



Water Law: Growing Fish and
Trees in a Legal Framework

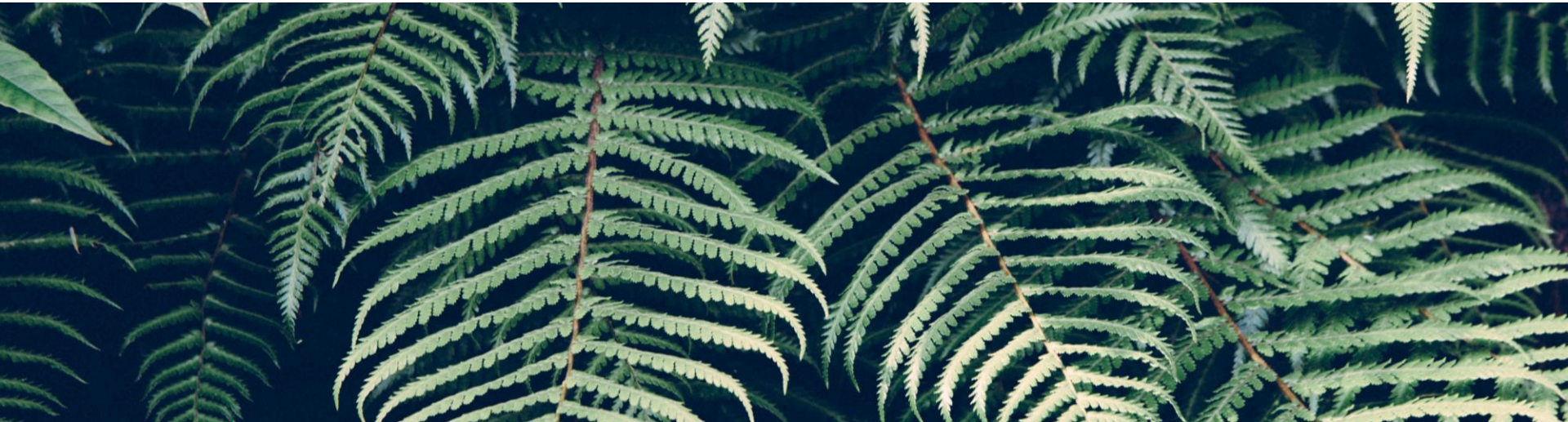
PRESENTED BY
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2016

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OVERVIEW

- Laws and background
- Context: Statements about forest practices and water quality.
- Litigation



BACKGROUND

WATER QUALITY LAWS

- Clean Water Act (Federal Water Pollution Control Act)
- Coastal Zone Act Reauthorization Amendments (CZARA)
- Endangered Species Act
- Tribal Treaties



BASIC BACKGROUND PRINCIPLES

CLEAN WATER ACT

- Point sources of water pollution: discharge from a pipe, generally industrial or municipal discharges
- Nonpoint sources of water pollution: diffuse runoff, not confined to a discrete conveyance
- Silviculture runoff generally addressed as non-industrial stormwater and nonpoint source pollution.
- Rock crushing, gravel washing, log sorting, and log storage require point source permits. Mills are point sources.



BASIC BACKGROUND PRINCIPLES

CLEAN WATER ACT

- Requires Environmental Protection Agency (“EPA”) to implement water quality standards based on beneficial uses
- Authority to create standards delegated to states, but EPA retains oversight
- Streams that don’t meet standards must have a pollution budget and plan to meet standards – commonly referred to as a total maximum daily load (“TMDL”) and an associated water quality management plan



