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## *Elliott State Forest Management Plan Public Comments Responses: December 2005*

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<b>Topic</b>	<i>Other</i>
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### **Sub-topic**

<b>Scope</b>	<b>FMP</b>
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<i>Comment Number</i>	8
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*Will we send compilation of comments to attendees (valuation of comments)?*

### **Response**

ODF will not send a compilation of comments to people who attended the public meetings. However, all comments received and how they were organized can be found in an Access database called ESF All comments matrix. You can access this database on ODF's website at <http://egov.oregon.gov/ODF/>.

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<i>Comment Number</i>	130
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### *Special Forest Products*

*ODFW recommends periodic monitoring of when and where special forest products uses occur, and address potential resource conflicts that might arise in the future through adaptive management. Special forest products include as mushrooms, cedar boughs, bark, and firewood. Collection of these items likely occurs throughout the year, and can impact wildlife at sensitive life history stages/times (e.g., concentrations of mushroom pickers walking through timber stands in the spring during fawning/calving periods). Disturbance may not be significant in 2005, but could become so in the future.*

### **Response**

We agree with the comment and the district does manage the amount of commercial harvesting of minor forest products. The primary special forest products sold from the forest include swordfern and evergreen huckleberry. Mushroom picking is for personal use only as we do not sell permits for commercial picking. It is conceivable that at some point in the future this district policy could change. There are no noble fir nor Port Orford cedar stands in the Elliott and we no longer issue bough cutting permits for other species. Commercial wood cutting permits are rarely issued as most firewood is cut under free use permits by the public for personal use.

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## *Elliott State Forest Management Plan Public Comments Reponses:December 2005*

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### **Scope**

### **HCP**

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#### *Comment Number*

210

#### *Incidental Take Permit and HCP Should Include Safe Harbors*

*The described conditions for the ITP fail to include several important provisions, which should be added in the event future changed situations occur which would warrant modified forest management to address several probable changed situations. For example, the ITP should address ODF allowance to adjust management actions to respond to new situations, such as: catastrophic stand destroying event (fire, storm, drought, flood, landslide, pest, disease); invasive species threat; new ESA listed species (either one of the 22 included species, or a non-included species); and de-listing of an ESA listed species (such as the marbled murrelet or the Southern Oregon/Northern California coho)*

#### **Response**

We agree that these provisions need to be addressed in the HCP and the Implementing Agreement.

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## *Elliott State Forest Management Plan Public Comments Responses: December 2005*

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*Comment Number*      212

*The Scope of Action Being Taken is Mis-Defined: The Effects Analysis Must Consider the Totality of Impacts from Covered Activities, Not Just the Incremental Change in Effects Between HCP and No HCP Scenarios*

*Chapter 8 of the proposed HCP concludes that the practices in the new HCP “are expected to result in either a reduced impact, no impact or a low impact,” which analysis is further detailed for specific watershed condition parameters in the ensuing chart. HCP at 8-2. We caution the ODF and the Services that regardless of whether the proposed HCP would improve on existing practices (which is arguable for riparian areas, which we note below) this kind of analysis will not be adequate to support the analysis required to meet Sections 10 and 7 of the ESA.*

*We recognize that the Services may have, in some past HCPs and their biological opinions, tended to define proposed actions as the incremental change between past management and proposed management. However, this practice does not comport with the ESA because it avoids enunciation of the level of impact (and “take”) that was perpetuated by the prior existing and often continuing practices. All impacts must be considered in order to make a logically defensible determination that the permitted incidental take does not cause jeopardy to covered species. This requires evaluating the total impacts of all activities covered, which accords with federal regulation on the effects of federal actions. 50 CFR §402.02.*

*Moreover, it is simply illogical to focus only in the incremental change between HCP-additions and prior practices because federal assurances for aquatic species were not part the prior policies, so the rigorous analysis required by Section 10 and Section 7 was not brought to bear on the prior regime. Therefore, it is not enough to state that “future conditions will be significantly improved for headwater amphibians,” (DHCP at 9-5), because we haven’t first established “how bad it is” for these species. (Not to mention that it is unclear how reducing the overall amount of mature forest will help these species). This logic applies both to listed and unlisted species.*

*It is abundantly clear that analysis which focuses only on the incremental impact of a proposed action will not withstand court challenge. We refer the involved agencies to the recent opinion in *NWF et. al. v. NMFS et al.* in which the court noted :*

*“The scope of the agency action is crucial because the ESA requires the biological opinion to analyze the effect of the entire agency action.” *Conner v. Burford*, 848 F.2d. 1441, 1454 (9th Cir. 1988) (emphasis in original). See also *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 n. 12 (9th Cir 1994)(“Consultation on the entirety of [Land Resource Management Plans] is required, not just an amendment to the LRMPs.”*

