise the Forest Service to gauge social acceptance. Part of their response noted that whatever is proposed will not likely be “socially acceptable for everyone.” As active participants in those workshops, we believe that the feedback provided by public participants did not reflect an accurate representation of the interested public. This was perhaps partially due to the virtual nature of the workshops. We hope that the Forest Service receives feedback from a broader range of interested stakeholders over the ensuing months and that feedback is properly weighed in your decision-making process.

We hope to stay engaged with the Forest Service throughout the amendment process in order to share our perspectives with you on the consequences, both socially and ecologically, that this outdated rule has had. We also hope to provide solutions that we believe will assist the Forest in attaining its desired ecological outcomes while at the same time ensuring that our members can continue to thrive in their respective communities.

AFRC is pleased to be involved in the planning, environmental analysis, and decision-making process for the Eastside Screens Plan Amendment, and looks forward to playing a constructive role in this process. Should you have any questions regarding the above comments, please contact me at 541-525-6113 or [ageissler@amforest.org](mailto:ageissler@amforest.org).

Sincerely,

Andy Geissler  
Federal Timber Program Director  
American Forest Resource Council



48500

## Notices

Federal Register

Vol. 85, No. 155

Tuesday, August 11, 2020

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

### DEPARTMENT OF AGRICULTURE

#### Office of the Secretary

#### Notice of Request for Extension of a Currently Approved Information Collection

**AGENCY:** National Appeals Division, Department of Agriculture.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the U.S. Department of Agriculture, National Appeals Division's request for an extension to a currently approved information collection for Customer Service Survey.

**DATES:** Comments on this notice must be received by October 13, 2020 to be assured of consideration.

**ADDRESSES:** The National Appeals Division invites interested persons to submit comments on this notice. Comments may be submitted by the following method: Federal eRulemaking Portal. This website provides the ability to type short comments directly into the comment field on this web page or attach a file for lengthier comments. Go to <http://www.regulations.gov>. Follow the on-line instructions at that site for submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Dr. Angela Parham, U.S. Department of Agriculture, National Appeals Division, 1320 Braddock Place, Fourth Floor, Alexandria, Virginia 22314, 703.305.2588.

#### SUPPLEMENTARY INFORMATION:

*Title:* National Appeals Division Customer Service Survey.

*OMB Number:* 0503-0007.

*Expiration Date of Approval:* October 31, 2020.

*Type of Request:* Extension of a currently approved information collection.

*Abstract:* Executive Order 12862, requires Federal Agencies to identify the

customers who are or should be served by the Agency and survey those customers to determine the kind and quality of services they want and level of satisfaction with existing services. Therefore, NAD proposes to extend its currently approved information collection survey.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average .17 hours per response.

*Respondents:* Appellants, producers, and other USDA agencies.

*Estimated Number of Respondents:* 1,600.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 272.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Dr. Angela Parham, U.S. Department of Agriculture, National Appeals Division, 1320 Braddock Place, Fourth Floor, Alexandria, Virginia 22314. All comments received will be available for public inspection during regular business hours at the same address.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

**Authority:** 44 U.S.C., Chapter 35.

**Jennifer Michael Nicholson,**

*Deputy Director, National Appeals Division.*

[FR Doc. 2020-17537 Filed 8-10-20; 8:45 am]

**BILLING CODE 3410-WY-P**

### DEPARTMENT OF AGRICULTURE

#### Forest Service

#### Pacific Northwest Region; Oregon; Land Management Plan Amendment; Forest Management Direction for Large Diameter Trees in Eastern Oregon

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice to initiate a land management plan amendment and notice of availability.

**SUMMARY:** The Pacific Northwest Region of the Forest Service has prepared a Preliminary Environmental Assessment (EA) for Forest Management Direction for Large Diameter Trees in Eastern Oregon. The proposal would amend the land management plans for the Deschutes, Fremont-Winema, Malheur, Ochoco, Umatilla, and Wallowa-Whitman National Forests in Oregon. This notice also provides information on how to comment on the Preliminary EA.

**DATES:** Comments concerning the scope of the analysis must be received by September 10, 2020. The final EA is expected September 2020.

**ADDRESSES:** Individuals and entities are encouraged to submit comments via webform at <https://cara.ecosystem-management.org/Public/CommentInput?project=58050>.

Comments may also be sent via email to [SM.FS.EScreens21@usda.gov](mailto:SM.FS.EScreens21@usda.gov). Hardcopy letters must be submitted to the following address: Shane Jeffries, Forest Supervisor, Ochoco National Forest, 3160 NE Third Street, Prineville, OR 97754. For those submitting hand-delivered comments, please call 541-416-6500 to make arrangements.

#### FOR FURTHER INFORMATION CONTACT:

Emily Platt, Team Leader, at [SM.FS.EScreens21@usda.gov](mailto:SM.FS.EScreens21@usda.gov) or at 541-416-6500. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Time, Monday through Friday.

#### SUPPLEMENTARY INFORMATION:

#### Background

In 1995, the Forest Service adopted the Eastside Screens, which amended land management plans for national forests outside of the range of the northern spotted owl in Oregon and Washington. The Eastside Screens

include a limit on the harvest of trees equal to or greater than 21-inches diameter at breast-height (dbh) where late and old structural stage forests are below the historic range of variability.

Since the issuance of the Eastside Screens, forest conditions have changed, new science has emerged, and land management priorities have shifted to emphasize forest restoration and the mitigation of wildfire impacts. By adapting the 21-inch standard to reflect learning over the past 25 years, the Agency would streamline restoration of forests in eastern Oregon in order to create landscapes that withstand and recover more quickly from drought, wildfire, and other disturbances.

#### Purpose and Need for Action

The purpose of this proposal is to analyze a science-based, contemporary alternative to the 21-inch standard in the Eastside Screens. Adapting the standard to incorporate science and 25 years of learning would enable managers to more effectively restore forestlands in eastern Oregon.

#### Proposed Action

The Forest Service is proposing to replace the 21" standard with a guideline that emphasizes recruitment of old trees and large trees. An adaptive management component is also assessed in this analysis.

#### Responsible Official

The Responsible Official for this amendment is Ochoco Forest Supervisor, Shane Jeffries.

#### Nature of Decision To Be Made

Given the purpose and need of the project, the Responsible Official will review alternatives, public comments, and consider the environmental consequences to decide whether to prepare a finding of no significant impact or prepare an environmental impact statement. If a finding of no significant impact is appropriate, the Responsible Official will decide whether to select the proposed action, another alternative, or a combination of alternatives.

#### Substantive Requirements

When proposing a Forest Plan amendment, the 2012 Planning Rule (36 CFR 219), as amended, requires the responsible official to identify the substantive requirements of the rule that are likely to be directly related to the amendment (36 CFR 219.13(b)(5)). The substantive requirements that are likely to be directly related to the proposed amendments are: (1) 36 CFR 219.8(a)(1)(iv) System drivers, including

dominant ecological processes, disturbance regimes, and stressors, such as natural succession, wildland fire, invasive species, and climate change; and the ability of terrestrial and aquatic ecosystems on the plan area to adapt to change; (2) 36 CFR 219.8(a)(1)(v) Wildland fire and opportunities to restore fire adapted ecosystems; and (3) 219.9(b)(1) The responsible official shall determine whether or not the plan components provide the ecological conditions necessary to: Contribute to the recovery of federally listed threatened and endangered species, conserve proposed and candidate species, and maintain a viable population of each species of conservation concern within the plan area.

#### Comment and Objection Information

The Preliminary EA and other related documents are available for comment on the project website at <https://www.fs.usda.gov/project/?project=58050>. Additional information regarding this proposal can found at <https://go.usa.gov/xvV4X>. As provided for at 36 CFR 219.16, the responsible official has combined the notifications for initiating the plan amendment and inviting comments on the proposed plan amendment and alternatives.

This EA is subject to Forest Service regulation 36 CFR 219, Subpart B, known as the administrative review, or objection, process. Only individuals or entities who submit specific written comments during the designated comment period will be eligible to participate in the objection process. Specific written comments should be within the scope of the proposed action, have a direct relationship to the proposed action, and include supporting reasons for the Responsible Official to consider. Comments submitted anonymously will be accepted and considered but will not meet the requirements to be eligible for administrative review. Comments received in response to this solicitation, including names (and addresses, if included) of those who comment, will be part of the public record for this proposed action.

#### Allen Rowley,

*Associate Deputy Chief, National Forest System.*

[FR Doc. 2020–17430 Filed 8–10–20; 8:45 am]

**BILLING CODE 3411–15–P**

#### COMMISSION ON CIVIL RIGHTS

##### Agenda and Notice of Public Meeting of the District of Columbia Advisory Committee

**AGENCY:** Commission on Civil Rights.

**ACTION:** Announcement of meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a meeting of the District of Columbia Advisory Committee to the Commission will convene by conference call, at 11:30 a.m. (EDT) Thursday, September 3, 2020. The purpose of the planning meeting is to discuss and vote to submit the Committee's civil report rights project report on the DC Mental Health Community Court to the Staff Director for publication.

**DATES:** Thursday, September 3, 2020 at 11:30 a.m. (ET).

##### Public Call-In Information:

Conference call number: 1–877–260–1479 and conference call ID number: 1929821

**FOR FURTHER INFORMATION CONTACT:** Ivy L. Davis, at [ero@usccr.gov](mailto:ero@usccr.gov) or by phone at 202–376–7533.

**SUPPLEMENTARY INFORMATION:** Interested members of the public may listen to the discussion by calling the following toll-free conference call number: 1–877–260–1479 and conference call ID number: 1929821. Please be advised that before placing them into the conference call, the conference call operator may ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number herein.

Persons with hearing impairments may also follow the discussion by first calling the Federal Relay Service at 1–800–877–8339 and providing the operator with the toll-free conference call number: 1–877–260–1479 and conference call ID number: 1929821.

Members of the public are invited to make statements during the Public Comments section of the meeting or to submit written comments. The comments must be received 30 days after the meeting date. Comments may be mailed to the Eastern Regional Office, U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, Suite 1150,



United States Department of Agriculture  
Forest Service

# Forest Plans Amendment

## Forest Management Direction for Large Diameter Trees in Eastern Oregon

### Environmental Assessment-Preliminary

Pacific Northwest Region (R6) Oregon and Washington  
August 2020



Photo Credit: Mark Penninger, U.S. Fish & Wildlife, La Grande, OR Field Office



**Responsible Official Delegated by the Regional Forester**

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## 1.0 INTRODUCTION

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### 1.1 FOREST SERVICE PLANNING FRAMEWORK

National forests and grasslands are required to have a Land and Resource Management Plan (LRMP). Those plans inform the overall management of each unit and all projects on each unit must be in conformance with the associated LRMP. When plan components (desired conditions, goals, standards, and/or guidelines) need to be changed for any reason the planning unit must complete a plan amendment (36 CFR 219). The amendment process is intended to help keep plans current and responsive as conditions change or updated science changes our understanding.

The Eastside Screens were adopted in 1994-95 (see below) and amended the underlying forest plans which were published in either 1989 or 1990, depending on the forest. They consisted of three components for screening proposed timber sales: riparian screen, ecosystem screen, and the wildlife screen. The Inland Native Fish Strategy (INFISH) and Pacific Anadromous Fish Strategy (PACFISH) now operate in place of the riparian screen. Under the ecosystem screen, the Forest Service compares current conditions of a proposed timber sale area with the historical range of variability (HRV). Under the wildlife screen, the Forest Service imposes certain harvesting restrictions according to whether or not the condition of a sale area is within the HRV for late and old structure (LOS) forest<sup>1</sup>.

Subsection 2 of the Wildlife Screen's Scenario A stipulates that:

*Outside of LOS, many types of timber sale activities are allowed. The intent is still to maintain and/or enhance LOS components in stands subject to timber harvest as much as possible, by adhering to the following standards:*

*a) Maintain all remnant late and old seral and/or structural live trees  $\geq 21$ -inch dbh<sup>2</sup> that currently exist within stands proposed for harvest activities.*

The amendment analyzed in this document specifically addresses this portion of subsection two and a portion of subsection four (see Appendix B). These portions are commonly referred to as "the 21" standard." The amendment would not change any other

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<sup>1</sup> Late and Old Structure (LOS) forest is described in the ecosystem standard of the Eastside Screens. No changes are proposed to the ecosystem standard. LOS is described in detail in the vegetation section.

<sup>2</sup> Diameter at breast height is a common forestry term used to express the diameter of the trunk or bole of a standing tree. Tree trunks are measured at the height of an adult's breast which in the U.S. is 4.5 feet above the ground on the highest side of the tree.

plan components in the individual forest plans. All management areas, timber requirements, MIS, and other standards and guidelines remain unchanged.

## 1.2 HISTORY OF THE EASTSIDE SCREENS

The Forest Service developed the Eastside Screens in the 1990s in response to concerns about old trees on the eastside of the Cascades. House Speaker Tom Foley (Washington) and Senator Mark Hatfield (Oregon) requested that Agricultural Secretary Edward Madigan form an interagency panel to complete a scientific evaluation of the effects of Forest Service management practices on the sustainability of eastern Oregon and Washington forests. The panel was to address seven key questions defined by Speaker Foley and Senator Hatfield (Everett et al. 1994). The panel produced the Eastside Forests Ecosystem Health Assessment (EFEHA) or the “Everett Report.”

EFEHA concluded that there was a loss of large trees and old forests, fragmented landscapes caused by small harvest units, and conditions were ripe for large and severe insect, disease, and wildfire disturbances due to large increases in forested area, density, and shade-tolerant forest cover. The panel did not address social or economic concerns, but acknowledged their importance for ecosystem sustainability and identified the need for more information about social values and expectations for management of eastside forests.

During the same timeframe, Natural Resources Defense Council (NRDC) petitioned the courts to suspend old tree harvest on eastside forests. Regional Forester (RF) John Lowe asked the EFEHA team to develop interim policies that could be applied to vegetation management and timber sale projects. This team developed the Eastside Screens in part to keep existing large and old trees and manage national forests to promote an increase in the number of large and old trees. They recommended replacing it within 12–18 months with more formal landscape evaluations that responded to their key findings. A lower-end size limit of 21 inches was negotiated with the plaintiffs included in the NRDC petition. On June 12, 1995 RF Lowe signed the Decision Notice for the “Revised Continuation of Interim Management Direction Establishing Riparian, Ecosystem and Wildlife Standards for Timber Sales” (Regional Forester’s Forest Plan Amendment #2), which slightly modified the initial screens.

During the last three decades there have been multiple interpretations and guidance documents issued on how to implement the screens. Some guidance documents encouraged forests to complete project specific plan amendments to cut trees over 21 inches while others outlined direction that trees greater than 21 inches could be cut under certain conditions. Due to changing and conflicting guidance national forests have taken different approaches to addressing this issue on the ground. Some national forests in eastern Oregon have completed multiple project specific forest plan amendments that alter the 21-inch standard in some way. Other forests have avoided the harvest of trees over 21-inches to avoid project specific forest plan amendments. Still others have started amendments and not finished; for example, in 2014 the Snow Basin lawsuit led the Wallowa-Whitman National Forest to pull a proposed amendment to the Eastside Screens because the court found that the Forest Service could not use a site-specific amendment to address a forest-wide problem. In total since 2003, there have been 21 amendments to forest plans related to the 21-inch standard. Amendments generally focused on removing

Adapting the Wildlife Standard of the Eastside Screens

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young grand fir or white fir in dry ponderosa pine forests but some also addressed removal of lodgepole, Douglas fir, and ponderosa pine. Project level analyses have shown no significant adverse impacts to resources as a result of the amendments and in fact the analyses have demonstrated positive impacts in terms of restoring stand and landscape resilience.

The limitations of the 21-inch standard have become increasingly apparent in recent years as the Forest Service has intensified its focus on restoring forest resistance and resilience to disturbance and as public and agency interest in creating forests better able to withstand and recover from disturbances like drought and wildfire has grown. At the same time, scientific knowledge about frequent-disturbance environments like those in eastern Oregon has grown. The need for new approaches to forest management has become even more urgent given ongoing changes such as an increase in the length of fire season and the area burned by wildfires. Managers often do not have the flexibility to take advantage of opportunities to protect and enhance large and old trees by removing fast-growing shade tolerant species that compete with old pines and larch for resources or to thin fast-growing pine stands to develop more disturbance-resistant conditions. Restoring and adapting forests and reducing mortality of old trees from large disturbances like wildfire, drought, and insect outbreaks requires a more strategic approach than the 21-inch standard allows.

### 1.3 PUBLIC INPUT

Pre-NEPA engagement activities were conducted to help develop: 1) an ecologically, socially, and politically durable amendment, 2) coordinated and timely communications and engagement, 3) public access to and understanding of the process, and 4) relationship focused involvement.

In order to gather feedback early in the process (pre-NEPA), we reached out to likely interested individuals and organizations during the COVID-19 pandemic. To comply with social distancing policies, we were unable to convene in-person public meetings. Instead, we used a variety of alternative methods to make project information accessible including through phone calls, mailings, posting information to the website, and holding our workshops virtually. The Forest Service hosted three virtual workshops that included 171 participants. The workshops included:

- A **Science Forum** (May 11, 2020) where ten scientists from the PNW Research Station, universities, and non-profit groups shared science related to eastern Oregon forest management and set the stage for a discussion of the science and values underlying the 21-inch standard.
- An **Intergovernmental Technical Workshop** (May 13, 2020) with the **Eastern Oregon Counties Association** and a **Partner Technical Workshop** (May 15, 2020). Both technical workshop formats were identical and included: project background, review of 2012 Planning Rule, brief summary of a rapid science review by the Pacific Northwest Research Station, case study, and small breakout groups led by ID Team members and line officers to gather feedback.