BASIC BACKGROUND PRINCIPLES

CZARA

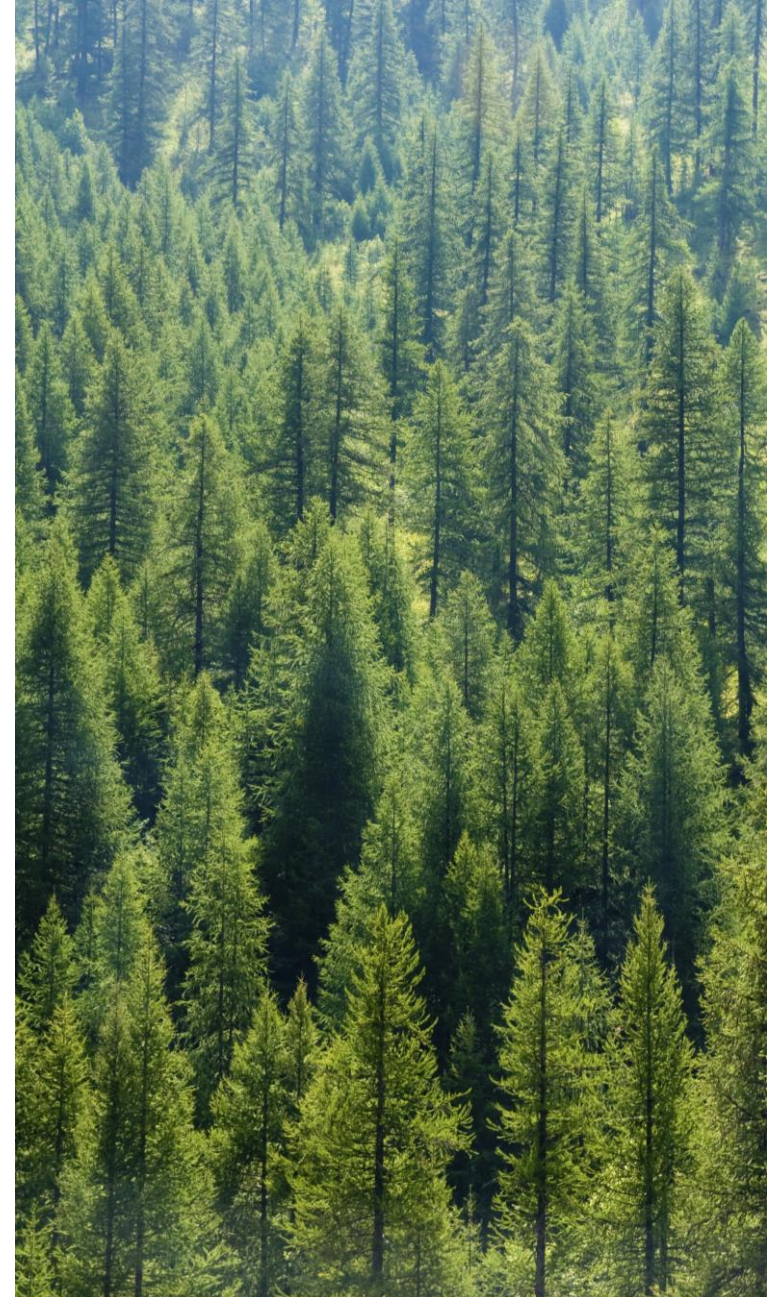
- States submit a coastal nonpoint pollution control program to EPA and NMFS to obtain funding for state programs
- CNPCP must implement measures to achieve and maintain water quality standards



BASIC BACKGROUND PRINCIPLES

ENDANGERED SPECIES ACT

- Federal agencies may not jeopardize species or adversely affect critical habitat
- Federal actions are to lead to recovery of species
- Prohibition on “take” of individual members of species listed as endangered or threatened (by regulation)
- Habitat conservation plans – comprehensive plans that allow “incidental take” as part of an overall effort to protect and recover listed species



BASIC BACKGROUND PRINCIPLES

TREATIES WITH PACIFIC NW TRIBES

- Stevens Treaties – reserved tribal fishing rights at usual and accustomed places (Washington)
- Federal fiduciary duty to protect treaty trust resources, including tribal property and reserved treaty fishing rights



STATEMENTS ABOUT WATER & FOREST PRACTICES

NATIONAL MARINE FISHERIES SERVICE

Proposed ESA Recovery Plan for Oregon Coast Coho Salmon, September 2015.

