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Forest Conference-Forest Plan Litigation [3]

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U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
GENERAL LITIGATION SECTION
601 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004

FAX NUMBER (202) 272-6817, 5775, 6815
CONFIRMATION NUMBER (202) 272-8056

*File of
Forest Plan
Litigation*

MEMORANDUM

To: Ellen Athas
Andrea Berlowe
Ted Boling (202) 514-4231
Wells Burgess
Todd Campbell (202) 456-6429
Kristina Clark (202) 219-1792
Ana Cobian (202) 514-7971
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Karen Mouritsen (202) 219-1792
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Lois Schiffer (202) 514-0557
David Shilton (202) 514-4240
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Tom Tuchmann (503) 326-6254
Jean Williams

DATE: August 29, 1994

NUMBER OF PAGES TO BE TRANSMITTED: 28

FROM: Paula Clinedinst, Legal Assistant (202) 272-8019

MESSAGE: Attached is the Federal Defendants' Answers and Responses to
NFRC's Second Set of Interrogatories and Requests for Documents.
Attachments are available upon request.

THE HONORABLE WILLIAM L. DWYER

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

v.

Civ. No. C92-479WD

JAMES LYONS, in this official
capacity as Assistant Secretary of
Agriculture, and the UNITED STATES
FOREST SERVICE, an agency of the
United States,

Defendants,

and

WASHINGTON CONTRACT LOGGERS
ASSOCIATION, et al.,

Defendant-Intervenors.

SAVE THE WEST,

Plaintiff,

v.

Civ. No. C94-758WD

JAMES LYONS, et al.,

FED. DEF. ANSWERS AND
RESPONSES TO NFRC'S SECOND SET - 1

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Defendants.

NATIVE FOREST COUNCIL,

Plaintiff,

v.

BRUCE BABBITT, et al.,

Defendants.

Civ. No. C94-803WD

THE SIERRA CLUB,

Plaintiff,

v.

MICHAEL ESPY, et al.,

Defendants.

Civ. No. C94-820WD

FEDERAL DEFENDANTS'
ANSWERS AND RESPONSES TO
NFRS'S SECOND SET OF
INTERROGATORIES AND
REQUESTS FOR DOCUMENTS

COME NOW Federal Defendants and submit below answers and responses to the Second Set of Interrogatories and Requests for Documents of Cross-Defendant Northwest Forest Resource Council (NFRS). With regard to this discovery, Federal Defendants state that they are not waiving their right to object to, or seek a protective order regarding, possible further discovery in this matter. The below answers and responses have been submitted in

FED. DEF. ANSWERS AND
RESPONSES TO NFRS'S SECOND SET - 2

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1 order to facilitate the expeditious resolution of this litigation
2 and because the discovery in essence only seeks particulars from
3 the Administrative Record already in existence and not items or
4 information outside the Record.

5 Further, all parties have full access to the Administrative
6 Record, which is the focus of this discovery. Federal Defendants
7 consequently invoke Federal Rule of Civil Procedure 33(d)¹, which
8 provides them with the option of producing relevant records as a
9 sufficient response to discovery. Thus, while Federal Defendants
10 have made best efforts to respond to the discovery requested by
11 NFRC, there may be further items in the Administrative Record
12 that are responsive to such discovery, and NFRC has that record
13 available to it for its review. NFRC's discovery requests and
14 Federal Defendants' answers and responses follow:

15 To: Defendants MICHAEL DOMBECK AND BRUCE BABBITT, and their
16 attorneys.

17 Pursuant to Rules 33 and 34 of the Federal Rules of Civil
18 Procedure, plaintiffs Northwest Forest Resource Council et al.²

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22
23 ¹ Former Rule 33(c).

24 ² These discovery requests were originally served on federal
25 defendants informally by NFRC and the other plaintiffs in NFRC v.
26 Dombeck, No. 94-1031 (D.D.C.) (stayed); as a result, the party

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1 hereby request that you answer the following interrogatories by
2 July 25, 1994, and produce for inspection and copying documents
3 identified herein at the Law Offices of Mark C. Rutzick, 500
4 Pioneer Tower, 888 S.W. Fifth Avenue, Portland, Oregon 97204-
5 2089, or another mutually agreeable location, at 9:00 a.m. on the
6 same date you answer the interrogatories.
7

8 DEFINITIONS AND INSTRUCTIONS

9 The following definitions apply to these Interrogatories and
10 Requests for Production of Documents:

11 1. The term "document" or "documents" is used in the
12 broadest possible sense, and means any kind of printed, recorded,
13 written, graphic or photographic matter (including tape
14 recordings), however printed, produced, reproduced, coded or
15 stored, of any kind or description, whether sent or received or
16 not, including original, copies, reproductions, facsimiles,
17 drafts and both sides thereof, and including, without limitation
18 papers, books, accounts, letters, models, photographs, drawings,
19
20

21
22 references in the discovery requests reflect the configuration of
23 parties in that action. In light of this Court's order
24 confirming that NFRC remains a party to these consolidated
25 actions in the Western District of Washington, however, federal
26 defendants deem these responses to NFRC's discovery requests to
be served within the purview of these actions, and not for of the
stayed Dombeck action.

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1 sketches, objects, tangible things, correspondence, telegrams,
2 memoranda, work papers, interoffice communications, transcripts,
3 minutes, reports and recordings of telephone or other
4 conversations, or of committee meetings or of other meetings,
5 statements, summaries, court pleadings, reports, indexes,
6 contracts, licenses, agreements, ledgers, journals, books or
7 records of account, summaries of account, balance sheets, income
8 statements, appointment books, diaries, telephone logs and
9 expense accounts, regardless of their author or origin, however
10 denominated by you, which were formerly in your actual or
11 constructive possession, custody or control. The term "document"
12 or "documents" shall also mean exact copies or reproductions of
13 any of the foregoing items upon which notations in writing, print
14 or otherwise have been made or which do not appear in the
15 originals.
16
17

18 2. The term "you" or "your" as used herein shall mean
19 defendants Michael Dombeck and Bruce Babbitt, and any person or
20 persons acting or purporting to act on their behalf or at their
21 direction, including their attorneys. If different defendants
22 answer individual interrogatories or requests for production
23 differently, state each defendant's answer to response
24
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FED. DEF. ANSWERS AND
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1 separately.

2 3. The term "relate" or "relating to" as used herein,
3 includes from, to, referring to, concerning, alluding to,
4 responding to, connected with, commenting on, in respect of,
5 about, regarding, discussing, showing, describing, mentioning,
6 reflecting, analyzing, constituting, evidencing or pertaining to.
7

8 4. The term "FEMAT Report" means the report issued by FEMAT
9 entitled *Forest Ecosystem Management: An Ecological, Economic,*
10 *and Social Assessment* (July 1993).

11 5. The term "FEMAT Team" means the group that wrote the
12 FEMAT Report.
13

14 6. The term "Forest Plan" means the plan adopted by the
15 Secretaries of Agriculture and Interior on April 13, 1994 which
16 is challenged in this case.

17 7. The term "EIS Team" means the group that wrote the Final
18 Environmental Impact Statement released February 1994 that is
19 challenged in this case, and any earlier draft of the same
20 document.
21

22 8. The term "O & C Act" means Oregon and California
23 Railroad and Coos Bay Wagon Road Grant Lands Act, 43 U.S.C. §
24 1881a.
25
26

FED. DEF. ANSWERS AND
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1 9. The term "ROD" means the Record of Decision in this case
2 signed April 13, 1994.

3 10. If any document responsive to these requests is
4 withheld from production under a claim of privilege, each such
5 document must be identified by furnishing the following
6 information: (a) the nature of the document (e.g. memorandum,
7 letter, computer tape, etc.); (b) date; (c) author or preparer;
8 (d) sender; (e) addressee(s) (if any); (f) copyees (persons to
9 whom a copy is indicated as having been sent); (g) the present
10 custodian of the document; (h) the identity of each person who
11 has been shown such document; and (i) each and every basis in
12 fact and law relied upon for withholding the identity or
13 production of such documents.
14

15
16 11. These requests for production are continuing. If after
17 the date of production specified herein, you come into the
18 possession of any document responsive to any of the request
19 herein, you must give notice to plaintiffs' counsel specified
20 below and produce such document within thirty days of the date
21 upon which such document comes into your possession.
22

23 INTERROGATORIES AND REQUESTS FOR ADMISSIONS

24 INTERROGATORY NO. 10: Please identify the name, position
25

26
FED. DEF. ANSWERS AND
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1 and address of every person who participated in assembling the
2 administrative record in this case.

3 The process of assembling the administrative record took place over roughly a one-year
4 period, from July 1993 through June 1994. During that time, Jack Ward Thomas, Robert T.
5 Jacobs, and Arnold G. Holden had ultimate oversight responsibility at different time periods
6 for compiling and keeping the administrative record. Upon filing the Index to the
7 Administrative Record in these consolidated actions, federal defendants submitted a declaration
8 of each of these individuals to the Court setting forth their respective positions and roles in
9 overseeing the administrative record-keeping process. The person who has had primary
10 responsibility for physically compiling the Administrative Record is John Gant, whose
11 declaration federal defendants also submitted when they filed the Record Index. The
12 declaration of Mr. Gant explains that he has served as Administrative Record Coordinator for
13 the administrative record underlying the April 13, 1994, Record of Decision, and describes
14 how he has executed his duties in that position.

17 Further, other individuals have played other, less significant roles in assembling the
18 Administrative Record as it has been filed in these actions. These persons include attorneys
19 from the Department of Justice and relevant agencies, as well as various agency staff. The
20 name, position, and address of these individuals are as follows: Stephen J. Odell, Trial
21 Attorney, U.S. Department of Justice, Environment and Natural Resources Division, General
22 Litigation Section, P.O. Box 663, Washington, DC 20044-0663; Tim Obst, Attorney, U.S.
23 Department of Agriculture, Office of General Counsel, 14th and Independence Ave.,
24
25

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FED. DEF. ANSWERS AND
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1 Washington, DC 20008-1400; Susan Yonts-Shepard, Staff Assistant, Department of
2 Agriculture, U.S. Forest Service, Auditor's Building, 201 14th Street SW, Washington, DC
3 20250; Owen Schmidt, Attorney, Northern Spotted Owl Plan Support Group, P.O. Box 3623,
4 Portland, OR 97208-3623; Karen Mouritsen, Attorney, Department of the Interior, Office of
5 Solicitor, 1849 "C" Street, N.W., Washington, DC 20240; Ed Shepard, Forester, BLM,
6 Division of Forestry, LLM-L Street Building, 1620 L Street, NW, Washington, DC 20036-
7 5605; Roger Nesbit, Attorney, Office of Regional Solicitor, U.S. Department of the Interior,
8 500 N.E. Multnomah Street, Suite 607, Portland, OR 97232 and employees of CACI,
9 Commercial Inc., 666 11th Street, Washington, DC 20001.

