

APPENDIX J Related Legal History

On June 2, 1981, the Pacific Northwest Region Forest Service issued a Final Environmental Impact Statement and Record of Decision regarding Methods of Managing Competing Vegetation (USDA FS, 1981). Analyses included in the 1981 EIS considered all vegetation management activities, excluding only tree harvest and tree-nursery operations. The management decision was to allow the Forest Service to make all tools available while working toward a goal of reducing reliance on herbicides.

The Northwest Coalition for Alternatives to Pesticides, the Oregon Environmental Council, and the Audubon Society of Portland filed a lawsuit against the 1981 EIS in US District Court of Oregon on July 13, 1983. The lawsuit was levied against the USDA Forest Service, the USDI Bureau of Land Management (BLM), and the US Environmental Protection Agency (EPA). Oregonians for Food and Shelter, an organization representing the business community, intervened on behalf of the government agencies.

A judgment was entered on March 14, 1984, finding that the defendants (USDA Forest Service) had not prepared an adequate Worst Case Analysis, pursuant to their NEPA obligations.

Responding to the Court's directive, the Forest Service and the BLM prepared a worst-case analysis that included a comprehensive human-health risk assessment for the use of herbicides. Subsequently, the Forest Service determined that a new EIS for vegetation management was needed. Work on this EIS began in July 1986.

In December 1988, the Pacific Northwest Region issued the 1988 EIS and ROD on the Management of Competing and Unwanted Vegetation (USDA FS, 1988). Competing and unwanted vegetation occurs in all ecological systems. Such vegetation may include (in addition to invasive plants), roadside brush, and other plants that compete for nutrients and sunlight with what the agency determined to be more desirable species. The 1988 EIS and ROD describe methods and identify a preferred alternative for managing competing and unwanted vegetation within the forest environment, generally following regeneration harvests and plantings.

Following the release of the 1988 EIS and ROD, the defendants asked the court to dissolve the order enjoining the Secretary of Agriculture from using herbicides within the Pacific Northwest Region of the Forest Service. Oregonians for Food and Shelter subsequently joined in the motion. After a status conference, plaintiffs filed a statement of opposition to lifting the court-ordered injunction. Paul Merrell filed a motion to intervene, because he had an interest in the matter stemming from a previous lawsuit (*Merrell v. Block*). The involved parties, plus Mr. Merrell, then engaged in court-approved-and-arranged mediation. The outcome of the mediation was a written agreement (1989 Mediated Agreement) detailing resolution on several points, including compliance details on the part of the Forest Service. District Court Judge James M. Burns signed the Mediated Agreement on May 24, 1989. This signing lifted the court-ordered injunction prohibiting Forest Service use of herbicides in the Pacific Northwest Region. An Amendment to the 1988 Record of Decision was eventually prepared and signed on February 27, 1992.

A December 2002 U.S. District Court decision (*Blue Mountain Biodiversity Project v. US Forest Service*, CV 01-703-HA) concluded that the Malheur National Forest Environmental Assessment

for Noxious Weed Control Project was insufficient under NEPA because it was tiered to the 1988 EIS, which the Court determined to be inadequate. The Court determined that the use of the 1988 EIS is inadequate because it does not address new information developed and available in the last 14 years regarding herbicides and the causes of the spread of invasive plants. The court decision applies exclusively to the Malheur National Forest.

In July 2002, the U.S. District Court for the Western District of Washington found that the U.S. Environmental Protection Agency (EPA) had violated the Endangered Species Act. The court ordered EPA to initiate a review of 54 pesticide active ingredients for their effects on salmon. The review was to be conducted on a schedule over a period of 2 years and 6 months. The EPA was further ordered to consult with the National Marine Fisheries Service (now known as the National Oceanic and Atmospheric Administration –Fisheries, or NOAA-Fisheries) and the U.S. Fish and Wildlife Service (USFWS), regarding any of the 54 pesticides that are found to potentially affect salmon. Two herbicides considered for use in the Invasive Plant EIS (IPEIS) are included in the District Court decision: 2,4-D and triclopyr.

The plaintiff requested injunctive relief. On January 22, 2004, the court ordered that certain protective measures be taken in applications involving the pesticides until consultation is completed. The interim protective measures that took effect February 5, 2004 include “buffer zones” along identified salmon habitat streams. The protective measure generally requires no-spray “buffer zones” of 20 yards when making applications of the specified pesticides using ground equipment, and “buffer zones” of 100 yards when using aerial application equipment.

The court exempted certain pesticide uses from the buffer zone requirement, including, herbicide use by government agencies in noxious weed control programs when the program implements specific safeguards routinely required by NMFS (NOAA) for such programs.

The Court injunction is not likely to affect the IPEIS purpose and need or the effects analysis for the proposed action; amending all Forest Plans by incorporating region-wide standards for invasive plant management. All action alternatives propose standards to protect fish habitat and water quality in herbicide applications without specifying buffer zones. The No Action alternative retains current Regional mitigation measures to establish buffer zones in project NEPA analysis. The IPEIS and subsequent Forest-level or project-level NEPA for site-specific herbicide treatments will consult with the regulatory agencies, and implement EPA restrictions resulting from the Court-ordered consultation on pesticide registrations.

Appendix K contains the following documents:

Managing Competing and Unwanted Vegetation: Record of Decision (12-8-1988)

The Mediated Agreement (05-24-1989)

Amendment to the 1988 Record of Decision (02-27-1992)