Meeting recordings and all materials from the early engagement events are posted on our project website: <https://go.usa.gov/xvV4X>

## 1.4 PURPOSE AND NEED FOR ACTION

The purpose of this assessment is to analyze a durable, science-based alternative to the 21-inch standard in the Eastside Screens. Adapting the standard to incorporate science and 25 years of learning would enable managers to more effectively restore forestlands in eastern Oregon.

## 1.5 NEED FOR CHANGE

Scientific research, ongoing monitoring of restoration treatments and natural disturbances, and practical experience implementing the 21-inch standard demonstrate a need to change policy to better conserve large and old trees and to adapt stands to future climate and disturbance regimes. Adapting the 21-inch standard to respond to science findings and experience restoring eastern Oregon forests can better protect old trees and better provide for resilience of forest stands to future climate and disturbance stressors.

Old trees provide critical habitat functions and form the foundation for stands that are resilient to future change because they have persisted through past climatic and disturbance variability (Marcot et al. 2018, Hessburg et al. 2015, Vosick et al. 2007, Bull et al. 1997). Achieving more effective conservation of old trees in eastern Oregon is of critical importance to tribes, recreationists and other forests users, local communities that depend on ecosystem services from national forests, and the general public because of the critical functions they provide and because older trees are in steep decline throughout the American West (Lindenmayer et al. 2012, Lutz et al. 2009, van Mantgem et al. 2009). As discussed in the current conditions discussion below, old trees in eastern Oregon are declining at an alarming rate.

Although the 21-inch standard protects large trees from logging, it does not protect old trees that are smaller than 21 inches. And implementation of the 21-inch standard often prevents restoration treatments from achieving conditions necessary for old trees to persist. Old trees are at elevated risk of mortality when young trees compete with old trees for light and water (Bradford and Bell 2017, Millar and Stephenson 2015, Fettig et al. 2007, Kolb et al. 2007, Waring and Law 2001, Kolb et al. 1998). Competition is particularly acute when trees are large and young because larger trees have greater leaf area and use more resources (Johnston et al. 2019, Gersonde and O'Hara 2005).

Increases in stand basal area since frequent fire was excluded from eastern Oregon forests are largely attributable to growth and establishment of relatively large, fast growing, shade tolerant species like grand fir and Douglas-fir (Johnston 2017, Merschel et al. 2014, Hagmann et al. 2014). Increases in stand basal area have significantly reduced drought resistance of old trees (Voelker et al. 2019). Restoring historical competition dynamics characterized by low basal area, low stand density, and a relatively higher proportion of shade intolerant species increases the resistance of stands to drought, insects, and fire disturbance effects associated with a warming climate (e.g., Tepley and Hood 2020, Zhang et al. 2019, Vernon et al. 2018, Sohn et al. 2016). A variety of empirical studies and science syntheses demonstrate that protection of all trees greater

Adapting the Wildlife Standard of the Eastside Screens

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than 21 inches prevents restoration of historical conditions and conditions that are likely to maintain old trees into the future (Johnston in review, Lindsay and Johnston 2020, Merschel et al. 2019, Johnston et al. 2018, Johnston 2017, Stine et al. 2014).

Although the 21-inch standard protects large trees from logging, it does not protect large trees from mortality from fire, insects, and drought. Many large trees will be lost to mortality as these disturbance processes become more extensive in the coming decades (Kerns et al. 2018, Littell et al. 2018, Mote and Salathe 2010). Although replacing the 21-inch standard with different conservation policies may result in more large trees being cut, better providing for stand and landscape scale resilience to disturbance has the potential to optimize provision of large trees over time (Spies et al. 2018, Bradford and Bell 2017, Sohn et al. 2016, McDowell and Allen 2015, Millar and Stephenson 2015).

## **1.6 GOALS**

The goal of this proposed amendment is synonymous with the purpose and need for the original screens, which is the "...need to maintain the abundance and distribution of old forest structure." The original 1994 EA explains, "The purpose is to preserve those components of the landscape -- old forest abundance, wildlife habitat in late and old structural stages, and riparian areas -- which new information suggests is vitally important to certain species of wildlife and fish and to the overall vegetative structure of the forest."

Given new science and our evolving understanding of landscape ecology, a standard that prohibits logging of all trees larger than or equal to 21 inches diameter at breast height (dbh) is no longer adequate to support landscape restoration and resiliency efforts, nor conserve the remnant old and late seral and/or structural live trees it was meant to protect.

This proposed amendment is narrowly focused on Scenario A of the wildlife standard of the Eastside Screens. This means that in project level application and NEPA analysis, the ecosystem screen is still applied first, and this proposed amendment would only affect project areas where LOS forest is found to be below HRV for one or more biophysical environments.

## **1.7 DECISION TO BE MADE**

The Region 6 (Pacific Northwest Region) Regional Forester, Glenn Cassamassa, has designated the Forest Supervisor of the Ochoco National Forest as the Decision Maker for this analysis. When the analysis is completed, he will decide which alternative to select. He will compare each alternative's ability to meet the purpose and need and weigh the effects of each alternative as presented in the environmental analysis.

## **2 PROPOSED ACTION AND ALTERNATIVES**

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Through the means described in section 1.3, and through written communications, individuals, groups, organizations and county governments have provided feedback to the interdisciplinary team. Some support the effort in concept, and some are conceptually opposed to it.

The discussions and suggestions made during our early engagement activities helped inform the development of the alternatives and the key issues addressed in this assessment. Eight important themes emerged in our early engagement work: trust and collaboration; monitoring and adaptive management; social and economic issues; diameter limits and species composition; large trees vs. old trees; scale and flexibility issues; climate change and wildfire; and, wildlife, snags and down wood.

- In response to concerns related to trust, collaboration, monitoring, and adaptive management, the alternatives integrate an adaptive management component to ensure accountability through targeted monitoring of impacts to large and old trees. The alternatives also encourage the use of multi-party monitoring to support a meaningful way for citizens to be involved in the monitoring.
- Social concerns about the amendment being driven by economic factors (i.e. to get the cut out) and by concerns about the economic impacts of the Eastside Screens were addressed by using a science-based approach to focus on the ecological need for change and by incorporating a social and economic assessment in the analysis.
- The differences between large old and large young trees are directly addressed in our analysis, and alternatives were developed to enable managers to base decisions on these differences while recognizing both large and old trees as ecologically valuable. Likewise, the concern about diameter limits as it relates to species composition is directly addressed by our range of alternatives. Expected changes in species composition is addressed in our analysis.
- Concerns about scale were addressed in the development of alternatives, and flexibility was addressed directly in the range of alternatives.
- All action alternatives directly address concerns about climate change and wildfire as these alternatives allow for management strategies that increase resilience to future climate and disturbance regimes.
- In response to concerns about wildlife, the amendment retains the original intent of the Eastside Screens to protect and promote LOS for wildlife habitat and incorporates an approach grounded in wildlife science to revise of the snag and green-tree retention portion of the standard.

## 2.1 CURRENT MANAGEMENT ALTERNATIVE

Currently, implementation of the Eastside Screens is inconsistent across the region. Scenario A of the wildlife standard requires no net loss of LOS from each biophysical environment. In practice, the interpretation of no net loss of LOS has varied from Forest to Forest and through time. Sub-section 1 of Scenario A stipulates that:

*Some timber sale activities can occur within LOS stages that are within or above HRV in a manner to maintain or enhance LOS with-in that biophysical environment. It is allowable to manipulate one type of LOS to move stands into the LOS stage that is deficit if this meets historical conditions.*

Adapting the Wildlife Standard of the Eastside Screens

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No restriction on the harvest size of trees is stipulated. In practice many Forests and projects have applied a restriction to the harvest of trees larger than or equal to 21 inches dbh to the management of all LOS.

Subsection 2 of Scenario A stipulates that:

*Outside of LOS, many types of timber sale activities are allowed. The intent is still to maintain and/or enhance LOS components in stands subject to timber harvest as much as possible, by adhering to the following standards: a) Maintain all remnant late and old seral and/or structural live trees  $\geq$  21-inch dbh that currently exist within stands proposed for harvest activities ...*

This standard has been applied as written across Forests and through time.

Subsection 4 of Scenario A stipulates that:

*All sale activities (including intermediate and regeneration harvest in both even-age and uneven-age systems, and salvage) will maintain snags and green replacement trees of  $>21$  inches dbh (or whatever is the representative dbh of the overstory layer if it is less than 21 inches), at 100% potential population levels of primary cavity excavators. This should be determined using the best available science on species requirements as applied through current snag models or other documented procedures. NOTE: for Scenario A, the live remnant trees ( $< 21$ " dbh) left can be considered for part of the green replacement tree requirement.*

The Current Management Alternative represents continued implementation of the Eastside Screens 21-inch dbh harvest restriction as described above.

## **2.2 OLD TREE AND LARGE TREE GUIDELINE WITH ADAPTIVE MANAGEMENT (PROPOSED ACTION)**

The Proposed Action is to replace the 21-inch **standard** with a **guideline** that emphasizes recruitment of old trees and large trees. Old trees are defined as  $\geq 150$  years of age. Large trees are defined as grand fir, white fir, or Douglas-fir  $\geq 30$ " dbh or trees of any other species  $\geq 21$  inches dbh. This alternative would also include adaptive management.

The current standard says:

*Outside of LOS, many types of timber sale activities are allowed. The intent is still to maintain and/or enhance LOS components in stands subject to timber harvest as much as possible, by adhering to the following standards: a) Maintain all remnant late and old seral and/or structural live trees  $\geq 21$ -inch dbh that currently exist within stands proposed for harvest activities ...*

The new guideline would say:

*Outside of LOS, many types of timber sale activities are allowed. The intent is still to maintain and/or enhance LOS components in stands subject to timber harvest as much as possible, by adhering to the following plan components: a) Managers*

*should retain and generally emphasize recruitment of old trees and large trees. Management activities should first prioritize old trees for retention and recruitment. If there are no old trees, the largest trees should be retained. Old trees are defined as having visual characteristics that suggest an age  $\geq 150$  years. Large trees are defined as grand fir, white fir, or Douglas-fir  $\geq 30$ " dbh or trees of any other species  $\geq 21$  inch dbh. Old and large trees will be identified through best available science. Management activities should consider species composition and spatial arrangement within stands and across the landscape ...*

Exclusive of the snag and green tree retention change described below, all other standards would be maintained as they currently exist.

The adaptive management approach would include both implementation and effectiveness monitoring. Effectiveness monitoring would focus on answering the following questions:

- How does the mortality level of 1) old trees and 2) all trees differ between managed stands and unmanaged stands?
- How does mortality of old trees differ based on species, biophysical setting, and/or management and disturbance history?
- Does the type of management or the combination of management actions prior to disturbance influence mortality of old trees?

Multi-party site visits would also be encouraged to consider ways to make treatments more effective at preserving and maintaining old and large trees across the landscape.

If restoration treatments prove ineffective at conserving old trees relative to passive management of unmanaged stands, a dbh limit will be re-imposed. The dbh limit that would be imposed would prohibit harvest of grand fir, white fir and Douglas-fir trees  $\geq 30$  inches and prohibit the harvest of all other tree species  $\geq 21$  inches. This standard is not suggested specifically by the scientific literature but rather is a recognition of trust issues deeply embedded in management activities involving old trees in the Northwest. The dbh limit would not necessarily be reimposed across the whole landscape but rather by Potential Natural Vegetation groups (PNV) where restoration has proven ineffective based on an analysis conducted every five years by the Pacific Northwest Regional Office. See Vegetation section for a more detailed description of PNV.

See Appendix B for a comparison of plan language for each alternative.

### **2.3 OLD TREE STANDARD ALTERNATIVE**

This alternative replaces the size prohibition with an age prohibition.

The new standard would say:

*Outside of LOS, many types of timber sale activities are allowed. The intent is still to maintain and/or enhance LOS components in stands subject to timber harvest as much as possible, by adhering to the following plan components: a) Trees estimate to be old ( $> 150$  years) shall not be removed. Forests may use best*

Adapting the Wildlife Standard of the Eastside Screens

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*available scientific information to estimate the age of old trees based on physical characteristics. Management activities should retain and emphasize the recruitment of large trees of the appropriate (dependent on the site) species composition and spatial arrangement within stands and across the landscape ...*

Exclusive of the snag and green tree retention change described below, all other standards would be maintained as they currently exist.

See Appendix B for a comparison of plan language for each alternative.

## **2.4 ADAPTIVE MANAGEMENT ALTERNATIVE**

In this alternative, the 21-inch standard would be removed. Management activities would not include a size or age requirement. Exclusive of the snag and green tree retention change described below, all other standards would be maintained as they currently exist, including moving the stand toward the desired condition of LOS.

This alternative would include the same adaptive management approach described in the proposed action.

See Appendix B for a comparison of plan language for each alternative.

## **2.5 ALTERNATIVES CONSIDERED BUT NOT FULLY ANALYZED**

### ***Lower diameter limit***

Some participants in the public engagement sessions suggested we lower the diameter limit to 16 inches dbh. This alternative would not allow us to reduce competition and associated mortality in old trees across the landscape by removing some young but large shade tolerant trees. Please see need for change section for additional detail.

### ***Basal area alternative***

This alternative would have allowed activities to occur within and outside of LOS if harvest activities would increase the basal area-weighted age of stands, and there would be no net loss of LOS. Exceptions would have been permitted by the following process:

- If a forest wants to manage an area in such a way that basal-area weighted age of the stands will not increase, it may do if it uses a collaborative process with a representative range of stakeholders to engage the public and the project is being proposed to:
  - Meet or maintain desired conditions for species composition by removing shade tolerant species in favor of shade-intolerant species,
  - Meet or maintain desired conditions for low density stand conditions in appropriate biophysical settings where removal of smaller trees alone cannot achieve desired conditions,
  - Control or limit the spread of insect or disease infestation, or
  - To favor aspen, cottonwood, whitebark pine, or special plant habitats.
- Projects brought forth through the exception process must include multi-party monitoring.

This alternative was eliminated from detailed analysis because it was difficult for many people to understand and would create the need for the Forest Service and partners to develop entirely new approaches to management. It would also require data that is often not readily accessible at the project level.

***All trees over 21 inches that are cut would remain on site***

In pre-NEPA public meetings and discussions, an option was suggested that would allow for cutting of trees as needed with all cut trees greater than 21 inches dbh left onsite. This option is currently available to managers without completing a forest plan amendment because the Eastside Screens only apply to subset of management activities, and the 21-inch standard does not apply to this kind of “drop and leave” scenario. Regardless, the drop and leave option is not always feasible or desirable because it could create fuel loads that make forests susceptible to uncharacteristic fire severity. Drop and leave scenarios may also conflict with existing Land and Resource Management Plan (Forest Plan) direction to maintain lower fuel loads post –treatment than created by drop and leave scenarios.

***Combined age and diameter limit standard***

This alternative would have given managers the ability to choose either age or size in implementing projects. That is, managers would either be required to protect all trees over 21 inches (30 inches for shade tolerant species) or managers would be required to protect all trees over 150 years of age. While similar to the preferred alternative, this option is a standard rather than a guideline. Other alternatives more directly and reliably met the purpose and need in a way that was simpler and easier for managers and interested publics to understand.

## **2.6 CHANGE COMMON TO ALL ACTION ALTERNATIVES**

***Snag and Green Tree Retention Change***

Rather than existing language at 4.a.1 of the Eastside Screens, forests would have a choice: Maintain all snags > 20" (or whatever is the representative DBH of the overstory layer if it is less than 20") or complete a snag analysis using the best available science on snag-dependent species ecological requirements as applied through current snag tools, models, or other documented procedures to maintain or increase habitat for a diverse composition of wildlife species.

For green tree retention, forests will retain and recruit large trees of the appropriate species and spatial arrangements to meet LOS objectives and wildlife tree objectives using best available science. Forests are encouraged to use natural decay processes and agents to recruit snags from green trees.

See Appendix B for detailed plan language including guidelines referred to above.

## **2.7 COMPLIANCE WITH NFMA-SUBSTANTIVE REQUIREMENTS**

When proposing a Forest Plan amendment, the 2012 Planning Rule (36 CFR 219), as amended, requires the responsible official to identify the substantive requirements of the rule that are likely to be directly related to the amendment (36 CFR 219.13(b)(5)). The substantive requirements that are likely to be directly related to the proposed amendment

### Adapting the Wildlife Standard of the Eastside Screens

---

are: 1) 36 CFR 219.8(a)(1)(iv) System drivers, including dominant ecological processes, disturbance regimes, and stressors, such as natural succession, wildland fire, invasive species, and climate change; and the ability of terrestrial and aquatic ecosystems on the plan area to adapt to change; 2) 36 CFR 219.8(a)(1)(v) Wildland fire and opportunities to restore fire adapted ecosystems; and 3) 219.9(b)(1) The responsible official shall determine whether or not the plan components required by paragraph (a) of this section provide the ecological conditions necessary to: contribute to the recovery of federally listed threatened and endangered species, conserve proposed and candidate species, and maintain a viable population of each species of conservation concern (SCC) within the plan area. If the responsible official determines that the plan components required in paragraph (a) are insufficient to provide such ecological conditions, then additional species-specific plan components, including standards or guidelines, must be included in the plan to provide such ecological conditions in the plan area.