11 INTERROGATORY #11:

12 Please describe all steps taken to assemble the
13 administrative record in this case, and identify all documents
14 containing instructions, directions or guidance regarding the
15 assembly of the administrative record in this case.

17 The steps taken to assemble that portion of the Administrative Record related to
18 preparation of the FEMAT Report are described in a declaration of Jack Ward Thomas, and
19 attachments thereto, filed on June 20, 1994, accompanying the Index to the Administrative
20 Record.

22 The steps taken to assemble and index that portion of the Administrative Record related
23 to preparation of the SEIS are described by Arnold G. Holden and John Gant in declarations
24 accompanying filing of the Index to the Administrative Record. There may be additional
25

26 FED. DEF. ANSWERS AND
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1 documents discussing these issues in the Administrative Record which is available for
2 examination and making copies of portions thereof to cross-defendant NFRC.

3 The steps taken to assemble that portion of the Administrative Record related to
4 preparation of the ROD are as follows: Department of Justice litigation counsel requested
5 agency counsel from the Departments of Agriculture and the Interior to have officials within
6 their respective departments who were involved in drafting or otherwise preparing the ROD
7 review their files and submit all documents found that relate to the ROD's preparation. These
8 documents were eventually forwarded to Department of Justice litigation counsel, who, along
9 with agency counsel, separated the documents into those with respect to which the agencies
10 wished to assert protection from disclosure on the basis of the existence of one or more
11 privileges, and those with respect to which the agencies did not (or as to which no such
12 privilege applies). There is a non-record memorandum from Department of Justice litigation
13 counsel Steve Odell to agency counsel, dated May 5, 1994, that discusses the process used to
14 separate these documents along such lines. All assembled documents were then forwarded to
15 Mr. John Gant, Administrative Record Coordinator who prepared an index of the documents
16 in each category.
17
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20 Additional documents underlying the decision made in the ROD were compiled
21 in the process of making a final list of documents with respect to which federal defendants
22 have chosen to assert protection from disclosure on the basis of the existence of one or more
23 privileges. Documents so compiled were either placed on the list of privileged documents, or
24 on the list of supplemental deliberative documents recently filed in these consolidated actions.
25
26

FED. DEF. ANSWERS AND
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REQUEST FOR PRODUCTION NO. 7:

Please produce all documents described in response to Interrogatory No. 11.

Attached are copies of the Declarations and various attachments described in response to Interrogatory No. 11, with the exception of the May 5, 1994, memorandum, which is not in the Administrative Record because it is privileged and post-dates the ROD.

INTERROGATORY NO. 12:

Identify all documents containing or referring to instructions to the FEMAT Team or the EIS Team (or any member of either group) relating to the retention, destruction or shredding of documents; for each such document state to whom it was transmitted, by whom and the date of such transmittal.

The instructions given FEMAT concerning "retention, destruction or shredding" of documents are described in a declaration of Jack Ward Thomas, filed on June 20, 1994, accompanying the Index to Administrative Record..

The instructions given SEIS team members concerning "retention, destruction or shredding of documents" are described by Arnold G. Holden in a declaration filed June 20, 1994, accompanying filing of the Index to the Administrative Record. In addition, a memorandum from USDA agency counsel Owen Schmidt to Plan Support Group Leader Arnold G. Holden, dated March 25, 1994, discusses document retention standards generally, making reference to the FEMAT report and SEIS.

FED. DEF. ANSWERS AND
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1 REQUEST FOR PRODUCTION NO. 8:

2 Please produce all documents described in response to
3 Interrogatory No. 12.

4 The referenced documents have been produced in response to Request for Production
5 No. 7, except for the March 25, 1994, memorandum, which is on the list of privileged
6 documents. (PR-191).

7
8 INTERROGATORY NO. 13:

9 Identify all documents containing or referring to
10 instructions to any federal employee relating to the retention,
11 destruction or shredding of documents that related to the ROD in
12 this case; for each such document state to whom it was
13 transmitted, by whom and the date of such transmittal.

14
15 A search of relevant Department of Agriculture and Department of the Interior files
16 produced no documents responsive to Interrogatory No. 13.

17 REQUEST FOR PRODUCTION NO. 9:

18 Please produce all documents described in response to
19 Interrogatory No. 13.

20
21 No documents are responsive.

22 INTERROGATORY NO. 14:

23 Please identify, by name and location, every federal office, -
24 agency, unit or organization from which any written materials
25

26
FED. DEF. ANSWERS AND
RESPONSES TO NFRC'S SECOND SET - 12

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1 were requested or received as part of the administrative record
2 in this case; identify all documents requesting such written
3 materials.

4 Written materials were requested or received as part of the administrative record from
5 offices in Washington, D.C., of the following federal organizations: Department of Justice,
6 Department of the Interior, and Department of Agriculture. In addition, written materials
7 were requested or received as part of the administrative record in this case from the following
8 federal employees who work in offices located in or near the planning area: SEIS Team
9 Members and Federal FEMAT participants. Also received were comments from various
10 federal employees on the DSEIS, FSEIS, and ROD.

11
12 REQUEST FOR PRODUCTION NO. 10:

13 Produce all documents described in response to Interrogatory
14 No. 14.

15 All documents described in response to Interrogatory No. 14 are in the Administrative
16 Record with the exception of those with respect to which federal defendants have chosen to
17 assert protection from disclosure on the basis of one or more existing privileges.

18
19 INTERROGATORY NO. 15:

20 Please identify the name, employer and address of every
21 person, other than full-time federal employees, from whom any
22 written materials were requested or received as part of the
23 administrative record in this case; identify all documents
24
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FED. DEF. ANSWERS AND
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requesting such written materials.

With regard to the first subpart of Interrogatory No. 15, written material was requested or received from non-federal FEMAT members and individuals submitting public comments on the DSEIS, FSEIS and ROD.

With regard to the second subpart of Interrogatory No. 15, a letter enclosed in the front of the DSEIS requested comments from all persons who received the document. This letter is contained in the Administrative Record as part of the Draft SEIS. On February 25, 1994, the Environmental Protection Agency published a Federal Register notice of availability of the FSEIS, setting March 28, 1994, as the deadline for submission of comments. On March 2, 1994, the Departments of Agriculture and the Interior published a joint notice also announcing the availability of the Final SEIS and setting forth an address to which comments could be sent. A Federal Register notice was published for the Record of Decision on April 20, 1994, indicating that the ROD was available for inspection and naming persons to contact for further information.

REQUEST FOR PRODUCTION NO. 11:

Attached are copies of the three reference Federal Register notices and a copy of the letter included in the DSEIS.

INTERROGATORY NO. 16:

Please identify, by date, author, addressee, copyee and subject matter, every document that has been withheld from the administrative record by reason of any privilege, and for each

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1 such document identify the privilege asserted and the name of the
2 person finally determining to assert such privilege.

3 Attached is an index setting forth every document that has been withheld from the
4 administrative record based on privilege. Final assertions of each privilege will occur in
5 opposition to a pending motion to compel. Declarations for all documents for which a
6 privilege is still asserted will be submitted to all counsel of record at that time.

7
8 REQUEST FOR PRODUCTION NO. 12:

9 Produce all documents described in response to Interrogatory
10 No. 16.

11 In response to NFRC's request for production of documents, Federal defendants hereby
12 produce the attachment to PR-95 which was inadvertently included on the privileged index list.
13 As to document number PR-122, this document is already part of the Administrative Record
14 Index and is referenced as document number E0046. A copy of this document is produced
15 herein.

16
17 Document numbers PR-237, PR-245, and PR-267 are being produced on a limited
18 basis. Federal defendants hereby produce the first three pages of document number PR-245
19 and continue to assert the deliberative process privilege as to the final page. As to document
20 number PR-237, nine pages of this document are referenced in the Administrative Record
21 Index as E0032. In addition, the attachment of document number PR-267 is included in the
22 Administrative Record Index as E0024. Federal defendants continue to assert the attorney-
23 client and deliberative process privileges as to the cover letter for PR-267 and the remaining
24
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26

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four pages of PR-237. Copies of these referenced documents are produced herein. As to the remaining requests for production, federal defendants continue to assert that these documents are privileged and thus will be not be produced.

INTERROGATORY NO. 17:

Please describe in detail every meeting or conversation between any person working in the Department of Agriculture or Interior and any person working in or for the Executive Office of the President (including officials or staff working for the Vice President) or the Environmental Protection Agency on any subject relating to the ROD and identify all documents relating to any such meeting or conversation, including a statement whether such documents are in the administrative record in this case. This request applies to all officials including the President, Vice President and the respective Secretaries and Administrator.

In general, federal defendants object to Interrogatory No. 17 on the grounds that (a) it is overly burdensome, in that it asks for a description, in detail, of every conversation and meeting that occurred between any employees of various offices and agencies of the federal government over a period of several months; and (b) it improperly seeks to probe the mental processes and intrude into the deliberations of federal officials who were involved in the decision-making process leading up to the selection of the decision announced in the ROD. Nevertheless, with the goal of forestalling a discovery dispute regarding this interrogatory and

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1 in the interest of being forthcoming, federal defendants produce a list of dates on which
2 meetings were held of the major policy-makers and advisors involved in the decision-making
3 process leading to adoption of the strategy reflected in the ROD to discuss what the strategy
4 should be. This group, which was referred to as the "Northwest Forest Plan Executive
5 Committee" or "Interagency Steering Committee," consisted of representatives of the
6 Department of Agriculture, Department of the Interior, the Environmental Protection Agency,
7 Department of Commerce, Department of Justice, and Office on Environmental Policy. Dates
8 on which the group held pre-decisional meetings to discuss the strategy ultimately adopted in
9 the ROD include: January 10-11, 1994; March 14, 1994; March 18, 1994; and March 31,
10 1994. This list was compiled on the basis of a review of files of the Office on Environmental
11 Policy, which chaired the group's meetings. Any existing documents within the decision-
12 making agencies' files that pertain to the meetings and the decisions reached at the meetings
13 should already be a part of the administrative record or set forth on the list of privileged
14 documents that relate to the decision announced in the ROD. No formal minutes of the listed
15 meetings were maintained.

16 REQUEST FOR PRODUCTION NO. 13:

17 Produce all documents identified in response to
18 Interrogatory No. 17.

19 All existing documents of the decision-makers pertaining to the requested information
20 are already part of the administrative record or set forth on the list of privileged documents
21 being withheld.