*See also *Kandra v. United States*, 145 F. Supp.2d 1192 (D.Or. 2001) (effects of the proposed action must be addressed in conjunction with those impacts that constitute the environmental baseline) and *Defenders of Wildlife v. Babbitt*, 130 F. Supp.2d 121,127-28 (D.D.C. 2001)(baseline as part of effects to be considered and to which effects of proposed action are added)...*

*In sum, under the flawed logic of the proposed “incremental” analysis where the federal action is the act of approving the HCP itself, ANY PROPOSAL WHATSOEVER could justify federal assurances. This would make a mockery of the HCP approval process and contravene both the*

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## *Elliott State Forest Management Plan Public Comments Reponses:December 2005*

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*spirit and the intent of the ESA.*

### ***Response***

We agree with your comment. This approach will be changed in the next version.

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## *Elliott State Forest Management Plan Public Comments Reponses:December 2005*

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**Sub-topic** Covered activities

**Scope** HCP

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**Comment Number** 209

*Incomplete Covered Incidental Take Permit Activities, as Proposed*

*Add several customary and necessary forest management activities to be included as ITP activities for healthy and timely forest management, including but not limited to : use of stream waterfor forestry activities; prescribed burning; herbicide application; invasive species control-including herbicides & pesticides; aerial operations-including herbicide application & helicopter logging; recreational use activities-including site construction & maintenance; special permits-utilities, ROW's, etc; blasting & rock quarry activities; stream crossing construction; equipments & minerals transportation; pest & disease control.*

**Response**

Thank you for these suggestions. These activities will be considered in finalizing the HCP Covered Activities list.

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**Comment Number** 220

*Exclusion of Herbicide Use from Covered Activities Does not Mean that Reasonably Foreseeable Impacts of such Activities Do not Require Evaluation in the HCP Approval Process*

*The Draft HCP does not consider the potential impacts of herbicides on water quality and listed aquatic species. There is substantial literature available to generate a summary of how the application of herbicides may affect aquatic species. From this literature review ODF could list the steps they (or their sub-contractors) would follow to minimize the accidental introduction of substances commonly used in commercial timber management; such as Atrazine; Triclopyr; Garlon 3 and 4; 2,4-D; and Glyphosate into streams.*

*Regardless of whether ESA coverage is sought, the description of forest management on the Elliott should provide information regarding the application of herbicides. Annual, repeated use of herbicides over tens of thousands of acres of forest lands that drain into waterways that support sensitive species and are utilized by the public cannot reasonably be omitted. Given that the use of herbicides is an integral part of ODF management, it should be fully disclosed to allow reviewers to decide if there might be the potential for take. It is impossible to wholly assess the potential impacts of proposed activities or the effectiveness of proposed mitigation measures without being able to assess all interrelated portions of their timber management activities.*

**Response**

If analysis of herbicide application is required in the HCP/EIS, it will be provided.

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## *Elliott State Forest Management Plan Public Comments Reponses:December 2005*

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**Sub-topic** History

**Scope** IP

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**Comment Number** 175

*Another history revision is on page 11 of the IP: “Anadromous salmonid populations have been generally depressed throughout western Oregon for a variety of reasons, including...” There is a long list of reasons that does not include logging of stream-side habitat. Since this is a logging plan, it seems that reason would not be the one to forget.*

*The IP says, “in recent years, numbers of spawning adults on the ESF have increased...”  
Where are the spawning numbers for 2004 and 2005?*

**Response**

It is correct that logging has had some effect on salmonid populations and this should be noted along with the other factors.

The spawning counts for 2004 and 2005 can be located on ODFW's web site.

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## *Elliott State Forest Management Plan Public Comments Reponses:December 2005*

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**Sub-topic** Legal Mandates

**Scope** FMP

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*Comment Number* 180

*Legal mandates are unclear. Peppered throughout the draft plans are references to meeting “legal mandates for common school land”. For instance, there is a wide range of acres that can be clearcut every year “to insure that Coos District can meet legal mandates to produce revenue.... If the clearcut acreage for mature stands is reduced for some reason, then increased clearcutting of young stands may be necessary.” Also, note that the biggest headline in the News-Review insert was “Plan Seeks To Meet Legal Mandate”.*

*I asked ODF: Haven't you been meeting your legal requirement all along under the current plan? The answer is a vague “some feel not”. The ODF owes the public a clear explanation. What in the old plans did not meet the legal mandate?*

**Response**

As the plan clearly describes in Chapter 3, the legal mandate for Common School Lands is to maximize revenue to the Common School Fund over the long term, using sound techniques of land management. This was a key mandate that was considered in the planning process. The decision makers for the plan - the Land Board and the Board of Forestry - will need to determine how well the proposed plan meets legal mandates. In the case of the Land Board, it is prudent for them to periodically re-evaluate how well they are meeting their fiduciary responsibility in regard to trust lands. As new information is learned, decisions on meeting trust obligations may change.

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*Comment Number* 5E+08

*In the legal mandates section (D-6) , we suggest a discussion between added as to Tillamook County v. State, 302 Or. 404 (1986) and Tillamook County et al. v. State of Oregon et al (Tillamook Co. Case No.04 2118).*

**Response**

There is a great deal of case law as well as legislative history in regard to management of state forest lands and the Counties' protected and recognizable interest in receiving revenues from these forestlands. Though Tillamook County v. State, 302 Or 404 (1986) and Tillamook Co. Case No. 04 2118 are important cases we believe the discussion on legal mandates in Appendix D effectively summarizes the key legal mandates for managing Board of Forestry lands and the interest the Counties have in these lands.

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*Comment Number* 1E+09

*On page S-13, the plan notes that "other important legal mandates include meeting or exceeding the Oregon Forest Practices Act." If there is a legal mandate to exceed the Oregon Forest Practices Act, this mandate must be identified and discussed as to how it takes precedence over the Board's trust responsibilities to the counties and Common School Fund.*

**Response**

The language on page S-13, Other important legal mandates include meeting or exceeding the Forest Practices Act., is mis-stated. It will be changed to "Other important legal mandates include complying with the Forest Practices Act". However, one of the strategies for meeting legal mandates is for the forest to be managed in a manner that meets or exceed the Forest Practices Act.

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## *Elliott State Forest Management Plan Public Comments Reponses:December 2005*

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*Comment Number* 2E+09

*In Chapter 4 of the draft management plan (S-11), the basic concepts for managing the Elliott State Forest are identified as:*

- \* Sustainable economic and social benefit.*
- \* Sustainable forest ecosystem management.*
- \* Integrated resource management.*

*(a) While the sustainable economic and social benefit provision correctly seeks to focus the plan on meeting the legal mandates and trust obligations, it improperly focuses the plan on achieving "social benefit through forest management." Clearly, social benefit is an indirect result of managing in accordance with the trust and other legal mandantes, however, it is secondary objective and to the extent it reduces harvest or economic benefit to the counties or common school fund it is a violation of the Board of Forestry's trust and other legal mandates.*

*(b) In the section defining "sustainable forest ecosystem management" the plan states this is the application of silvicultural tools to attain the desired landscape condition which will meet the resource objectives of the Elliott State Forest Management Plan (S-11). Unfortunately, the plan is not clear as to what are these "resource objectives".*

*If the objectives are the five items listed on S-12, then careful scrutiny must be made to insure that all of these items are directly benefitting the objective to meet the Board of Forestry's trust and other obligations, namely to manage these lands for the benefit of the counties and common school fund.*

*While the social benefits are defined on page S-14 as an indirect benefit from maximizing revenues to the counties and Common School Fund, it nonetheless appears that the secondary goal of "social benefit" has been elevated above the economic requirements. For example, on page S-11, the sustainable forest ecosystem management is defined to provide for the "social, economic, and environmental benefits. "We caution that as a general rule of construction when a list of activities are provided the priority is on descending scale with the first item listed as the highest priority. In this case the list "social, economic, and environment" improperly elevates "social" above the requirement to meet the economic benefits that flow to the counties and common school fund.*

### ***Response***

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## *Elliott State Forest Management Plan Public Comments Reponses:December 2005*

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We agree that social benefits may be an indirect result of applying the management strategies. However, social benefits derived from forests include providing a regular source of employment for the local and regional economy, producing products used by businesses, and providing revenue to support education or other public programs. These benefits can be provided through sustainable commercial harvest of timber and other forest products. Environmental values such as clean air, water, and productive soils are important aspects of social benefits that are highly valued by most people. Recreational opportunities are also key benefits of managing the Elliott State Forest, especially for local communities. Economic and social benefit from recreation activity includes direct, indirect and induced economic activity for local communities, the region and state.

b- The language on page S-11 will be changed from "resource objectives" to "resource goals" to help clarify the plan. The resource goals are stated in Chapter 3.

Though no hierarchy was intended by the order in which the benefits were described on page S-11, ("social, economic, and environmental") we will change the order to "economic, social, and environmental".

