

Administrative Tools to Fix the Northwest Forest Plan

The Northwest Forest Plan, adopted in 1994 by the Secretaries of Agriculture and Interior, promised 1.1 billion board feet of timber sales per year from the national forests and BLM lands of western Washington, western Oregon and northern California. That promise has not been kept. Sales never reached more than 700 million board feet in a year, and since 1999 court decisions and administrative paralysis have brought the annual sale level virtually to zero. The limited remedial steps currently planned by the Forest Service, BLM and NMFS are incomplete and ineffective. The Northwest Forest Plan is broken, and needs repair.

The agencies with responsibility for the NWFP have the tools to make the necessary repairs. This paper summarizes seven specific administrative initiatives the agencies can take to fix the NWFP. Citizens have legal remedies available in the courts to achieve many of these reforms if agency leadership does not make the necessary changes.

1. Amend the NWFP to correct recent misinterpretations of the Aquatic Conservation Strategy (ACS) by the Ninth Circuit Court of Appeals.
2. Revise the NMFS programmatic biological opinion on the NWFP to delete the equivalency between ACS compliance and ESA avoidance of jeopardy.

For more than two years, NMFS has been unable to complete ESA consultations on NWFP timber sales. This gridlock stems from a decision made by NMFS in its 1997 programmatic biological opinion (PBO) on the NWFP to require its future project-level NWFP consultations to use a methodology that equates consistency with the ACS with "no jeopardy" under the ESA, and conversely equates lack of consistency with the ACS with a finding of jeopardy under the ESA.

In the *Pacific Coast Federation of Fishermen's Associations (PCFFA)* cases, the courts required NMFS to use its project-level ESA consultations to assure that all FS/BLM timber sales comply with the ACS, and ruled that a large group of FS/BLM timber sales had all failed to comply with the ACS because NMFS, FS and BLM had misinterpreted the Plan in four separate ways: a) by evaluating timber sale impacts at the watershed level rather than the project level; b) by evaluating timber sale impacts 10 years after harvest rather than immediately after harvest; c) by failing to give appropriate weight to recommendations presented in Watershed Analysis reports; and d) by approving timber removal within designated Riparian Reserves where there are no benefits to aquatic species.

The Forest Service and BLM should issue a minor amendment to the NWFP to clarify the erroneous interpretations of the plan adopted by the courts. NMFS should issue a revised PBO eliminating the ACS-ESA equivalency policy. The FS and BLM would be able to administer the NWFP as all the agencies originally intended. NMFS in turn would be free to continue to meet its ESA obligations without playing the role of "review board" that has resulted from its ESA-ACS equivalency policy.

3. Amend the NWFP to conform the survey and manage program to legal requirements.

The survey and manage (S/M) program protects some 400 species believed to be rare or isolated. Approximately 200 of these species are fungi; 98% are non-vertebrates. The January 12, 2001 amendment to the NWFP ROD established "persistence" of the S/M species as the binding legal objective of the S/M program. The 2001 ROD also created a new level of agency planning and management by requiring the creation of an effectively-binding "Management Recommendation," for every S/M species. The Persistence Objective and the Management Recommendations work together to create a major new limitation on land management. The ROD reduced the probable sale quantity of the NWFP by 115 mmbf to accommodate the changes.

Neither the BLM or Forest Service has legal authority to adopt a Persistence Objective to protect fungi. The ESA only permits listing of species of "fish or wildlife or plants." 16 U.S.C. §1532(16). "Fish and wildlife" means "any member of the animal kingdom," and "plant" means "any member of the plant kingdom." 16 U.S.C. §1532(8), (14). Fungi are not entitled to protection under the ESA because they are not within the animal or plant kingdom. Fungi constitute their own separate kingdom under the universally accepted Linnaean Classification System. For the same reason, the NFMA statutory language encouraging "diversity of plant and animal communities" does not allow protection of fungi, and the NFMA viability rule does not apply to fungi. The BLM and Forest Service also lack legal authority to protect plants and non-vertebrate animal species not currently listed under ESA. Neither the ESA nor the NFMA viability rule applies to plants or non-vertebrate animal species. On O & C lands, the BLM lacks power to protect vertebrates like the red tree vole.

The Management Recommendation is a new level of planning which is not permitted under either Forest Service or BLM regulations, and is not accompanied by any NEPA analysis.

The Forest Service and BLM should amend the NWFP: a) to delete the Persistence Objective from the S/M program; b) to remove fungi, plants and non-vertebrates from the current S/M list; c) to exclude O & C timberlands from management restraints on remaining vertebrate species; d) to return management discretion to local managers by deleting the unlawful Management Recommendation protocol

4. Amend the NWFP to conform to the Oregon & California Lands Act.

In *American Forest Resource Council v. BLM*, No. 94-1031-TPJ (D.D.C.) a group of timber and affiliated interests are challenging the NWFP as a violation of the 1937 O & C Act on the 2.4 million acres of O & C timberlands in western Oregon. Until 1994, the BLM and the courts had interpreted the O & C Act as imposing a dominant use of timber production on O & C timberlands. The NWFP reversed this long-standing interpretation of the O & C Act, created over one million acres of late-successional reserves, riparian reserves and key watersheds on the O & C timberlands, and also imposed survey and manage standards and other major harvest restrictions.