22 FED. DEF. ANSWERS AND
23 RESPONSES TO NFRC'S SECOND SET - 17

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1 INTERROGATORY NO. 18:

2 Please identify the author and date of creation of the
3 document attached hereto as Exhibit A.

4 Exhibit A, referenced in the Administrative Record Index as FEMAT-2140, is readily
5 available for inspection by all parties in the BLM public reading room in Portland, Oregon.

6 The primary author for pages 1-8 and 14-15 is Mike Crouse, a BLM employee who was a
7 member of the Agency Coordination Working Group. As to pages 9 and 12, they were
8 written by Phil Stanbro. The information contained on page 13 was written by Roger Nesbit.

9 The identity of the author of pages 10 and 11 is unknown. The final document represents a
10 culmination of work by agency staff members. No date of creation is known.
11

12 INTERROGATORY NO. 19:

13 Please identify all documents created since April 13, 1994
14 that relate to consideration of amending or revising the ROD in
15 any way.
16

17 Federal Defendants object to this interrogatory on the basis that it seeks information
18 irrelevant to the claims that have been asserted in these actions insofar as it requests
19 identification of documents that were created after the signing of the Record of Decision on
20 April 13, 1994.
21

22 REQUEST FOR PRODUCTION NO. 14:

23 Produce all documents identified in response to
24 Interrogatory No. 19.
25

26
FED. DEF. ANSWERS AND
RESPONSES TO NFRC'S SECOND SET - 18

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1 Federal Defendants object to this interrogatory on the basis that it seeks documents
2 irrelevant to the claims that have been asserted in these actions insofar as it requests
3 production of documents that were created after the signing of the Record of Decision on April
4 13, 1994.

5 INTERROGATORY NO. 20:

6 Please identify all documents relating to any consideration
7 of whether the Forest Plan challenged in this case complies with
8 the Federal Advisory Committee Act, 5 U.S.C. App.2.

9 The ROD discusses the subject-matter referenced in Interrogatory No. 20 on pages 52-
10 53. In addition, the documents referenced on the privileged index list as Nos. PR- 155, PR-
11 160, PR-171, PR-PR-172, PR-173, PR-180, PR-181, PR-182, PR-183, PR-188, PR-205, PR-
12 232, and PR-234 discuss information responsive to Interrogatory No. 20. There may be
13 additional documents discussing the referenced subject-matter in the Administrative Record,
14 which is available for NFRC to examine and make copies of any portion thereof.

15 REQUEST FOR PRODUCTION NO. 15:

16 Produce all documents described in response to Interrogatory
17 No. 20.

18 All referenced documents have already been served on NFRC, are readily available in
19 the BLM Public Reading Room in Portland, Oregon, or are privileged documents being
20 withheld from discovery.

21 INTERROGATORY NO. 21:

22 FED. DEF. ANSWERS AND
23 RESPONSES TO NFRC'S SECOND SET - 19

24 United States Department of Justice
25 Environmental & Natural Resources Division
26 General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-8056

1 Please identify all documents relating to any consideration
2 of whether the Forest Plan challenged in this case complies with
3 the O & C Act.

4 The ROD discusses the subject-matter of Interrogatory No. 21 on pages 49-50. In
5 addition, the documents contained in the administrative record index that relate to the
6 interrogatory are as follows: FSEIS No. 0591 and FSEIS No. 0593. Responsive privileged
7 documents are as follows: PR-18, PR-19, PR-33, PR-34, PR-40, PR-77, PR-81, PR-82, PR-
8 83, PR-86, PR-89, PR-90, and PR-161. There may be additional documents discussing the
9 referenced subject-matter in the Administrative Record, which is available for NFRC to
10 examine and make copies of any portion thereof.
11

12 REQUEST FOR PRODUCTION NO. 16:
13

14 Produce all documents described in response to Interrogatory
15 No. 21.

16 All referenced documents have already been served on NFRC, are readily available in
17 the BLM Public Reading Room in Portland, Oregon, or are privileged documents being
18 withheld from discovery.
19

20 INTERROGATORY NO. 22:

21 Please identify all documents relating to any consideration
22 of whether the Forest Service viability standard, 36 C.F.R. §
23 219.19, can legally be applied to lands subject to the O & C Act. -

24 The ROD discusses the subject-matter of Interrogatory No. 22 on page 44. In addition,
25

26 FED. DEF. ANSWERS AND
RESPONSES TO NFRC'S SECOND SET - 20

United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-8056

responsive documents referenced in the privileged index are Nos. PR-19, PR-34, PR-40, PR-52, PR-65, PR-77, PR-81, PR-84, PR-86, PR-89, PR-91, PR-108, PR-132, PR-272, PR-273, and PR-274. There may be additional documents discussing the referenced subject-matter in the Administrative Record, which is available to NFRC to examine and make copies of any portion thereof.

REQUEST FOR PRODUCTION NO. 17:

Produce all documents described in response to Interrogatory No. 22.

The referenced documents either have already been served on NFRC or are privileged and thus being withheld from discovery.

INTERROGATORY NO. 23:

Please identify all documents relating to any consideration of whether the Forest Plan challenged in this case complies with any other statute, law or regulation.

Federal Defendants invoke Federal Rule of Civil Procedure 33(d) as to information requested in Interrogatory No. 23. This request seeks documents that discuss whether the strategy adopted in the ROD "complies with an other statute, law or regulation." This request is unduly broad and a comprehensive response would require an extensive search of the voluminous administrative record. Thus, federal defendants properly place the burden of deriving or ascertaining these documents on the interrogating party.

REQUEST FOR PRODUCTION NO. 18:

FED. DEF. ANSWERS AND
RESPONSES TO NFRC'S SECOND SET - 21

United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-8056

1 Produce all documents described in response to Interrogatory
2 No. 23.

3 All documents responsive to Interrogatory No. 23 are readily available in the
4 administrative record.

5 INTERROGATORY NO. 24:

6 Please identify all documents relating to any consideration
7 of this range of alternatives that were presented and analyzed in
8 the EIS in this case, or any draft thereof.

10 Federal Defendants invoke Federal Rule of Civil Procedure 33(d) as to information
11 requested in Interrogatory No. 24. The task of searching the administrative record and/or its
12 index to ascertain the requested information is substantially the same for NFRC and federal
13 defendants. The administrative record is readily available to the parties and all documents can
14 be obtained for inspection and copying from the BLM public reading room in Portland,
15 Oregon.

17 REQUEST FOR PRODUCTION NO. 19:

18 Produce all documents described in response to Interrogatory
19 No. 24.

21 All documents responsive to Interrogatory No. 23 are readily available for examination
22 and copying as part of the administrative record.

23 INTERROGATORY NO. 25:

24 Please identify all documents relating to the decision not
25

26
FED. DEF. ANSWERS AND
RESPONSES TO NFRC'S SECOND SET - 22

United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-8056

1 to analyze in detail a "no action" alternative in the EIS,
2 including all documents or correspondence to or from the Council
3 on Environmental Quality.

4 With regard to the first subpart of Interrogatory No. 25, see "Introduction to the
5 Action Alternatives" on page 2-13 and "Comparison of the Effects of the Alternatives-No-
6 Action Alternative" on page 2-48 of the Draft SEIS. With respect to responsive information in
7 the final SEIS, see "The No-Action Alternative" on page 2-19, and in Appendix F of the Final
8 SEIS, see pages F-94 and F-95, "The No-Action Alternative." Appendix C, Letters of
9 Direction, in the Draft SEIS contains a copy of the June 21, 1993, letter from the Council of
10 Environmental Quality regarding the No-Action Alternative (also in the administrative record
11 as AR # DSEIS 23). Additionally, the following documents in the Administrative Record
12 address the no-action alternative or comprise relevant correspondence to or from the Council
13 on Environmental Quality: AR # DSEIS 55, AR # DSEIS 118, AR # FSEIS 72 (repeated at
14 FSEIS 116), and AR # FSEIS 117.

17 With regard to the second subpart of Interrogatory No. 25, federal defendants invoke
18 Federal Rule of Civil Procedure 33(d). The information requested in the second subpart is
19 contained within the administrative record or already in NFRC's possession by means of
20 responses provided to Freedom of Information Act requests. Under the circumstances, the
21 burden of searching these sources for "all documents or correspondence to or from the Council
22 on Environmental Quality" lies with the interrogating party.

24 REQUEST FOR PRODUCTION NO. 20:

26 FED. DEF. ANSWERS AND
RESPONSES TO NFRC'S SECOND SET - 23

United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-8056

1 Produce all documents described in response to Interrogatory
2 No. 25.

3 All documents responsive to Interrogatory No. 25 are readily available to NFRC in the
4 Administrative Record.

5 INTERROGATORY NO. 26:

6 Please identify all documents that discuss or refer to
7 comments on the draft EIS (July 1993) by Dr. Chad Oliver, Dr.
8 Thomas Bonnickson, Dr. John Palmisano and Mr. Robert Zybach.

9 Appendix F of the FSEIS, Response to Public Comments, addresses the subjects raised
10 in the comments referenced in Interrogatory No. 26. Specifically, Dr. Oliver's comments are
11 addressed in the following sections of Appendix F: Ecosystem, Fire, Legal and Process Issues
12 (The Alternatives, The FEMAT Report and SEIS, Suggested Changes Outside Agency
13 Authority), Terrestrial Species (The Northern Spotted Owl, Early-Successional Species),
14 Aquatic Wildlife Habitat, and Other (Agency Cooperation, Budgets and Funding). Dr.
15 Bonnickson's comments are addressed in: Ecosystem, Fire, Land Allocations, and Legal and
16 Process Issues (The FEMAT Report and SEIS) in Appendix F. Dr. Palmisano's comments are
17 addressed in: Ecosystem, Land Allocations, Legal and Process Issues, Aquatic Wildlife and
18 Habitat, Watershed/Water Quality and Soils, and Other (Agency Cooperation) in Appendix F.
19 Finally, Mr. Zybach's comments are addressed in: Ecosystem, Fire, and Social and
20 Community Effects, all in Appendix F. Additionally, Dr. Oliver's comments are summarized
21 and addressed on page 65 of the Record of Decision. There may be additional documents
22
23
24
25
26

FED. DEF. ANSWERS AND
RESPONSES TO NFRC'S SECOND SET - 24

United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
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Washington, D.C. 20044-0663
Telephone: (202) 272-8056

1 discussing this issue in the Administrative Record, which is available to NFRC to examine and
2 make copies of any portion thereof.

3 REQUEST FOR PRODUCTION NO. 21:

4 Produce all documents described in response to Interrogatory
5 No. 26.

6 The ROD and Appendix F to the Final SEIS previously has been served on NFRC, and
7 the Administrative Record is available for its examination and copying of any other responsive
8 documents that may exist.

9
10 INTERROGATORY NO. 27:

11 Please identify all documents relating to any consideration
12 of whether the ROD in this case constitutes a withdrawal of lands
13 under 43 U.S.C. § 1714.