Forest management activities that impair stream habitat: Historical and ongoing timber harvest and road building have reduced stream shade, increased fine sediment levels, reduced levels of instream large wood, and altered watershed hydrology (and natural sediment production, storage, and transportation regimes). Fish passage blocked in many streams by improperly designed culverts. Table 3-1 (factors that led to listing), p. 3-3.

Water quality has been identified as a factor for decline (NMFS 1997) and as a limiting factor for recovery (ODFW 2005b) of Oregon Coast coho salmon. In its 2005 assessment, the state of Oregon identified water quality as the primary or secondary limiting factor for 13 of the 21 coho salmon populations (Table 3-2). Primary water quality concerns include high water temperatures, increased fine sediment levels, and pollutants. p. 3-9.

Several land use activities have contributed to increased water temperatures in coastal streams. Historical and ongoing timber harvest and road building have reduced riparian condition and stream shade. p. 3-10.

http://www.nmfs.noaa.gov/pr/species/documents/proposed_recovery_plan_for_coho_salmon.pdf

STATEMENTS ABOUT WATER & FOREST PRACTICES

NOAA FISHERIES OREGON WATER QUALITY STANDARDS BiOp

“The historical disturbance regime in the central Oregon Coast Range was dominated by a mixture of high and low-severity fires, with a natural rotation of approximately 271 years. Old-growth forest coverage in the Oregon Coast Range varied from 25 to 75% during the past 3,000 years, with a mean of 47%, and never fell below 5% (Wimberly et al. 2000). Currently, the Coast Range has approximately 5% old-growth, almost all of it on Federal lands. The dominant disturbance now is logging on a cycle of approximately 30 to 100 years, with fires suppressed.” p. 85 (regarding Oregon Coast habitat for coho, southern green sturgeon, and eulachon)

“Limiting Factors. Threats from natural or man-made factors have worsened in recent years, primarily due to four factors: small population dynamics, climate change, multi-year drought, and poor ocean conditions (NOAA Fisheries 2011; NMFS 2014). Limiting factors for this species include:

- Lack of floodplain and channel structure
- *Impaired water quality*
- Altered hydrologic function (timing of volume of water flow)
- Impaired estuary/mainstem function
- *Degraded riparian forest conditions*
- *Altered sediment supply*
- Increased disease/predation/competition
- *Barriers to migration*
- Fishery-related effects
- Hatchery-related effects”

p. 52 (regarding Southern Oregon/Northern Coast California coho salmon)

https://pcts.nmfs.noaa.gov/pcts-web/dispatcher/trackable/WCR-2013-76?overrideUserGroup=PUBLIC&referer=%2fpcts-web%2fpublicAdvancedQuery.pcts%3fsearchAction%3dSESSION_SEARCH

STATEMENTS ABOUT WATER & FOREST PRACTICES

WASHINGTON FOREST LAW CENTER

“WFLC is currently working closely with sister state environmental organizations examining cases involving discharge of logging road sediment, impacts of industrial forestry on threatened or endangered species, and issues arising from the cumulative impact of logging on the environment. WFLC envisions a three-state region that offers state-of-the-art forestry practices, practices that are both sustainable for industry and the species that depend on them for their essential habitat.”

www.wflc.org/whatwedo/

STATEMENTS ABOUT WATER & FOREST PRACTICES

“The issue of rural community health and exposure to forestry pesticides in air and drinking water has never been more important. Polling by the Pew Research Center consistently shows that clean water is what matters most to Oregonians.

However, Oregon’s loose and antiquated forestry laws permit the use of herbicides aerially sprayed by helicopter. That’s different from federal logging practices, which banned the use of aerial helicopter spray over twenty years ago.” Beyond Toxics

<http://www.beyondtoxics.org/work/pesticide-reform/forestry-pesticide-project/>



Photo by Carla Hervert, RN

LITIGATION

OREGON DISTRICT COURT JUDGE ACOSTA

“Federal agencies inadequately reviewed Oregon's water quality standards for stream temperatures, a U.S. District Court judge ruled Tuesday, a decision that puts a critical component of the state's clean water laws in doubt. Judge John Acosta said the Environmental Protection Agency needs to take a much harder look at how the state evaluates the temperature effects of logging, farming and cattle grazing.