Document available at [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd779174.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd779174.pdf)



# Eastside Screens Amendment

Sara Ghafouri, American Forest Resource Council  
OSB ENR CLE, October 8, 2020

## History of Eastside Screens

- Developed in the 1990s
- Eastside Forests Ecosystem Health Assessment or Everett Report
- NRDC Litigation
- Decision Notice for the “Revised Continuation of Interim Management Direction Establishing Riparian, Ecosystem and Wildlife Standards for Timber Sales” signed in 1995.

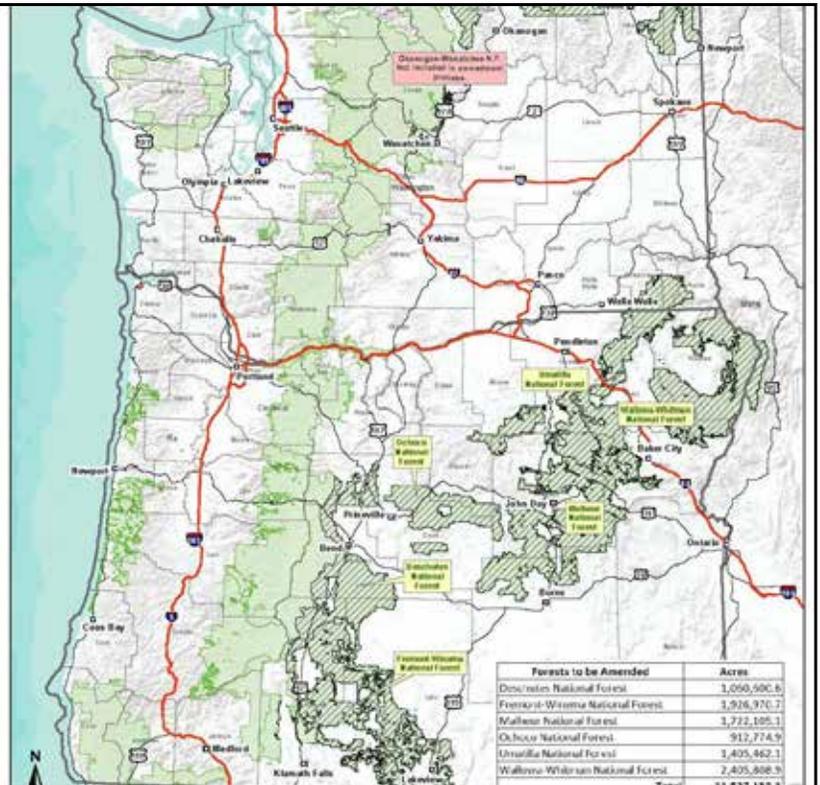


Photo Credit: U.S. Forest Service

## Where Eastside Screens Apply

- Deschutes NF
- Fremont-Winema NF
- Malheur NF
- Ochoco NF
- Umatilla NF
- Wallowa-Whitman NF

Photo Credit: U.S. Forest Service



## Eastside Screen Amendment

### Riparian Standards

### Ecosystem Standards

### Wildlife Standards

- 21" Rule

“Outside of LOS, many types of timber sale activities are allowed. The intent is still to maintain and/or enhance LOS components in stands subject to timber harvest as much as possible, by adhering to the following standards: a) Maintain all remnant late and old seral and/or structural live trees  $\geq$  21-inch dbh that currently exist within stands proposed for harvest activities ...”

## Need For Change

- The constant need for site-specific project-level amendments
  - 2014 Snow Basin Decision
- Failure to protect older trees (smaller than 21 inches) that provide critical habitat functions
- The 21" Rule prevents restoration that could create conditions for older trees to persist

Photo credit: Andy Geissler

## Forest Plan Amendment Process

### Public Involvement

- Science Forum (May 11, 2020)
- Intergovernmental Technical Workshop (May 13, 2020)
- Partner Technical Workshop (May 15, 2020)
- General Information Sessions (August 19 and August 20, 2020)

### Draft Environmental Analysis

- Released August 11, 2020
- Comments due October 13

### Final EA & Draft Decision

- Fall/Winter 2020
- 45-day Objection Period.

### Final Decision

- Winter/Spring 2021

Photo credit: James Johnston

## Purpose and Need

To analyze a durable, science-based alternative to the 21-inch standard in the Eastside Screens. Adapting the standard to incorporate science and 25 years of learning would enable managers to more effectively restore forestlands in eastern Oregon.



## Preliminary Environmental Assessment

### Four Alternatives

Current Management Alternative

Old Tree and Large Tree Guideline with Adaptive Management (Proposed Action)

Old Tree Standard Alternative

Adaptive Management Alternative

Old Tree and Large Tree Guideline with Adaptive Management (Proposed Action)



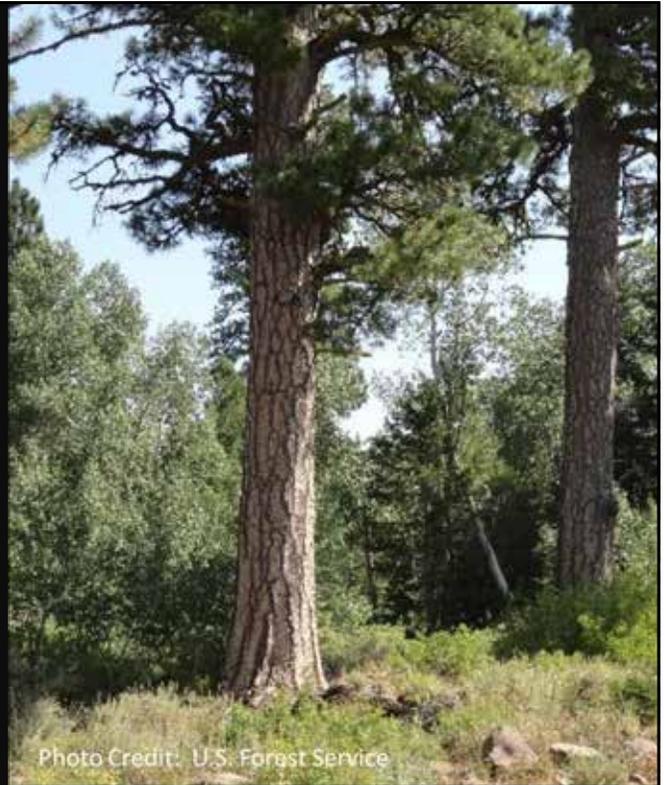
Current Language (Not Action)

Maintain all remnant late and old seral and/or structural live trees > 21-inch dbh that currently exist within stands proposed for harvest activities

Old Tree and Large Tree Guideline with Adaptive Management (Proposed Action)

Guideline: Management activities should retain and generally emphasize recruitment of old and large trees. Management activities should first prioritize old trees for retention and recruitment. If there are no old trees, the largest trees should be retained.

## Old Tree Standard Alternative



### Current Language (Not Action)

Maintain all remnant late and old seral and/or structural live trees > 21-inch dbh that currently exist within stands proposed for harvest activities

### Old Tree Standard Alternative

Standard: Old trees estimated to be > 150 years shall not be removed. Forests will use best available science information to estimate old trees based on physical characteristics.

Guideline: Management activities should consider species composition and spatial arrangement within stands and across the landscape.

## Adaptive Management Alternative



### Current Language (Not Action)

Maintain all remnant late and old seral and/or structural live trees > 21-inch dbh that currently exist within stands proposed for harvest activities

### Adaptive Management Alternative

Guideline: Management activities don't include a size or age requirement but must still adhere to the rest of the screens including d.2.b and d.2.c.



## NEPA Analysis

Vegetation Management

- Species composition
- Late and old growth structure

Wildlife

- 4 Federally listed species
- 85 Region 6 sensitive species and management indicator species
- 16 wildlife species habitat associations with late and old growth forests

Social and Economic

- Forest Products
- Cultural and Heritage resources
- Recreation

Photo Credit: Irene Jerome



## Considerations

- 2012 Planning Rule
- Impacts of new CEQ NEPA regulations
- EA versus EIS

Photo Credit: Andy Geissler



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650-279-3569



## **Chapter 5A**

# **Presentation Slides: 1200-Z Industrial Stormwater Permit Rulemaking**

**JUSTIN GREEN**

Water Quality Division Administrator  
Oregon Department of Environmental Quality  
Portland, Oregon



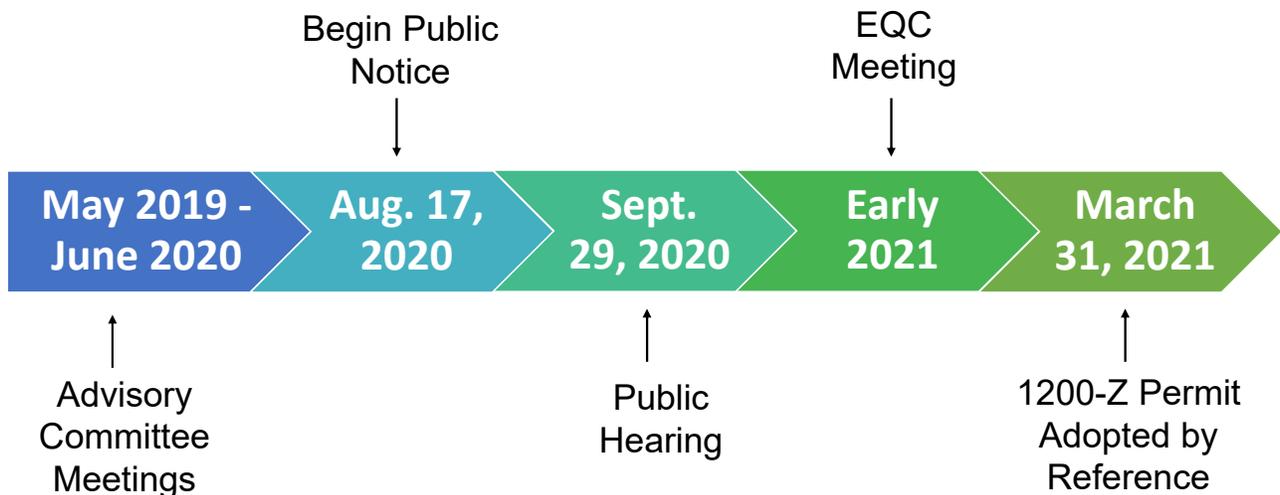


## 1200-Z Industrial Stormwater Permit Rulemaking

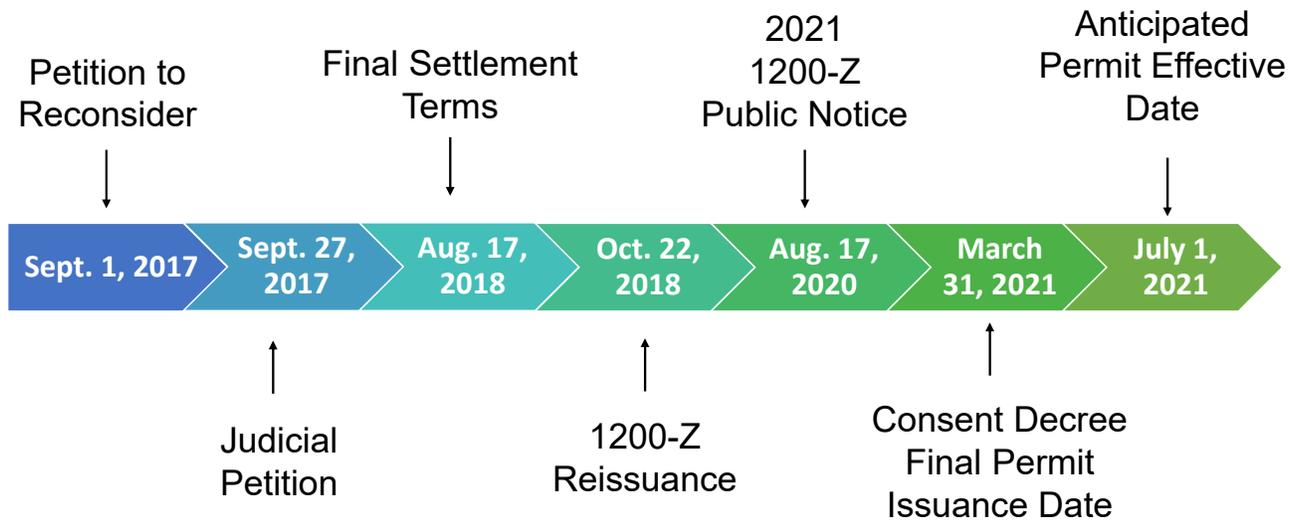
Rulemaking [webpage](#)

<https://www.oregon.gov/deq/Regulations/rulemaking/Pages/r1200Z.aspx> (includes meeting materials and public hearing packet)

## Rulemaking Timelines 2019-2021



# Permit Renewal Timelines



# Proposed Permit Changes

Structural changes:

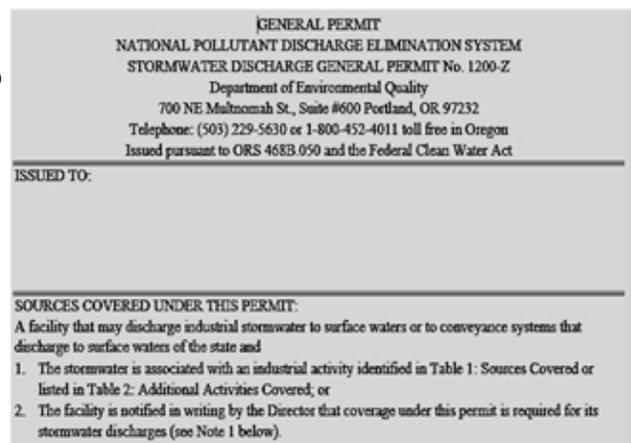
- Monitoring tables Schedule B

Schedule E – sector-specific:

- Align with OR water quality standards

Electronic Reporting:

- “Your DEQ Online”



## Proposed Permit Changes cont.

### Category 5: 303(d) listed waters:

- Water quality-based effluent limit for pH
- Schedule C, compliance schedule
- Narrowed sampling: copper lead, zinc, bacteria, and iron

#### CATEGORY 5: 303(d) LISTED WATERS EXCEEDANCE RESPONSE

##### 13. Water Quality-based Effluent Limits

- A permit registrant that discharges into Category 5: 303(d) listed waters for pH must achieve the applicable basin-specific pH effluent limits in Table 5 and Appendix A.
- If either of the following events occur based on sample results for total copper, total lead, or total zinc, and the permit registrant that discharges into Category 5: 303(d) listed waters for that pollutant, the permit registrant must comply with an effluent limit, established by DEQ, that equal to the applicable water quality criteria specified in Table 6 shall become effective for the remainder of the permit term.
  - Any two consecutive samples exceed the applicable water quality criteria; or
  - Any one sample is greater than two times the water quality criteria.
- Permit registrants will be allowed a two year compliance schedule in accordance with Schedule C, when the water quality criteria in Table 6 escalates to a numeric effluent limit.
- Permit registrants that discharge into Category 5: 303(d) listed waters for fecal coliform and enterococcus must monitor stormwater discharge and report as specified in Tables 7 and 8 applicable to impairment pollutants. DEQ may require additional narrative water quality-based effluent limits if a public health risk is identified from the discharge.
- Permit registrant that discharge into Category 5: 303(d) listed waters for E. coli must implement controls to achieve 406 colonies per 100 ml.
  - Permit registrants' monitoring results that exceed E. coli two consecutive times during this permit term must implement the following narrative water quality-based effluent limit:
    - Prevent rodents, birds, and other animals from feeding/nesting/roosting at the facility to the degree possible. Nothing in this section shall be construed as allowing violations of

## Proposed Permit Changes cont.

### Benchmarks:

- Expanded geo-regions
- Recalculated concentrations
- Oil and grease removed
- Benchmarks sector I, P and R

#### 2. Statewide Benchmarks:

Permit registrants must monitor for the following applicable benchmarks at all discharge points. See Schedule E of this permit for sector-specific benchmarks that apply to certain industrial sectors and co-located industrial activities. See Schedule B.6.c.ii and iii for exception.

Table 4: Statewide Benchmarks

| Pollutant        | Units     | Columbia Slough | Portland Harbor | Cascades | Coastal | Columbia River | Eastern | Willamette Valley |
|------------------|-----------|-----------------|-----------------|----------|---------|----------------|---------|-------------------|
| pH               | p.u.      | 5.5-9.0         | 5.5-9.0         | 5.5-9.0  | 5.5-9.0 | 6.0-9.0        | 5.5-9.0 | 5.5-9.0           |
| Total copper     |           | 0.012           | 0.012           | 0.016    | 0.018   | 0.024          | 0.032   | 0.014             |
| Total lead       |           | 0.060           | 0.060           | 0.016    | 0.016   | 0.18           | 0.054   | 0.046             |
| Total zinc       |           | 0.15            | 0.16            | 0.066    | 0.050   | 0.35           | 0.15    | 0.12              |
| TSS              | mg/L      | 30              | 30              | 100      | 100     | 100            | 100     | 100               |
| BOD <sub>5</sub> |           | 24              |                 |          |         |                |         |                   |
| Total Phosphorus |           | 0.16            |                 |          |         |                |         |                   |
| E. coli          | Counts/ml | 406             |                 |          |         |                |         |                   |

## Proposed Permit Changes cont.

### Corrective Actions:

- Tier 1 (N/A Impairments exceedance)
- Tier 1.5 – Industrial checklist adopted from EPA
- Tier 2 – June 30, 2021 or later implementation deadline exempt

#### BENCHMARK EXCEEDANCES CORRECTIVE ACTIONS

- 11. Tier 1 and Tier 1.5 Corrective Action Response based on Exceedances of Benchmarks**
- Permit registrants must take Tier 1 corrective actions based on triggering events below.
  - Triggering events include:
    - If the permit registrants' monitoring results exceeds a qualifying sample of any applicable statewide benchmarks in Table 4 of this permit or sector-specific benchmarks in Schedule E.
    - Visual observations show signs of pollution as specified in Schedule B.11.vii.
  - Corrective action and reporting must include:
    - Investigate the cause of the elevated pollutant levels, including conducting, commencing or planning for any needed pollutant source tracing activities. Ensure that known or discovered significant materials from previous operations are controlled, removed or otherwise not exposed.
    - Review the SWPCP to ensure it is implemented, evaluate selection, design, installation and implementation of control measures for compliance with this permit and manufacturers' specifications. Evaluate whether any previous pollutant source isolation actions are complete and whether additional modifications are necessary.
    - Evaluate any treatment measures, infiltration devices and mass reduction measures, including if they were properly installed, maintained and implemented and whether maintenance, corrections, or modifications are necessary.
    - Applicable corrective action response must be assessed and implemented on all substantially similar discharge points.