14
15 Page 112 of Appendix F to the Final SEIS includes a discussion related to the subject-
16 matter of Interrogatory No. 27

17 REQUEST FOR PRODUCTION NO. 22:

18 Produce all documents described in response to Interrogatory
19 No. 27.

20
21 Appendix F to the Final SEIS previously has been served on NFRC, and the
22 administrative record is available for its examination and copying of any other responsive
23 documents that may exist.

24
25
26
FED. DEF. ANSWERS AND
RESPONSES TO NFRC'S SECOND SET - 25

United States Department of Justice
Environmental & Natural Resources Division
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P.O. Box 663
Washington, D.C. 20044-0663
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DATED this 26TH day of August, 1994.

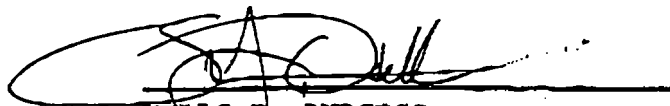


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FED. DEF. ANSWERS AND
RESPONSES TO NFRC'S SECOND SET - 26

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 26, 1994, she caused one copy of the foregoing, **FEDERAL DEFENDANTS' ANSWERS AND RESPONSES TO NFRC'S SECOND SET OF INTERROGATORIES AND REQUESTS FOR DOCUMENTS**, to be served by telefacsimile machine transmission and on August 29, 1994, she caused on copy of the foregoing to be served by first-class United States mail, postage prepaid, upon the counsel of record hereinafter named:

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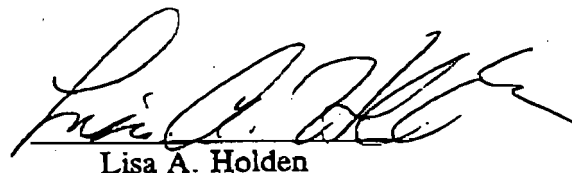
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MEMORANDUM

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DATE: October 5, 1994

NUMBER OF PAGES TO BE TRANSMITTED (including
cover): 22

FROM: Paula Clinedinst, Legal Assistant, (202) 272-8019

MESSAGE: Attached is NFRC's Motion for Four-Week
Postponement of Summary Judgment Briefing
Schedule.

ND1-9406\RP01098.00X

Honorable William L. Dwyer

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Attorneys for Cross-Claim Defendant
Northwest Forest Resource Council

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,)
Plaintiffs,)

vs.)

JAMES LYONS, in his official capacity as)
Assistant Secretary of Agriculture, et al.,)

Defendants.)

vs.)

NORTHWEST FOREST RESOURCE)
COUNCIL,)

Cross-Claim Defendant.)

No. C92-479WD

NFRC'S MOTION FOR FOUR-
WEEK POSTPONEMENT OF
SUMMARY JUDGMENT BRIEFING
SCHEDULE

NOTE ON MOTION CALENDAR:
October 21, 1994

[Subject to Shortened Time
to October 10, 1994]

NFRC'S MOTION FOR FOUR-WEEK POSTPONEMENT OF
SUMMARY JUDGMENT BRIEFING SCHEDULE - 1

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W01-9406\IRP01098.00X

SAVE THE WEST,

Plaintiff,

No. 94-758WD

vs.

JAMES LYONS, et al.,

Defendants.

NATIVE FOREST COUNCIL,

Plaintiff,

No. C94-803WD

vs.

BRUCE BABBITT, et al.,

Defendants.

THE SIERRA CLUB,

Plaintiff,

No. C94-820WD

vs.

MICHAEL ESPY, et al.,

Defendants.

Cross-claim defendant Northwest Forest Resource Council ("NFRC") moves for a four-week postponement of the summary judgment briefing schedule for these reasons:

1. To allow time for NFRC to complete discovery necessary to respond to the Government's summary judgment motion.
2. To require the Government to complete production of its "administrative record" before NFRC must respond to the motion.
3. To allow NFRC to have the benefit of the Court's ruling on NFRC's motion to dismiss the cross-claims before it must respond to the motion.
4. To allow the court in the District of Columbia additional time to consider

NFRC'S MOTION FOR FOUR-WEEK POSTPONEMENT OF
SUMMARY JUDGMENT BRIEFING SCHEDULE - 2

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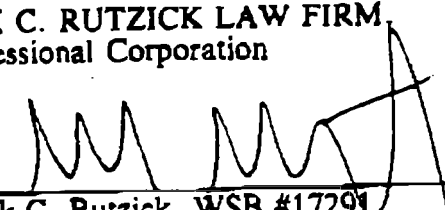
N01-9406\IRP01098.00X

1 NFRC's pending motion for an injunction against the cross-claims in that court.

2 In support of this motion the court is respectfully referred to the Memorandum In
3 Support of NFRC's Motion For Four-Week Postponement Of Summary Judgment Briefing
4 Schedule filed herewith.

5 Dated this 4th day of October, 1994.

6 MARK C. RUTZICK LAW FIRM
a Professional Corporation

7
8 By: 

9 Mark C. Rutzick, WSB #17291
Alison Kean Campbell, WSB #19363

10 SMITH & LEARY

11
12 By: _____

13 J. J. Leary, jr., WSB #08776
James R. Hennessey, WSB #14376

14 Of Attorneys for Cross-Claim
15 Defendant Northwest Forest
16 Resource Council
17
18
19
20
21
22
23
24
25
26

NFRC'S MOTION FOR FOUR-WEEK POSTPONEMENT OF
SUMMARY JUDGMENT BRIEFING SCHEDULE - 3

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NO1-9406\1RP01099.00Y

Honorable William L. Dwyer

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Attorneys for Cross-Claim Defendant
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IN THE UNITED STATES DISTRICT COURT
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AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

vs.

JAMES LYONS, in his official capacity as
Assistant Secretary of Agriculture, et al.,

Defendants,

vs.

NORTHWEST FOREST RESOURCE
COUNCIL,

Cross-Claim Defendant.

No. C92-479WD

MEMORANDUM IN SUPPORT OF
NFRC'S MOTION FOR FOUR-
WEEK POSTPONEMENT OF
SUMMARY JUDGMENT BRIEFING
SCHEDULE

MEMORANDUM IN SUPPORT OF NFRC'S MOTION FOR
FOUR-WEEK POSTPONEMENT OF SUMMARY JUDGMENT
BRIEFING SCHEDULE - 1

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NO1-9406\IRP01099.00Y

SAVE THE WEST,

Plaintiff,

No. 94-758WD

vs.

JAMES LYONS, et al.,

Defendants.

NATIVE FOREST COUNCIL,

Plaintiff,

No. C94-803WD

vs.

BRUCE BABBITT, et al.,

Defendants.

THE SIERRA CLUB,

Plaintiff,

No. C94-820WD

vs.

MICHAEL ESPY, et al.,

Defendants.

INTRODUCTION

Cross-claim defendant Northwest Forest Resource Council ("NFRC") has moved for a four-week postponement of the summary judgment briefing schedule for four reasons:

1. To allow time for NFRC to complete discovery necessary to respond to the Government's summary judgment motion.
2. To require the Government to complete production of its "administrative record" before NFRC must respond to the motion.
3. To allow NFRC to have the benefit of the Court's ruling on NFRC's motion to dismiss the cross-claims before it must respond to the motion.

MEMORANDUM IN SUPPORT OF NFRC'S MOTION FOR
FOUR-WEEK POSTPONEMENT OF SUMMARY JUDGMENT
BRIEFING SCHEDULE - 2

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N01-9406\1RP01099.00Y

4. To allow the court in the District of Columbia additional time to consider NFRC's pending motion for an injunction against the cross-claims in that court.

The motion requires timely and prompt consideration by the court since NFRC's opposition to the Government's summary judgment motion is currently due on October 19, 1994.

ARGUMENT

THE COURT SHOULD GRANT A FOUR-WEEK POSTPONEMENT OF THE SUMMARY JUDGMENT BRIEFING SCHEDULE TO AVOID IRREPARABLE HARM TO NFRC'S INTERESTS.

The Court's order of September 14, 1994¹ allowing NFRC to file a motion to compel additional discovery expressly contemplated that NFRC could seek an adjustment to the briefing schedule if necessary.

On September 20 NFRC wrote the Government proposing additional discovery. The Government never answered the letter. On September 28 NFRC wrote the Government again, asking for an answer. On September 29 the Government finally answered, refusing to agree to any additional discovery. On September 30 NFRC filed the motion to compel permitted in the September 14 Order.

The Government has opposed expedition of the motion and NFRC's other discovery motion as requested by NFRC, saying they need until October 7 to respond.

The Government's delay and stonewalling have necessitated this request for a postponement of the briefing schedule.

There are four reasons for a postponement of the briefing schedule:

1. Without a postponement there is no time for NFRC to conduct any discovery

¹ The Government's brief opposing shortening of time on NFRC's two discovery motions erroneously stated that this order was entered September 9. Government's October 3, 1994 Memorandum at 4. NFRC has contacted Government counsel and asked them to correct this and other resulting errors in that brief.

NO1-9406\IRP01099.DDY

1 before responding to the Government's summary judgment brief. NFRC cannot prejudge the
2 outcome of its discovery motion, but there is certainly a reasonable chance, at a minimum,
3 that NFRC will be permitted at least some additional discovery, if only to cross-examine the
4 Government's affiants in this court (Thomas, Holden, Gant, Vancil), and quite possibly will
5 be permitted more discovery than that. No court can ignore a deliberate Government policy
6 of destroying relevant documents which may impede or frustrate judicial review. Denying
7 NFRC discovery on this critical issue would be a denial of due process in this case.

8 Dr. Thomas is in Washington, D.C.; the other three affiants are in Portland. Most of
9 the other witnesses are in the Northwest, except a few others in Washington, D.C. In the best
10 of circumstances even deposing the four affiants could not be completed and transcripts
11 prepared by October 19, let alone completing more depositions. While it might have been
12 possible to schedule and complete the four affiant depositions before October 19 if the
13 Government had cooperated, the Government's recalcitrance has made even that impossible.
14 NFRC's motion to compel discovery will not be decided until October 10 at the earliest.

15 2. The Government still has not produced all the documents in its administrative
16 record -- on which it maintains judicial review must be based. It has not yet made available
17 any of the electronic communications from its DG system that this court ordered it to produce
18 in its Order dated September 12, 1994. As Seattle Audubon points out, the Government has
19 also failed to produce FEMAT viability assessment documents it agreed to produce on August
20 24, 1994. Without the full administrative record, NFRC cannot respond to the Government's
21 motion even on the Government's terms.