He also ordered the National Marine Fisheries Service and U.S. Fish and Wildlife Service to re-do their reviews of how the standards affect fish listed under the Endangered Species Act.

The ruling, effectively 20 years in the making, covers every river in Oregon and could ramp up water quality regulation, a plus for fish but a big concern for business.

Oregon's water quality standards are violated by temperature more than by any pollutant, said Nina Bell, executive director of Northwest Environmental Advocates, which first sued over the standards first developed in 1992.

Warm streams harm salmon and other cold water fish. But Oregon, unlike Washington, has avoided addressing key sources of higher temperatures, Bell said. ‘This ruling is going to make it a lot more difficult to just ignore Oregon's temperature standards,’ she said, ‘and that is critically important to the recovery of salmon, steelhead and bull trout.’”

OregonLive, February 29, 2012

http://blog.oregonlive.com/environment_impact/print.html?entry=/2012/02/judge_rejects_review_of_oregon.html

LITIGATION

NORTHWEST ENVIRONMENTAL ADVOCATES: Washington water quality standards litigation

“EPA Failure brings into question Washington’s water quality standards. In a sweeping case that addresses a wide variety of pollutants – from temperature to toxics –NWEA has challenged EPA’s failure to consult under the Endangered Species Act on its approval of Washington’s water quality standards dating to 1993.”
February 23, 2014

www.northwestenvironmentaladvocates.org/category/wa/

[Northwest Environmental Advocates v. US Environmental Protection Agency, Case No. 2:14-cv-00196, filed February 10, 2014](#)

- Most ESA claims dismissed. July 2, 2015, Order on Motion to Dismiss
- What’s left: whether EPA properly approved natural conditions criteria provisions pertaining to temperature and dissolved oxygen. One ESA consultation claim related to metals and ammonia.

LITIGATION

NORTHWEST ENVIRONMENTAL ADVOCATES: Water Quality Litigation

November 2015 NMFS Oregon Water Quality Standards Biological Opinion

- Focused on temperature and dissolved oxygen
- Requires adequately distributed cold water refugia because 20° C standard is insufficient to remove adverse effects for migrating salmon and steelhead in upper Willamette River and upper and mid-Columbia River
- Cold water refugia: 2° C colder than daily maximum temperature of the adjacent, well-mixed flow of the water body.

LITIGATION

ADVOCATES FOR THE WEST – 60 DAY NOTICE

“Columbia Riverkeeper, Idaho Rivers United, Snake River Waterkeepers, Pacific Coast Federation of Fisherman’s Associations, and the Institute for Fisheries Resources provide notice of their intent to sue the United States Environmental Protection Agency (“EPA”) under the Clean Water Act for failing to establish a public budget, known as a total maximum daily load (“TMDL”), for temperature in the Columbia and Lower Snake Rivers in Washington and Oregon, a nondiscretionary duty under the Clean Water Act.”

August 15, 2016

Letter to Gina McCarthy, EPA Administrator, and Dennis McLerran, Regional 10 Administrator EPA

LITIGATION

NORTHWEST ENVIRONMENTAL ADVOCATES

“Two federal agencies have cut Oregon CZARA grant funding by \$1.2 million because the state has failed to protect water quality from logging activities in coastal watersheds. The funding cuts are required by federal law, which is intended to induce states to control water pollution to protect fish, wildlife, and public health.

The U.S. Environmental Protection Agency (EPA) and National Oceanic and Atmospheric Administration (NOAA) have said for 18 years that Oregon’s logging practices create dangerous levels of water pollution and harm fish. On January 30, 2015 the agencies disapproved Oregon’s coastal nonpoint pollution control program and, pursuant to a court order in settlement of a lawsuit brought by the Portland, OR-based Northwest Environmental Advocates, were required to withhold the grant funds.”