## Proposed Permit Changes cont.

### Monitoring:

- Mass reduction devices
- Monitoring waivers
- Background exemption

#### 6. Mass Reduction Measures

- For approved mass reduction measures installed during previous permit cycles in response to Tier 2 corrective action, mass reduction waiver, which reduce the mass of pollutants at or above DEQ-approved design capacity, permit registrants must submit to DEQ or agent an evaluation in a stamped certification by an Oregon registered professional engineer (PE) or Oregon certified engineering geologist (CEG) of the following information, as applicable, to validate the system is operating as designed:

## **Chapter 5B**

# **Presentation Slides: Draft 1200-Z Provisions**

**STACY HIBBARD**

Environmental Program Manager

City of Portland

Portland, Oregon



## working for clean rivers



## Draft 1200-Z Provisions

STACY HIBBARD, Environmental Program Manager  
City of Portland Environmental Services

Oregon State Bar Environmental and Natural Resources  
Annual CLE, October 8, 2020



ENVIRONMENTAL SERVICES  
CITY OF PORTLAND

working for clean rivers

AMANDA FRITZ, COMMISSIONER • MICHAEL JORDAN, DIRECTOR

## Presentation Overview

- Background & Context
- Proposed Provisions – What is changing?
  - Structural & Condition I
  - Schedule A
  - Schedule B
  - Schedule E



Environmental Services | Presentation Title

2

## Background & Context

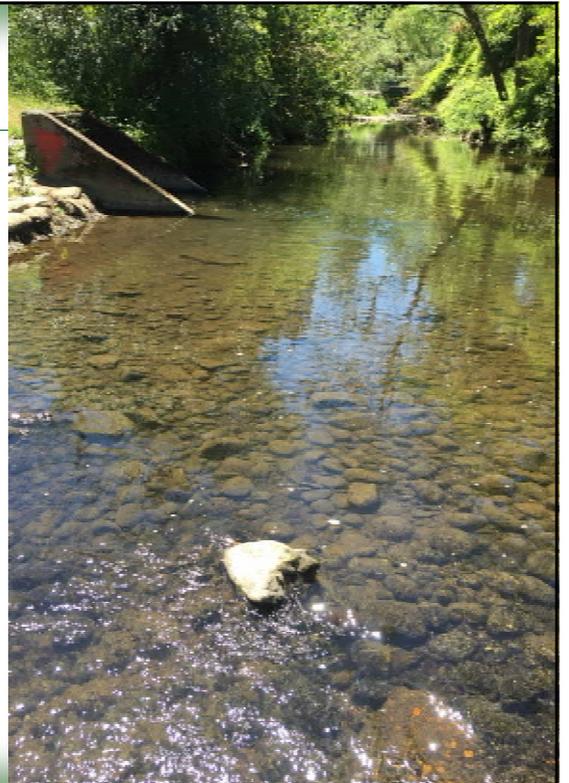
- DEQ – BES Agent Relationship
- ~ 850 Permit Registrants
- BES administers ~ 230
- BES Columbia Blvd Treatment Plant covered under 12-Z
- Draft Permit, comment period ends October 14th



Environmental Services | Presentation Title

## Structural & Condition I

- Monitoring Tables moved; Schedule B
- Condition I
- No Renewal Applications
  - Updated SWPCP by August 31, 2021
- Transfers & Name Changes – Public Comment on SWPCP



Environmental Services | Presentation Title

## Schedule A

- Mass Reduction Measures Certification
- SWPCP
  - SDS for treatment chemicals
  - Latitude and Longitude for MPs
  - O&M for passive treatment & mass reduction devices
- Tier 1 and 1.5
  - Does not apply to impairment pollutants
  - 1.5 = Two Consecutive Exceedances
    - Checklists – Appendix B



Environmental Services | Presentation Title

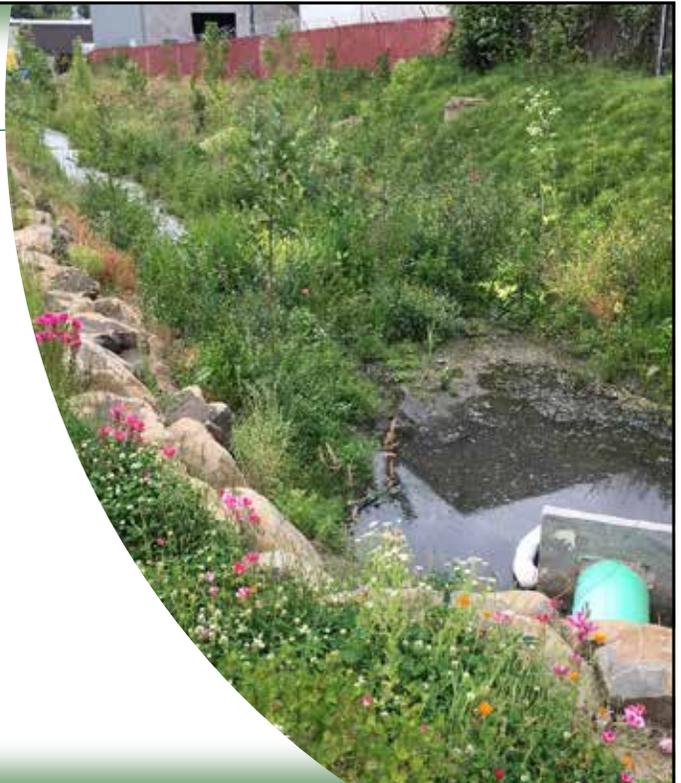


## Schedule A

- Tier 2
  - Parameters at MPs with install due date 6/30/21 or later exempt
  - Evaluation done each year – no more year 2 of coverage
  - Can only trigger once per parameter and MP
  - Implementation due date moved from June 30 to Sept 30
- WQBELs – covered by Jamie



Environmental Services | Presentation Title



## Schedule B

- Seven geo-regions for Statewide Benchmarks (was four)
- Oil and Grease removed from monitoring
- Changes to benchmark numbers
- Impairment monitoring limited to pH, Cu, Pb, Zn, Fe and bacteria forms
- Mass Reduction Measures exempt from monitoring
- Sample 72 hours apart instead of 14 days



## Schedule B

- Monitoring Waiver
  - Different methodology benchmarks vs. impairment parameters
  - Background Waiver
  - All must reinstate monitoring for the last year of permit coverage (7/1/2025 – 6/30/2026)
- Electronic Reporting

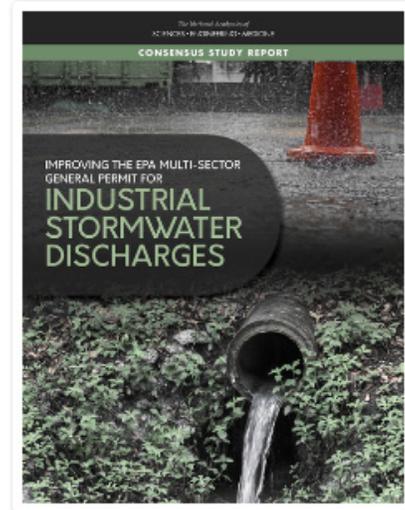


We are modernizing and upgrading the way we process information at DEQ with **Your DEQ Online**: a new centralized hub for communities, businesses and individuals. [Click here to learn more.](#)



## Schedule E

- Mirrors draft EPA MSGP changes
  - Monitoring added: Sector I, P & R
  - Iron removed
- Pollutant concentrations revised – OR WQ Standards
- Saltwater criteria added



Environmental Services | Presentation Title

9

working for clean rivers



ENVIRONMENTAL SERVICES  
CITY OF PORTLAND

working for clean rivers

AMANDA FRITZ, COMMISSIONER • MICHAEL JORDAN, DIRECTOR

Stacy Hibbard

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**Chapter 6A**  
**Hot Topics in Ocean Advocacy**

**TARA BROCK**  
Oceana  
Portland, Oregon

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# Hot Topics in Ocean Advocacy

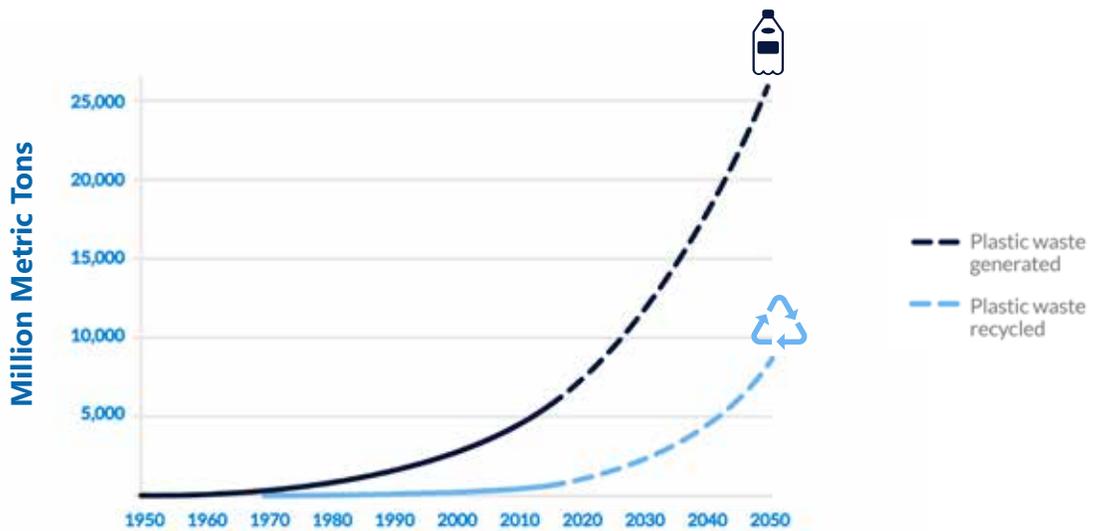
*Tara Brock, Pacific Counsel, Oceana*







## Recycling Cannot Keep Pace With Plastic Waste



Source: Adapted from Geyer et al. 2017

## Local Plastics Regulation



**Provide only when requested**



**THERE ARE CURRENTLY**

**27 OFFSHORE OIL PLATFORMS** OFF THE COAST OF CALIFORNIA

**0 OFFSHORE OIL PLATFORMS** OFF THE COASTS OF WASHINGTON AND OREGON

**MORE THAN 4 million gallons** OF OIL HAS BEEN SPILLED OR LEAKED SINCE 1969

**43 ACTIVE OIL & GAS LEASES** IN FEDERAL WATERS OFF THE COAST OF CALIFORNIA

**935 SQUARE MILES OF OCEAN** OIL SPILLS HAVE AFFECTED AT LEAST

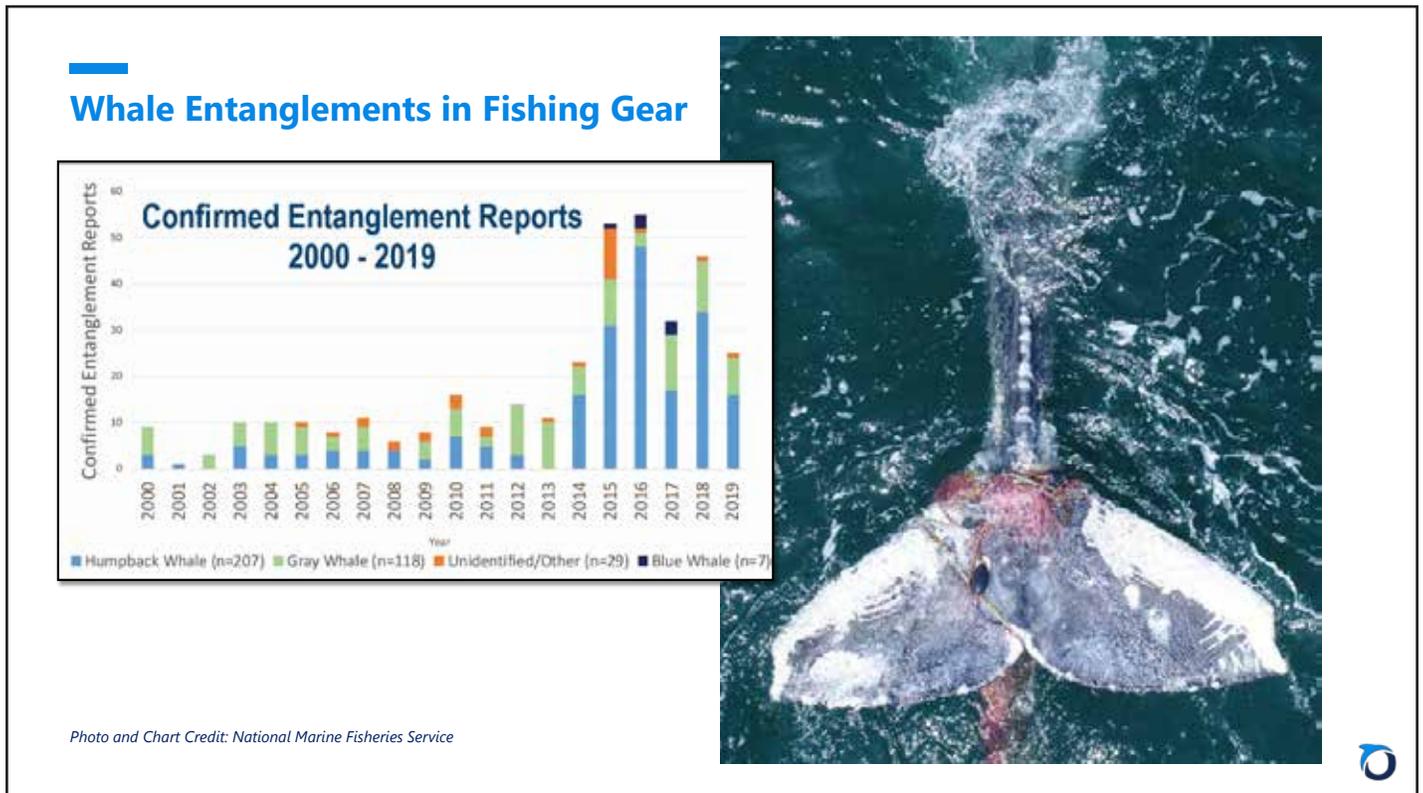
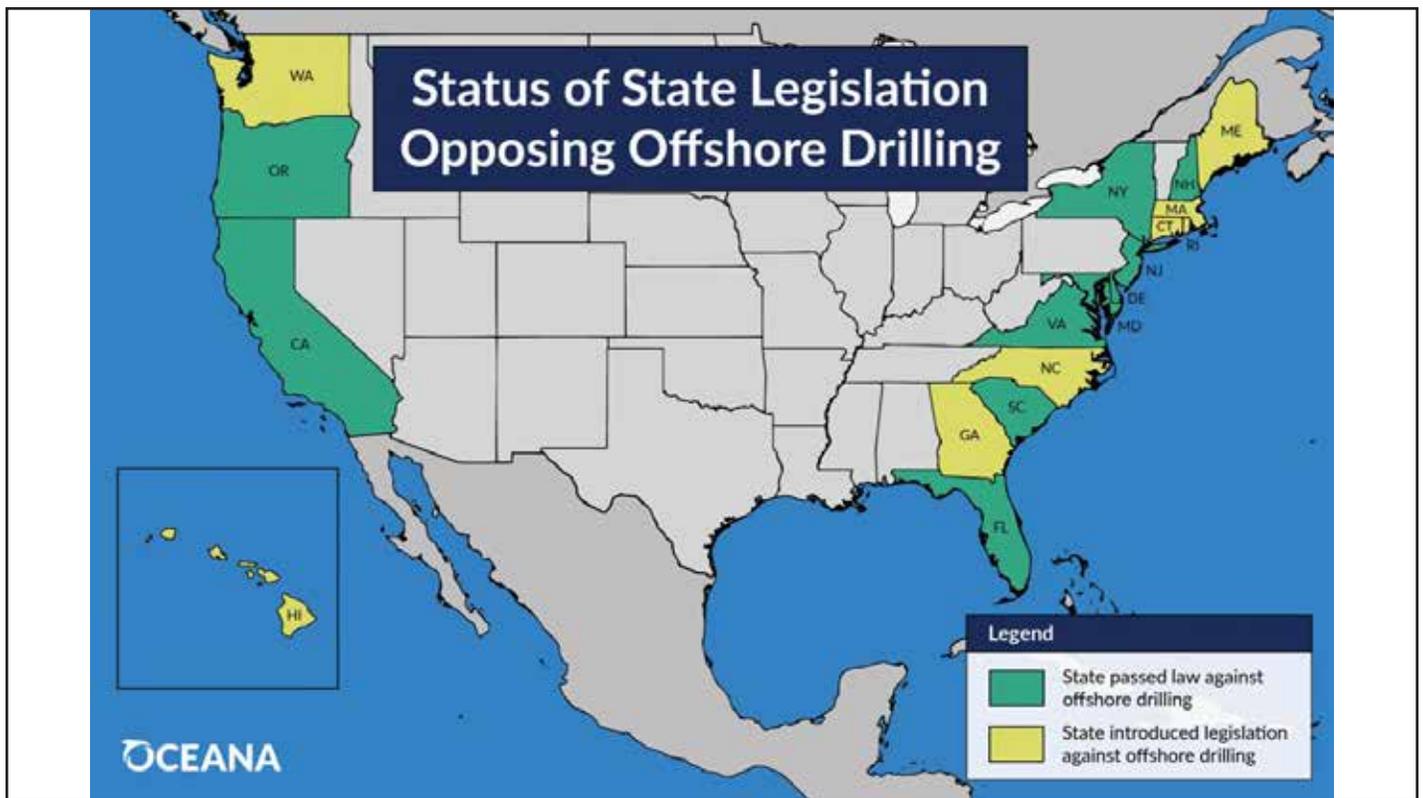
**THAT'S NEARLY TWICE THE SIZE OF THE CITY OF LOS ANGELES**