22 3. The Court has not yet ruled on NFRC's Rule 12 motions. NFRC is entitled to
23 receive and review the court's decision on the motions before filing its summary judgment
24 opposition since the decision could substantially affect the content of the opposition.

25 4. The Court in *NFRC v. Dombeck*, No. 94-1031 TPJ (D.D.C.), has not yet ruled
26 on NFRC's motion to enjoin the cross-claims. The Court in the District of Columbia should

MEMORANDUM IN SUPPORT OF NFRC'S MOTION FOR
FOUR-WEEK POSTPONEMENT OF SUMMARY JUDGMENT
BRIEFING SCHEDULE - 4

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NOJ-9406\JRP01099.00Y

1 be afforded a reasonable opportunity to decide that motion before the summary judgment
2 proceedings go farther.

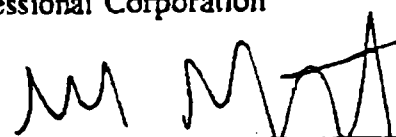
3 Each of these four reasons independently supports a reasonable postponement of the
4 briefing schedule; collectively they make a postponement necessary to avoid irreparably
5 prejudicing NFRC's rights to a full and fair hearing in this case. A four-week postponement
6 is short in the context of the tasks to be completed in the interim, and would at least afford
7 NFRC some chance to present its view on the Government's summary judgment motion fully
8 and fairly.

9 **CONCLUSION**

10 NFRC's motion for a four-week postponement of the summary judgment briefing
11 schedule should be granted.

12 Dated this 4th day of October, 1994.

13 MARK C. RUTZICK LAW FIRM,
14 a Professional Corporation

15 By: 

16 Mark C. Rutzick, WSB #17291
17 Alison Kean Campbell, WSB #19363

18 SMITH & LEARY

19 By: _____

20 J. J. Leary, jr., WSB #08776
21 James R. Hennessey, WSB #14376

22 Of Attorneys for Cross-Claim
23 Defendant Northwest Forest
24 Resource Council
25
26

MEMORANDUM IN SUPPORT OF NFRC'S MOTION FOR
FOUR-WEEK POSTPONEMENT OF SUMMARY JUDGMENT
BRIEFING SCHEDULE - 5

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(503) 499-4672 • Fax (503) 296-0816

N01-9406\1RP01100.002

Honorable William L. Dwyer

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Alison Kean Campbell, WSB #19363
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SMITH & LEARY
316 Occidental Avenue South
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(206) 292-1770

Attorneys for Cross-Claim Defendant
Northwest Forest Resource Council

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,)

Plaintiffs,)

vs.)

JAMES LYONS, in his official capacity as)
Assistant Secretary of Agriculture, et al.,)

Defendants,)

vs.)

NORTHWEST FOREST RESOURCE)
COUNCIL,)

Cross-Claim Defendant.)

No. C92-479WD

MOTION TO SHORTEN TIME FOR
CONSIDERATION OF NFRC'S
MOTION FOR FOUR-WEEK
POSTPONEMENT OF SUMMARY
JUDGMENT BRIEFING SCHEDULE

NOTE ON MOTION CALENDAR:
October 6, 1994

MOTION TO SHORTEN TIME FOR CONSIDERATION OF
NFRC'S MOTION FOR FOUR-WEEK POSTPONEMENT OF
SUMMARY JUDGMENT BRIEFING SCHEDULE - 1

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Portland, OR 97204-2089
(503) 499-4573 • Fax (503) 296-0915

NO1-9406\1RP01100.00Z

SAVE THE WEST,

Plaintiff,

vs.

JAMES LYONS, et al.,

Defendants.

No. 94-758WD

NATIVE FOREST COUNCIL,

Plaintiff,

vs.

BRUCE BABBITT, et al.,

Defendants.

No. C94-803WD

THE SIERRA CLUB,

Plaintiff,

vs.

MICHAEL ESPY, et al.,

Defendants.

No. C94-820WD

Title of Underlying Motion:

NFRC's Motion for Four-Week Postpone-
ment of Summary Judgment Briefing
Schedule

Moving party:

Northwest Forest Resource Council

If Motion to Shorten Time is not granted,
underlying motion would be noted on the
Court's calendar for:

October 21, 1994

Date by which movants seek to have
Court rule on motion to shorten time:

October 6, 1994

Date by which movants seek to have
Court consider merits of underlying
motion:

October 10, 1994

MOTION TO SHORTEN TIME FOR CONSIDERATION OF
NFRC'S MOTION FOR FOUR-WEEK POSTPONEMENT OF
SUMMARY JUDGMENT BRIEFING SCHEDULE - 2

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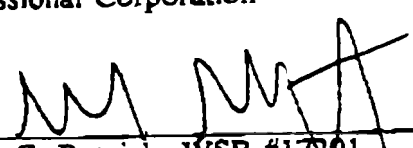
N01-9406\IRP01100.002

This motion is supported by the Memorandum In Support of Motion to Shorten Time on NFRC's Motion for Four-Week Postponement of Summary Judgment Briefing Schedule.

Cross-claim defendant NFRC certifies that this motion to shorten time has been served on all other parties prior to filing with the court.

Dated this 4th day of October, 1994.

MARK C. RUTZICK LAW FIRM,
a Professional Corporation

By: 
Mark C. Rutzick, WSB #17291
Alison Kean Campbell, WSB #19863

SMITH & LEARY

By: _____
J. J. Leary, jr., WSB #08776
James R. Hennessey, WSB #14376

Of Attorneys for Cross-Claim
Defendant Northwest Forest
Resource Council

MOTION TO SHORTEN TIME FOR CONSIDERATION OF
NFRC'S MOTION FOR FOUR-WEEK POSTPONEMENT OF
SUMMARY JUDGMENT BRIEFING SCHEDULE - 3

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NO1-9406\1RP01101.OP0

Honorable William L. Dwyer

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(206) 292-1770

Attorneys for Cross-Claim Defendant
Northwest Forest Resource Council

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,
Plaintiffs,

vs.

JAMES LYONS, in his official capacity as
Assistant Secretary of Agriculture, et al.,
Defendants,

vs.

NORTHWEST FOREST RESOURCE
COUNCIL,
Cross-Claim Defendant.

No. C92-479WD

MEMORANDUM IN SUPPORT OF
NFRC'S MOTION TO SHORTEN
TIME ON MOTION FOR FOUR-
WEEK POSTPONEMENT OF
SUMMARY JUDGMENT BRIEFING
SCHEDULE

MEMORANDUM IN SUPPORT OF NFRC'S MOTION TO
SHORTEN TIME ON MOTION FOR FOUR-WEEK
POSTPONEMENT OF SUMMARY JUDGMENT BRIEFING
SCHEDULE - 1

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N01-9406\IRP01101.OPD

SAVE THE WEST,

Plaintiff,

No. 94-758WD

vs.

JAMES LYONS, et al.,

Defendants.

NATIVE FOREST COUNCIL,

Plaintiff,

No. C94-803WD

vs.

BRUCE BABBITT, et al.,

Defendants.

THE SIERRA CLUB,

Plaintiff,

No. C94-820WD

vs.

MICHAEL ESPY, et al.,

Defendants.

Cross-claim defendant Northwest Forest Resource Council ("NFRC") has this day filed NFRC'S Motion for Four-Week Postponement of Summary Judgment Briefing Schedule.

Currently, summary judgment motions opposition briefs are due October 19, 1994, and reply briefs are due November 4, 1994. The motion would be noted for October 21, after the date NFRC's opposition to the Government's summary judgment brief is due. Without shortened time the motion could not be decided before NFRC must file its opposition to the motion.

For these reasons the Court should grant NFRC's Motion to Shorten Time on NFRC's Motion for Four-Week Postponement of Summary Judgment Briefing Schedule. The Court

MEMORANDUM IN SUPPORT OF NFRC'S MOTION TO
SHORTEN TIME ON MOTION FOR FOUR-WEEK
POSTPONEMENT OF SUMMARY JUDGMENT BRIEFING
SCHEDULE - 2

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Portland, OR 97204-2089
(503) 498-4873 • Fax (503) 298-0916

NOI-9406\IRP01101.OP0

should order the following schedule on the motion for a change in briefing schedule:

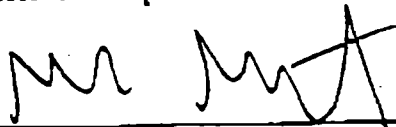
Any opposition: By October 7, 1994 (service by telefax).

Reply: By October 10, 1994 (service by telefax).

Motion Submitted: October 10, 1994.

Dated this 4th day of October, 1994.

MARK C. RUTZICK LAW FIRM,
a Professional Corporation

By: 
Mark C. Rutzick, WSB #17291
Alison Kean Campbell, WSB #19363

SMITH & LEARY

By: _____
J. J. Leary, jr., WSB #08776
James R. Hennessey, WSB #14376

Of Attorneys for Cross-Claim
Defendant Northwest Forest
Resource Council

MEMORANDUM IN SUPPORT OF NFRC'S MOTION TO
SHORTEN TIME ON MOTION FOR FOUR-WEEK
POSTPONEMENT OF SUMMARY JUDGMENT BRIEFING
SCHEDULE - 3

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N01-9406\RP01102.OP1

Honorable William L. Dwyer

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Attorneys for Cross-Claim Defendant
Northwest Forest Resource Council

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,
Plaintiffs,

vs.

JAMES LYONS, in his official capacity as
Assistant Secretary of Agriculture, et al.,
Defendants,

vs.

NORTHWEST FOREST RESOURCE
COUNCIL,
Cross-Claim Defendant.

No. C92-479WD

[PROPOSED]
ORDER

[PROPOSED] ORDER - 1

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500 Pioneer Tower
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Portland, OR 97204-2089
(503) 499-4573 • Fax (503) 296-0915

NO1-9406\JRP01102.OP1

1 SAVE THE WEST,

2 Plaintiff,

No. 94-758WD

3 vs.

4 JAMES LYONS, et al.,

5 Defendants.

6
7 NATIVE FOREST COUNCIL,

8 Plaintiff,

No. C94-803WD

9 vs.

10 BRUCE BABBITT, et al.,

11 Defendants.

12
13 THE SIERRA CLUB,

14 Plaintiff,

No. C94-820WD

15 vs.

16 MICHAEL ESPY, et al.,

17 Defendants.

18 Upon consideration of the motion of cross-claim defendant Northwest Forest Resource
 19 Council for reconsideration of the Court's order of September 22, 1994 regarding privileged
 20 documents, and upon consideration of the federal defendants' opposition thereto,

21 IT IS HEREBY ORDERED that NFRC's Motion for Four-Week postponement of
 22 summary Judgment Briefing Schedule is granted, and

23 IT IS HEREBY ORDERED that the date for all parties to file briefs in opposition to
 24 summary judgment is extended to November 16, 1994; all replies are due December 1;
 25 hearing is set for December 7, 1994, at 9:00 a.m.