March 2016

www.northwestenvironmentaladvocates.org/2016/03/oregons-czara-grant/

LITIGATION

FOREST ROADS: *DECKER V. NORTHWEST ENVIRONMENTAL ADVOCATES*, 133 S. Ct. 1326 (March 2013)

- Forest and logging roads are not “point sources” of pollution requiring an NPDES permit for stormwater runoff.
- It is reasonable for EPA to conclude that federal regulation would be duplicative or counterproductive in light of Oregon’s extensive rules on the subject.



LITIGATION

FOREST ROADS: SILVICULTURE REGULATORY CONSISTENCY ACT (JAN. 2014 FARM BILL)

Amended Clean Water Act to exempt stormwater runoff from most silviculture activities including site prep, thinning, harvest, prescribed burning, reforestation, road use, road construction and maintenance. 33 USC 1342(I).



LITIGATION

FOREST ROADS: *ENVIRONMENTAL DEFENSE CENTER V. EPA*, 344 F.3d 832 (9th Cir. 2003); August 26, 2015 Settlement

- EPA required to evaluate whether Clean Water Act requires federal regulation of stormwater discharges from federal roads
- August 26, 2015 – set deadline to respond to question
- July 2016 – determined that roads should be regulated under existing state laws

LITIGATION

FOREST ROADS: CULVERTS DECISION: *United States v. State of Washington*, 9th Circ. Case No. 13-35474, June 27, 2016

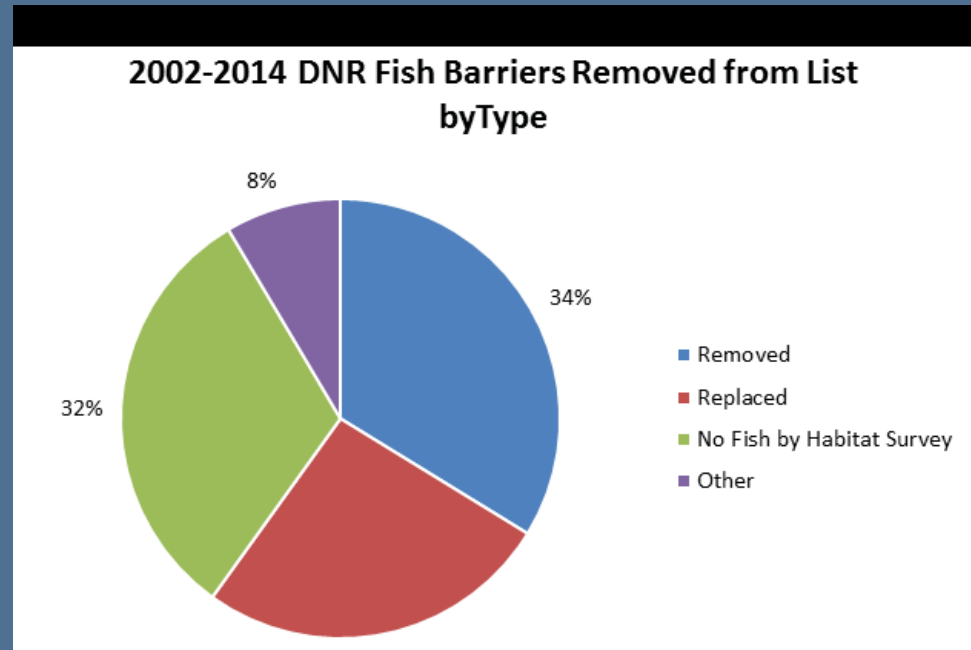
- Stevens Treaties guaranteed a right to off-reservation fishing; *Bolt* decision guaranteed a right to 50% of harvestable fish from Western Washington and ocean areas
- Decision found that culverts on Washington state roads and highways violate the State's obligation to the Tribes because they block and inhibit fish passage and thereby diminish the size of the salmon runs
- Issued injunction requiring Washington to correct most of its high-priority barrier culverts (inhibit or prevent fish passage) within 17 years, and the remainder to be addressed at the end of their natural life or in the course of road construction projects

LITIGATION

FOREST ROADS: CULVERTS DECISION

Injunction Fish Barriers

“DNR began 2013 with 118 barriers on the ‘official barrier’ list submitted to the Court. Since 2013, DNR has removed 89 barriers and added 14. We started 2015 with 53 barriers to correct, 43 of which are on the ‘official list’ needing correction by October 2016. The remaining 10 are on the ‘6-year after Identification’ timeline allowed under the injunction.”

