

## STAFF REPORT

Agenda Item No.:	5
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:	July 20, 2016
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### SUMMARY

Because the bald eagle is no longer listed as a threatened species, the Board of Forestry (Board) must determine if continued protection under the Forest Practices Act (FPA) is warranted, and if so, promulgate rules under the appropriate rule section. The department is seeking a decision by the Board on whether protection is still warranted under the FPA for bald eagle foraging perch, winter roosting and nesting sites. If the Board determines that protection is still warranted, the department is seeking a decision regarding the protection requirements for new rules.

The department provided information in the Bald Eagle Technical Report (attachment 1), presented to the Board in April, that suggest protection may no longer be warranted for bald eagle foraging perch and winter roosting sites, but that protection may still be warranted for nesting sites. Options for modified protection standards for bald eagle nesting site rules are provided in the technical report. The department recommends the Board rescind FPA rules for Bald Eagle Roosting Sites (OAR 629-665-0230) and Bald Eagle Foraging Perches (OAR 629-665-0240). The department also recommends that the Board direct the department to modify the nesting rules for the bald eagle and move the modified rules into the Species Using Sensitive Bird Nesting, Roosting and Watering Sites (Oregon Administrative Rule [OAR] 629-665-0100), utilizing the Regional Forest Practice Committees in an advisory role.

### CONTEXT

The Board'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).

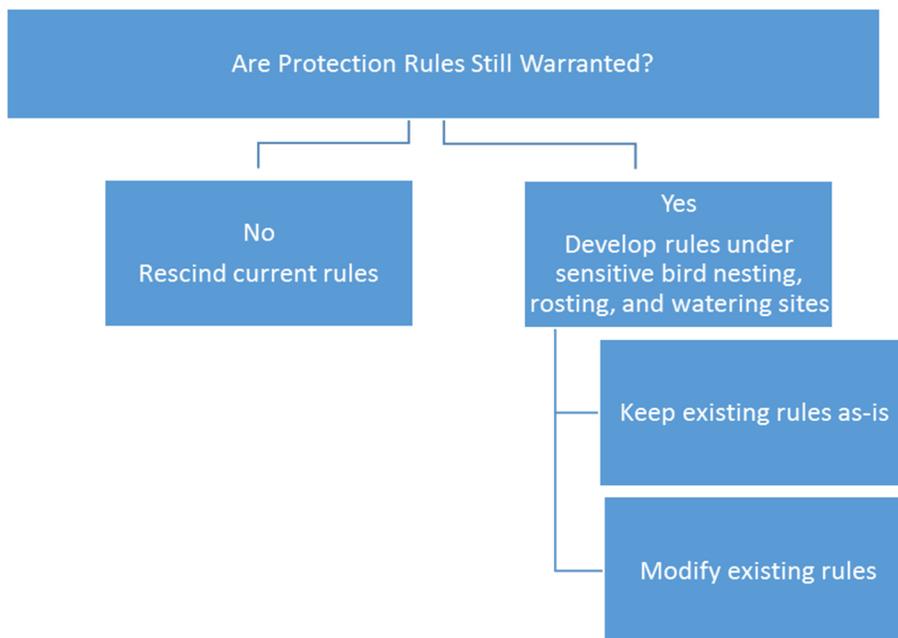
The bald eagle has been removed from both the federal and Oregon endangered species lists. However, the FPA still identifies bald eagle nesting, roosting and foraging perch sites as resource sites used by threatened and endangered species and includes rules for their protection (OAR 629-665-0220 through 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 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.

In April, the department presented a technical report to the Board that provided background information on bald eagles and forest practices. The presentation and report contained information to assist the Board in making decisions regarding continued protection of bald eagles under the FPA. The report also provided the analysis required for consideration of rules under the Species Using Sensitive Bird Nesting, Roosting and Watering Sites. The department is seeking a decision regarding whether or not continued protection is warranted, and if so, what rules are still necessary.

### BACKGROUND AND ANALYSIS

The FPA includes rules for bald eagle nesting, roosting and foraging perch sites in the threatened and endangered species section (OAR 629-665-0200, and 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. FPA 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 Species Using Sensitive Bird Nesting, Roosting and Watering Sites (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.

In the event that the Board decides that protection is still warranted, the technical report also includes required information as described in OAR 629-680-0200 for development of rules under the FPA’s Species Using Sensitive Bird Nesting, Roosting and Watering Sites (see Table 1 for summary of results).

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

<b>Criteria</b>	<b>Nest Sites</b>	<b>Roost Sites</b>	<b>Perch Sites</b>
(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
<b>Overall Conclusion (all three criteria met)</b>	<b>Y</b>	<b>N</b>	<b>N</b>

Based on the analysis in Part 1 of the technical report, it appears that protection under the FPA may no longer be warranted for bald eagle foraging perch or winter roosting sites, but that 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 discussed in the report 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. Options are discussed for possible modifications and a recommendation is made for a modified rule structure for bald eagle nesting sites in the report.

Although the bald eagle is 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. Since nearly half of the known nest sites are located on private lands, 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 can 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).

### **RECOMMENDATION**

The department recommends that the Board direct the Department to initiate rulemaking to:

1. Continue protection for bald eagle nest sites and develop modified rules for nest sites under OAR 629-665-0100 (Species Using Sensitive Bird Nesting, Roosting and Watering Sites), including the following parameters:
  - Maintain a 330 foot habitat buffers around nesting trees,
  - Protect sites from disturbance by restricting operations within 660 feet and use of aircraft within 1000 feet of an active nest site during the critical use period,
  - Allow exceptions to the FPA rules for eagle nesting sites if the landowner holds a permit under the Bald and Golden Eagle Protection Act and,
  - Allow for abandonment of nesting sites if surveys document no use after five years.
2. Rescind FPA rules for Bald Eagle Roosting Sites (OAR 629-665-0230) and Bald Eagle Foraging Perches (OAR 629-665-0240).
3. Utilize the Regional Forest Practice Committees in an advisory role for the rulemaking process.

### **NEXT STEPS**

At the November 2016 Board meeting, the department will present a proposed rule package that satisfies the Board's direction (see timeline in attachment 2).

### **ATTACHMENTS**

- Attachment 1: Bald Eagle Technical Report
- Attachment 2: Bald Eagle Rulemaking Timeline (Graphic)