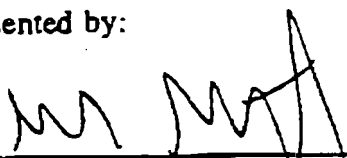
26 [PROPOSED] ORDER - 2

NO1-9406\IRP01102.OP1

Dated this _____ day of October, 1994.

United States District Judge

Presented by:



Mark C. Rutzick, WSB #17291
J.J. Leary, jr., WSB #08776

[PROPOSED] ORDER - 3

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C:\CAPTION\W01\92-479.CER

Honorable William L. Dwyer

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Attorneys for Cross-Claim Defendant
 Northwest Forest Resource Council

IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF WASHINGTON
 AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

vs.

JAMES LYONS, in his official capacity as
 Assistant Secretary of Agriculture, et al.,

Defendants.

vs.

NORTHWEST FOREST RESOURCE
 COUNCIL,

Cross-Claim Defendant.

No. C92-479WD

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE - 1

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C:\CAPTION\NO1\92-479.CER

SAVE THE WEST,

Plaintiff,

No. 94-758WD

vs.

JAMES LYONS, et al.,

Defendants.

NATIVE FOREST COUNCIL,

Plaintiff,

No. C94-803WD

vs.

BRUCE BABBITT, et al.,

Defendants.

THE SIERRA CLUB,

Plaintiff,

No. C94-820WD

vs.

MICHAEL ESPY, et al.,

Defendants.

The undersigned hereby certifies that on October 4, 1994, a copy of the following documents:

1. NFRC's Motion for Four-Week Postponement of Summary Judgment Briefing Schedule;
2. Memorandum in Support of NFRC's Motion for Four-Week Postponement of Summary Judgment Briefing Schedule;
3. Motion to Shorten Time for Consideration of NFRC's Motion for Four-Week Postponement of Summary Judgment Briefing Schedule;
4. Memorandum in Support of NFRC's Motion to Shorten Time on Motion for Four-Week Postponement of Summary Judgment Briefing Schedule;
5. [Proposed] Order

CERTIFICATE OF SERVICE - 2

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C:\CAPTION\ND1\92-479.CER

were served on the following persons in the manner designated:

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Sierra Club Legal Defense Fund
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10/04/1994 14:02 5034994660

MARK C. RUTZICK

C:\CAPTION\101\92-479.CER

1 **WELLS BURGESS**
2 U.S. Department of Justice
3 Environment & Natural Resources Division
4 General Litigation Section
5 601 Pennsylvania Avenue N.W., Eighth Floor
6 Washington, D.C. 20044
7 Telephone: (202) 272-6958
8 Fax: (202) 272-6815, 5775

9 () Hand Delivered () Mail (X) Federal Express (X) Fax

10 Dated this 4th day of October, 1994.

11 
12 Mark C. Rutzick, WSB #17291
13 J.J. Leary, jr., WSB #08776

14 Of Attorneys for Cross-Claim
15 Defendant Northwest Forest
16 Resource Council
17
18
19
20
21
22
23
24
25
26

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U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
GENERAL LITIGATION SECTION
601 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004

*F.P.
L.H. Johnson*

FAX NUMBER (202) 272-6815, 5775
CONFIRMATION NUMBER (202) 272-8056

MEMORANDUM

To: Ellen Athas
Andrea Berlowe
Ted Boling (202) 514-4231
Wells Burgess
Todd Campbell (202) 456-6429
Ana Cobian (202) 514-7971
William Cohen
Peter Coppelman (202) 514-0557
Michael Davis (202) 456-2710
Lisa Freedman (503) 326-6254
Mark Gaede (202) 720-4732
David Gayer (202) 208-3877
David Gehlert
Michael Gippert (202) 690-2730
Jim Kilbourne
Thomas Lee (503) 727-1117
Karen Mouritsen (202) 219-1792
Roger Nesbit (503) 231-2166
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Jim Pipkin (202) 219-1220
Plan Support Group (503) 326-6590
David Shilton (202) 514-4240
Robert Simmons (415) 744-3170
Tom Tuchmann (503) 326-6254
Jean Williams

DATE: October 5, 1994

NUMBER OF PAGES TO BE TRANSMITTED (including
cover): 11

FROM: Paula Clinedinst, Legal Assistant, (202) 272-8019

MESSAGE: Attached is the Status Report filed in D.C.
yesterday, and the Notice to court Regarding
NFRG's Failure to File a Cross-Motion for
Summary Judgment, filed yesterday in Seattle.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST FOREST RESOURCE COUNCIL)
et al.,)

Plaintiffs,)

v.)

Civil No. 94-1031 TPJ

MICHAEL DOMBECK, Acting Director)
Bureau of Land Management)
U.S. Department of Interior)
and BRUCE BABBITT, Secretary of)
Interior, U.S. Department of Interior,)

Defendants.)

RECEIVED

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CLERK'S OFFICE
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

STATUS REPORT

Defendants hereby provide notice to this Court of a filing made in the case of Seattle Audubon Soc'y v. Lyons, Civil. No. C94-479WD (W.D. Wash.). On September 28, 1994, federal defendants filed with the Honorable William L. Dwyer a Motion for Summary Judgment and supporting memorandum. The Motion seeks summary judgment on all claims asserted by the environmental group plaintiffs in that action, and on the federal defendants' cross-claims for declaratory judgment against Northwest Forest Resource Council.

//

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//

//



Dated: October 4, 1994

Respectfully submitted,

WELLS D. BURGESS

STEPHEN J. ODELL

DAVID GEHLERT

ANDREA L. BERLOWE

U.S. Department of Justice

Environment and Natural Resources

Division

General Litigation Section

P.O. Box 663

Washington, D.C. 20044-0663

(202) 272-8056

Attorneys for Defendants



CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 4, 1994, she deposited one copy of the foregoing, STATUS REPORT, to be served via telefacsimile machine and first-class United States mail, postage prepaid, upon the counsel of record herinafter named:

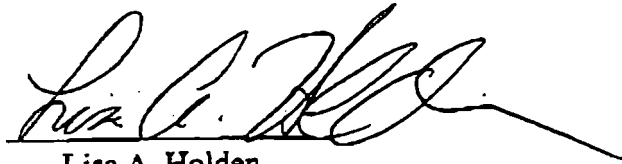
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Lisa A. Holden

THE HONORABLE WILLIAM L. DWYER

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.)

Plaintiffs,)

v.)

Civ. No. C92-479WD

JAMES LYONS, in this official)
capacity as Assistant Secretary of)
Agriculture, and the United States)
Forest Service, an agency of the)
United States,)

Defendants,)

and)

WASHINGTON CONTRACT LOGGERS)
ASSOCIATION, et al.)

Defendants-Intervenors.)

SAVE THE WEST,)

NOTICE TO COURT REGARDING
NFRC'S FAILURE TO FILE A
CROSS-MOTION FOR SUMMARY JUDGMENT - 1

United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-8056

1

Plaintiff,

2

v.

3

JAMES LYONS, et al.,

4

5

Defendants.

6

NATIVE FOREST COUNCIL,

7

8

Plaintiff,

9

v.

10

BRUCE BABBITT, et al.,

11

Defendants.

12

THE SIERRA CLUB

13

14

v.

15

MICHAEL ESPY, et al.,

16

Defendants.

17

18

19

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26

Civ. No. C94-758WD

Civ. No. C94-803WD

Civ. No. C94-820WD

**NOTICE TO THE COURT
REGARDING NFRC'S FAILURE
TO FILE A CROSS-MOTION
FOR SUMMARY JUDGMENT**

Federal defendants submit this paper for the purpose of placing NFRC on notice that federal defendants will avail themselves of all defenses available to them, including laches, waiver and estoppel, by reason of NFRC's failure to file a motion for summary judgment on acknowledged legal claims against the government in this case. In connection with this notice, federal defendants note:

**NOTICE TO COURT REGARDING
NFRC'S FAILURE TO FILE A
CROSS-MOTION FOR SUMMARY JUDGMENT - 2**

United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-8056

1 This Court ordered the parties to file cross-motions for summary judgment on
2 a date certain and later extended the date by one week to allow NFRC additional time for filing.
3 See Order Amending Schedule at 3 (Aug. 23, 1994); and, Order on NFRC's Motion for Change
4 in Briefing Schedule passim (Sept. 14, 1994).

5 2. The cross-claims for declaratory judgment filed by federal defendants were
6 brought for the purpose of obtaining the adjudication of claims asserted by NFRC. See Federal
7 Defendants' Amended Answer at ¶ 4. NFRC has taken the position that these claims are legal
8 claims, subject to disposition upon summary judgment:
9

10 I guess what I -- if I could take a moment just to talk about what these cases are
11 going to look like if they are here or even if they aren't here, just to tell you what's likely
12 to happen, these are summary judgment cases. We will not have a trial on these cases.
13 The government will need to assemble an administrative record but it's -- these cases are
14 not particularly fact intensive. We primarily raise legal issues that we can address
15 primarily in briefs. It is conceivable that there might be a tiny bit of discovery but it is
also conceivable we won't need any discovery. What we plan to do is file a motion for
summary judgment in both cases in about sixty days, hopefully here, and we anticipate
the government will need some time to respond.

* * *

16 Our hope is that we can complete briefing by about the end of September and
17 have the case ready for oral argument at your Honor's convenience and then handle the
case as you can assuming that we are here.

18 NFRC v. Espy, Civ. No. 93-162, Transcript of Proceedings before the Honorable Thomas

19 Penfield Jackson, United States District Judge, May 23, 1994, pp. 11-12 (attached as Exhibit A).

20 //

21 //

22 //

23 //

24 //

25 NOTICE TO COURT REGARDING
26 NFRC'S FAILURE TO FILE A
CROSS-MOTION FOR SUMMARY JUDGMENT - 3

United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-8056



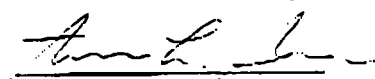
1 Dated this 4th day of October, 1994.

2 Respectfully submitted,

3 LOIS J. SCHIFFER
4 Acting Assistant Attorney General

5 PETER D. COPPELMAN
6 Deputy Assistant Attorney General

7 KATRINA C. PFLAUMER
8 United States Attorney

9 
10 WELLS D. BURGESS
11 STEPHEN J. ODELL
12 DAVID W. GEHLERT
13 ANDREA L. BERLOWE
14 U.S. Department of Justice
15 Environment and Natural Resources
16 Division
17 General Litigation Section
18 P.O. Box 663
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26 NOTICE TO COURT REGARDING
NFRC'S FAILURE TO FILE A
CROSS-MOTION FOR SUMMARY JUDGMENT - 4

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1 challenging here from anything that Judge Dwyer dealt with to
2 illustrate that there isn't much connection at all between what
3 he dealt with two years ago or five years ago and what the
4 secretaries have decided to do here.