### **Sub-topic** No Surprise

### **Scope** HCP

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#### **Comment Number** 156

*The ODF should remove the No Surprises provision of the HCP. Public forests should protect public resources, including endangered species, no matter what surprises come up. Nothing can be so important as to permit the extinction of an entire species in Oregon.*

*The No Surprises policy is contrary to the policy behind the ESA, as well as the terms of Sections 7 and 9 of the Act. Moreover, the only conceivable way in which a No Surprises provision would be adequate is if it provides for permit revocation in all of the possible changes in circumstances. For example, if large scale disturbance occurs – as contemplated by the draft HCP and proposed FMP – the remedy should be permit revocation (not, as currently contemplated, adaptive management, which should be used only for minor, insignificant changes). Since there is no way the state and federal agencies can possibly conceive of all possible changed circumstances, it necessarily follows that there is no way the No Surprises provision of the HCP can be made adequate under the ESA.*

#### **Response**

ODF will provide information about "no surprises" so the Land Board and Board of Forestry can consider the effects and value of this provision.

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## *Elliott State Forest Management Plan Public Comments Reponses:December 2005*

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**Sub-topic** Roads

**Scope** HCP

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**Comment Number** 213

*Adverse Impacts from the Existing Road System, Including Old Roads, Must be Evaluated in Order to Establish the Environmental Baseline for Jeopardy Analysis*

*The HCP states at 8-28:*

*“The greatest risks for increased drainage network are associated with the existing road system. This is because older roads may have greater connectivity with steams than newly constructed roads, a characteristic believed to increase the drainage network. The vast majority of the Elliott State Forest road system is (and will continue to be) comprises of old roads. However, this would be the case with or without the new HCP so there are no road-associated impacts with the new HCP.” (emphasis added)*

*This view of “no impacts” is legally wrong for the reasons stated above – the effects of the road system must be evaluated in order to evaluate whether the roads impacts being granted assurances are capable of avoiding jeopardy. Ongoing, remediable harm – such as is represented by old roads which cause chronic and episodic sedimentation – cannot be “grandfathered” and insulated from ESA take liability through the HCP process without a finding that these impacts will not jeopardize all of the covered aquatic species – including those that are not currently listed.*

*The unfortunate fact is that old roads cause ongoing harm, and it is entirely possible – even likely – that this level of harm “jeopardizes” some of the covered species. (We note that the Services have at times found existing conditions to cause jeopardy, allowing management to go forward if management impacts are reduced overall). If so, then any impacts from forest management – including but not limited to roads management -- must be limited so as not to retard or prevent attainment of the conditions required to avoid jeopardy.*

*In sum, the adequacy of the roads program cannot be evaluated for ESA assurances without assessment of the impacts of the existing road system.*

**Response**

We agree with your comment. This approach will be changed in the next version of the HCP. A more in-depth analysis of HCP effects will be provided in the EIS.

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## *Elliott State Forest Management Plan Public Comments Reponses:December 2005*

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### **Scope** **IP**

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*Comment Number* 165

*To build the new roads, and to reconstruct old roads, the ODF will develop four sandstone quarries on the Elliott. The locations were not disclosed for public comments. Mining road rock can be very disturbing to surrounding wildlife, not to mention the damage it does to soils. Sandstone is highly erosive. Eventually, most of the sandstone excavated could find it's way back into fish-bearing streams. The ODF should reconsider the extensive road program and a stronger look at the impacts of developing sandstone rock quarries on the Elliott.*

#### ***Response***

The Elliott State Forest will develop small sandstone pits as needed in rocky ridgetop areas or other areas with little soil. These locations are as yet unknown, and will be determined based on proximity to project, distance from stream, and ability to keep these small (these will be local pits, not like large commercial quarries) The ESF will use only this rock for spurs that do not drain to streams, or for base rock where it will not be worn down by traffic. As such, it will minimize impacts to wildlife, impact very little on soil productivity, protect water quality, and reduce greater impacts associated with hauling long distances from areas with little remaining rock resources. Sandstone rock needs are expected to be small, several thousand yards per year (or a solid rock volume of about a 50 foot cube or less).

### **Sub-topic** Unforeseen Circumstances

### **Scope** **HCP**

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*Comment Number* 187

*Any changes made to the HCP's conservation strategies due to unforeseen circumstances must be subject to public comment, not in a "relatively formal public process" as described in the draft HCP.*

*Consider our HCP scoping comments submitted to the USFW on June 23, 2005.*

#### ***Response***

Any changes to the proposed HCP in the future will be governed by the implementing agreement between ODF and the federal services.