**ZERO NEW LEASES** HAVE BEEN ISSUED IN FEDERAL WATERS OFF CALIFORNIA SINCE 1984 OR IN CALIFORNIA STATE WATERS SINCE 1969



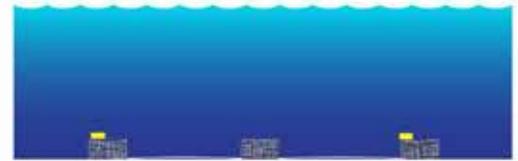
**OFFSHORE DRILLING**





## “Pop-Up” Fishing Gear

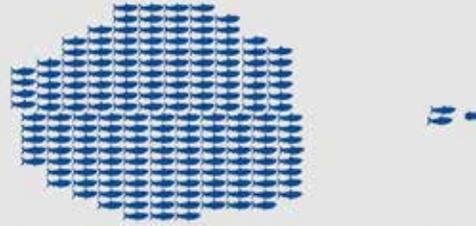
Instead of surface buoys and lines— using acoustics to mark gear locations



### Emergency Regulations & Scientific Uncertainty



#### PACIFIC SARDINE NUMBERS ARE CRASHING AND OVERFISHING CONTINUES TO BE A MAJOR THREAT



#### THE OCEAN'S SAVINGS ACCOUNT THE CUTOFF: A MINIMUM BALANCE BEFORE ALLOWING PACIFIC SARDINE FISHING

**CURRENT**  
150,000 metric tons

**NEEDED**  
640,000 metric tons

#### OCEAN ANIMALS DEPEND ON A HEALTHY SARDINE POPULATION

From 2010-2015, brown pelicans suffered unrecovered reproductive failures due to a lack of sardines and other forage fish.

Whales eat more than 75% of all sardines consumed by wildlife.

More than 9,500 (including California sea lion pups and yearlings) washed up on beaches from 2013-2016.

OCEANA

## Other Ocean Issues of Interest

- Oregon's Rocky Habitats
- Fisheries Management
- Underwater Noise
- Ship Strikes
- Wind & Wave Energy

Tara Brock  
Pacific Counsel

[tbrock@oceana.org](mailto:tbrock@oceana.org)  
503-236-7098







Credit: Shutterstock

**PLASTICS HAVE A PROFOUND DESIGN FLAW: THEY ARE MADE TO LAST FOREVER BUT ARE OFTEN ONLY USED FOR A FEW MOMENTS.**

## PLASTIC IS A GROWING THREAT TO OUR FUTURE

**The oceans face a massive and growing threat from something we encounter every day: plastics. An estimated 17.6 billion pounds of plastic enters the marine environment every year — roughly equivalent to dumping a garbage truck full of plastic into the oceans every minute.**

Maybe you have seen the viral video of the plastic straw being painfully pulled out of a sea turtle's nose. Maybe you have read recent reports of whales washing up dead with dozens of plastic bags in their stomachs. Maybe you have seen the photos of dead seabirds with their bodies stuffed with plastic debris. Or maybe your recent beach visit was spoiled by plastic waste at the high tide line.

Plastic debris has been found floating on the surface of the sea, washing up on the world's most

remote coastlines, melting out of Arctic sea ice and sitting at the deepest point of the ocean floor. It is everywhere.

As plastics continue to flood into our oceans, the list of marine species affected by plastic debris expands. Tens of thousands of individual marine organisms have been observed suffering from entanglement or ingestion of plastic permeating the marine environment — it is impacting everything from zooplankton and fish to sea turtles, marine mammals and seabirds.

To learn more, visit [usa.oceana.org/plastics](https://usa.oceana.org/plastics)

**OCEANA** Protecting the World's Oceans

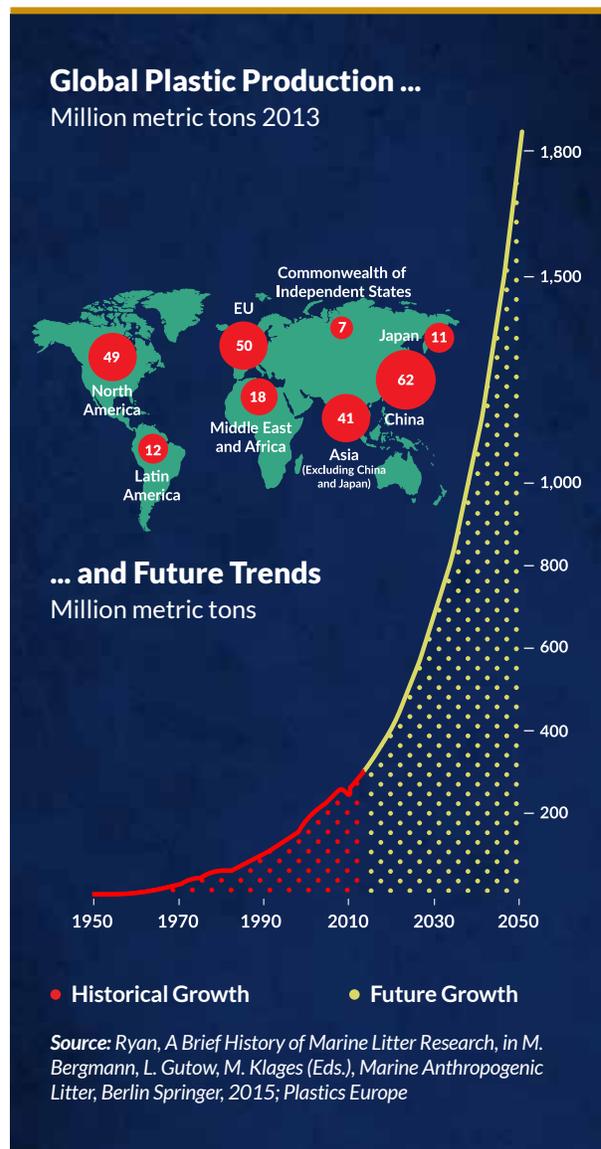
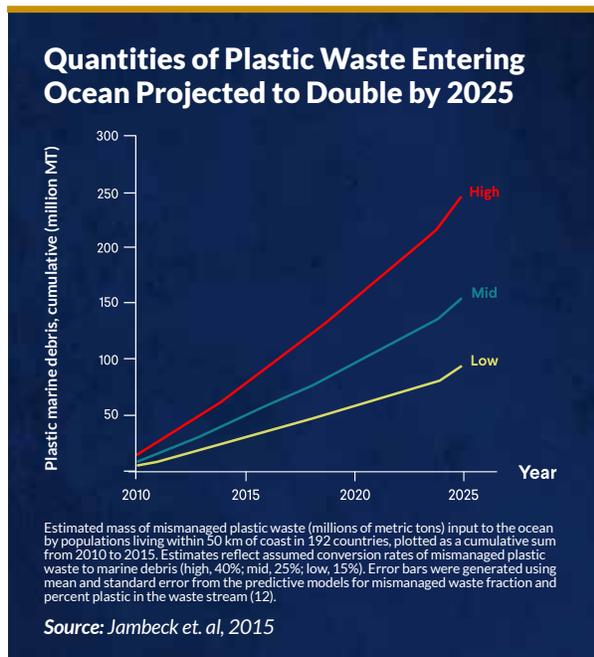
**MADE TO LAST FOREVER, YET USED ONLY ONCE**

Plastic never goes away. Instead, it breaks up into smaller and smaller pieces, ultimately becoming microplastics that act as magnets for harmful chemical pollutants. When eaten by fish and shellfish, some of the contaminants from microplastics work their way into our food supply. Everything from salt to honey to beer has been found to contain microplastics. Scientists are still studying how humans might be affected by the plastics that are making their way into our food, water and air.

*“When your bathtub is overflowing, you don’t run for a mop before you turn off the faucet. Recycling is the mop. We need to first turn off the faucet.” – Jacqueline Savitz, Chief Policy Officer at Oceana*

**RECYCLING ALONE IS NOT ENOUGH**

One of the most popular solutions to plastic pollution falls far short. A meager 9% of all the plastic waste ever generated has been recycled. Current projections show plastic production increasing at least fourfold between 2014 and 2050, far outpacing recycling and resulting in more plastic in the ocean. Recycling alone is not enough to solve the plastics crisis.



To stop plastic from entering our oceans, we must reduce the amount of single-use plastic being produced at the source.

Companies need to dramatically reduce the amount of plastic they are putting into the supply chain and offer consumers plastic-free choices for their products.

Without immediate changes to the way we use plastics, the amount of plastic debris annually entering the marine environment will roughly double from 2015 to 2025.

To learn more, visit [usa.oceana.org/plastics](http://usa.oceana.org/plastics)

**OCEANA** Protecting the World's Oceans



Federal Register

Vol. 82, No. 84

Wednesday, May 3, 2017

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## Presidential Documents

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Executive Order 13795 of April 28, 2017

### Implementing an America-First Offshore Energy Strategy

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, and in order to maintain global leadership in energy innovation, exploration, and production, it is hereby ordered as follows:

**Section 1. Findings.** America must put the energy needs of American families and businesses first and continue implementing a plan that ensures energy security and economic vitality for decades to come. The energy and minerals produced from lands and waters under Federal management are important to a vibrant economy and to our national security. Increased domestic energy production on Federal lands and waters strengthens the Nation's security and reduces reliance on imported energy. Moreover, low energy prices, driven by an increased American energy supply, will benefit American families and help reinvigorate American manufacturing and job growth. Finally, because the Department of Defense is one of the largest consumers of energy in the United States, domestic energy production also improves our Nation's military readiness.

**Sec. 2. Policy.** It shall be the policy of the United States to encourage energy exploration and production, including on the Outer Continental Shelf, in order to maintain the Nation's position as a global energy leader and foster energy security and resilience for the benefit of the American people, while ensuring that any such activity is safe and environmentally responsible.

**Sec. 3. Implementing an America-First Offshore Energy Strategy.** To carry out the policy set forth in section 2 of this order, the Secretary of the Interior shall:

(a) as appropriate and consistent with applicable law, including the procedures set forth in section 1344 of title 43, United States Code, in consultation with the Secretary of Defense, give full consideration to revising the schedule of proposed oil and gas lease sales, as described in that section, so that it includes, but is not limited to, annual lease sales, to the maximum extent permitted by law, in each of the following Outer Continental Shelf Planning Areas, as designated by the Bureau of Ocean Energy Management (BOEM) (Planning Areas): Western Gulf of Mexico, Central Gulf of Mexico, Chukchi Sea, Beaufort Sea, Cook Inlet, Mid-Atlantic, and South Atlantic;

(b) ensure that any revisions made pursuant to subsection (a) of this section do not hinder or affect ongoing lease sales currently scheduled as part of the 2017–2022 Outer Continental Shelf Oil and Gas Leasing Proposed Final Program, as published on November 18, 2016; and

(c) develop and implement, in coordination with the Secretary of Commerce and to the maximum extent permitted by law, a streamlined permitting approach for privately funded seismic data research and collection aimed at expeditiously determining the offshore energy resource potential of the United States within the Planning Areas.

**Sec. 4. Responsible Planning for Future Offshore Energy Potential.** (a) The Secretary of Commerce shall, unless expressly required otherwise, refrain from designating or expanding any National Marine Sanctuary under the National Marine Sanctuaries Act, 16 U.S.C. 1431 *et seq.*, unless the sanctuary designation or expansion proposal includes a timely, full accounting from the Department of the Interior of any energy or mineral resource potential

within the designated area—including offshore energy from wind, oil, natural gas, methane hydrates, and any other sources that the Secretary of Commerce deems appropriate—and the potential impact the proposed designation or expansion will have on the development of those resources. The Secretary of the Interior shall provide any such accounting within 60 days of receiving a notification of intent to propose any such National Marine Sanctuary designation or expansion from the Secretary of Commerce.

(b) The Secretary of Commerce, in consultation with the Secretary of Defense, the Secretary of the Interior, and the Secretary of Homeland Security, shall conduct a review of all designations and expansions of National Marine Sanctuaries, and of all designations and expansions of Marine National Monuments under the Antiquities Act of 1906, recently recodified at sections 320301 to 320303 of title 54, United States Code, designated or expanded within the 10-year period prior to the date of this order.

(i) The review under this subsection shall include:

(A) an analysis of the acreage affected and an analysis of the budgetary impacts of the costs of managing each National Marine Sanctuary or Marine National Monument designation or expansion;

(B) an analysis of the adequacy of any required Federal, State, and tribal consultations conducted before the designations or expansions; and

(C) the opportunity costs associated with potential energy and mineral exploration and production from the Outer Continental Shelf, in addition to any impacts on production in the adjacent region.

(ii) Within 180 days of the date of this order, the Secretary of Commerce, in consultation with the Secretary of Defense and the Secretary of the Interior, shall report the results of the review under this subsection to the Director of the Office of Management and Budget, the Chairman of the Council on Environmental Quality, and the Assistant to the President for Economic Policy.

(c) To further streamline existing regulatory authorities, Executive Order 13754 of December 9, 2016 (Northern Bering Sea Climate Resilience), is hereby revoked.

**Sec. 5. *Modification of the Withdrawal of Areas of the Outer Continental Shelf from Leasing Disposition.*** The body text in each of the memoranda of withdrawal from disposition by leasing of the United States Outer Continental Shelf issued on December 20, 2016, January 27, 2015, and July 14, 2008, is modified to read, in its entirety, as follows:

“Under the authority vested in me as President of the United States, including section 12(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1341(a), I hereby withdraw from disposition by leasing, for a time period without specific expiration, those areas of the Outer Continental Shelf designated as of July 14, 2008, as Marine Sanctuaries under the Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. 1431–1434, 33 U.S.C. 1401 *et seq.*”

Nothing in the withdrawal under this section affects any rights under existing leases in the affected areas.

**Sec. 6. *Reconsideration of Notice to Lessees and Financial Assurance Regulatory Review.*** The Secretary of the Interior shall direct the Director of BOEM to take all necessary steps consistent with law to review BOEM’s Notice to Lessees No. 2016–N01 of September 12, 2016 (Notice to Lessees and Operators of Federal Oil and Gas, and Sulfur Leases, and Holders of Pipeline Right-of-Way and Right-of-Use and Easement Grants in the Outer Continental Shelf), and determine whether modifications are necessary, and if so, to what extent, to ensure operator compliance with lease terms while minimizing unnecessary regulatory burdens. The Secretary of the Interior shall also review BOEM’s financial assurance regulatory policy to determine the extent to which additional regulation is necessary.

**Sec. 7. *Reconsideration of Well Control Rule.*** The Secretary of the Interior shall review the Final Rule of the Bureau of Safety and Environmental

Enforcement (BSEE) entitled “Oil and Gas and Sulfur Operations in the Outer Continental Shelf-Blowout Preventer Systems and Well Control,” 81 *Fed. Reg.* 25888 (April 29, 2016), for consistency with the policy set forth in section 2 of this order, and shall publish for notice and comment a proposed rule revising that rule, if appropriate and as consistent with law. The Secretary of the Interior shall also take all appropriate action to lawfully revise any related rules and guidance for consistency with the policy set forth in section 2 of this order. Additionally, the Secretary of the Interior shall review BSEE’s regulatory regime for offshore operators to determine the extent to which additional regulation is necessary.

**Sec. 8. *Reconsideration of Proposed Offshore Air Rule.*** The Secretary of the Interior shall take all steps necessary to review BOEM’s Proposed Rule entitled “Air Quality Control, Reporting, and Compliance,” 81 *Fed. Reg.* 19718 (April 5, 2016), along with any related rules and guidance, and, if appropriate, shall, as soon as practicable and consistent with law, consider whether the proposed rule, and any related rules and guidance, should be revised or withdrawn.

**Sec. 9. *Expedited Consideration of Incidental Harassment Authorizations, Incidental-Take, and Seismic Survey Permits.*** The Secretary of the Interior and the Secretary of Commerce shall, to the maximum extent permitted by law, expedite all stages of consideration of Incidental Take Authorization requests, including Incidental Harassment Authorizations and Letters of Authorization, and Seismic Survey permit applications under the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, and the Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.*

**Sec. 10. *Review of National Oceanic and Atmospheric Administration (NOAA) Technical Memorandum NMFS–OPR–55.*** The Secretary of Commerce shall review NOAA’s Technical Memorandum NMFS–OPR–55 of July 2016 (Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing) for consistency with the policy set forth in section 2 of this order and, after consultation with the appropriate Federal agencies, take all steps permitted by law to rescind or revise that guidance, if appropriate.

**Sec. 11. *Review of Offshore Arctic Drilling Rule.*** The Secretary of the Interior shall immediately take all steps necessary to review the Final Rule entitled “Oil and Gas and Sulfur Operations on the Outer Continental Shelf—Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf,” 81 *Fed. Reg.* 46478 (July 15, 2016), and, if appropriate, shall, as soon as practicable and consistent with law, publish for notice and comment a proposed rule suspending, revising, or rescinding this rule.

**Sec. 12. *Definition.*** As used in this order, “Outer Continental Shelf Planning Areas, as designated by the Bureau of Ocean Energy Management” means those areas delineated in the diagrams on pages S–5 and S–8 of the 2017–2022 Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program, as published by the BOEM in January 2015, with the exception of any buffer zones included in such planning documents.

**Sec. 13. *General Provisions.*** (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

**20818**      **Federal Register** / Vol. 82, No. 84 / Wednesday, May 3, 2017 / Presidential Documents

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(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

A handwritten signature in black ink, appearing to be the signature of Donald Trump, located on the right side of the page.

THE WHITE HOUSE,  
*April 28, 2017.*

[FR Doc. 2017-09087  
Filed 5-2-17; 11:15 am]  
Billing code 3295-F7-P



(iii) You can run a draft electronic submission of payment online form through MyIBFS, in association with a filed application, and the system will automatically enter your required fee on the form.

(2)(i) A complete FCC electronic submission of payment online form must accompany all fee payments. You must provide the FRN for both the applicant and the payer. You also must include your International Bureau (IB) submission ID number on the electronic submission of payment online form in the box labeled “FCC Code 2.” In addition, for applications for transfer of control or assignment of license, call signs involved in the transaction must be entered into the “FCC Code 1” box on the FCC electronic submission of payment online form. (This may require the use of multiple rows on the electronic submission of payment online form for a single application where more than one call sign is involved.)

(ii) You can generate a pre-filled FCC electronic submission of payment online form from MyIBFS using your IB submission ID. For specific instructions on using MyIBFS to generate your FCC electronic submission of payment online form, go to the MyIBFS website (<http://licensing.fcc.gov/myibfs>) and click on the “Getting Started” button.

- (3) \* \* \*
- (i) Pay by credit card (through MyIBFS);
- (ii) Pay by online Automatic Clearing House (ACH) payment; or

(4) You must electronically submit payment on the date you file your application in MyIBFS. If not, we will dismiss your application.

(5) For more information on fee payments, refer to Payment Instructions found on the MyIBFS internet site at <http://licensing.fcc.gov/myibfs>, under the Using IBFS link.

■ 7. Revise § 1.10010 to read as follows:

**§ 1.10010 Do I need to send paper copies with my electronic applications?**

When you file electronically through MyIBFS, the electronic record is the official record. You do not need to submit paper copies of your application.

■ 8. Amend § 1.10011 by revising paragraphs (a) through (c) and (d) introductory text to read as follows:

**§ 1.10011 Who may sign applications?**

(a) The Commission only accepts electronic applications. An electronic application is “signed” when there is an electronic signature. An electronic signature is the typed name of the person “signing” the application, which

is then electronically transmitted via MyIBFS.

(b) For all electronically filed applications, you (or the signor) must actually sign a paper copy of the application, and keep the signed original in your files for future reference.

(c) You only need to sign the original of applications, amendments, and related statements of fact.

(d) Sign applications, amendments, and related statements of fact as follows:

\* \* \* \* \*

■ 9. Amend § 1.10015 by revising paragraph (b) to read as follows:

**§ 1.10015 Are there exceptions for emergency filings?**

\* \* \* \* \*

(b) Emergency authorizations stop at the end of emergency periods or wars. After the emergency period or war, you must submit your request by filing the appropriate form electronically.

\* \* \* \* \*

**PART 63—EXTENSION OF LINES, NEW LINES, AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS**

■ 10. The authority citation for part 63 continues to read as follows:

**Authority:** 47 U.S.C. 151, 154(i), 154(j), 160, 201–205, 214, 218, 403, 571, unless otherwise noted.

■ 11. Amend § 63.53 by revising paragraph (a) to read as follows:

**§ 63.53 Form.**

(a) Applications for international service under section 214 of the Communications Act must be filed electronically with the Commission. Subject to the availability of electronic forms, all applications and other filings described in this section must be filed electronically through the International Bureau Filing System (MyIBFS). A list of forms that are available for electronic filing can be found on the MyIBFS homepage. For information on electronic filing requirements, see §§ 1.10000 through 1.10018 of this chapter and the MyIBFS homepage at <http://www.fcc.gov/ibfs>. See also § 63.20.

\* \* \* \* \*

[FR Doc. 2020–05800 Filed 3–26–20; 8:45 am]

**BILLING CODE 6712–01–P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 600**

[Docket No. 200321–0084]

RIN 0648–BJ70

**Emergency Measures To Address Fishery Observer Coverage During the COVID–19 Coronavirus Pandemic**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule; emergency action; request for comments.

**SUMMARY:** NMFS issues this temporary rule (also referred to herein as “emergency action”) to provide it with authority to waive observer coverage requirements established in regulations promulgated under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and other statutes, consistent with applicable law and international obligations. NMFS is taking this action to address public health concerns relating to the evolving pandemic of Coronavirus Disease 19 (COVID–19). NMFS is taking this action to protect public health, economic security, and food security, and to safeguard the health and safety of fishermen, observers, and other persons involved with such monitoring programs, while safeguarding the ability of fishermen to continue business operations and produce seafood for the Nation. This action also authorizes NMFS to waive some training or other program requirements to ensure that as many observers are available as possible while ensuring the safety and health of the observers and trainers.

**DATES:** Effective March 24, 2020 through September 23, 2020. Comments must be received by April 27, 2020.

**ADDRESSES:** Written comments, identified by NOAA–NMFS–2020–0036, may be submitted to NMFS using an electronic submission via the Federal e-Rulemaking portal. Go to <https://www.regulations.gov/docket?D=NOAA-NMFS-2020-0036>, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.

Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and generally will be posted for public viewing on

[www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

**FOR FURTHER INFORMATION CONTACT:**

Kelly Denit at 301–427–8517.

**SUPPLEMENTARY INFORMATION:**

**Background**

NMFS is promulgating this emergency action in response to the evolving COVID–19 pandemic. Currently, NMFS requires many fishing vessels to carry an observer as part of a mandatory observer program (or provides for voluntary observer programs) under the MSA (16 U.S.C. 1801 *et seq.*) and other Federal fishery statutes, including the Marine Mammal Protection Act (MMPA, 16 U.S.C. 1361 *et seq.*), and statutes implementing international agreements, such as the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*), South Pacific Tuna Act of 1988 (16 U.S.C. 973 *et seq.*), Western and Central Pacific Commission Implementation Act (16 U.S.C. 6901 *et seq.*), Western and Central Pacific Fisheries Convention Implementation Act (16 U.S.C. 6901 *et seq.*), Antigua Convention Implementing Act (16 U.S.C. 951 *et seq.*), High Seas Fishing Compliance Act (16 U.S.C. 5501 *et seq.*), and the Agreement on the International Dolphin Conservation Program as per MMPA. National observer regulations for the adequacy of a vessel for safety purposes are at 50 CFR 600.746, but there are also fishery-specific regulations regarding observers.

Many fisheries across the Nation are subject to mandatory observer coverage requirements that prohibit a vessel from fishing unless it carries one or more observers or at-sea monitors. While observers most frequently are deployed on fishing vessels, they are also deployed on motherships and at shoreside locations, including first receivers and processing facilities. Observers can also be called “catch-monitors” or “at-sea monitors.” Observers provide critical fishery-dependent data, which are used to manage fisheries pursuant to catch limits, collect information on bycatch, and monitor compliance. Observers also collect biological information that may not otherwise be collected. In some fisheries, observers are placed on only a portion of fishing vessel trips, while in other fisheries, observers are placed on every fishing vessel trip. Observers are

also placed at fish processing plants and collect additional information, such as that associated with a prohibited species census. Regulations requiring observer coverage do not expressly address the circumstances when NMFS may waive coverage due to a public health emergency. Further, some observer coverage regulations stipulate specific training and other program requirements that observers must meet in order to continue to serve as an observer, and do not address when NMFS may waive such requirements. Consistent with applicable law and international obligations, this emergency action will allow NMFS, under certain circumstances related to the COVID–19 pandemic, to waive observer coverage and some training and other program requirements for observers.

Given the COVID–19 pandemic, the resulting national and local declarations of emergency, and guidance from the Centers for Disease Control and Prevention, NMFS has determined that an emergency action is needed to enable NMFS to waive observer coverage and some related training and other program requirements. This emergency action would permit waivers in appropriate circumstances to protect public health and to ensure the safety of fishermen, observers, and other persons involved with observer coverage, while meeting conservation needs and providing an ongoing supply of fish to markets.

**Emergency Management Measures**

Under this emergency action, NMFS may waive observer coverage requirements if:

- Local, State, or national governments, or private companies or organizations that deploy observers pursuant to NMFS regulations, restrict travel or otherwise issue COVID–19-related social control guidance, or requirement(s) addressing COVID–19-related concerns, such that it is inconsistent with the requirement(s) or not recommended to place an observer(s); or
- No qualified observer(s) are available for placement due to health, safety, or training issues related to COVID–19.

If either of these conditions is satisfied, then NMFS may waive observer coverage requirements for an individual trip or vessel, an entire fishery or fleet, or all fisheries administered under a NMFS Regional Office (*see* 50 CFR 600.10 (defining Region) and <https://www.fisheries.noaa.gov/regions>) or NMFS Headquarters Office. However, waivers should be issued as narrowly as

possible in terms of duration and scope to meet the particular circumstances. Such waivers will be communicated in writing or electronic format. At any time, if the circumstances for a waiver are no longer applicable, NMFS will withdraw, in writing or electronic format, that waiver. In making decisions regarding observer coverage waivers, NMFS will gather information, if needed, from relevant observer service providers and other parties involved with observer coverage before issuing the waivers. Additionally, NMFS will take into account the ability of fishermen who are subject to observer coverage to adjust operations in response to this pandemic, such as for those fisheries that have year-round access compared with those that have only seasonal availability of fish.

This emergency action also allows NMFS to waive certain observer training and other observer program requirements (e.g., requiring a minimum class size or requiring that observers transfer to other vessels between trips). Before doing so, NMFS will ensure that any such waiver does not remove requirements that ensure the health and safety of the observer or observer trainer.

This emergency action is effective on March 24, 2020. However, NMFS is soliciting public comment on this temporary rule, and will consider any comments received as it evaluates whether any modifications to the emergency measures are needed. NMFS will continue to monitor and evaluate the COVID–19 pandemic and will take additional action if needed. Unless otherwise determined, NMFS anticipates that these emergency measures will be effective until the earlier of the following dates: (1) The date when the current COVID–19 pandemic is no longer deemed a public health emergency by the Secretary of Health and Human Services; and (2) September 23, 2020, with a possible extension of 186 days following that date, *see* MSA section 305(c)(3)(B), 16 U.S.C. 1855(c)(3)(B), if necessary. As warranted, if this emergency continues beyond the end of the 186-day extension period, NMFS may consult with the Secretary of Health and Human Services pursuant to MSA section 305(c)(3)(C) or may conduct more permanent rulemaking.

NMFS expects this emergency action to advance the protection of and to promote public health and the safety of fishermen, observers, and other parties in the area that may come in contact with those persons, consistent with relevant guidance and any local, State, and national requirements, and to help

secure the economic well-being of the Nation. NMFS will consider applicable law (e.g., the Endangered Species Act and the statutes noted above) and international obligations when making decisions about observer coverage waivers. In issuing such waivers, NMFS will carefully monitor the status of the fishery and/or protected species that were being observed or monitored to ensure that the relevant conservation and management goals are still being met. If needed to address any significant issues or concerns, or if NMFS determines that a waiver cannot be issued (e.g., observer coverage is required due to other applicable law or international obligations), NMFS may implement additional, separate actions (e.g., fishery closures, additional monitoring) per existing regulations or may issue emergency regulations, as necessary and appropriate. As a result, no ecological or socioeconomic impacts are expected by this temporary rule beyond any caused by the COVID-19 pandemic itself.

#### Classification

This action is issued pursuant to section 305(c) of the MSA, 16 U.S.C. 1855(c), and pursuant to the rulemaking authority under other statutes that apply to Federal fisheries management or that implement international agreements. Such statutes include, but are not limited to, the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*), South Pacific Tuna Act of 1988 (16 U.S.C. 973 *et seq.*), Western and Central Pacific Commission Implementation Act

(16 U.S.C. 6901 *et seq.*), Western and Central Pacific Fisheries Convention Implementation Act (16 U.S.C. 6901 *et seq.*), Antigua Convention Implementing Act (16 U.S.C. 951 *et seq.*), High Seas Fishing Compliance Act (16 U.S.C. 5501 *et seq.*), and MMPA (16 U.S.C. 1361 *et seq.*). This temporary rule is intended to authorize NMFS to waive any observer requirement implemented under any of those authorities, consistent with other applicable law. Consistent with MSA section 305(c)(3)(B), this action will remain in effect as to all such requirements for 180 days, with a possible extension of up to an additional 186 days (unless, prior to these dates, the current COVID-19 pandemic is no longer deemed a public health emergency by the Secretary of Health and Human Services, in which case NMFS anticipates that a notice of termination of this temporary rule would be filed in the **Federal Register** pursuant to MSA section 305(c)(3)(D)). If this emergency needs to be extended beyond that time, or if this public health emergency evolves to the point where it is deemed necessary, NMFS will consult with the Secretary of Health and Human Services, pursuant to MSA section 305(c)(3)(C), to seek the Secretary's concurrence on extending the action until the circumstances that created the public health emergency related to COVID-19 no longer exist.

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public

comment. Prior notice and opportunity for public comment would be contrary to the public interest, as this action is needed immediately to enable NMFS to respond to evolving, public safety-related concerns. NMFS is implementing this emergency action to authorize action to prevent any potential health issues caused by spreading the virus to fishermen, observers, technicians, and other persons involved with observer coverage. Any delay of implementation of this emergency action could result in public health and safety issues during this global pandemic. In addition, this emergency action is needed to address potential disruptions in observer and technician availability due to health, training or travel issues or COVID-19-related guidance, requirements, or restrictions.

For the reasons stated above, the AA also finds good cause to waive the 30-day delay in effective date of this temporary rule under 5 U.S.C. 553(d)(3).

Because prior notice and opportunity for public comment are not required for this temporary rule by 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are inapplicable.

Dated: March 24, 2020.

**Samuel D. Rauch III**,  
Deputy Assistant Administrator for  
Regulatory Programs, National Marine  
Fisheries Service.

[FR Doc. 2020-06426 Filed 3-24-20; 4:15 pm]

**BILLING CODE 3510-22-P**



**Enrolled**  
**House Bill 2509**

Sponsored by Representatives PILUSO, SOLLMAN, GORSEK, RAYFIELD, Senators DEMBROW, HASS; Representatives GOMBERG, KENY-GUYER, MCKEOWN, MCLAIN, MITCHELL, NERON, NOSSE, SANCHEZ, SCHOUTEN, SMITH WARNER, WILDE, Senator MONNES ANDERSON (Presession filed.)

CHAPTER .....

AN ACT

Relating to checkout bags; creating new provisions; and repealing ORS 459A.695.

**Be It Enacted by the People of the State of Oregon:**

**SECTION 1. As used in this section and sections 2, 3 and 5 of this 2019 Act:**

(1) “Garment bag” means a large bag that incorporates a hanger on which garments may be hung to prevent wrinkling during travel or storage.

(2) “Local provision” means a charter provision, ordinance, resolution or other provision adopted by a city, county or other local government, as defined in ORS 174.116.

(3) “Recycled paper checkout bag” means a paper bag that contains at least 40 percent post-consumer recycled fiber.

(4) “Restaurant” means an establishment where the primary business is the preparation of food or drink:

(a) For consumption by the public;

(b) In a form or quantity that is consumable then and there, whether or not it is consumed within the confines of the place where prepared; or

(c) In consumable form for consumption outside the place where prepared.

(5) “Retail establishment” means a store that sells or offers for sale goods at retail and that is not a restaurant.

(6) “Reusable fabric checkout bag” means a bag with handles that is specifically designed and manufactured for multiple reuse and is made of cloth or other machine-washable fabric.

(7) “Reusable plastic checkout bag” means a bag with handles that is specifically designed and manufactured for multiple reuse and is made of durable plastic that is at least four mils thick.

(8)(a) “Single-use checkout bag” means a bag made of paper, plastic or any other material that is provided by a retail establishment to a customer at the time of checkout, and that is not a recycled paper checkout bag, a reusable fabric checkout bag or a reusable plastic checkout bag.

(b) “Single-use checkout bag” does not mean:

(A) A bag that is provided by a retail establishment to a customer at a time other than the time of checkout, including but not limited to bags provided to:

(i) Package bulk items such as fruit, vegetables, nuts, grains, greeting cards or small hardware items, including nails, bolts or screws;

- (ii) Contain or wrap frozen food, meat, fish, flowers, a potted plant or another item for the purpose of addressing dampness or sanitation;
  - (iii) Contain unwrapped prepared food or a bakery good; or
  - (iv) Contain a prescription drug;
  - (B) A newspaper bag, door hanger bag, garment bag, laundry bag or dry cleaning bag;
- or
- (C) A bag sold in a package containing multiple bags for uses such as food storage, garbage containment or pet waste collection.