5 I guess what I -- if I could take a moment just to
6 talk about what these cases are going to look like if they are
7 here or even if they aren't here, just to tell you what's
8 likely to happen, these are summary judgment cases. We will
9 not have a trial on these cases. The government will need to
10 assemble an administrative record but it's -- these cases are
11 not particularly fact intensive. We primarily raise legal
12 issues that we can address primarily in briefs. It is
13 conceivable there might be a tiny bit of discovery but it is
14 also conceivable we won't need any discovery. What we plan to
15 do is to file a motion for summary judgment in both cases in
16 about sixty days, hopefully here, and we anticipate the
17 government will need some time to respond.

18 We have a total of, I think, twenty-four different
19 legal issues in the two cases that are not duplicative. There
20 are some issues that are raised in both cases. The Association
21 of O&C Counties has about six issues, some of which are quite
22 similar to some of ours, a couple of which are different, but I
23 am sure the government will need some time to respond. Our
24 hope is that we can complete the briefing by about the end of
25 September and have the case ready for an oral argument at your



1 Honor's convenience and then handle the case as you can
2 assuming that we are here. The government may challenge our
3 standing and if they do that in a separate motion we will deal
4 with that, but basically from the plaintiff's standpoint we are
5 just looking at filing summary judgment and then moving on to
6 the briefing schedule.

7 We would like to see the cases decided in this court
8 because your Honor has lived through the FACA issue and waited
9 to see what action the government took to respond to your
10 Honor's decision and they took action. They did their best, I
11 guess, to explain what they were doing. We don't think it is
12 satisfactory and we think that this is the right court to
13 address the question of whether the government responded in a
14 legally adequate way to your Honor's earlier decision as well
15 as the many other important legal questions that are new and
16 have not been raised in any case before and are not raised in
17 any other pending case. So that's a sort of a preview of where
18 we think we are going and hopefully we will be doing that
19 here.

20 THE COURT: All right.

21 MR. RUTZICK: Thank you.

22 THE COURT: Thank you, Mr. Rutzick.

23 Mr. Burgess, did you want to respond to that because
24 it looks to me like what I simply do is wait to see what --

25 MR. BURGESS: Yes, your Honor, and obviously this is

1 The undersigned hereby certifies that on October 4, 1994, she caused one copy each of
2 the above mentioned document to be served by first-class mail, postage prepaid, upon the counsel of
3 record named above.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 4, 1994, she caused one non-conformed copy of the foregoing, **NOTICE TO COURT REGARDING NFRC'S FAILURE TO FILE A CROSS-MOTION FOR SUMMARY JUDGMENT**, to be served via telefacsimile machine transmission upon the counsel of record hereinafter named:

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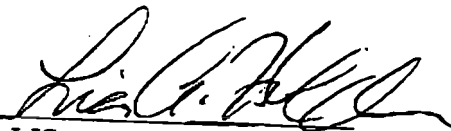
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MEMORANDUM

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DATE: October 12, 1994

NUMBER OF PAGES TO BE TRANSMITTED (including
cover): 15

FROM: Paula Clinedinst, Legal Assistant, (202) 272-8019

MESSAGE: Attached is Federal Defendants' Opposition to
NFRF's Motion for Reconsideration of
September 22, 1994, Order.

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8 THE HONORABLE WILLIAM L. DWYER

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11
12 IN THE UNITED STATES DISTRICT COURT
13 WESTERN DISTRICT OF WASHINGTON
14 AT SEATTLE

15 SEATTLE AUDUBON SOCIETY, et al.,)

16 Plaintiffs,)

17 v.)

Civ. No. C92-479WD

18 JAMES LYONS, in this official)
19 capacity as Assistant Secretary of)
20 Agriculture, and the United States)
21 Forest Service, an agency of the)
22 United States,)

23 Defendants,)

24 and)

25 WASHINGTON CONTRACT LOGGERS)
26 ASSOCIATION, et al.,)

Defendant-Intervenors.)

27
28 SAVE THE WEST,)
29 Plaintiff,)

30 v.)

Civ. No. C94-758WD

31 JAMES LYONS, et al.,)

32 Defendants.)

33
34 NATIVE FOREST COUNCIL,)

35 Plaintiff,)

1

v.

2

BRUCE BABBITT, et al.

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Defendants.

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5

THE SIERRA CLUB,

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Plaintiff,

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v.

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MICHAEL ESPY, et al.

9

Defendants.

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**FEDERAL DEFENDANTS' OPPOSITION TO NFRC'S
MOTION FOR RECONSIDERATION OF SEPTEMBER 22, 1994 ORDER**

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Civ. No. C94-803WD

Civ. No. C94-820WD

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I. INTRODUCTION

On September 30, 1994, cross-claim defendant Northwest Forest Resource Council ("NFRC") filed a motion for reconsideration of this Court's September 22, 1994, Order On Motions of SAS and NFRC to Compel Production of Documents Withheld on Claim of Privilege ("September 22 Order"). Because the grounds asserted by NFRC offer no basis for reconsideration, under either the standards for such motions or on their merits, the motion should be denied.

II. STATEMENT

In its motion for reconsideration, NFRC fails to note certain relevant facts. Though federal defendants previously submitted a statement of facts concerning the motion to compel production of privileged documents, this recitation is necessary to provide a complete background to NFRC's current motion.

On June 20, 1994, federal defendants filed Defendants' Notice of Filing of Index to Administrative Record, noting that the Administrative Record itself was then available for public review. On August 3, 1994, in answer to an interrogatory propounded by the Seattle Audubon Society plaintiffs ("SAS") which sought a list of "all documents withheld from the administrative record on a claim of privilege," federal defendants served an index of 275 documents. On August 11, 1994, SAS served a request for production of 179 of the 275 documents. On August 12, 1994, federal defendants filed their cross claims. On August 25, 1994, SAS followed this request with a motion to compel production of 177 of the 179 documents (two of the documents having been released).

On September 12, 1994, this Court entered an Order directing federal defendants to submit the 177 documents sought by SAS to the Court for in camera review. On September 14, 1994, the Court entered a further Order allowing NFRC to file a motion to compel discovery "if counsel are unable to agree on any remaining discovery." The details of NFRC's motion to compel production of the 177

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documents as well as an additional 43 documents are set forth in the September 16, 1994, Stipulation Between Federal Defendants and NFRC Regarding Production Of Documents Withheld On Claim Of Privilege, p. 3 ("Stipulation"). As described in the Stipulation, NFRC and federal defendants agreed that federal defendants would submit the additional 43 privileged documents sought by NFRC to the Court to be included in the Court's in camera review. NFRC further agreed "to accept the court's determinations on the 43 documents as if NFRC had filed a motion to compel and the court had ruled on the motion in terms identical to the September 12 Order. . ." i.e., that the Court would review the 43 documents in camera. Stipulation, p. 4.

The September 22 Order followed, denying the motions to compel of NFRC and SAS and upholding federal defendants' assertion of privilege.

III. ARGUMENT

A. NFRC has alleged no basis for reconsideration.

The arguments now raised for the first time by NFRC should not be considered by the Court because they are untimely. The Local Rules of this court establish that such motions should not be reviewed:

Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authorities which could not have been brought to its attention earlier with reasonable diligence.

Local Rule CR 7(e)(1).

NFRC does not allege manifest error in the September 22 Order or submit new facts; indeed, NFRC barely discusses the September 22 Order in its Memorandum ("NFRC Mem.") Instead, NFRC merely states that the motion is based on grounds not previously asserted, which is not a basis for seeking reconsideration.

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1 In addition, here, NFRC agreed in the Stipulation to be bound by the Court's ruling without
2 further briefing and to rely on the grounds for production raised by SAS. NFRC specifically stipulated
3 that it would accept the determinations of this Court as if it had filed a motion to compel and NFRC
4 should not be permitted a second opportunity to be heard, where to do so would require that this Court
5 release NFRC from the terms of the Stipulation.

6 As is plainly stated in Local Rule CR 7, legal arguments which could have been submitted to the
7 Court prior to its ruling on the motion for which reconsideration is sought should not be considered.
8 Federal Deposit Ins. Corp. v. Former Officers and Directors of Metropolitan Bank, 705 F. Supp. 505,
9 511-512 (D. Or. 1987) ("[a] motion for reconsideration should not be the occasion to tender new legal
10 theories for the first time, but rather should serve to correct manifest errors of law or fact or to present
11 newly discovered evidence").

12 Courts routinely and summarily reject motions for reconsideration such as NFRC's where the
13 movant simply seeks to pursue legal avenues not originally raised. In Fay Corp. v. Bat Holdings I, Inc.,
14 651 F. Supp. 307 (W.D. Wash. 1987), aff'd, 896 F.2d 1227 (9th Cir. 1990), the court denied a motion for
15 reconsideration raising new legal arguments because they were untimely:

16
17 Motions for reconsideration. . . are not justified on the basis of new evidence which
18 could have been discovered prior to the Court's ruling. . . . Moreover, 'after thoughts' or
19 'shifting of ground' are not an appropriate basis for reconsideration. . . . In this instance,
defendants are particularly remiss in now offering evidence and legal theories that were
clearly within their province at the time of this Court's earlier ruling.

20 651 F. Supp. at 309. See, also, Mateo v. M/S Kiso, 805 F. Supp. 792, 797 (N.D. Cal. 1992)
21 ("[d]efendants have failed to meet the standards for a motion to reconsider as they revisit the issue with
22 arguments that were either made at that time or could have been made at that time").

23 Here, NFRC could have submitted the arguments set forth in its motion for reconsideration had it
24 chosen to submit briefing on the motion to compel. NFRC now argues that federal defendants have

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1 waived some/all of the privileges asserted 1) by bringing the cross claims; 2) by waiving the deliberative
2 process privilege as to 39 deliberative documents; and 3) by allegedly disclosing confidential
3 communications in certain Administrative Record documents.

4 Had NFRC not waived its opportunity to submit briefing on the motion to compel, NFRC
5 obviously could have made these arguments in support of its motion to compel. The Administrative
6 Record has been available since June 1994, and the list of privileged documents was filed on August 3,
7 1994. The Notice of Filing of Supplemental Index to Administrative Record notifying the parties that
8 the 39 deliberative documents were being provided as part of the Record was filed on August 4, 1994
9 ("August 4 Notice"). Federal defendants' cross claims were filed on August 12, 1994. NFRC's
10 arguments on the motion for reconsideration are contained in a short brief and rest entirely on facts
11 contained in these filings -- facts within NFRC's knowledge well before NFRC agreed to forego briefing
12 on the motion to compel and submit itself to the ruling of the Court.

