STATE OF OREGON
BEFORE THE BOARD OF FORESTRY

IN THE MATTER OF State Forests Work Plan 2, IBI-6 Changes to the NW Forest Management Plan made by the Oregon Board of Forestry	)	OAH No. _____ Agency Case No. _____
Sierra Club, Pacific Rivers Council, Native Fish Society, Center for Biological Diversity, Coast Range Association, Wild Salmon Center, Association of Northwest Steelheaders, Inc., Northwest Guides and Anglers Association, Trout Unlimited, Oregon Wild, Audubon Society of Portland *Petitioners*.	)	**PETITION FOR RECONSIDERATION**

I. Introduction.

Petitioners the Sierra Club, the Pacific Rivers Council, the Center for Biological Diversity, the Coast Range Association, the Wild Salmon Center, the Native Fish Society, the Association of Northwest Steelheaders, the Northwest Guides and Anglers Association, Trout Unlimited, Oregon Wild, and the Audubon Society of Portland ("Petitioners") respectfully request reconsideration of the decision issued by the Board of Forestry ("BOF") on April 22, 2010. (Attached hereto as Exhibit 2).

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In its decision of April 22, 2010, the Board of Forestry voted 5 to 2 to approve changes to the forest management plan and Chair Blackwell ordered:

> "The Board determined the activities carried out or allowed by the State Forester meet the obligation to secure greatest permanent value to the state as defined in Oregon Administrative Rule 629-035-0020.
>
> The Board adopted the revised forest management plans in rule and amended Oregon Administrative Rule 629-035-0105 to reflect the revised plan."

The ODF Has Decreased the Older Forest Goal. The previous Forest Management Plan ("FMP") set the goal for the development of older, complex forest at 40% to 60% of the landscape. In the FMP, complex forest is characterized as either Layered stands or Older Forest Structure stands, which are defined in terms of tree size, plant diversity, presence of snags, etc. Practically speaking, the 40%-60% designation meant that stands identified to become complex forest would not be subject to regeneration harvest (clearcutting) in the future. Instead, these stands would be thinned with the goal of reducing competition between stems and letting light reach the forest floor. In its decision, the Board changed the FMP's goal for complex forest stands to only provide these forests on 30% to 50% of the landscape. The practical effect of the change was to allow as little as only 30% of the forest stands to be designated to become complex, thereby allowing for far more clear cutting than previously allowed.

The ODF has Approved Higher Regeneration (Clearcut) Limits. The previous FMP also set a limit of 5-15% of the forest to be in regeneration (clearcutting) stand type, which ODF generally characterizes as from 0-12 or 15 years after a clear cut harvest. The revision to the FMP changed the goal for regeneration type stands to 15%-25% of the landscape. The practical

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effect of this change was to make the old maximum for regeneration stands the new minimum goal for such stands. The change will also allow as much as 25% of all stands to be regeneration stands (i.e. recently clearcut areas).

While these two changes to the FMP do not require the ODF to manage all the way down to the 30% floor for complex forest or all the way up to the 25% limit for regeneration stands, they do authorize the ODF to go that far. Moreover, the ODF has made it clear that it plans to manage down to the 30% floor for older forest in at least three ways: 1) the selection of performance measure targets for harvest revenues, and 2) the preparation of draft maps of a 30% landscape design for some districts (attached hereto as Exhibit 1), and 3) the elimination of conservation considerations associated with fulfillment of the terms of a federal Habitat Conservation Plan.

The ODF Has Abandoned the Habitat Conservation Plan Process. In its decision, the ODF expressly deleted references to developing a Habitat Conservation Plan ("HCP"). The previous FMP directed ODF to work to complete an HCP with the responsible federal agencies. ODF has sought an HCP for several years, but a plan has never been finalized. One key component of the HCP was an "owl cluster" strategy, which limited harvest activities in significant areas of the forest. The revisions to the FMP removed all references to the HCP, so ODF is now free to ignore the strategies proposed in the HCP, such as the owl cluster strategy.

The original FMP stated that if the HCP was not completed, ODF would develop a "Species of Concern" strategy. ODF has developed a "Species of Concern" strategy, and it contains strategies which allow more timber harvest than was allowed under the draft HCP. The

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practical effect of ODF terminating work on the HCP work is to remove the Species of Concern strategy from the direct participation of the federal services. The Species of Concern strategy (SOC) was developed by ODF and ODFW, without the participation or review by any outside scientists, from federal agencies or elsewhere.

The result is that the fate of sensitive species will not be decided in a collaborative planning process that includes federal scientists. Rather, the content of a Species of Concern plan will be entirely determined by the State Forester alone. In effect, abandonment of the HCP process will allow increased timber harvest without countervailing assurances that the increased harvest will not harm fish and wildlife. The original forest plan provided for less timber harvest in general, especially less clearcutting. The revised forest plan will allow as little as 30% of the landscape to be designated to become older and as much as 25% of the landscape to be recently clear cut areas (regeneration stand type).

The Plan Modifications Exceed the Board's Legal Authority. The ODF has not shown how allowing high levels of clearcutting is consistent with the legal requirement that the ODF engage in management that has a high probability to maintain and restore properly functioning aquatic habitat for salmonids and other native fish and aquatic life. This petition challenges the Board's official finding that the changes to the FMP meet the "maintain and restore" standard of state law.

The Plan Modifications Precede the Requisite Scientific Review. At the April 22, 2010 meeting, two board members expressed concern over the lack of scientific basis for the decision. Peter Hayes stated that it has "been the custom of this department and this board to use some

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form of peer review as a tool to help create that assurance" that the BOF decision is well-informed. Peter Hayes Transcript, page 2 (attached hereto as Exhibit 3). Bill Hutchison stated that that "the situation cries out for scientific affirmation of the direction we're going." Bill Hutchison Transcript, page 1 (attached hereto as Exhibit 4). Then, on June 8, 2010, at a recent Land Board meeting, members called for scientific review before any changes made to the current plan are implemented. Land Board Meeting Summary, June 8, 2010 (attached hereto as Exhibit 5).

The rationale for BOF's new plan is to allow a different balance of economic, environmental, and social benefits. In fact, the BOF has shifted away from a balanced mix of environmental protections and resource extraction toward one that tips in favor of resource extraction, focusing primarily on generating revenues from timber harvests rather than ensuring the greatest permanent value from state forest lands. The BOF actions simply do not square with Governor Kulongoski's endorsement "of deep science-based knowledge of our forests" as the basis for balanced forest management.[1] Rather, this decision was a rushed attempt to respond to pressure from certain members of the legislature, while the broader public interest and the requirements of state law were ignored. Further, ODF has approved these changes before receiving the results of an Independent Multi-Disciplinary Science Team (IMST) which is scheduled for completion in September 2010 at the earliest, over five months after the changes have been approved. Staff Report, Options for Peer Review, page 1 (attached hereto as Exhibit

[1] http://governor.oregon.gov/Gov/speech_102204.shtml

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6).[2] ODF has put the cart before the horse and not complied with the state law requirement that ODF base its decision on the best available science.

Pursuant to OAR 137-004-0080 and ORS 183.484, Petitioners request that the BOF reconsider and reverse its decision or provide the science supporting its decision consistent with the requirements of state law. Petitioners submit that the BOF has not complied with the legal requirements established by statute and its own governing regulations. Specifically, the BOF has not met its obligation under OAR 629-035-0010(5)(e) to manage the state forests using the best available science and instead the BOF has approved a plan based on predictions which do not comply with the mandates of state law. The BOF has an obligation to *maintain and restore* properly functioning aquatic habitats for salmonids under OAR 629-035-0030, but the BOF has instead adopted a plan that has a high potential for harming aquatic habitats that are in need of restoration. By approving modification of its plan, the BOF has exceeded the decision-making authority granted to it by statute and state rules.

In sum, the changes the Board approved on April 22, 2010 threaten significant negative impacts to aquatic and terrestrial habitat, do not comport with the requirements of state law and are not based on the best available science. This decision was made despite the fact that it was contrary to a majority of public comments received and underwent no outside peer review. Peter Hayes Transcript, page 2. For these reasons, the Petitioners request that the BOF reconsider its decision, respond to the public and, ultimately, reverse its decision, and prepare a plan that complies with state law.

[2] See also, ODF, State Forests Division, Scientific Review Options – Background (Feb. 7, 2010) (attached hereto as Exhibit 7).

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II. Scientific Background.

The reduction in the targeted acreage for older forests threatens to significantly increase clear cutting in the northern Coast Range. These forests are already dominated by clear cutting practiced by industrial forest land owners and permitted by the Oregon Forest Practices Act. As the Department of Forestry's own review of this approach noted, the increased harvest will have "a low probability of maintaining or enhancing hydrologic function" and will result in "more watersheds in a high risk category." Species of Concern report ("SOC report") page 27.

The ODF's own internal documents show that for years it has ignored concerns expressed by its own biologists that the Tillamook Forest District is failing to comply with existing FMP standards for downed woody debris. Memorandum from Clint Smith dated December 23, 2008, page 2 (attached hereto as Exhibit 8). Scientific research shows that woody material is vital for the recovery of salmon. *See e.g.* Charles W. Huntington, *Aquatic Conservation and Salmon Recovery in the North Coast Basin of Oregon: a Crucial Role for the Tillamook and Clatsop State Forests* (1997), page 12 (attached hereto as Exhibit 9).[3] If ODF is already not meeting these standards, then lowering these standards suggests that the ODF will be even less likely to meet its mandate.

Furthermore, the BOF decision was not informed by key scientific information. As noted by Board Member Bill Hutchison in the BOF meeting of April 22, 2010, the forest districts that will be impacted by this decision have not even been fully inventoried with on-the-ground

[3] See also, Charles Huntington, *Comments on the April 1998 Draft Western Oregon State Forests Habitat Conservation Plan as a Mechanism for Restoring Aquatic Habitats and At-Risk Salmon* (1998) (attached hereto as Exhibit 10)

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measurements. Bill Hutchison Transcript, page 2. In the Astoria district (which includes most of the Clatsop State Forest), only 57% of stands have been measured; in the Tillamook district (which includes most of the Tillamook State Forest), less than 16% of stands have been measured. Council of Forest Trust Land Counties, *State Forester's Annual Report for the Association of Oregon Counties*, November 2009, page 22.

Another key consideration that ODF did not address is the potential impact of climate change on these forests, either in terms of carbon sequestration or in terms of the way climate change will affect the forests according to the metrics that the ODF regularly uses to measure habitat condition and trend and compliance with other key requirements of state law.

Unlike the 2001 state forest plan, there was no independent scientific peer review of the effect of the proposed changes on threatened and endangered species. The current Salmon Anchor Habitat strategy, which the BOF endorsed in 2004, was seriously weakened by the April 21, 2010 decision without any review of the costs and benefits of continuing most of the strategy's components.

III. Legal Background.

OAR 629-035-0020(1) states that the term "greatest permanent value" as used in the ORS 530.050 means "healthy, productive, and sustainable forest ecosystems that over time and across the landscape provide a full range of social, economic, and environmental benefits to the people of Oregon." The benefits include timber production; properly functioning aquatic habitats for salmonids, and other native fish and aquatic life; habitats for native wildlife; productive soil, and clean air and water; protection against floods and erosion; and recreation. *Id*.

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OAR 629-035-0020(2) provides that the State Forester shall maintain these lands as forest lands and actively manage them in a sound environmental manner to provide sustainable timber harvest and revenues to the state, counties, and local taxing districts. Yet this particular management goal is not exclusive of other forest resources, but must be pursued within a broader management context that: "(a) [r]esults in a high probability of maintaining and restoring properly functioning aquatic habitats for salmonids, and other native fish and aquatic life; (b) [p]rotects, maintains, and enhances native wildlife habitats; (c) [p]rotects soil, air, and water; and (d) [p]rovides outdoor recreation opportunities." OAR 629-035-0020(2)(a)-(d).

The State Forester must pursue management practices that provide for compatibility of forest uses over time, are based on the best available science and apply new management practices and techniques as new scientific information and results of monitoring become available. OAR 629-035-0020(3). The BOF is not obligated to provide timber harvests or generate revenue at the expense of other values, nor does the BOF owe any fiduciary duty to Oregon counties. See Department of Justice Memorandum dated October 16, 2006 page 1. The DOJ has further found that even if such a duty to the counties existed, this duty should not govern how the forests are managed. *Id.* In sum, the BOF must obtain the greatest permanent value from Oregon's state forests by restoring aquatic habitats, enhancing wildlife habitat, and protecting other values. The BOF is not authorized to elevate timber extraction above all other values.

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IV. Petitioners' Interests.

Each Petitioner has a substantial interest in the state forest lands managed by the BOF. The decision to lessen the amount of older forest structure, weaken protections for older forests and the species and aquatic life that depend on them, and increase logging levels has a practical affect on each Petitioner and the tens of thousands of members that enjoy these state forest lands.

Petitioner Sierra Club is a non-profit corporation that represents over 20,000 members throughout Oregon, which includes thousands of members who enjoy the Tillamook and Clatsop state forests. The Sierra Club promotes conservation of Oregon's natural environment. The Sierra Club advocates for the protection of roadless areas, mature and old growth forests, and investment in ecological restoration of fish and wildlife habitat damaged by past logging and roadbuilding activities. The Sierra Club's members regularly enjoy hiking, camping, birding, wildlife watching, recreation, and ecological study within the Tillamook and Clatsop state forests.

Petitioner Association of Northwest Steelheaders ("NW Steelheaders") was formed to help conserve fish and to educate children and adults about the joys of fishing. NW Steelheaders brings together anglers to meet other anglers and find out about great places to go fishing. NW Steelheaders works to ensure that the agencies in charge of our public lands and waterways are doing what they should be doing to insure the long term health and sustainability of all anadromous fish – salmon, steelhead and trout – for today and future generations.

Petitioner Pacific Rivers Council ("PRC") works to protect and restore rivers, their watersheds and the native species that depend on them. PRC does this for the benefits that

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healthy watersheds provide to present and future generations and for the intrinsic virtues of rivers themselves. In the West, water resources are diminishing in quality and quantity. Land use practices continue to degrade water quality and watershed health. At the same time, scientific research clearly indicates that water resources will be further impacted by climate change. Thus, the threats to freshwater ecosystems have never been more abundant or more immense. To address these issues, PRC uses a watershed approach to river and aquatic species conservation. PRC focuses its efforts on building lasting solutions for people and species that depend on healthy watersheds, working closely with leading scientists, economists, and legal experts to synthesize current knowledge of watershed conservation, injecting current knowledge about watershed conservation into the most significant areas of policy decision-making, taking legal action to protect aquatic resources from imminent danger, promoting the economic benefits of healthy watersheds, establishing permanent protection for the best remaining watersheds and actively promoting watershed restoration. PRC works to ensure that the best available science is used to inform and reform Oregon's policies. PRC's Legacy Rivers Program has identified the Kilchis and Little North Fork Wilson Rivers as Legacy Rivers and these rivers run through Oregon's Tillamook State Forest.

Petitioners Wild Salmon Center ("WSC") works to identify, understand and protect the best wild salmon ecosystems of the Pacific Rim. The WSC devises and implements practical strategies, based on the best science, to protect forever these extraordinary places and their biodiversity. WSC works for institutional reform so water and land management agencies can effectively carry out restoration of our degraded public lands.

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Petitioner Native Fish Society ("NFS") protects and restores native, wild fish and their habitats in the Pacific Northwest. NFS works with public agencies and governments to get native fish conservation policies implemented and to ensure that native fish policies are indeed followed once implemented. NFS is involved in public policy decisions and promotes scientifically-based solutions to fish management problems. NFS encourages the involvement at both the administrative and personal levels by the public by educating them about the beauty, mystery and value of native fish and their environment. NFS advocates for scientifically sound conservation, protection, and recovery actions for native fish and their habitats in the Pacific Northwest. NFS monitors and influences public agency management decisions in favor of native fish. NFS inventories and monitors the status and health of native fish populations and works to improve the public's understanding of native fish ecosystem function.

Petitioner Northwest Guides and Anglers Association ("NWGA") works to protect, enhance, and promote healthy sport fisheries and the ecosystems they depend on in the Pacific Northwest. NWGA was formed to address issues that limit the productive capacity of the Northwest's rivers and streams. NWGA works for fair fishery allocations and the necessary conservation regulations that are backed by credible science to protect fisheries. NWGA works to restore water quality that limits fish production in our streams and rivers, including excessive water temperatures, and improper flow. NWGA works to reform industrial practices that negatively affect our salmonid and sturgeon fisheries to ensure that these resources are there for future generations to enjoy.

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Petitioner Center for Biological Diversity ("CBD") works to secure a future for all species, great and small, hovering on the brink of extinction. CBD uses science, law, policy advocacy, and strategic collaboration to protect and restore public lands. As the coming century of global warming threatens to accelerate the extinction crisis, CBD is working to ensure that public lands provide safe harbors for species by protecting the ecological systems upon which these species depend. To this end, CBD works to directly confront land uses that harm species and ecosystems. CBD works to protect and restore western rivers as well as the native fish and wildlife that make their homes in and around them.

Petitioner Coast Range Association ("CRA") was formed in 1991 to defend the region's interests, protect its natural and cultural endowments and restore its rivers, wetlands and forests. CRA is deeply committed to the stewardship of our natural resources. A balanced concern for people and the land informs the CRA mission. CRA works to build just and sustainable communities that provide for people and the natural world.

Petitioner Oregon Council of Trout Unlimited ("TU") consists of five chapters of Trout Unlimited members dedicated to conserving, protecting, and restoring Oregon's coldwater fisheries and their watersheds. Trout Unlimited has been and remains committed to applying "the very best information and thinking available" in its conservation work. TU aims to form collaborations with other conservation interests, local communities and state and federal partners to begin to rebuild the natural resiliency of watersheds.

Petitioner Oregon Wild (formerly known as Oregon Natural Resources Council) ("Oregon Wild") was founded in 1974 to protect and restore Oregon's wildlands, wildlife and

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waters as an enduring legacy for all Oregonians. Oregon Wild seeks to use its grassroots citizen network to ensure that environmental laws are maintained while securing protective legislation for the state's wild areas. Oregon Wild works to protect wild and roadless areas and forests for drinking water protection, fish and wildlife habitat, and recreation opportunities across the state.

Petitioner Audubon Society of Portland ("Audubon Society of Portland") has been devoted to conserving Oregon's last remaining wild places for over a century. The Portland chapter of the Audubon society was one of the first in the country. Today, Audubon Society of Portland continues to promote the understanding, enjoyment, and protection of native birds, other wildlife and their habitats, with a focus on local communities and the Pacific Northwest. The Audubon Society of Portland has been instrumental over the years in establishing natural refuges to serve as wildlife habitat.

The Petitioners' recreational, aesthetic, spiritual, scientific, and educational interests will be adversely affected and irreparably injured if the BOF is able to take actions in contravention of state law. Oregon's state forests include stream habitats essential for the recovery of imperiled salmon, trout, and other native aquatic species. The changes that the BOF has made to the management plan threaten to adversely degrade the ecological integrity, native forest species habitat viability, waterways and aquatic habitat, and water quality in Oregon's state forests. The changes negatively affect the Petitioners' interests and the interest of their members, volunteers, and supporters by diminishing and irreparably altering the quality and value of the areas for recreational, educational, natural, aesthetic, and other activities throughout the state forests.

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Petitioners and their members have an interest in protecting these resources and the relief sought herein will remedy those injuries.

V. Argument.

A. First Ground for Reconsideration: The Board of Forestry's Decision is Inconsistent with the Oregon Administrative Rules Which Mandate That the Board Restore Properly Functioning Habitats for Fish and Wildlife.

The BOF is charged under the Oregon Administrative Rules (OAR) to manage the state forestlands for the Greatest Permanent Value (GPV) for the State of Oregon. ORS 530.050; OAR 629-035-0000 to 629-035-0110. While the BOF has chosen to put a strong emphasis on the generation of revenue through timber production in attaining GPV, the obligation is actually much broader and includes a duty to maintain, enhance, and restore habitat. OAR 629-035-0020(2). Even if a more narrow economic focus were permitted by state law, the BOF ignored numerous direct economic benefits of more ecologically sound and sustainable management that are provided by high-quality and high-quantity sources of water and recreationally and commercially fishable wild salmon and steelhead populations. By increasing harvest levels and reducing complex forest structure targets, the BOF has decided to generate timber revenue at the expense of other values, and in so doing has reduced the value of the public's resources in violation of state law.

As part of requiring the state forests be managed to achieve the greatest permanent value, the Oregon Administrative Rules ("OAR") specifically mandate the maintenance, restoration, and enhancement of aquatic habitats and other wildlife habitats. OAR 629-035-0030(3)(b)(B). The OAR requires that forest conditions should be managed to "result in a high probability of maintaining and *restoring* properly functioning aquatic habitats for salmonids, and other native

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fish and aquatic life"[4] and also calls for "protecting, maintaining, and *enhancing* native wildlife habitats." OAR 629-035-0030 (emphasis added). This is especially important given the NMFS finding that Oregon Coast Coho habitat, to the extent that functioning habitat exists on the state lands at issue, has most likely declined in complexity over the last decade. 75 FR 29489, 29495 (May 26, 2010) (amending 50 CFR pt. 223). In other words, the regulations require the BOF not just to maintain the current conditions but actually to restore aquatic habitats and enhance terrestrial habitats.

The key words in the OAR are "maintain," "restore," and "enhance." The word "maintain" is defined as "to keep in a state of repair, efficiency, or validity: preserve from failure or decline." Webster's Third International Dictionary of the English Language, page 1362 (1993). The word "restore" is defined as "to bring back into a healthy state: to cause to recover" and "to bring back from a state of injury or decay." *Id., page* 1936. Lastly, the common dictionary meaning of "enhance" is "to raise" and to "advance, augment, elevate, heighten, increase." *Id., page* 753.

Importantly, the SOC report itself defines "maintain" and "enhance" for the purposes of discussing how these habitat parameters will be affected by the PM+SOC model itself.[5] However, with regards to "restoring" habitats, the SOC report avoids the issue by declaring that "[t]here are no specific standards describing a condition that represents 'habitat restoration.' Therefore, at this time [the probabilities] that the models restore habitats for species of concern

[4] Similarly, the Oregon Coast Coho Conservation Plan for the State of Oregon is based on the premise that: "*[h]abitat management and improvement is the key to protecting and enhancing coastal Coho.*" Page 6, March 16, 2007 (emphasis in original).

[5] Maintain: Spatial or temporal trends suggest no net loss of habitat quantity and no decrease in habitat function. Enhance: Spatial or temporal trends suggests increased habitat quantity or improved habitat function. SOC report page 10.

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are not evaluated." SOC report, page 11. As a result, in its SOC report the BOF rendered the habitat restoration requirements, a critical component of the operative state regulation, meaningless as a factor that is used in comparing the base plan with the PM + SOC model.

While the SOC report claims that the ODF lacks workable definitions of habitat restoration, this claim does not ring true because the same section of the report also refers to Appendix D, which contains detailed information regarding specific standards for habitat recovery set forth by the Oregon Coast Coho Conservation Plan. *Id., page* 54-55. Appendix D contains a metric for evaluating habitat condition and evaluation thresholds for aquatic habitat recovery. *Id.* Previously the BOF sought to rely on the SOC report and claimed that there are no specific standards for habitat restoration available. The BOF had asserted that habitat restoration cannot be evaluated, even though its claims were directly contradicted by Appendix D, which specifically sets forth evaluation standards for restoration of habitat for certain fish species which reside in the rivers and streams in the Tillamook and Clatsop State Forests. This contradiction underscores the lack of a rational basis for the BOF's decision.

In relying upon the State Forester Report for Board GPV and Planning Rule Determination ("State Forester Report") to make its decision of April 22, 2010, the BOF has repeated the same mistake and based its decision on the unsubstantiated claim that it is meeting the state standard. The fact that the BOF has ignored the "restore" requirement was actually raised at the BOF meeting by board member Peter Hayes. Mr. Hayes pointed out that the State Forester Report claimed the FMP would have a high probability of maintaining and restoring salmonid habitat, but that the State Forester only "looked at maintain and enhance and actually deliberately did not answer that question of restore or define restore." Peter Hayes Transcript, page 2. The Oregon Coast Coho Conservation Plan represents available science that the BOF

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could and should apply along with other available science to meet the best available science requirement.

The BOF's decision to use the State Forester Report to reduce from 50% to 30% the target for complex forests violates the OAR requirements because this decision does not ensure that that habitat will be enhanced. With regard to watershed function, the SOC report concluded that the changes that the BOF was making to the plan would not meet its legal obligations and these are the same changes that the BOF made on April 22, 2010. Specifically, the SOC report stated that "[t]his suggests *the PM+SOC model has a moderate probability to maintain watershed function. There is a low probability to enhance watershed function because although the trend is improving, there is an initial increase in high risk and individual watersheds attain very high levels of cumulative clearcut percentages.*" SOC report, page 26 (emphasis in original). Similarly, with regards to hydrologic function, the SOC report concludes, "*[t]here is a low probability of maintaining or enhancing hydrologic function at a watershed scale because the trend results in more watersheds in a higher risk category.*" *Id.*, page 27 (emphasis in original). While the SOC report predicts a moderate probability of maintaining and a low probability of enhancing watershed function, and low probability of maintaining or enhancing hydrologic function at a watershed scale, the OAR requires a *high* probability of maintaining and enhancing properly functioning habitats for salmonids. OAR 629-035-0020(2)(a).

As a result, the BOF decision does not come close to meeting the requirement that its decision maintain, restore, and enhance habitat for Oregon coast Coho. The SOC report admitted that both enhancement and maintenance of the existing aquatic habitat is unlikely to happen under the new plan by predicting a *low probability* of enhancing watershed function and a *low probability* of maintaining or enhancing hydrologic function at a watershed scale. The

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State Forester Report (issued in 2010) simply concluded that the revisions would "maintain the goals, concepts, strategies, and standards" of the original FMPs. State Forester Report, page 27. The State Forester Report further stated that the revisions to the NW and SW FMPs "have a high probability to *maintain* and *restore* properly functioning aquatic habitats for salmonids." *Id*. (emphasis added). There is no support or analysis provided for this claim in the State Forester Report, and the claim is directly contradicted by the ODF's earlier findings that for most species of salmonids the revised (PM+SOC) plan would have only a moderate probability of *maintaining* and *enhancing* habitat. SOC Report, page 39 (emphasis added). A moderate probability to maintain and enhance salmonid habitat is not sufficient under OAR 629-035-0020.

Additionally, the SOC Report claimed that there were no available metrics for predicting restoration effects, SOC Report, page 11, but the State Forester makes the unsubstantiated claim that the revisions to the FMP will most likely *restore* salmonid habitat. The State Forester relies on the creation of Aquatic Anchor Watersheds (AAWs) to "increase the probability that the FMPs will maintain and restore properly functioning aquatic habitats for salmonids and other native fish and aquatic life." State Forester Report, page 18. However, the SOC Report shows that under the revised FMP there will be substantially *more* logging in AAWs, with 13 out of 17 AAWs in the moderate to high risk category. SOC Report, Appendix E. In addition to the evidence noted in the record that the subject decision does not meet the applicable regulatory requirements, Thomas Davis, an expert hydrologist with over 35 years of experience in the field, reviewed the State Forester Report and found numerous gaps and unsubstantiated claims in it. As a result, Mr. Davis determined that it does *not* provide a plan that would result in a high probability of maintaining and restoring aquatic habitat for salmonids, as required by Oregon law. Declaration of H. Thomas Davis, page 1 (attached hereto as Exhibit 11).

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In sum, while the OAR calls for heightened protection for aquatic and terrestrial ecosystems by mandating the enhancement and restoration of these habitats, the BOF has adopted a new approach which fails to restore aquatic habitat and to enhance terrestrial habitat. Under the model adopted by the BOF, even the *maintenance* of existing aquatic habitat is being compromised. The BOF must address this requirement and reevaluate its approach. At bare minimum, the BOF must reconsider its modification to the state forest management plan to ensure that ODF's actions on these state forest lands do not violate OAR 629-035-0020 and OAR 629-035-0030.

B. Second Ground for Reconsideration: Failure to Meet the Best Available Science Requirement.

Under applicable law, the BOF must manage state forestlands using management practices that are "based on the best available science." OAR 629-035-0010(5)(e). However, the newly approved plan was not based on the best available science nor has it undergone peer review to provide an assurance that it is based on the best available science. *See also* OAR 629-035-0080(2) (public involvement may include "focused technical review.") The BOF did not provide a sufficient scientific basis for its decision to reduce the target for older, complex forest from 50% to 30%.

While the BOF states that its goal is to mimic or approximate the historic range of old forest structure, the BOF decided to provide a target of as little as 15% older forest structure. Northwest Forest Management Plan Revised April 2010, page 4-48. The Board has not provided a scientific basis for determining that the Tillamook and Clatsop State forests historically consisted of only 15% older forest structure. The Board has relied on studies that showed the area of the Tillamook and Clatsop historically had 30% to 70% old growth forest. *Id.*, page S-

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13. Old growth forest ("older forest structure" in ODF parlance) is not, however, synonymous with the complex forest produced under the state forest management plan. Equating the historic range of old growth on lands now state forests with the younger and less complex stands produced by the plan is not based in any science. Old growth includes large and ancient trees with deformities, large snags, large volumes of downed wood, and a wide range of diverse species. The complex forest sought by the BOF will not contain many of these characteristics. For example, the layered stands that the BOF plan counts as reflective of historic old growth do not require trees over 20 inches in diameter, snags, or downed wood. The decision to find that the 30% goal for older forest is reflective of the historic range of old growth in the area does not appear to be based on any science, much less the best available science. A reduction in the goal for complex forest structure from 50% to 30% represents a *40% decrease* in the amount of complex forest structure that ODF could eventually achieve on the land. The Tillamook and Clatsop State Forests are approximately 500,000 acres in size, so the net result would be a reduction of the goal of 250,000 acres of complex forest structure within 80 years to only 150,000 acres of complex forest structure within 80 years. In other words, the BOF decision would allow clearcutting on most of an additional 100,000 acres of land in the Tillamook and Clatsop state forests. The Board must re-evaluate this decision and determine whether such a large reduction in complex forest structure will approximate the historic range of variability within these forested landscapes.

Consistent with this loss of potential habitat, the June 3 SOC report details a large number of less-favorable predicted outcomes at 80 years under the adopted PM +SOC model than under the current (base) plan. Examples include a predicted reduction in the percent of complex landscape from 50% to 30% (Figure 2), a predicted reduction in percent landscape in

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older forest structure from 40% to 27%, a predicted reduction in suitable large patches for American marten and Northern spotted owl from 18% to 10% (Figure 6), an increase from 15% to 25% of young stands, and a decrease from nearly 60% to 35% for the amount of AAWs (aquatic anchor watersheds) with >50% area within complex forest strand structures (Figure 11).

Similarly, the BOF largely ignores sedimentation as a problem. SOC report, page 31. The BOF approach on this key issue is arbitrary and does not comport with the best available science requirement. The BOF has simply failed to model sediment output even though there are readily available scientific methods to conduct this kind of analysis. For example, the SOC report admits that hydrologically connected roads will have an impact of fish habitat, but then states that "there are no modeled outputs on sediment from roads." *Id.* However, the US Forest Service has published a study entitled "A Method for Measuring Sediment Production from Forest Roads" which cites several of the same sources as the State Forester's Report and states that "sediment production can be predicted from precipitation data based on measurable road characteristics." Keith Kahklen, *A Method for Measuring Sediment Production from Forest Roads*, US Forest Service 13 (2001) (attached hereto as Exhibit 12). In a similar manner, the State Forester Report summarily concluded that "[r]oad-related strategies have been demonstrated to be effective at minimizing sediment inputs to streams," yet also claims that "[r]oads remain a major influence on soil and water." State Forester Report, pages 19, 23. A study cited by the State Forester in its report found that "the hydrologic behavior of small forested watersheds may be altered when only a small area is disturbed by roads." J.G. King & L.C. Tennyson, *Alteration of Streamflow Characteristics Following Road Construction in North Central Idaho*. 20(8) WATER RESOURCES RESEARCH 1159 (1984).[6] Another of the State

[6] Available at: http://www.agu.org/pubs/crossref/1984/WR020i008p01159.shtml

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Forester's sources noted significant increases in peak discharges of streams caused by clear-cutting and roads. J.A. Jones and G.E. Grant, *Peak Flow Responses to Clear-Cutting and Roads in Small and Large Basins, Western Cascades, Oregon*. 32(4) WATER RESOURCES RESEARCH 959, 972 (1996) (attached hereto as Exhibit 13). This apparent inattention to the science cited in his own report shows that, even if the State Forester looked at the best available science, he certainly did not base his decision on an application of it.

While the State Forester mentions the importance of reducing the hydrologic connectivity of roads to streams, Thomas Davis points out that:

> [t]he term "hydrologically connected" is widely misused to imply that if a disturbance isn't close to a perennial water body there will be little or no sediment delivery. Many eroded soil particles move beyond the initial erosion plume and into rills, rivulets and gullies waiting for the next flow of water. Declaration of H. Thomas Davis, page 4.

Certainly, the BOF decision will increase road use and hauling and thereby increase sediment delivery to the connected streams and waterways. The BOF decision to ignore this issue is arbitrary and does not comport with state law.

Likewise, the BOF did not take into account the potential for increased logging on steep slopes and the potential for increased landslides and provides no scientific basis for so doing. The State Forester briefly addresses landslides in its report, but cites misleading data: while road management practices may "reduce[e] the size and occurrence of road-related landslides," State Forester Report page 7, "road-associated landslides were still several times larger on average than landslides not associated with roads." E.G. Robison et al., *Storm Impacts and Landslides of 1996 Final Report* FOREST PRACTICES TECHNICAL REPORT 109 (1999), available at https://www.wou.edu/las/physci/taylor/andrews_forest/refs/robison_etal_1999.pdf. While most

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of the erosion from roads occurs in the first few years after construction, the danger from landslides can remain for decades after the road has been built. *Id*., page 11. The BOF, in determining whether the decision meets the GPV requirements, must use the best available science in determining whether the increased logging will result in a greater number of landslide events and how those events will impact aquatic habitat and species.

The BOF also assumes that 100 foot buffers in fish-bearing and 50 foot buffers in non-fish bearing streams are adequate to protect aquatic habitat. SOC report, page 5. While the BOF cites to studies in the SOC report for the fact that 100 feet is adequate for large wood recruitment, SOC report, page 28-29, the best available science requirement would be more adequately met by running an actual wood budget model. (e.g. the model developed by Reeves and Benda analyzing the proposed Western Oregon Plan Revision).

In addition, the BOF does not provide a citation for the proposition that the 100 and 50 foot buffers are adequate to ensure suitable stream temperatures for aquatic life. Moreover, the SOC report acknowledges that stream temperature increases as timber harvests increase within 100 feet of streams, but the BOF never determined or considered whether harvests outside of the 100 foot buffer negatively impact stream temperature. The ODF has received numerous comments over the years about the shortcomings of their riparian buffer strategies. See, e.g., Letter from Hal Weeks to Jane Hope dated July 31, 1998, from the Oregon chapter of the American Fisheries Society (attached hereto as Exhibit 14). Recent research cited in the SOC report shows that stream temperature is affected by total timber harvest in the entire watershed, and that even extensive buffer zones around the streams cannot completely mitigate the effects of

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logging in other parts of the basin. Pollock, et al., *Stream Temperature Relationships to Forest Harvest in Western Washington*, 45 (1) JOURNAL OF THE AMERICAN WATER RESOURCES ASSOCIATION 141 (2009) (attached hereto as Exhibit 15).

In reaching its decision, the BOF also completely ignored sedimentation as a function of buffer width, despite available scientific information (e.g. the Northwest Forest Plan Aquatic Conservation Strategy) that provides guidance on the necessary buffer widths to ensure a high probability of protecting aquatic habitats. In addition, buffers only delay sedimentation; erosion far removed from the stream itself can still result in sedimentation. Declaration of H. Thomas Davis, page 4. While the BOF addresses mass and channel erosion, it fails to consider the negative effects of sheet erosion, even though such erosion can be predicted by models such as the Water Erosion Prediction Project (WEPP) model. *Id*., page 3. Petitioners strongly question the BOF's apparent assumption that 100 ft. and 50 ft. buffers are adequate to prevent sediment delivery in an amount that would degrade or prevent recovery of aquatic habitat. The BOF has not set forth any scientific basis for its actions on this point much less relied upon the best available science.

The BOF has based its conclusions solely on management practices within Aquatic Anchor Watersheds ("AAWs"), which includes only 17 watersheds. But the BOF did not consider what happens outside of those watersheds, when it happens, or where it happens. Even within these AAWs, the PM+SOC plan results in a "greater risk to hydrologic function" than would occur under the current model. SOC Report, page 27. Oregon law requires protection of all aquatic habitats, not only those in the proposed Aquatic Anchors, which comprise less than

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half of the forested landscape. By failing to conduct a basic analysis of the effects of the proposed management strategy on watersheds that are not AAWs, the BOF ignored those areas that do not have the special protections afforded to AAWs, which are most likely to fail to be maintained, enhanced, or restored under the new approach.

Furthermore, the best available science suggests that older forests act as an immense carbon sequestration mechanism and serve as an increasingly valuable function in maintaining the health of our planet and reducing global warming. In light of this science and the growing need to address global warming, the GPV for the State of Oregon can be achieved by preserving the forest as a carbon sequestration and habitat refuge resource. By increasing harvest levels and reducing targets for complex living forest structure, the BOF has ignored its responsibility to maintain GPV and effectively reduced the value of the public's resources. With climate change, the Oregon Coast Range will see increased storm precipitation with lower low flows during the dry season. The BOF has not considered how clearcutting and increasing peak flows will impact fish habitat synergistically with climatic changes over the long-term. The smaller buffers and increased sedimentation will combine with climate change to increase stream temperatures, yet BOF did not even consider whether the surrogates it has used to measure habitat effectiveness in its chosen model are currently adequate and will remain adequate in the short- and long-term to assess habitat health given the predicted impacts of climate change.

In a status review dated May 26, 2010, the National Marine Fisheries Service (NMFS) and the National Oceanic and Atmospheric Administration (NOAA) decided to relist the Oregon Coast Coho as threatened, maintaining the critical habitat requirements designated when the

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Coho was first listed in 2008. The biological review team that analyzed the Coho habitat concluded that the effects of historic and ongoing management practices still negatively influence the streams where Coho breed. 75 FR 29489, 29496 (May 26, 2010) (amending 50 CFR pt. 223) (attached hereto). The team also stated that "the threats facing Coho salmon are likely to grow more severe in the future" and that freshwater habitats may not be adequate to sustain the Coho in the face of normal fluctuations in sea conditions or as global climate change affects the entire ecosystem. *Id*., pages 29496-7. As such, conservation of the critical riverine habitat for Coho is more important than ever. *Id*., page 29500.

In 2010, NMFS expressed concern that the current 2001 state management plan would not be able to provide for the survival and recovery of Oregon Coast Coho. *Id*., page 25. This concern arose under the current 2001 plan, which the Oregon Department of Forestry admits is more protective of Coho habitat than the new proposed management plan, which will increase logging, roadbuilding and impacts on the Oregon Coast Coho. SOC Report, page 40. As a result, the revised FMP will likely cause even more harm to salmon and their riparian habitat. The Board's decision to revise the FMP ignores the science contained in its own report and threatens to further endanger the federally listed Oregon Coast Coho. Despite the numerous negative environmental effects under the PM + SOC model, the BOF reached the same conclusion for almost every species of concern, namely that they would fare equally well under either the old or the new plan.[7] In other words, the BOF relied on the SOC report to conclude

[7] Exceptions for terrestrial vertebrates are for the American marten and red tree vole, which are predicted to not do as well under the PM + SOC plan. Likewise fish are predicted to not do as well under the new plan due to higher amounts of clearcutting in AAWs.

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that the total effect of a large number of predicted negative ecological changes to the environment under the PM +SOC model, relative to the base plan, is essentially nothing. This predicted outcome appears to be based on a number of individual comparisons that ignore the cumulative impact of the proposed activities that are authorized by the new plan. The BOF has downplayed or disregarded shorter-term and smaller-scale impacts which cumulatively carry a high risk of degradation over the long-term. At a bare minimum, the predictions in the SOC report and the State Foresters Report must be squared with the requirements of state law and the best available science, which could be accomplished by subjecting the predictions in the SOC report to an independent peer review.

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VI. Conclusion.

In reaching its decision, the BOF has violated the state law and its commitment to the public to provide a transparent and open process. The BOF failed to place appropriate value on public testimony and sound science. For these reasons, the Petitioners request that the BOF carefully reconsider its decision, respond to the public and disclose the science upon which its decision is based. The Petitioners respectfully submit that the BOF should rescind its decision and engage in an open, transparent and scientific process to pursue a management approach consistent with applicable law.

Dated this June 18, 2010.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing **PETITION FOR RECONSIDERATION** on June 18, 2010 by hand delivery to:

Oregon Board of Forestry
2600 State Street
Salem, OR 97310

I further certify that I served the foregoing **PETITION FOR RECONSIDERATION** on June 18, 2010, by hand delivery to:

Attorney General John Kroger, OSB # 077207
Oregon Department of Justice
1162 Court Street, Suite 400
Salem, Oregon 97301-4096

Of Attorneys for Respondent Board of Forestry

I further certify that I served the foregoing **PETITION FOR RECONSIDERATION** on June 18, 2010, by mailing one courtesy copy by priority mail via the United States Postal Service to:

Michael Carrier, Natural Resources Policy Director
Governor's Natural Resources Office
900 Court Street NE
Salem, OR 97301

Respectfully submitted,

_____

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