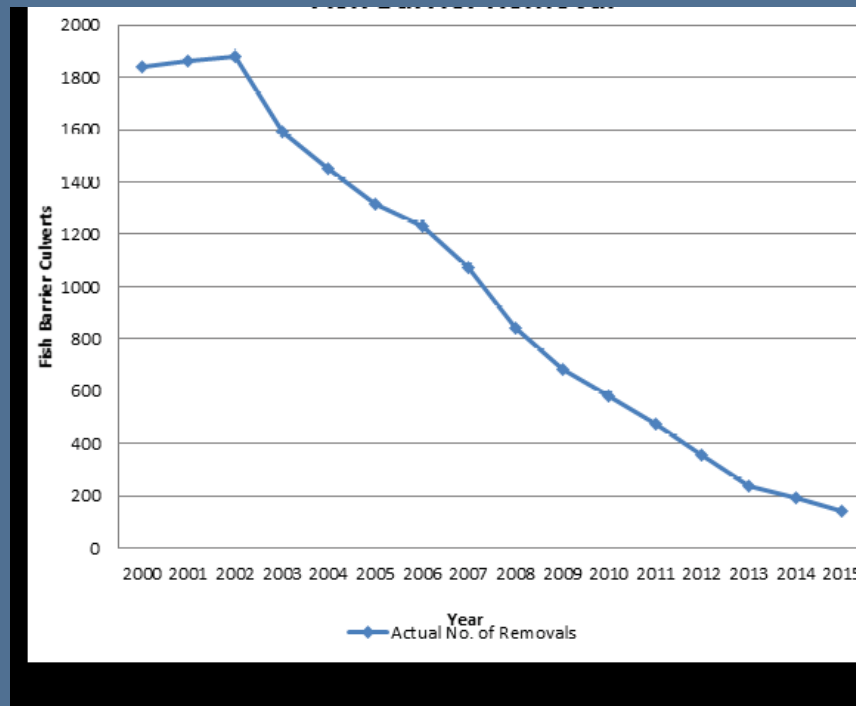


http://file.dnr.wa.gov/publications/em_tribal_summit_2015_handouts.pdf

LITIGATION

FOREST ROADS: CULVERTS DECISION

Fish Barrier Removals



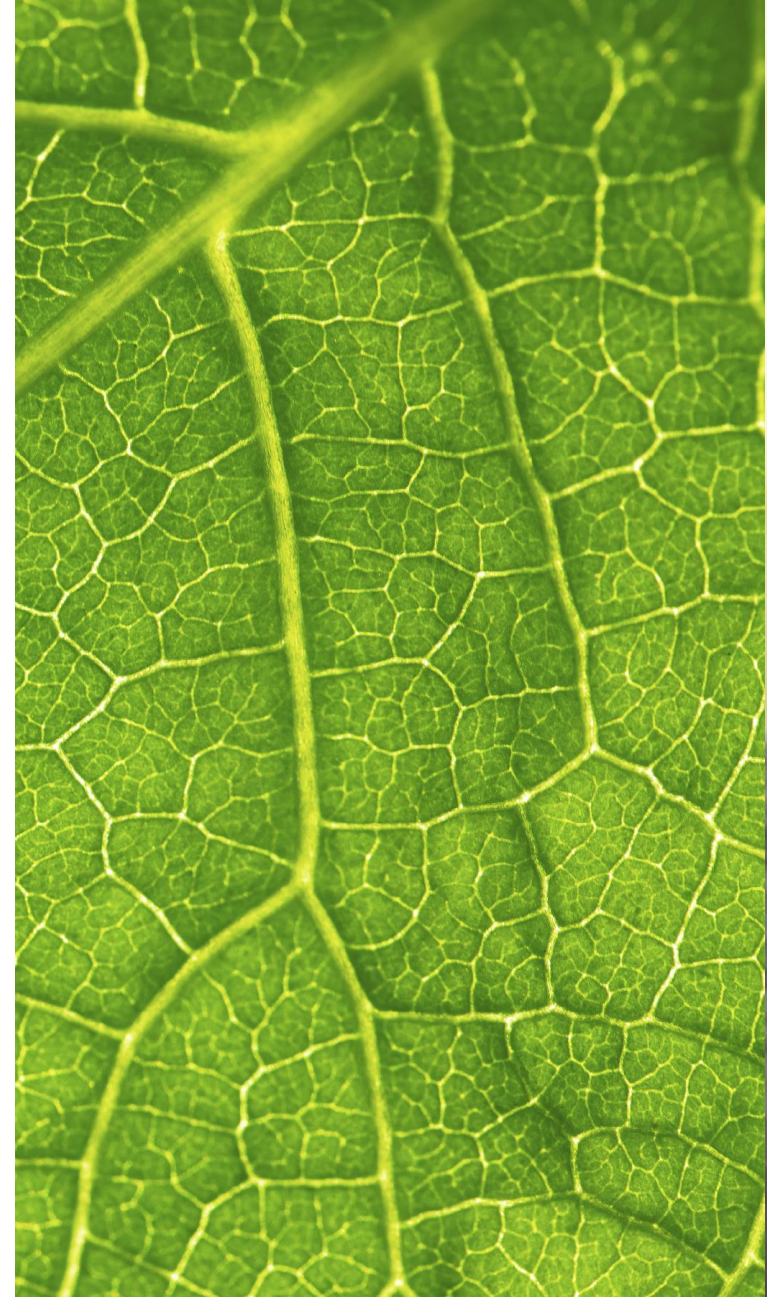
http://file.dnr.wa.gov/publications/em_tribal_summit_2015_handouts.pdf

LITIGATION

- PESTICIDES: EPA SETTLEMENTS
- Washington Toxics Coalition case – 2004 Order
 - Imposed no-use buffer zones around salmon waters in Washington, Oregon & California while EPA underwent ESA consultation on 54 pesticide active ingredients on salmon and steelhead
 - 20 yard buffer zone for ground pesticide applications
 - 100 yard buffer zone for aerial applications
 - Currently 5 pesticides under ESA consultation (to be complete end of 2018)
 - Three insecticides under consultation with NMFS (to be complete by Dec. 2018)
- *Northwest Center for Alternatives to Pesticides v. EPA* – 2014 Settlement
 - Required nation-wide effects determinations on herbicides (atrazine, simazine, propazine, glyphosate) by 2020
 - Confirmed ongoing application of the WTC spray buffers for pesticides carbaryl, chlorpyrifos, diazinon, malathion, and methomyl

LITIGATION

- PESTICIDES: New Laws
- Oregon 2015 Legislation: 60 foot buffers around schools and homes, increased fines and investigation procedures, applicator tests and certifications
- Aerial Pesticides Ban - Ballot Initiatives (Petitions 78, 79, 80):
 - Prohibits forestry-related aerial pesticide spraying on/near watersheds that provide drinking water, schools and homes
 - Failed to make 2016 ballot due to ballot title challenge
 - Expected to be addressed in 2017 legislative session and/or 2018 ballot



CONCLUSION

PRESSURES

- Public statements and perceptions
- Litigation
- Legislation and ballot measures

RESULTS

- More restrictive water quality standards and TMDLs
- More regulation of pesticide applications
- More restrictions on forest practices that impact water quality



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“I enjoy working with other hardworking individuals to solve problems. It is particularly rewarding to see operations growing and succeeding despite the many challenges these industries face.”

Elizabeth helps agriculture, forest product and energy businesses navigate burdensome regulations, negotiate favorable resolutions with agencies, defend against injunctions and cancellations, resolve enforcement actions and obtain permits. She is particularly experienced in the areas of water rights, water quality, endangered and threatened species, grazing and public lands.

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