13 NFRC's motion for reconsideration should be denied solely on the grounds that it is undeniably
14 an "afterthought" and does not raise issues of manifest error or present new facts. While NFRC is
15 presumably unsatisfied with the Court's Order, that is no basis for seeking reconsideration. Further,
16 NFRC should not be permitted to circumvent the provisions of the Stipulation into which NFRC entered
17 and upon which this Court relied in moving forward with its ruling on the motion: that NFRC would
18 "accept the court's determinations on the 43 documents as if NFRC had filed a motion to compel"
19 Thus, NFRC's untimely arguments should not be considered.

21 **B. NFRC offers no basis for reconsideration on the merits.**

22 NFRC's arguments offer no basis for revising the September 22 Order. In that Order, this Court
23 held, after in camera review, that the documents were all protected by the deliberative process privilege
24 because they contained "legal opinions, arguments, questions, recommendations, and proposals for
25

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wording and rewording, all communicated as part of the predecisional deliberative process." September 22, Order, p. 4.¹ On the basis of this ruling, the Court did not reach the issue of whether other privileges applied to the documents, but as is described in the Meridith/Unger and Varney Declarations, 99 of the 176 documents sought by SAS and 42 of the 43 documents sought by NFRC are protected by the attorney-client or attorney work product privilege, or both.

1. Federal defendants' filing of cross-claims did not waive privilege.

In their cross claims, federal defendants contend that they are entitled to a declaratory judgment that based upon the administrative record, the Record of Decision (ROD) and the Final Environmental Impact Statement (FSEIS) now before the Court meet the standard of review set forth in 5 U.S.C. 706(2)(A), (C) and (D), in respect of each claim asserted by NFRC in NFRC v. Thomas and NFRC v. Dombeck, concerning, inter alia, the National Forest Management Act ("NFMA"), the Oregon and California Lands Act ("O&CLA") and the National Environmental Policy Act ("NEPA"). See, Federal Defendants' Amended Answer, p. 9. In short, this case concerns review of federal agencies' land management plans under the Administrative Procedure Act.

The cases relied upon by NFRC in contending that federal defendants have waived their right to assert privilege primarily concern claims in which a party's state of mind is the central issue in the case. In Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975), plaintiff prisoner brought a civil rights action against prison officials and sought discovery on the issue of malice, including legal advice received by defendants on the legality of plaintiff's confinement.

In permitting the discovery, the court noted that "[i]n the ordinary case. . . attorney-client communications are usually incidental to the lawsuit, notwithstanding their possible relevance, and other

¹ The Court also held, with regard to document No. 31, on which only the attorney-client privilege was claimed, that the assertion of that privilege was warranted.

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means of proof are available." 68 F.R.D. at 582. By contrast, in Hearn, defendants' assertion of immunity "impose[d] on plaintiff the burden of proving malice . . ." 68 F.R.D. at 581, n.5. The court in Hearn found that the tests articulated there for waiver of the privilege were satisfied, as defendants had made their state of mind the focus of the case and the discovery was vital to examining their state of mind. Id. Other cases relied on by NFRC also concern the injection, by claim or defense, of the state of mind of the party opposing disclosure of privileged material. See, e.g., Federal Deposit Ins. Corp. v. Wise, 139 F.R.D. 168, 172 (D. Colo. 1991) (In suit for breach of fiduciary duties against bank directors, regulators alleged that they were misled concerning certain transactions, thus privileged documents would be produced, since regulators had placed their beliefs at issue).

In this case, the relevant facts are set forth in the Administrative Record before the Court, specifically the ROD, the FSEIS and the DSEIS, and the Court rules on the basis of that record.² Thus, the rules set forth for disclosure in the "state of mind" cases cited by NFRC are plainly inapplicable here.³ There is no general rule, as NFRC contends, that the government waives its right to assert all privilege when it institutes an action subject to record review. Rather, the contrary is the rule, and

² The Supreme Court has explicitly indicated that resolution of record review cases must be made on the basis of the record, and may not involve an inquiry into the mental deliberations of the responsible government officials. See, United States v. Morgan, 313 U.S. 409, 422 (1941); Animal Defense Council v. Hodel, 840 F.2d 1432, 1437 (9th Cir. 1988) (no need to go beyond administrative record submitted by the agency in NEPA action because the record and the EIS contained adequate information to respond to the allegations.)

³ In any event, NFRC's assertion that federal defendants have identified the privileged documents as part of the record thus establishing their relevance under the Hearns test misses the point. The issue already decided by this Court is whether the documents are privileged. Once their privileged nature is established they are not subject to disclosure whether or not they are part of the record. Additionally, though the documents were obviously before the decisionmaker, they contain, as this Court found, "opinions, arguments, questions, [and] recommendations. . . ." The decision in this case, while made with the benefit of these opinions and advice, was based on the facts in the record.

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1 NFRC's contention is the exception. See, e.g., Zenith Radio Corp. v. United States, 764 F.2d 1577, 1580
2 (Fed. Cir. 1985) ("[a] party does not automatically waive . . . privileges, which protect formulation of
3 legal opinions or litigation strategy, simply by bringing suit); Barr Marine Products, Co., Inc. v. Borg-
4 Warner, 84 F.R.D. 631, 635 (E.D. Pa. 1979) ("[g]enerally, the attorney-client privilege cannot 'be held to
5 be waived by bringing or defending a suit, for in the attorney-client situation the privilege is designed to
6 promote confidential relations that may well deal with the very suit in question"). Thus, NFRC's claim
7 of waiver should be rejected.

8 **2. Federal defendants' release of deliberative documents did not waive privilege as to other**
9 **documents.**

10 NFRC next contends (NFRC Mem., pp. 8-10) that federal defendants waived all applicable
11 privileges when it voluntarily released a set of 39 deliberative documents associated with preparation of
12 the FSEIS. ⁴ See, August 4 Notice. NFRC ignores the fact that, as noted above, 141 of the documents
13 sought by SAS and/or NFRC are also protected by the attorney-client or attorney work product doctrine.
14 As discussed below, release of the 39 deliberative documents did not waive the deliberative process
15 privilege as to other deliberative documents. But in any event the possible waiver of one privilege does
16

17 ⁴ NFRC suggests that the rationales offered for producing deliberative FSEIS documents are not credible
18 because federal defendants allegedly were disingenuous in moving for an extension of the FSEIS
19 issuance deadline. NFRC Mem. at 9 n.3. Aside from representing an absolute non-sequitur, NFRC's
20 suggestion that federal defendants did not really want the additional time to allow them to more
21 adequately address the flood of comments on the DSEIS is simply false. This is clear even from the
22 memorandum to which NFRC cites, which states in the very next paragraph after the excerpt NFRC sets
23 forth:

24 We have received more than 60,000 comment letters so far [as of October 25, 1993], and
25 anticipate significant, lengthy and substantive new issues to be raised in letters we could
26 receive as late as November 5, since they may be postmarked as late as October 28. We
27 know that these new comments will add to the list [of issues for which additional time to
28 work on the Final SEIS would prove useful].

29 FSEIS-307 at 3 (Exhibit D to the Rutzick Declaration).

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1 not mean that other applicable privileges have been waived. The various privileges protect differing
2 interests, and focus on differing factors in determining waiver -- disclosure of confidential
3 communications in the case of the attorney-client privilege, protection of the adversarial process in the
4 case of the work product privilege, and protection of agency deliberations in the case of the deliberative
5 process privilege. See, e.g., In Re Grand Jury, 106 F.R.D. 255, 257 (D. N.H. 1985) (work product
6 doctrine is an independent source of immunity from discovery, separate and distinct from the attorney-
7 client privilege).

8 NFRC makes no effort to justify its request for broad production of all privileged documents.
9 NFRC relies only on cases which reflect that waiver is to be narrowly defined, and which concern waiver
10 of the attorney-client privilege, not waiver of the deliberative process privilege. In any event, the release
11 of 39 deliberative documents associated with preparation of the FSEIS did not waive federal defendants'
12 right to assert the deliberative process privilege as to other deliberative documents. The 275 privileged
13 documents include a separable group of deliberative documents for which only the deliberative process
14 privilege has been asserted. These are draft versions of the ROD and comments and edits on the draft
15 ROD ("the ROD deliberative documents"). See, Meridith/Unger Declaration, para. 39.

16
17 These two groups of documents are clearly distinct and therefore no implicit waiver should be
18 found. The 39 documents released were primarily drafts of the FSEIS, developed during the analysis
19 stage of the decisionmaking process while the ROD documents are associated with the decision stage.
20 Additionally, federal defendants' release of the 39 documents was intended to defuse allegations that
21 papers created during the FSEIS process were selectively discarded. In the August 4 Notice, federal
22 defendants stated that because of these allegations the agencies desired to be especially forthcoming with
23 regard to papers generated during preparation of the FSEIS. Thus, and contrary to NFRC's contentions,
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1 the release of the 39 FSEIS documents and the protection of the ROD deliberative documents was not
2 arbitrary or suspiciously selective.⁵

3 Further, the issue presented by NFRC's claim of waiver is not simply one of disclosure. Rather,
4 the issue is whether federal defendants continue to have an interest in protecting the deliberative process
5 associated with these ROD documents. Clearly, such an interest does still exist and should be protected.
6 The deliberations associated with the process of developing the Record of Decision are rightly deserving
7 of greater protection, notwithstanding that the agencies had other legitimate reasons, as they did here, for
8 releasing the documents associated with the FSEIS but not those associated with the ROD. Thus, release
9 of the 39 documents did not waive the deliberative process privilege as to the ROD documents because
10 federal defendants continue to have a legitimate interest in protecting the deliberative nature of this
11 separate stage of the decisionmaking process.⁶

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16 ⁵ NFRC specifically identifies five Administrative Record documents (NFRC Mem., p.
17 10-11) and contends that the inclusion of these documents in the record supports NFRC's waiver
18 argument. All but one of these documents are connected with preparation of the DSEIS/FSEIS;
19 federal defendants have not asserted privilege regarding deliberative documents associated with
20 preparation of the FSEIS. See, August 4 Notice. One deliberative document from the ROD
21 preparation stage of the process is referenced by NFRC. Federal defendants contend that the
22 inadvertent inclusion of this document in the record does not act as a waiver regarding all ROD
23 deliberative documents for the reasons stated, infra, Argument B.3.; federal defendants clearly
24 took measures to protect all such deliberative documents as reflected by the Meridith/Unger and
25 Varney Declarations, and submit that the privilege has not been waived.

26 ⁶ NFRC's vituperative allegations about the role played by Assistant Secretary Frampton in
this decision are completely unsupported. This case, obviously, is not PAS v. