

## **STAFF REPORT**

Agenda Item No.:	8
Work Plan:	Private Forests Work Plan
Topic:	Forest Practices Act (FPA) Rule Policy Review
Presentation Title:	Specified Resource Site Rule Making for Bald Eagles
Date of Presentation:	April 27, 2016
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### **SUMMARY**

This agenda item summarizes progress to date on specified resource site rule making for bald eagles. We will present information from a technical report (Attachment 1). The technical report provides information that informs the Board's decision regarding Oregon Forest Practices Act (FPA) rule changes for bald eagle resource sites. This agenda item is informational only.

### **CONTEXT**

The Board of Forestry's 2011 Forestry Program for Oregon supports an effective, science-based, and adaptive FPA as a cornerstone of forest protection on private lands in Oregon. The Board's guiding principles and philosophies includes a commitment to continuous learning, evaluating, and appropriately adjusting forest management policies and programs based upon ongoing monitoring, assessment, and research (Value Statement 11).

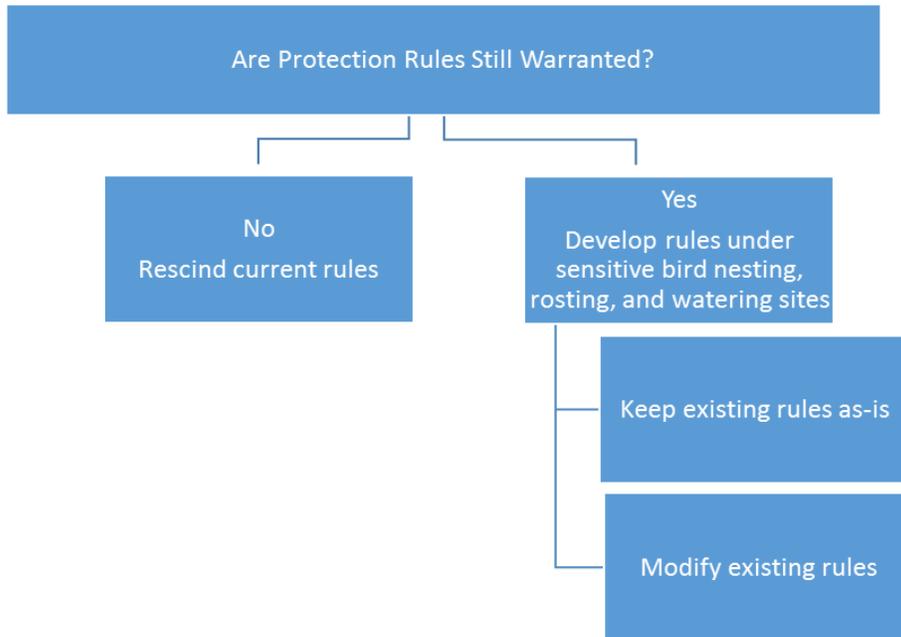
The bald eagle has been removed from both the federal and Oregon endangered species lists. However, the FPA still identifies bald eagle nesting, roosting, and foraging perch sites as resource sites used by threatened and endangered species and includes rules for their protection (Oregon Administrative Rules (OAR) 629-665-0220 through 629-665-0240). When a threatened or endangered species is delisted by the Oregon Fish and Wildlife Commission and/or the U.S. Fish and Wildlife Service (USFWS), the Board of Forestry (Board) must determine whether continued rules for protection of the species' resource sites are warranted. If the Board determines that continued protection rules are warranted, then rules shall be promulgated under the appropriate statutory authority. If the Board determines that continued protection rules are not warranted, existing rules must be repealed.

The Department first presented this topic to the Board in July 2014. At that time, the Board directed the Department to initiate the rule making process and to use the Regional Forest Practices Committees in an advisory role for this rule development process.

### **BACKGROUND AND ANALYSIS**

The FPA includes rules for bald eagle nesting, roosting, and foraging perch sites in the threatened and endangered species section (OAR 629-665-0220 through 629-665-0240). Because the bald eagle is no longer considered a threatened species, changes to the FPA rules are needed. Forest Practices Act rules that describe the process to inventory and protect special

resources on forest lands (OAR Division 680 of Chapter 629) contain information to direct the Board’s review process for specified resource sites. Specifically, OAR 629-680-0100(4) directs the Board to determine if continued protection of a delisted species is still warranted, but does not provide details as to how this review shall be conducted. In contrast, OAR 629-680-0200 explains the process for developing rules for species under the Bird Nesting, Roosting, and Watering Sites rules (OAR 629-665-0100) and includes very specific information that the Board shall review during their decision-making process. The decision space for the Board is shown in Figure 1.



**Figure 1:** Board of Forestry decision space for changes to FPA rules for bald eagles.

The department prepared a technical report to assist the Board with the decision-making process, the first step of which is to make a decision regarding whether protection rules are still warranted. In the event that the Board decides that protection is still warranted, the report also includes required information as described in OAR 629-680-0200 for development of rules under the FPA’s Sensitive Bird Nesting, Roosting, and Watering Sites. The technical review paper includes the following information:

- Biology of the species;
- Number and distribution of resource sites on private and public lands in Oregon;
- An evaluation of how the species meets criteria described in OAR 629-680-0210;
- An identification of forest practices that conflict with sites;
- An evaluation of biological consequences of the identified conflicts;
- Proposed protection requirements; and
- Proposed exception criteria.