**SECTION 2.** (1) Except as provided in subsection (2) of this section, a retail establishment may not provide:

- (a) Single-use checkout bags to customers.
  - (b) Recycled paper checkout bags, reusable fabric checkout bags or reusable plastic checkout bags to customers unless the retail establishment charges not less than five cents for each recycled paper checkout bag, reusable fabric checkout bag or reusable plastic checkout bag.
- (2) A retail establishment may provide:
- (a) Reusable fabric checkout bags at no cost to customers as a promotion on 12 or fewer days in a calendar year.
  - (b) Recycled paper checkout bags or reusable plastic checkout bags at no cost to customers who:
    - (A) Use a voucher issued under the Women, Infants and Children Program established under ORS 413.500.
    - (B) Use an electronic benefits transfer card issued by the Department of Human Services.

- (3) Except as provided in subsection (4) of this section, a restaurant may not provide:
- (a) Single-use checkout bags to customers.
  - (b) Reusable plastic checkout bags to customers unless the restaurant charges not less than five cents for each reusable plastic checkout bag.
- (4) A restaurant may provide:
- (a) Recycled paper checkout bags at no cost to customers.
  - (b) Reusable plastic checkout bags at no cost to customers who use an electronic benefits transfer card issued by the Department of Human Services.

**SECTION 3.** To prohibit or limit the use of recycled paper checkout bags, reusable fabric checkout bags, reusable plastic checkout bags or single-use checkout bags by a restaurant or retail establishment, a city, county or other local government, as defined in ORS 174.116:

- (1) May adopt a local provision that establishes definitions, requirements and restrictions that are identical to the definitions, requirements and restrictions established by sections 1 and 2 of this 2019 Act.
- (2) May amend a local provision that was in effect before the effective date of this 2019 Act so the local provision establishes definitions, requirements and restrictions that are identical to the definitions, requirements and restrictions established by sections 1 and 2 of this 2019 Act.
- (3) May adopt, amend or enforce a local provision to impose a penalty other than the penalty established by section 4 of this 2019 Act. A restaurant or retail establishment may be charged with a violation under either the local provision or section 4 of this 2019 Act, but not both.
- (4) May not adopt or enforce a local provision that establishes definitions, requirements or restrictions that are not identical to the definitions, requirements and restrictions established by sections 1 and 2 of this 2019 Act.
- (5) Notwithstanding subsection (4) of this section, may adopt, amend or enforce a local provision to require a restaurant or retail establishment to charge a fee of more than five cents under provisions otherwise identical to section 2 (1)(b) and (3)(b) of this 2019 Act.

**SECTION 4.** (1) Notwithstanding ORS 153.018 (3), a violation of section 2 of this 2019 Act by a restaurant or retail establishment, as those terms are defined in section 1 of this 2019 Act, is a Class D violation subject to a maximum fine of \$250.

(2) Each day that the restaurant or retail establishment commits a violation constitutes a separate offense.

**SECTION 5.** (1) The Department of Environmental Quality shall produce a report on the impacts of sections 2 and 3 of this 2019 Act that assesses, in retail establishments that primarily sell groceries:

(a) Collection of the fee described in section 2 (1)(b) of this 2019 Act; and

(b) Customers' use of recycled paper checkout bags, reusable fabric checkout bags and reusable plastic checkout bags.

(2) No later than September 15, 2024, retail establishments that primarily sell groceries shall provide to the department the information described in subsection (1) of this section.

(3) No later than September 15, 2025, the department shall submit the report described in subsection (1) of this section, in the manner provided by ORS 192.245, to an interim committee of the Legislative Assembly related to the environment.

**SECTION 6.** Section 5 of this 2019 Act is repealed on December 31, 2025.

**SECTION 7.** ORS 459A.695 is repealed.

Passed by House April 25, 2019

.....  
Timothy G. Sekerak, Chief Clerk of House

.....  
Tina Kotek, Speaker of House

Passed by Senate June 11, 2019

.....  
Peter Courtney, President of Senate

Received by Governor:

.....M.,....., 2019

Approved:

.....M.,....., 2019

.....  
Kate Brown, Governor

Filed in Office of Secretary of State:

.....M.,....., 2019

.....  
Bev Clarno, Secretary of State



**Enrolled**  
**Senate Bill 90**

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with pre-session filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Senate Interim Committee on Environment and Natural Resources)

CHAPTER .....

AN ACT

Relating to a restriction on restaurants providing single-use plastic straws to consumers; and declaring an emergency.

**Be It Enacted by the People of the State of Oregon:**

**SECTION 1. (1) As used in this section:**

(a) **“Consumer” means an individual who orders a beverage of any description from a food and beverage provider in this state.**

(b) **“Convenience store” means a business that, for compensation, offers or provides a range of commodities that includes food and beverages.**

(c) **“Enforcement officer” means an authorized representative of the State Department of Agriculture who conducts inspections under ORS 616.286 or an authorized representative of the Director of the Oregon Health Authority or of a local government who conducts inspections under ORS 624.010 to 624.121 or 624.310 to 624.430.**

(d)(A) **“Food and beverage provider” means a business that, for compensation, offers or serves food or beverages to a consumer.**

(B) **“Food and beverage provider” does not include a health care facility, as defined in ORS 442.015, or a residential care facility, as defined in ORS 443.400, that provides single-use plastic straws to patients or residents.**

(e)(A) **“Single-use plastic straw” means a tube made primarily from plastic that is derived from petroleum or a biologically based polymer, such as corn or another plant source, and that is intended:**

(i) **To transfer liquid from a container to a consumer’s mouth;**

(ii) **For a single use; and**

(iii) **For disposal after the single use.**

(B) **“Single-use plastic straw” does not include:**

(i) **A straw made from materials other than plastic, including but not limited to paper, pasta, sugar cane, wood or bamboo; and**

(ii) **A plastic straw that is attached to or packaged with a beverage container before the beverage container is offered for retail sale.**

(2)(a) **A food and beverage provider or convenience store may not provide a single-use plastic straw to a consumer unless the consumer specifically requests the single-use plastic straw.**

(b) Notwithstanding the prohibition in paragraph (a) of this subsection, a consumer may request, and a food and beverage provider or a convenience store may offer to the consumer, a single-use plastic straw in an area of the food service provider’s or convenience store’s premises in which the consumer may receive a delivery of prepared food or a beverage while seated in or on a vehicle.

(c) The prohibition in paragraph (a) of this subsection does not apply to a convenience store that:

(A) Sells or offers single-use plastic straws for sale in bulk or unconnected with a sale or provision of food or a beverage; or

(B) Makes single-use plastic straws available to consumers in an unattended location, provided that the convenience store may leave the single-use plastic straws in an unattended location only if the convenience store does not have space in which to store the single-use plastic straws in a location where employees of the convenience store provide service to consumers.

(3) An enforcement officer may enforce subsection (2) of this section in the course of conducting an inspection. A food and beverage provider or a convenience store that violates subsection (2) of this section is subject to a notice for a first and second violation and, for subsequent violations, to a fine of not more than \$25 for each day in which the food and beverage provider or convenience store remains in violation of subsection (2) of this section. The enforcement officer may not impose total fines of more than \$300 during a calendar year for a food and beverage provider’s or a convenience store’s violation of subsection (2) of this section.

**SECTION 2.** A local government or municipality may not, after the effective date of this 2019 Act, enact an ordinance, resolution, regulation, rule or other law with requirements that differ from the provisions set forth in section 1 of this 2019 Act.

**SECTION 3.** Section 1 of this 2019 Act becomes operative on January 1, 2020.

**SECTION 4.** This 2019 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2019 Act takes effect on its passage.

Passed by Senate April 11, 2019

Received by Governor:

Repassed by Senate June 5, 2019

.....M.,....., 2019

Approved:

.....  
Lori L. Brocker, Secretary of Senate

.....M.,....., 2019

.....  
Peter Courtney, President of Senate

.....  
Kate Brown, Governor

Passed by House May 29, 2019

Filed in Office of Secretary of State:

.....  
Tina Kotek, Speaker of House

.....M.,....., 2019

.....  
Bev Clarno, Secretary of State

## Chapter 6B

# Presentation Slides: Oregon and the Coastal Zone Management Act

**HEATHER WADE**

Coastal Policy Specialist and Senior Planner  
State of Oregon  
Salem, Oregon





# Oregon and the Coastal Zone Management Act

Oregon State Bar Environmental and Natural Resources  
Section Annual CLE Seminar on Ocean and Coastal Law  
October 8, 2020

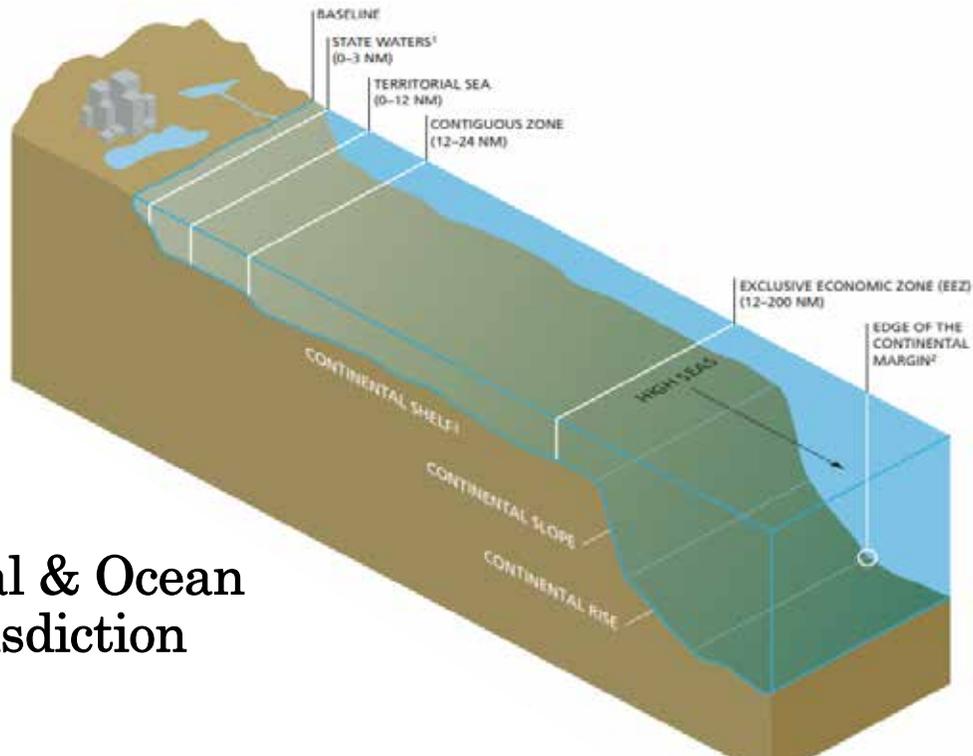
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Oregon Coastal Management Program  
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971-239-9467

## Coastal and Ocean Law Snapshot

- Coastal Zone Management Act
- National Flood Insurance Act
- Coastal Barrier Resources Act
- Magnuson-Stevens Fishery Conservation and Management Act
- Marine Mammal Protection Act
- Endangered Species Act
- Submerged Lands Act
- Outer Continental Shelf Lands Act
- Clean Water Act
- Oil Pollution Act
- Clean Air Act
- Deep Seabed Hard Mineral Resources Act
- Ocean Thermal Energy Conversion Act
- Rivers and Harbors Act
- Natural Gas Act

A complex mosaic  
of legal  
authorities...

## Coastal & Ocean Jurisdiction



## Intersection between State & Federal Rules

### Coastal Zone Management Act

- Flexible framework that aims to empowers states to appropriately balance the use and conservation of coastal resources.
- Voluntary state coastal programs
  - Federal \$\$\$\$
  - Federal consistency authority
- National program, implemented at the state and local level
- Federal Regulations provides general guidance for federal consistency authority
  - CZMA – broad goals and purpose
  - Code of Federal Regulations – rules and procedures for implementation.

### Federal Permit/Action

National Historic Preservation Act §106

Rivers & Harbors Act §10

Endangered Species Act

Clean Water Act §401 & §404

## Why is Federal Consistency Special?

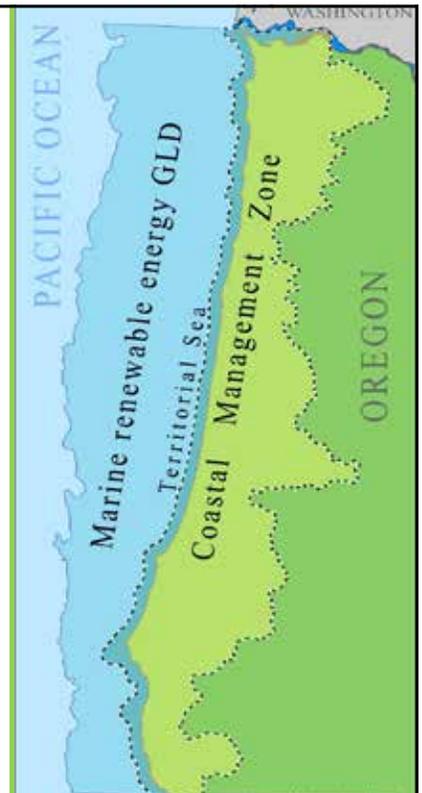
1. FC is a coordination tool
2. FC provides a holistic review of the action through the lens of state policies.
3. Federal entities cannot issue a final permit, or proceed with an activity without CZMA concurrence.
4. CZMA decisions can't be federally preempted
  - CZMA & 401 WQC are the only non-preemptable authorizations



## Where does it apply?

- The federally approved coastal zone
- Any projects that have reasonably foreseeable impacts to coastal resources
- Within OCM Approved GLD's (Oregon has one specific to MRE activities)

*\*Federally owned lands are not part of the coastal zone for FC purposes\**



# The Building Blocks of FC

**Program Changes** (staff action) allows the Program to update and modifications enforceable policies & foundational documents.  
\*\*Requires OCM approval.

Federal Consistency Reviews

Enforceable Policies

Foundational Documents & State FC Rules

Federal Regulations

# State Federal Consistency Structure

States with Local Enforceable Policies



States with Local Coastal Programs



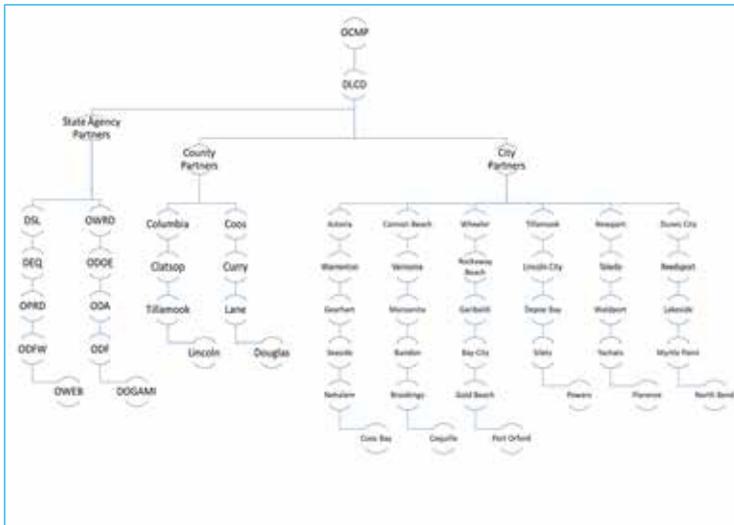


# Federal Consistency in Oregon

A majestic union of complex layers...

## Organizational Complexity

**Enforceable policies are sourced from each of the jurisdictions.**



- State Level
  - Revised Statutes
  - Administrative Rules & the Territorial Sea Plan
  - Statewide Land Use Planning Goals
- Local
  - Comprehensive Plans
  - Land Use Planning Ordinances
  - Transportation System Plans (only a handful of these)



# Federal Consistency Reviews

Directly Implementing FC and Program Standards (EP's)

Title 15 CFR §930

## Federal Consistency Reviews

### We Review:

- States must request review authority from NOAA-OCM (via Program Change)
- Oregon has authority to review
  - Federal Permits/Licenses (§930 Sub. D)
  - Direct Federal Actions (§930 Sub. C)
- NOAA-OCM requires all state to have a “Table 7”
  - Outlines what a state has authority to review
  - NOAA-OCM currently does not require states to list federal activities in Table 7, but States are beginning to add them for transparency.

# Reviewing Federal Permits



**\*\*All required state and local permits must be issued and submitted to DLCD-OCMP before issuing a federal consistency decision**

**\*\*DLCD-OCMP is required to independently evaluate consistency with local policies regardless of local permit review outcomes**

# Reviewing Federal Permits



**Joint Permit Application**

This is a joint application, and must be sent to all agencies (Corps, DOL, and DEQ). Alternative forms of permit applications may be acceptable; contact the Corps and DOL for more information.

U.S. Army Corps of Engineers Portland District
  Oregon Department of State Lands
  Oregon Department of Environmental Quality

Action ID Number: \_\_\_\_\_

Corps:  Individual  National  Regional General Permit  Other (specify): \_\_\_\_\_

EIS:  Individual  GP Trans  GP Min Wet  GP Maint Dredge  GP Ocean Energy  No Permit  Waiver

**(2) APPLICANT AND LANDOWNER CONTACT INFORMATION**

| Applicant   | Property Owner (if different) | Authorized Agent (if applicable)  |
|---|-------------------------------|---|
| Name (Required): Mike Moha<br>Business Name: Warrenton-Hammond School District<br>Mailing Address 1: 820 SW Cedar Avenue<br>City, State, Zip: Warrenton, OR 97146<br>Business Phone: (503) 861-2281<br>Cell Phone: _____<br>Fax: _____<br>Email: <a href="mailto:moham@warrenton.k12.or.us">moham@warrenton.k12.or.us</a> | Same as Applicant             | Name: Stefanie Taylor<br>Business Name: Ecological Land Services, Inc.<br>Mailing Address: 1187 3rd Avenue, Suite 220<br>City, State, Zip: Longview, WA 98032<br>Business Phone: (360) 878-1371<br>Cell Phone: _____<br>Fax: _____<br>Email: <a href="mailto:stef@eco-land.com">stef@eco-land.com</a> |

**(3) PROJECT INFORMATION**

**A. Provide the project location.**

Project Name: WHSO School Campus      Latitude & Longitude: 46.136666, -123.614313

Project Address / Location: West of SE Willow Drive, East of Dolphin Road      City (nearest): Warrenton      County: Clatsop

| Township | Range | Section | Quarter / Quarter | Tax Lot     |
|----------|-------|---------|-------------------|-------------|
| 6N       | 10W   | 34      | NW                | 100 and 103 |

Brief Directions to the Site: From Highway 101 in Warrenton, turn east on Ensign Lane, turn south on SE TSP Street, turn south on SE Chokaberry, turn south on SE Willow Drive. Continue on SE Willow Drive to it's terminus, then continue forward on the gravel access road that will end on the subject property.

**B. What types of waterbodies or wetlands are present in your project area? (Check all that apply.)**

River / Stream       Non-Tidal Wetland       Lake / Reservoir / Pond  
 Estuary or Tidal Wetland       Other       Pacific Ocean

| Waterbody or Wetland Name* | River Mile | SP File #/C Name        | SN File #/C #12 (state) |
|----------------------------|------------|-------------------------|-------------------------|
| Onsite Wetlands            |            |                         |                         |
|                            |            | Sigapanon River-Frontal | 1700000230              |
|                            |            | Columbia River          |                         |

\* In decimal format (e.g., 44.8399 -123.0283)  
\*\* If there is no official name for the wetland or waterbody, create a unique name (such as "Wetland 1" or "Tributary A").

**Issue Decision**

- Concur, Concur with Conditions, Object
- Applicant can appeal to the U.S. Secretary of Commerce

**\*\*All required state and local permits must be issued and submitted to DLCD-OCMP before issuing a federal consistency decision**

**\*\*DLCD-OCMP is required to independently evaluate consistency with local policies regardless of local permit review outcomes**

# Reviewing Direct Federal Actions

## CZMA Determination Submitted

- Effects Evaluation
- EP Analysis

## 60 Day Review Initiates

- Coordination with Network Partners
- Review EP Analysis & Coastal Effects

## 30 Day Public Comment Period

## Issue Decision

- Concur, Concur with Conditions, Object
- No Appeal Process – Court Mediation

\*\*Exempt from requirement to receive state or local permits, but still need to show consistency with underlying policies.

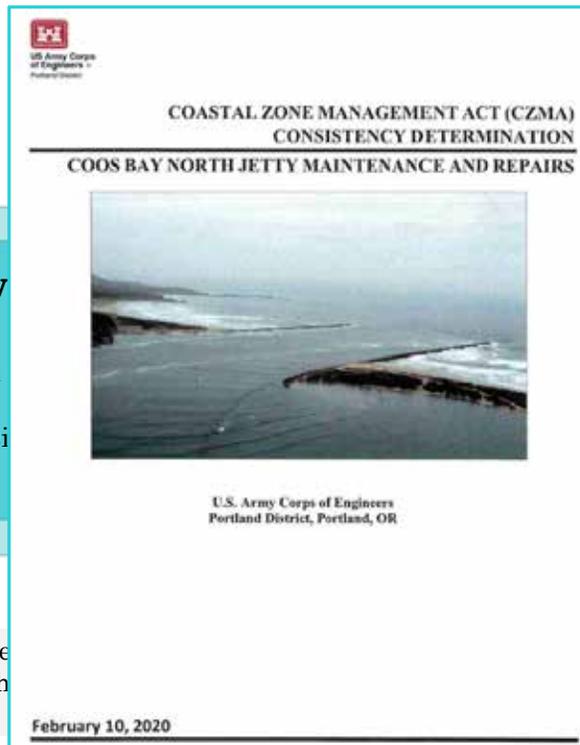
# Reviewing Direct Federal Actions

## CZMA Determination Submitted

- Effects Evaluation
- EP Analysis

## 60 Day Review Initiates

- Coordination with Network Partners
- Review EP Analysis & Coastal Effects



## Issue Decision

- Concur with Conditions, Object
- No Appeal Process – Court Mediation

\*\*Exempt from requirement to receive state or local permits, but still need to show consistency with underlying policies.

## Federal Consistency Reviews Summary

|                               | Federal Permits<br><small>(non-federal agency lead)</small>   | Federal Action<br><small>(federal agency lead)</small>  |
|-------------------------------|---|---|
| <b>Review Timeline</b>        | 6 months  | 2 months  |
| <b>Consistency Standard</b>   | Full Consistency  | Consistent to the <i>Maximum Extent Practicable</i>   |
| <b>Application Materials</b>  | <ol style="list-style-type: none"> <li>1. Consistency Certification</li> <li>2. EP analysis</li> <li>3. Coastal effects analysis</li> <li>4. Any other requirements a state has NOAA approval to require</li> </ol> <small>(Known in the regulations as “Necessary Data &amp; Information”, or “NDI”)</small> | <ol style="list-style-type: none"> <li>1. Consistency Determination</li> <li>2. EP Analysis</li> <li>3. Coastal Effects Evaluation</li> </ol> |
| <b>Special Considerations</b> | <ul style="list-style-type: none"> <li>• Table 7 lists the federal permits a state has review authority over.</li> <li>• All state and local permits must be issued and submitted to OCMP prior to a FC decision being issued.</li> </ul>   | Exempt from requirement to obtain state or local permits  |
| <b>Example</b>                | Army Corps of Engineers Section 404 (Federal Removal-Fill Authorization)  | Army Corps of Engineers Jetty Maintenance   |

OREGON'S FEDERAL CONSISTENCY AUTHORITY



Wilbur Ross  
U.S. Secretary  
of Commerce

## Appeal Process

Take it right to the top!

- Applicant has **30 days from decision** to appeal to the U.S. Secretary of Commerce.
  - Appeal to special conditions or decision
- Appeal Considers
  - Coastal Effects
  - National Interest
- LCDC has no role in the CZMA appeal process.
- Some timeline complexities based on project
  - Timeline extensions are available for energy projects





## Hot Topics to watch for in the future...

- Offshore Wind Development
- Offshore Oil and Gas Development
- Natural Gas Exports
- Nonpoint Source Pollution
- Submerged Cultural Resources
- Blue Carbon
- Can FC be used to address climate change?



### Social Media



[www.linkedin.com/in/heather-wade](http://www.linkedin.com/in/heather-wade)



@coastalplanner



<https://tamu.academia.edu/HeatherWade>

# THANK YOU

### For more information:

Heather Wade

[Heather.wade@state.or.us](mailto:Heather.wade@state.or.us)

[hwade@tamu.edu](mailto:hwade@tamu.edu)

971-239-9467 (work cell)



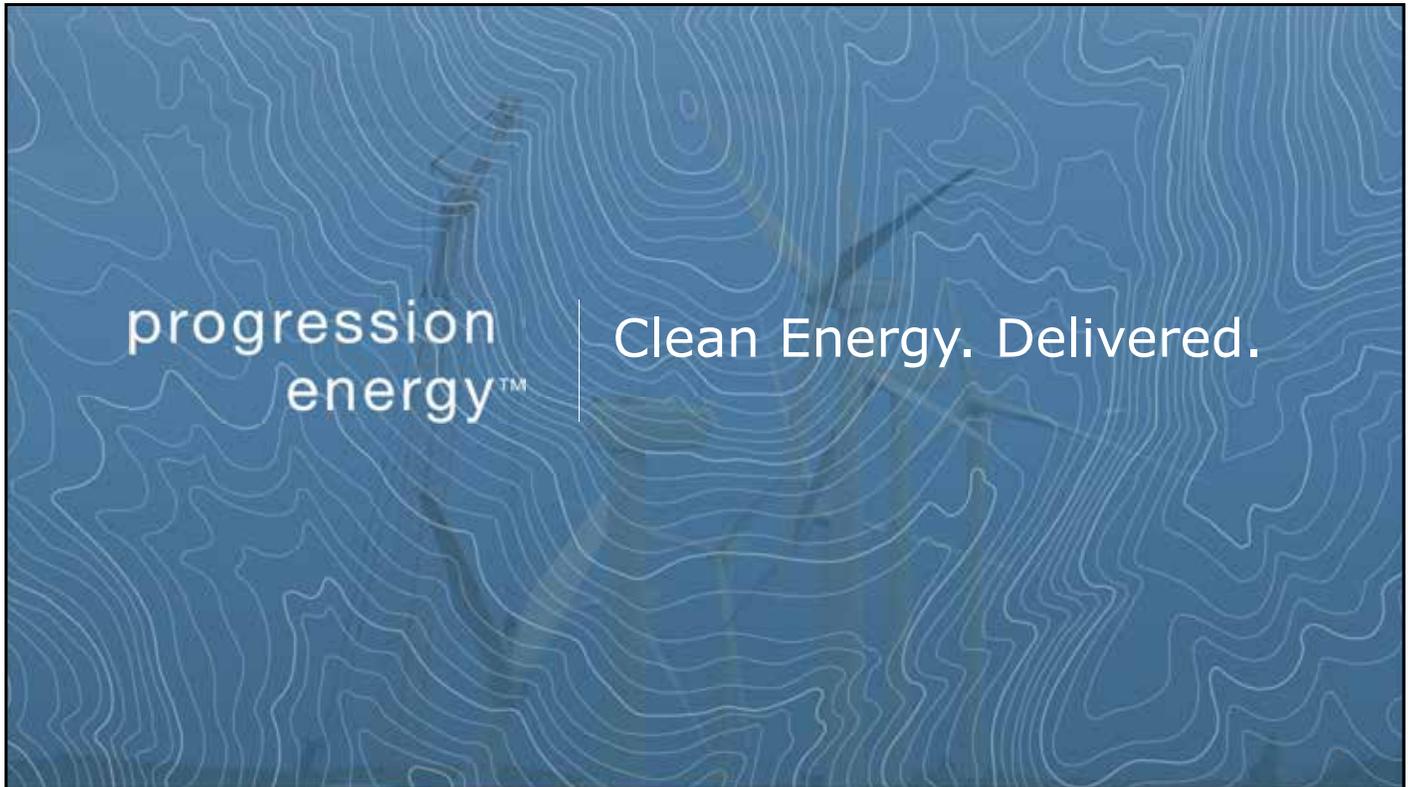
## Chapter 6C

# Presentation Slides: Floating Offshore Wind

**JOSH FRANKLIN**

Chief Development Officer, Progression Energy  
San Diego, California





**Progression Energy is a diversified energy company that operates in five global markets with floating offshore wind as the primary type of renewable generation technology**



**Hawaii**  
Offshore Wind  
Onshore Wind  
Solar + Storage



**Northeast US**  
Offshore Wind



**Japan**  
Offshore Wind



**Pacific**  
Offshore Wind  
Onshore Wind  
Solar + Storage



**Caribbean**  
Offshore Wind  
Onshore Wind  
Solar + Storage

## Offshore wind turbine foundations can either be secured to the seabed (bottom fixed) or turbines can be mounted on anchored floating substructures (floating)



Semi-submersible

Achieves stability via combination of waterplane area (footprint), draft and column diameter



Spar buoy

Achieves stability via combination of column diameter, depth and ballast mass (water & permanent)



Tension-leg platform

Achieves stability via tension between submerged buoyancy and mooring lines



Barge

Achieves stability via water plane area, structural buoyancy, and mooring line tension

## Floating offshore wind (FOW) platforms combine two proven technologies from terrestrial wind generation and offshore oil drilling to develop stable semi-submersible substructures

Semi-submersible platforms (“semisubs”) are a proven technology frequently used in the oil & gas sector since the 1960s

- Semisubs were historically chosen for oil rigs due to exceptional stability and adaptability to harsh environments over drill-ships, and deep water capabilities over submersibles and jack-up vessels
- Majority of new oil & gas platforms are based on floating technology
- First prototypes of FOW applications show that the concept works for the wind industry; larger projects are currently in development

### Oil & gas substructure usage

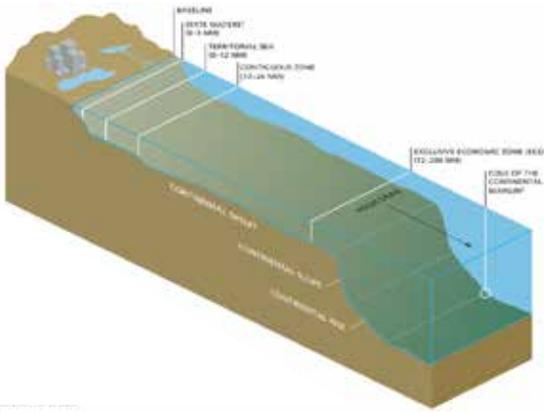
# substructures



|      |  |  |  |
|------|--|--|--|
| 1962 | First converted semi-submersible drilling rig                |  | Blue Water 1, is the first submersible drilling oil rig to drill in floating mode and therefore converted into a semi-submersible by Shell in 1962, Gulf of Mexico |
| 1963 | First purpose-built semi-submersible drilling rig            |  | Ocean Driller was the first purpose-built semi-submersible platform, designed by Odeco and built in 1963 for operations in the Gulf of Mexico                      |
| 1986 | First purpose-built semi-submersible oil production platform |  | The GVA5000 'Balmoral' floating production unit, built in Sweden and operating in the UK Balmoral oil field since 1986   |
| 2011 | First purpose-built semi-submersible offshore wind platform  |  | WindFloat 1, the first semi-submersible 2 MW offshore wind prototype by Principle Power, Inc. in Portugal  |

## Coastal jurisdictional issues and international squabbles over the ownership of sea space presents a threat to the development of OSW projects in the Pacific

US, Hawaii



Japan



# Thank You

This Project Overview ("Overview") does not constitute an offer or a solicitation of an offer in respect to any securities or assets described in this Overview. The information in this Overview is merely a descriptive narrative and is provided solely for discussion and evaluation purposes. The information discussed in this Overview is subject to change without notice. The information may contain statements which are either missing information or which assume completion of matters expected to be completed in the future or are based on assumptions which are not expressly discussed herein and/or may not be within the control of Progression Energy. Accordingly, this Overview does not purport to be all-inclusive or to contain all the information that may be required in relation to such discussions or for an evaluation. This Overview shall not form the basis of any proposal, contract or commitment. This Overview does not constitute investment, legal, tax or other advice, and does not take into consideration the investment objectives, financial situation or particular needs of any particular investor.

This Overview does not constitute an offer or invitation to purchase any securities and neither this Overview nor anything contained herein shall form the basis of any contract or commitment whatsoever.

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**progression-energy.com**



**Chapter 7**  
**Ethics of Storytelling in  
Environmental Litigation**

**STEVE JOHANSEN**  
Lewis and Clark Law School  
Portland, Oregon

**Contents**

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## Ethics of Storytelling in Environmental Litigation

### I. Why I Don't Eat at KFC.

### II. The Power of Storytelling.

#### A. Storytelling defined.

1. Aristotle: A story has a beginning, a middle, and an end.
2. More helpful definition: A character-based narrative of a character's efforts to overcome obstacles to achieve a goal. (Three elements: character, conflict, goal)

#### B. The science of story: humans are storytelling animals.

C. Narrative coherence: A story doesn't have to be true to be persuasive; it just has to be believable.

### III. Ethical Dangers of Storytelling.

A. Lawyers are not supposed to lie. (See Rules 3.3, 4.1, 8.4)

B. Stories never tell the whole truth

- Point of view
- coherence v. truth

### IV. What is *Lawrence v. Texas* Doing in a Presentation about Environmental Litigation?

- A. Clients stories in interest litigation.
- B. Stories we tell our clients.
- C. Finding the hero of the story.
- D. Climate Change.

### VI. Do We Need A New Ethics Rule For Storytelling?



## Rule 1.6 Confidentiality of Information

(a) **A lawyer shall not reveal information relating to the representation of a client** unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

## Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) **make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;**

- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
- (3) **offer evidence that the lawyer knows to be false.** If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false;
- (4) conceal or fail to disclose to a tribunal that which the lawyer is required by law to reveal; or
- (5) engage in other illegal conduct or conduct contrary to these Rules.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, but in no event require disclosure of information otherwise protected by Rule 1.6.

(d) **In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.**

### Rule 4.1 Truthfulness in statements to others

In the course of representing a client a lawyer shall not knowingly:

**(a) make a false statement of material fact or law to a third person; or**

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting in an illegal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

### Rule 8.4 Misconduct

(a) It is professional misconduct for a lawyer to:

- (1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (3) **engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;**
- (4) engage in conduct that is prejudicial to the administration of justice; or
- (5) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law, or
- (6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

(7) in the course of representing a client, knowingly intimidate or harass a person because of that person's race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability.

(b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct.

"Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein.



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