

Helpful Information for Engagement with Forest Law and Policy

LEGAL ALPHABET SOUP:

United States Code (USC): Where federal laws/statutes live.

Code of Federal Regulations (CFR) Where federal regulations, implementing statutes, live.

Northwest Forest Plan (NFP): This is the overarching planning document for forests in the range of the Northern Spotted Owl. The main components are the different land designations, the Aquatic Conservation Strategy, and the survey and manage requirements.

National Environmental Policy Act (NEPA); 42 USC §4332. Procedural statute that directs federal agencies undertaking “major federal actions” to analyze the impacts of these actions, and make them available for public review & comment.

National Forest Management Act (NFMA); 16 USC §1600; 36 CFR §219. This is the governing substantive statute for Forest Service land. It requires every national forest to have a management plan, called a Land and Resource Management Plan (LRMP)

Federal Land Protection and Management Act (FLPMA) 43 USC §1701; 43 CFR §3809. This is the governing substantive statute for managing for BLM land. It also requires a management plan, called an Resource Management Plan (RMP) for all BLM Districts.

Freedom of Information Act (FOIA). CFR different for each agency: Forest Service: 36 CFR Sec. 215; BLM: 43 CFR Sub. A, Sec. 2. This law is great! It gets you more information out of the agencies than they provide in their public documents. This is a good way to get specialists reports, maps, aerial photos, etc.

Clean Water Act (CWA) – Protects water quality from point source pollution, which – thanks to recent case law – may soon apply to runoff from certain logging roads.

Endangered Species Act (ESA) – The government must not “take” a threatened or endangered species (primarily spotted owls and salmon in these forests) without consulting with the Fish & Wildlife Service and/or National Marine Fisheries Service.

HELPFUL WEBSITES:

bark-out.org – for updates on projects, agency planning documents, and sample comments

publicnoticeads.com/OR/search/searchnotices.asp - to search public notices. This is important because comments are typically due 30 days after public notice is published in the newspaper of record, and the Forest Service leaves it up to us to figure that out.

ceq.hss.doe.gov – The fed’s home page for all things NEPA, including a “Citizen’s Guide”

foiaadvocates.org - a great go-to website for help with all things FOIA

fs.usda.gov/mthood - for info on all planned projects, go to “land & resource management”, then “projects”

AGENCIES THAT ARE INVOLVED WITH FEDERAL PUBLIC LAND ISSUES:

U.S. Forest Service (USFS) – Administers land that is part of the National Forest system – primarily in the Cascades in Oregon, except for the Siuslaw in the southern coast range.

Bureau of Land Management (BLM) – Administers BLM land – primarily east of the Cascade Mountains (grazing, mining and gas/oil extraction), except for the O&C Lands on the Westside.

National Marine Fisheries Service (NMFS) (also known as NOAA Fisheries) – Administers the ESA for anadromous fish.

U.S. Fish & Wildlife Service (USFWS) – Administers the ESA for non-anadromous fish, and for birds and wildlife.

State Department of Environmental Quality (DEQ) – Overlaps with the federal agencies in administering the Clean Water Act, especially as regards the 303(d) water quality limited waterbodies, and the Total Maximum Daily Load (TMDL) for watersheds. Has a Memorandum of Understanding (MOU) with BLM & USFS for CWA compliance.

HELPFUL PLANNING DOCUMENTS:

Mt. Hood Land & Resource Management Plan (*Mt. Hood Forest Plan, or LRMP*): The 23-year old plan that guides all management on the Mt. Hood National Forest.

Northwest Forest Plan Record of Decision and Standards & Guidelines (*NFP ROD*): Amended all existing Forest Plans with three major things: 1) Land Designations; 2) Aquatic Conservation Strategy; and 3) Survey & Manage Requirements

Watershed Analyses: Required by the NFP for every 6th-field watershed. Very helpful – though becoming outdated.

Watershed Condition Framework & Transportation Analysis Plan: Two Forest-level planning documents that the National Forests were recently required to create. Possibly helpful.

THINGS TO KNOW:

1. The NFMA Planning Regulations have recently been changed, so the next round of Forest Plans will be using the new regulations. I don't know much about them (yet) but will learn as we organize around (finally) getting a new Mt. Hood Forest Plan.
2. The administrative appeals process has also been recently changed – now, instead of appealing a decision after it is made, we have to do a pre-decisional objection to a project *before* the decision is made. Mt. Hood National Forest has used this a few times, but it is not so great. They still refuse to make any changes to projects.
3. Specialists write lots of reports for each project. Most of this info never sees the EA. It can be very helpful, and can be accessed through FOIA requests.

How the Endangered Species Act is supposed to work:

1. Under the ESA, the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (“NMFS;” collectively “the Services”) must list a species as endangered if it is in danger of going extinct throughout all or a significant portion of its range, and must list it as threatened if it is likely to become endangered in the foreseeable future. 16 U.S.C. §§ 1532(6), (20); 1533(a)(1).¹ The Services may also list sub-species or distinct populations of fish or wildlife as threatened or endangered under the ESA. *Id.* § 1532(16).

2. Once species are listed as threatened or endangered, the Services must designate critical habitat, which is occupied or unoccupied habitat that contains physical or biological features essential to the conservation of the species and which may require special management considerations or protection. *Id.* §§ 1532(5); 1533(a)(3). The intent of the ESA is to conserve ecosystems upon which threatened and endangered species depend, and recover listed species to the point at which they no longer need the protections of the Act. *Id.* §§ 1531(b); 1532(3).

3. A federal agency that authorizes an activity that may affect a listed species or critical habitat must consult with the Services over the impacts of that activity to ensure that it does not jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). Jeopardize means to reduce appreciably the likelihood of both the survival and recovery of the species in the wild by reducing the reproduction, numbers, or distribution of the species. 50 C.F.R. § 402.02. Destruction or adverse modification is a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. *Id.*

4. During the ESA consultation process, if the action agency concludes in a “biological assessment” that the activity is “not likely to adversely affect (NLAA)” the listed species or adversely modify its critical habitat, and the Service concurs with that conclusion, then the consultation is complete. *Id.* §§ 402.12, 402.14(b). *Most timber sales end their consultation here.*

5. If, however, the action agency or the Service determines that the activity is “likely to adversely affect (LAA)” the listed species or its critical habitat, then the Service completes a “biological opinion” to determine whether the activity will jeopardize the

¹ U.S. Fish and Wildlife Service is responsible for consultations involving freshwater aquatic species, such as bull trout, while NOAA Fisheries is responsible for consultations involving marine species, such as salmon and steelhead.

species or result in destruction or adverse modification of critical habitat. *Id.* § 402.14. If the Service determines that the action will jeopardize the species or adversely modify critical habitat, it may propose one or more reasonable and prudent alternative actions that would avoid such results. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(5).

6. In addition to the substantive duty under the ESA to avoid jeopardizing a species or adversely modifying critical habitat, the action agencies also have a duty, while the consultation process is occurring, to avoid making any irreversible or irretrievable commitment of resources that has the effect of foreclosing reasonable and prudent alternative measures that would avoid jeopardizing the species or adversely modifying critical habitat. 16 U.S.C. § 1536(d).

7. The ESA and its regulations also prohibit “take” of listed species, which includes harming, wounding, or killing the species. 16 U.S.C. §§ 1538; 1533(d); 1532(19). Harm is further defined to include significant habitat modification or degradation that injures a listed species by significantly impairing its breeding, feeding, or sheltering behaviors, while harassment is an act that creates the likelihood of injury by annoying a species to the extent that it significantly disrupts breeding, feeding, or sheltering behaviors. 50 C.F.R. § 17.3.

8. The Services, however, can authorize take of a listed species through an “Incidental Take Statement” that accompanies a biological opinion if the taking is incidental to an otherwise lawful activity and does not cause jeopardy to the species or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). Any taking that conforms to the terms and conditions within an Incidental Take Statement is not prohibited under Section 9 of the ESA. 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i)(5).

9. Once the consultation is complete, the agencies (action and consulting) have an ongoing duty to protect the species. Re-initiation of consultation is required and shall be requested by the action agency or the Services if: (a) the amount or extent of taking specified in the incidental take statement is exceeded; (b) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (c) the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (d) a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16.