Based on the analysis in Part 1 of the technical report, it appears there is support for a decision to rescind the FPA rules for winter roosting sites and foraging perch sites. It does not appear that these resource sites are limiting bald eagle populations and are not expected to limit populations

should FPA rules be rescinded. Based on the Department’s analysis, neither winter roosting sites nor foraging perch sites met criteria to be added as protected resource sites under the Sensitive Bird Nesting, Roosting, and Watering Site rules (Table 1). However, very large winter roosting sites are identified in the report as possibly being important at the scale of local populations.

**Table 1:** Summary of analysis of whether the bald eagle meets criteria for development of rules under the Sensitive Bird Nesting, Roosting and Watering Site rules in the FPA. Sites must meet all three criteria for rule development.

Criteria	Nest Sites	Roost Sites	Perch Sites
(1) Requires site-specific protection in order to assure continuation of species throughout range	Y	N	N
(2) Has a direct probability of being adversely affected by forest practices	Y	Y	Y
(3) Meets one or more of the following criteria			
3a—where birds concentrate nesting, roosting, or watering use	Y	Y	N
3b—number of sites is limited and used by a species with specialized nesting or roosting requirements	Y	N	N
3c—number of sites is declining or expected to decline in the future	Y	N	N
3d—resource sites are protected by the Bald Eagle Protection Act	Y	Y	Y
Overall Conclusion (all three criteria met)	Y	N	N

Based on the analysis in Part 1 of the technical report, it appears there is decision space to either keep FPA rules for bald eagle nesting sites or to rescind the rules and rely on the federal Bald and Golden Eagle Protection Act (Eagle Act). Possible implications from relying on the Eagle Act are discussed in the technical report.

Should the Board decide to maintain rules for bald eagle nesting sites in the FPA there are two general options for rules under OAR 629-665-0100. The board could choose to keep the existing FPA rules “as-is” or they could choose to develop a modified rule. The technical report discusses options for possible modifications. If the Board chooses to maintain rules, the department suggests a modified rule structure for bald eagle nesting sites. The suggested modified rule contains the following components:

- Definition of an active nesting site as one that has been used within the last five years.
- A habitat buffer around all nesting trees that is approximately 330 feet in radius that contains the following key components (in most cases within, but possibly extending outside the buffer):
  - Replacement nesting trees;
  - Perching and fledging trees (perching trees in this case are not related to foraging, but are instead trees used by adults or young to perch near the nest tree); and
  - Screening to protect nest tree from wind.
- Seasonal restrictions during a critical use period of January 1 to August 31.
- Seasonal restrictions within one-quarter mile of an active nest tree; distance can be reduced on a case by case basis.

- Exceptions are allowed if the landowner possesses a valid “take permit” under the Eagle Act.
- Abandonment Criteria that allows for a nesting site to be considered an abandoned resource site after five years of confirmed non-use.

Although the bald eagle is still protected under the Eagle Act, there still may be a role for state protection in Oregon. Bald eagles continue to play an important cultural role for Native American tribes in Oregon and this should be taken into consideration by the Board. Nearly half of the known nest sites are located on private lands, thus private lands will continue to play an important role in providing bald eagle nesting habitat. In addition, ODF already has the infrastructure in place to interact with landowners, screen proposed operations for known nest sites, and to ensure protection of those sites through administration of the FPA. In contrast, protection of sites only under the Eagle Act would rely on: 1) landowners proactively seeking assistance from the USFWS if they are aware of a nest site on or near their property, and 2) enforcement actions by the USFWS, based primarily on complaints (thus often after damage is done).

The Department requested input from staff and stakeholders throughout this process. An early draft of the report was reviewed by technical experts on bald eagles from Oregon Department of Fish and Wildlife, Oregon Eagle Foundation, and the USFWS. We also received input from all three Regional Forest Practices committees as well as the Committee for Family Forestlands. Input on the draft technical report was received from ODF stewardship foresters, unit foresters, and State Forest Program wildlife biologists. Most recently, the technical report was sent out for review by a large group of stakeholders. To the extent practicable, the report was modified based on input from staff and stakeholders at each step in the process. A full summary of all comments received has been compiled.

## **ALTERNATIVES CONSIDERED**

This board agenda item is informational only. The Department will request a decision from the Board in July on the topic of bald eagle rulemaking. Specifically, the Board will be asked to decide what rule concept(s) for the bald eagle should be captured in rule language, if any, in order to begin the formal Secretary of State rulemaking process. The range of options available to the Board for rule making are described in this agenda topic and technical report.

## **RECOMMENDATION**

This board agenda item is informational only.

## **NEXT STEPS**

The Department will return at the July Board of Forestry meeting to continue the discussion of bald eagle rule making and will request decisions regarding changes to bald eagle rules at that time (Attachment 2). The department will continue with the rulemaking process after the June Board meeting.

## **ATTACHMENTS**

1. Bald Eagle Technical Report, March 2016
2. Bald Eagle Rulemaking Process and Timeline