The BLM can settle the pending case by agreeing to a review of the O & C Act leading to a return to its pre-1994 interpretation of the O & C Act, which does not permit O & C timberlands to be set aside as late-successional reserves, riparian reserves, set-asides for "rare" species or any other purpose. The settlement could include the following elements: a) the BLM will initiate notice-and-comment rulemaking to adopt a formal regulation interpreting the O & C Act in accordance with the 1937-1994 interpretation; b) the BLM will begin the process to revise its Western Oregon district resource management plans (RMPs) to reflect its return to the 1937-94 interpretation of the O & C Act; c) the BLM will initiate preparation of a draft and then final environmental impact statement in support of each revised district RMP, which will examine impacts on listed species, non-listed rare species and old-growth ecosystems on a district-wide, state-wide and region-wide basis; e) the BLM will initiate early consultation with FWS and NMFS on its proposed revised RMPs to seek to ascertain the highest level of timber harvest on the O & C timberlands that can be supported under §7(a)(2) of the ESA; d) the BLM will issue a final rule adopting the 1937-1994 interpretation of the O & C Act, and contemporaneously issue records of decision (RODs) to adopt new RMPs reflecting that interpretation; the RODs will be based on non-jeopardy biological opinions from FWS and NMFS; g) the BLM will set firm deadlines for completing each step of the rulemaking and NEPA process; h) the Forest Service will begin preparation of a region-wide EA to determine whether the revisions to the BLM RMPs are significant new information requiring a supplemental EIS for the national forests in the NWFP region, and will issue the EA at the same time the BLM issues its new O & C Act regulations and new RMP records of decision.

5. The FWS should conduct a five year review of the northern spotted owl followed by revisions to spotted owl critical habitat.

The FWS listed the Northern Spotted Owl as threatened in 1990. The FWS has not conducted any further review of the status of the owl since 1990, in apparent violation of 16 U.S.C. §1533(c)(2), which requires a review of all listed species "at least once every five years," and requires "on the basis of such review" a determination whether to delist or change the status of the species. On January 15, 1992 FWS issued a regulation designating approximately seven million acres of federal timberland (essentially all existing suitable spotted owl habitat on federal land) as critical habitat for the owl.

The FWS should conduct the required five year review of the owl, and should use the status review as the basis for a revision of critical habitat for the owl. Biologists' understanding of spotted owl use of habitat types has changed considerably since 1992 when "old-growth" forest was viewed as the working definition of suitable spotted owl habitat. Today spotted owl habitat is understood to be much broader than old-growth, including many younger and mixed-age stands. With more habitat available, less of it can justifiably be considered critical. Finally, the recent Tenth Circuit decision in *New Mexico Cattle Growers Association v. United States Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001), undermines the legal adequacy of the economic analysis used in the 1992 decision.

6. The FWS should conduct a five year review of the marbled murrelet, followed by changes in protection or critical habitat.

On October 1, 1992 the FWS listed the Washington, Oregon and California populations of the marbled murrelet as a threatened species. 57 Fed. Reg. 45328. No five year status review has ever occurred. Critical habitat was designated in 1996. 61 Fed. Reg. 26255 (May 24, 1996).

The FWS should conduct the required five year review of the murrelet, and should use the status review to determine if the three-state population meets the legal definition of "distinct population segment" (DPS) under the ESA, and to evaluate a revision of critical habitat for the owl.

The review should consider Judge Hogan's recent ruling in *Alsea Valley Alliance v. Evans*, Case No. 99-6265-HO ("*Alsea Valley Alliance*") that NMFS' decision to list the Oregon coastal coho salmon as a threatened DPS was unlawful because the agency listed the natural stock portion of the DPS without listing the hatchery stock portion of the DPS, contrary to the plain language of the ESA that only permits the listing of an entire DPS. It should also consider a population viability analysis in press by biologists at Simon Fraser University in Vancouver, B.C. concluding that the Desolation Sound population of marbled murrelets is stationary (not declining). In addition, the 1996 critical habitat designation appears vulnerable to legal challenge under the *New Mexico Cattle Growers* case.

7. The FWS and NMFS should review their joint consultation regulations to expedite, streamline and reform the paralyzed consultation process.

The FWS/NMFS joint consultation rules published in 1986 contain several provisions that have caused large numbers of unneeded and burdensome consultations. The following are suggestions of some changes that could be made in the regulations to streamline the consultation process:

The primary cause of the explosion in unneeded consultations is the "may affect" threshold in the regulations for an action agency to initiate a consultation. The ESA does not contain the "may affect" consultation standard (or any consultation standard at all). The "may affect" standard in the regulations is so far removed from the substantive no-jeopardy requirement in the ESA that large volumes of unnecessary consultations were virtually guaranteed to occur - and have.

Other sections of the regulations also compel large numbers of unnecessary consultations: consultation is required on any action authorized, funded, or carried out "in part" by a federal agency, even if the federal involvement is minor or secondary to private or state action; consultation is required for agency actions that are intended to benefit species; consultation is required for agency regulations with no direct on-the-ground impact; and consultation is required for agency actions that "indirectly" cause modification to the land, water, or air. The regulations also impose burdensome documentation requirements that guarantee that even the most minor consultation will be long and slow.

FWS and NMFS have the authority under existing law to amend their regulations to improve the operation of the process. The agencies can initiate a rulemaking process under 5 U.S.C. §553 to amend their regulations, with notice and opportunity for the public to comment, following the same procedures as were employed for the original 1986 regulations.