

SETTLEMENT AGREEMENT

Pursuant to Federal Rule of Civil Procedure 41(a), plaintiffs the Center for Biological Diversity, Cascadia Wildlands, Native Fish Society (“Plaintiffs”), and defendants State Forester Cal Mukumoto in his official capacity, District Forester Katherine Skinner in her official capacity, District Forester Michael Cafferata in his official capacity, and District Forester Daniel Goody in his official capacity (“Defendants”), (collectively, “Parties”). Plaintiffs agree to dismiss their claim for relief without prejudice as set forth below.

I. RECITALS

- A. On June 13, 2018, the Center for Biological Diversity, Cascadia Wildlands, Native Fish Society, Institute for Fisheries Resources, and Pacific Coast Federation of Fisherman’s Associations (“Original Plaintiffs”) filed this lawsuit in the United States District Court for the District of Oregon, Case No. 3:18-cv-01035 (“Lawsuit”), asserting claims against former State Forester Peter Daugherty in his official capacity, District Forester Katherine Skinner in her official capacity, District Forester Michael Cafferata in his official capacity, and District Forester Daniel Goody in his official capacity (“Defendants”).
- B. In the Lawsuit, Original Plaintiffs asserted a claim under the Endangered Species Act (“ESA”) alleging that Defendants are in violation of Section 9 of the ESA because forestry activities they undertake or authorize take federally-listed Oregon Coast coho salmon. The Original Plaintiffs sought declaratory and injunctive relief.
- C. On July 26, 2018, Oregon Forest Industries Council filed an unopposed motion to intervene as a defendant. On August 15, 2018, the Court entered an order granting intervention. On September 14, 2018, Tillamook County filed an unopposed motion to intervene as a defendant. On September 18, 2018, the Court entered an order granting intervention. Oregon Forest Industries Council and Tillamook County (“Intervenor-Defendants”) asserted no counterclaims in the Lawsuit.
- D. Following rulings on Defendants’ motion to dismiss and motion to strike, on May 27, 2019, Center for Biological Diversity, Cascadia Wildlands and Native Fish Society (“Plaintiffs”) filed their First Amended Complaint. In their First Amended Complaint, Plaintiffs again asserted Defendants to be in violation of Section 9 of the ESA and sought declaratory relief and an injunction to prevent Defendants from conducting or authorizing activities Plaintiffs alleged cause take of Oregon Coast coho salmon.
- E. On May 28, 2019, Pacific Coast Federation of Fisherman’s Associations and Institute for Fisheries Resources filed a notice of voluntary dismissal of their claims.
- F. On July 11, 2019, Defendants filed an Answer to Plaintiffs’ First Amended Complaint denying that Plaintiffs are entitled to the requested relief. On the same day, Intervenor-Defendants also filed Answers denying that Plaintiffs are entitled to relief.
- G. Pursuant to Fed. R. Civ. P. 25(d), when former State Forester Peter Daugherty resigned his position, his successor, acting State Forester Nancy Hirsch, was automatically substituted as a Defendant in his place. And when current State Forester Cal Mukumoto became State Forester, he was automatically substituted as a Defendant for acting State Forester Nancy Hirsch.
- H. Now, without a determination or an admission of liability, the Plaintiffs wish to resolve their claim against Defendants in the Lawsuit.

II. TERMS OF AGREEMENT

1. Within five business days of the effective date of this Agreement, Plaintiffs shall file a request for voluntary dismissal of the Lawsuit without prejudice under Fed. R. Civ. P. 41(a)(2). Dismissal of the Lawsuit is a condition of Defendants' performance under this Agreement.
2. Defendants agree to implement on the Clatsop and Tillamook State Forests the following measures or requirements, which include components of the public draft of the Western Oregon State Forests Habitat Conservation Plan dated February 2022 ("draft HCP"), beginning with timber sales identified in the FY 2024 Annual Operations Plans ("AOP") and continuing through timber sales identified in the FY 2025 through FY 2028 AOPs, or until issuance of an Incidental Take Permit ("ITP") by the National Marine Fisheries Service, whichever comes first.

Aquatic Protections

3. Defendants agree that their timber sales and forestry activities on the Clatsop and Tillamook State Forests will comply with the following aquatic protections:
 - a. All fish-bearing, and large and medium non-fish-bearing streams will have a 120-foot (horizontal distance) Riparian Conservation Area ("RCA") that extends from the aquatic zone.
 - b. Seasonal fish-bearing streams will have a 120-foot (horizontal distance) RCA for the entire fish-bearing portion of the stream segment.
 - c. Small, perennial non-fish-bearing streams will have a 120-foot RCA (horizontal distance) for the first 500 feet upstream, or until the end of perennality, from the end of fish use on perennial fish-bearing streams. Upstream of the 500-foot process protection zone (as described in the draft HCP) the buffer will be 35 feet (horizontal distance) from the aquatic zone.
 - d. Seasonal non-fish-bearing streams that Defendants determine are potential debris flow track or high-energy reaches that have the potential to deliver to fish-bearing streams will have RCAs that extend 50 feet (horizontal distance) from the aquatic zone for the first 500 feet upstream of the end of fish use to recruit wood into streams from standing trees. Upstream of the 500-foot process-protection zone, the buffer will be 35 feet (horizontal distance) from the aquatic zone, to the potential initiation site in potential debris flow track or high-energy reaches. Defendants may determine, based upon their assessment of the slope's risk of failure, that trees may also be retained, as described in Table 4-6 below.
 - e. Consistent with Section 4 of the draft HCP, Defendants will not approve harvest or thinning within the RCAs, including harvest of standing or downed trees for salvage after disturbance events; provided however that felling of live or dead trees may occur in RCAs, limited to only what is necessary for safe, operational accommodation of the activity. Full suspension yarding is required during cable yarding across live streams. Average yarding corridors to be 15 to 20 feet wide, with a maximum of 35 feet (up to 10% of corridors on a given reach within a harvest unit), and be spaced no closer than 100 to 150 feet apart. Within RCAs, all ground-based operations will be limited only to conservation actions, those actions required for felling and removal of trees, and road and trail building and maintenance. Trees damaged or felled from yarding activities shall be left in the buffer. Where possible, trees will be felled toward the stream.

- f. Seasonal non-fish reaches that Defendants determine are not potential debris flow tracks or high energy will have a 35-foot equipment restriction zone (“ERZ”). In an ERZ, all ground-based operations will be limited to only conservation actions, those actions required for felling and removal of trees, and road and trail building and maintenance. If there are disconnected sections of seasonal non-fish streams (e.g., no stream channel or evidence of surface flow) these disconnected sections will not have RCAs but will be subject to ERZ ground-based equipment restrictions.
- g. High and moderate hazard upland slopes and debris flow tracks with a potential to deliver to fish-bearing streams will be identified as follows and buffered as described in Table 4-6:
 - i. Defendants will use the debris flow tracks stream layer developed for the draft HCP. This was developed from a 10-meter digital elevation model (DEM) by TerrainWorks using the Miller and Burnett model. Defendants will provide the stream layer to Plaintiffs within thirty (30) days of the effective date of this Agreement.
 - ii. Defendants will establish the actual location of the modeled debris flow track stream channels on the ground because the location of the modeled stream does not always align with a gulley or a stream feature on the ground. Defendants will do so using their best professional judgment, mainly, the presence or absence of a stream channel.
 - iii. Defendants will buffer all actual on-the-ground stream channels modeled as debris flow tracks that wouldn’t otherwise have one of the other standard stream buffers applied as moderate hazard upland slopes under Table 4-6, at a minimum.
 - iv. Department of Forestry (“Department”) geotechnical specialist(s) will then conduct a desk and/or field analysis of every location identified in the process outlined in (i), (ii), and (iii) above to exercise their best professional judgment to determine whether an area above the terminus of the actual on-the-ground stream channel should be buffered as a high hazard upland slope pursuant to Table 4-6. Locations buffered as high hazard uplands slopes will be those determined by Department geotechnical specialist(s) to be convergent, unchanneled, and soil-laden.
 - v. In the event one or more Department geotechnical specialists determine, using their professional judgment, that a high hazard upland slope is not present and no buffering above the terminus of the stream channel identified in (iv) above will be recommended, Defendants will provide written notice to Plaintiffs identifying the location of the area and the reasons a buffer was not applied prior to the end of fiscal years 2024-2028.
- h. **Considerations for Potentially Unstable Slopes.** The table below summarizes the actions Defendants will take related to considerations for unstable slopes with the potential to impact the aquatic environment:

Table 4-6. Slope Buffers for Protection of Fish-Bearing Streams

Slope Classification	Characteristics	Management Practices	Buffer above Fish Bearing when:
Inner Gorge	Obvious slope breaks of >20% from moderate to steeper slopes of $\geq 70\%$ and ≥ 15 feet in height. Not to exceed widths of 170 feet from water.	No harvest. Leave trees within one canopy width above the slope break, unless conifer already occupies the inner gorge, in which case leave timber only within the gorge.	Adjacent to: Type F; Perennial Type N; Seasonal High Energy; Potential Debris Flow Track
Aquatic Adjacent Unstable Slope	Unstable slope immediately adjacent to a channel, where the toe of the unstable slope interacts directly with erosive forces of a stream. Not to exceed widths of 170 feet from water.	No harvest. Buffer to leave trees within one canopy width above the unstable slope, unless conifer already occupies the unstable slope in which case leave timber only on the unstable portion of the slope.	Adjacent to: Type F; Perennial Type N; Seasonal High Energy; Potential Debris Flow Track
Upland Potentially Unstable Slopes and Debris Flow Tracks	High Hazard upland slopes: relatively high likelihood of slide initiation.	Buffer potential initiation site and underlying seasonal reaches (debris flow tracks). Buffer to leave trees within one canopy width above the potentially unstable slope, unless stand-age conifer already occupies the site.	Deliverable to Type F stream Debris-flow track may traverse other high-energy seasonal and perennial Type N segments between the potential unstable upland site and Type F stream. Debris may become entrained within downstream segments for a time before potentially delivering to fish.
	Moderate Hazard upland slopes: may have relatively high likelihood of slide initiation.	Buffer underlying seasonal streams (known as debris flow tracks).	
	Low Hazard upland slopes: do not have a relatively high likelihood of slide initiation.	No upland slope buffers required for potential initiation site or for any underlying seasonal stream.	N/A

Road Design

4. Defendants agree to design new roads or road segments in connection with any timber sale approved in an AOP that is subject to the terms of this Agreement in compliance with the following aquatic protections:
 - a. Temporary and permanent roads and landings will be located on either ridge tops, stable benches, or flats, and gentle to moderate side slopes; or if Defendant determines a planned location on slopes other than gentle to moderate side slopes will be sufficiently stable, then Defendants will utilize full-bench construction.
 - b. Defendants will not locate any new road or road segment within an RCA unless they determine that no other alternatives are operationally or economically feasible.
 - c. Defendants will design all road crossings of fish-bearing streams (e.g., bridges and culverts) to meet NOAA Fisheries and ODFW fish-passage laws, including minimum design standards Defendants determine are practical with respect to road width, radius, and gradient but that Defendants determine provide for drainage of surface water so as not to introduce runoff to streams, such as but not limited to the use of grade breaks, out-sloping, in-sloping, ditching, road dips, water bars, and relief culverts.

Road Management

5. Defendants agree to maintain existing roads used in connection with any timber sale approved in an AOP that is subject to the terms of this Agreement in compliance with the following aquatic protections:
 - a. Defendants will implement the Department's wet weather hauling rules, including closing roads where Defendants determine that such roads are unsuitable for wintertime haul.
 - b. Defendants will suspend commercial road use on roads where they determine turbid runoff is likely to reach waters of the State.
 - c. Defendants will follow the established Oregon Guidelines for Timing of In-Water Work to Protect Fish and Wildlife (ODFW 2022) including obtaining appropriate approvals from ODFW if work on stream crossings needs to occur outside of the established work window.
 - d. Defendants will not site storage and staging areas for road construction, harvest activities, and restoration projects inside of RCAs and ERZs where they determine the staging area or materials stored could cause erosion or contamination of waters of the United States (80 FR 37053). Defendants will construct staging areas in a manner that they determine is hydrologically disconnected from the aquatic environment. (If Defendants determine that storage of materials has no potential to deliver contaminants, such as culverts for stream crossings, logs for aquatic enhancement activities, and bales of mulch for erosion control, Defendants may store such materials within RCAs and ERZs.)
 - e. Road improvement and construction activities will be conducted during the dry season April 1 through October 31 except that Defendants may allow construction outside that time period during prolonged periods of dry weather. In that instance, if rainy weather

occurs, construction will be suspended until Defendants determine that soils that are saturated with water have sufficiently drained.

- f. Defendants will dispose of excess road excavation materials at a site that they determine will not contribute to sedimentation or otherwise degrade coho habitat.
- g. Defendants will utilize rock on all roads that they deem will have high erosion potential.
- h. Defendants will ensure that all road drainage structures (ditches, out-sloping, culverts, water bars, dips, etc.) are in place as soon as possible during construction of the road, and before the rainy season. Provided further that on road areas of bare soil, which Defendants determine could deliver sediment to waters of the state, Defendants will ensure they have established drainage or will be mulched and/or seeded before the start of the rainy season.

Road Vacating and Improvement

- 6. Defendants agree to vacate or improve existing roads used in connection with any timber sale approved in an AOP that is subject to the terms of this Agreement consistent with the following aquatic protections:
 - a. Where Defendants determine operationally and economically feasible, Defendants will vacate or close roads, and stabilize areas when Defendants determine that roads are unstable, unsafe, or subject to chronic erosion.
 - b. Defendants will have sidecast material, stream crossings, culverts, cross drains and fills removed on vacated roads; with unstable road and landing fills excavated; ditch and road surfaces treated to disperse runoff and prevent surface erosion; and exposed soils revegetated.
 - c. If Defendants determine a road repair or improvement is necessary for aquatic protection, then Defendants will use the best available data as a starting point to review the conditions of the road system in the permit area and conduct field inspections to identify potential erosion and landslide hazards in proposed harvest areas. Methods for identifying potential landslide areas include initial inspection of high-resolution data (i.e., LiDAR), aerial photography, and when necessary, field survey by a geotechnical specialist to identify sites with high likelihood of failure and delivery to a stream. This process will identify existing roads that should be reconstructed or considered for removal, based on factors identified below, to reduce the potential for failure or contribution of sediment to the stream channel:
 - i. Sidecast Failures/Slope Stability
 - (A) Steep slopes.
 - (B) Nearby slope failures.
 - (C) High cut slopes, i.e., over 15 feet high.
 - (D) Sidecast over 2 feet deep on steep slopes.
 - (E) Fills supported by trees and/or organic debris.
 - (F) Arc-shaped cracks in the fill or other evidence of fill movement.
 - ii. Water Quality/Sediment Delivery
 - (A) Direct delivery of sediment in runoff water from roads to streams.
 - (B) Ditch downcutting.
 - (C) Inadequate depth and/or poor-quality road surfacing.

- (D) Damaged, collapsing, and/or inadequate drainage relief structures. Relief culvert shall be placed in the best location possible to allow filtering of sediment from the road ditches or upslope areas.
 - iii. Eroding Soil on Cut-and-Fill Slopes
 - (A) Buried culverts and ditches.
 - (B) Fill erosion at culvert outlet.
 - iv. Current/Planned Uses of Road
 - (A) Unsafe conditions are present. (e.g., width, alignment, visibility)
 - (B) Volume of traffic exceeds road design.
 - (C) Road surfacing will not accommodate current/planned uses.
- d. Defendants will follow the general guidelines for road design and construction described previously and in the Forest Roads Manual. However, because of the nature of some road projects, additional engineering and design work may be needed before construction begins.

Roads Report

7. Defendants will produce a roads report for the Tillamook and Clatsop State Forests within five years. This report will inventory the roads network on each district that 1) categorizes roads, drainage systems, and surfaces, and rates their conditions, 2) identifies/updates points and segments with hydrological connectivity, 3) identifies slope stability problems, fish passage barriers, and areas in need of upgrading to meet current and future needs, 4) includes any other information needed for planning road improvements, maintenance, and vacature, and 5) provides an estimate of the cost of completing needed road repairs, vacatures and improvements. The roads report will be posted on ODF's website.

III. ENFORCEMENT AND MISCELLANEOUS PROVISIONS

1. Nothing in this Agreement nor the existence of the Agreement itself constitutes an admission of liability by Defendants.
2. The Parties agree that nothing in this Agreement establishes factual, legal, or policy precedent. Without limiting the generality of the foregoing, this Agreement establishes no principle or precedent with regard to any issue addressed herein; provided further that this Agreement shall not be offered in evidence or cited as precedent by any Party to this Agreement in any judicial litigation, arbitration, or other adjudicative proceeding, except to enforce or implement any provision of this Agreement. This provision shall survive the termination of this Agreement.
3. Plaintiffs release and discharge Defendants and their successors in office from any and all potential liability, known or unknown, suspected or unsuspected, which exists, may have existed, or might in the future exist for all claims under the Endangered Species Act that were, might have been, or might later be asserted relating to any timber sales or other forestry activities that are approved in any AOPs prior to the date of any Incidental Take Permit, or relating to timber sales or other forestry activities that are approved in any AOPs prior to the end of fiscal year 2028 (June 30, 2028), whichever is earlier.
4. Plaintiffs may recommence a lawsuit bringing the same claims at issue in this case only if: no ITP is issued to allow incidental take of Oregon Coast coho salmon in the Tillamook and Clatsop State Forests prior to the conclusion of fiscal year 2028 (June 30, 2028); provided, however, that

prior to reinitiating any such litigation Plaintiffs shall confer with Defendants to address the lack of such ITP and engage in good-faith negotiations to attempt to address the lack of an ITP in connection with the Department's forestry activities in the State Forests and avoid further litigation.

5. To the extent that any provision in this Agreement leaves the exact requirement to the discretion of Defendants or Department employees, Defendants or Department employees will exercise their discretion in good faith utilizing their best professional judgment.
6. Defendants or Department employees, where applicable, will apply their understanding of the terms utilized in this Agreement and their best professional judgment in implementing this Agreement. In the event multiple interpretations of a term or requirement are possible, Defendants' or Department employees' judgment will control.
7. This Agreement does not include all components of the draft HCP, nor is it intended to incorporate the draft HCP. To the extent measures identified in this Agreement are also contained in the draft HCP, nothing in this Agreement should be construed to impose obligations on the Defendants or the Department beyond or in addition to those contained in the draft HCP's parallel measures.
8. The terms and conditions of a final HCP and final ITP will supersede the terms of this Agreement, regardless of differences between the terms of this Agreement and the final HCP or ITP.
9. This Agreement will not affect the authority of the Board of Forestry or the Department to modify any draft or future HCP over the state forests subject to this Agreement.
10. This Agreement is terminated and no longer in effect upon the issuance of an ITP covering Tillamook and Clatsop State Forests. If no such ITP is issued prior to the end of fiscal year 2028, this Agreement shall continue to apply to timber sales and forestry activities approved in AOPs covering Tillamook and Clatsop State Forests from 2024 AOPs up to and including the 2028 AOPs. In no event will this Agreement apply or otherwise obligate Defendants with respect to any forestry activities or timber sales approved in FY 2029 (or subsequent) AOPs.
11. Nothing in this Agreement shall be construed to limit or constrain Plaintiffs' ability to bring litigation challenging a final ITP approved by National Marine Fisheries Service.
12. If any party to this Agreement believes that another party is not in compliance with the terms of this Agreement, the party asserting noncompliance will follow the following dispute resolution procedure prior to initiating any court proceeding to remedy the alleged noncompliance: (a) Provide written notice of the specific actions alleged to be out of compliance as follows: If to Defendants, then by U.S. mail to the State Forester at 2600 State Street, Salem, Oregon 97310 and by U.S. mail to the Attorney-in-Charge of the Special Litigation Unit, Trial Division, Oregon Department of Justice at 100 SW Market St., Portland, OR 97201; if to Plaintiffs, then by U.S. mail to the Center for Biological Diversity Endangered Species Director at P.O. Box 11374, Portland, OR 97211; (b) Provide the party alleged to be out of compliance a 30 calendar-day period from the date the notice was mailed to evaluate the issue and respond in writing either proposing a resolution (without necessarily admitting noncompliance), requesting additional information, or denying noncompliance; and (c) Confer in person or by telephone with the designee of the party alleged to be out of compliance about the actions described in the notice and the response to the notice. If the Parties, after following the foregoing dispute resolution procedure, cannot reach agreement on a plan to resolve the alleged noncompliance, the party asserting noncompliance may file a motion to enforce the settlement agreement seeking

- specific performance of the term(s) with which it alleges the opposing part is materially out of compliance. The Parties agree that no additional remedies will be sought.
13. Other than any notices of noncompliance pursuant to the Dispute Resolution Process described in paragraph 12, any data or notices required to be provided under this Agreement shall be delivered as provided in paragraph 12(a) above in the most appropriate format for the data or notices being provided.
 14. This Agreement is binding upon the Parties by and through their employees, contractors, agents, designees, and successors for the term of this Agreement. This Agreement does not create any right or benefit for third parties and is enforceable only by and against the Parties.
 15. Plaintiffs reserve their right to seek attorneys' fees and costs. Defendants reserve their right to contest Plaintiffs' entitlement to recover fees and costs and the amount of any such fees and costs and do not waive any objection or defenses they may have to Plaintiffs' request.
 16. The Parties agree that any fees or costs associated with monitoring or enforcement of the Agreement shall be the responsibility of each Party and no Party shall be entitled to recover attorneys' fees or costs for those activities, regardless of who prevails.
 17. The parties agree that this Agreement was negotiated in good faith and constitutes a settlement of claims disputed by the Parties. By entering into this Agreement, the Parties do not waive any legal rights, claims, or defenses, unless expressly stated herein.
 18. Other than any motion described in paragraph fifteen (15), this Agreement constitutes the entire agreement among the Parties relating to the Lawsuit and no other statement, promise, or agreement, written or oral, made by any Party or any agent of any Party that is not contained in this Agreement shall be enforceable. This Agreement is not intended and shall not be construed to affect or limit Defendants from complying with their obligations under applicable laws, nor from considering and responding to comments received in any review or regulatory process related to state forests management.
 19. The persons executing this Agreement on behalf of the respective Parties warrant that they are duly authorized to accomplish the same and possess all requisite authority to bind the represented Parties to all the provisions of this Agreement.
 20. The Parties agree that they have jointly participated in the preparation of this Agreement and that, accordingly, any rule of interpretation construing terms and conditions against the party preparing the agreement or any of its provisions is inapplicable.

21. This Agreement may be executed in counterparts, each of which shall be deemed to be an original but all of which taken together shall constitute one and the same Agreement. The Agreement shall become effective on the date that the last counterpart is executed.

For Plaintiffs:

s/ Noah Greenwald 3/21/2023
Noah Greenwald Date
Endangered Species Program Director
Center for Biological Diversity

s/ Joshua Laughlin 3/21/2023
Joshua Laughlin Date
Executive Director
Cascadia Wildlands

s/ Jennifer Fairbrother 3/21/2023
Jennifer Fairbrother Date
Conservation Director
Native Fish Society

For Attorneys for Plaintiffs:

s/ Amy R. Atwood 3/21/2023
Amy R. Atwood Date
Senior Counsel
Center for Biological Diversity

For Defendants:

s/ Cal Mukumoto 3/20/2023
Cal Mukumoto Date
State Forester

s/ Katherine Skinner 3/20/2023
Katherine Skinner Date
District Forester
Tillamook District

s/ Michael Cafferata 3/20/2023
Michael Cafferata Date
District Forester
Forest Grove District

s/ Daniel Goody 3/20/2023
Daniel Goody Date
District Forester
Astoria District

For Attorneys for Defendants:

ELLEN F. ROSENBLUM
Attorney General

s/ Deanna J. Chang 3/20/2023
Deanna J. Chang Date
Christina L. Beatty-Walters
Senior Assistant Attorneys General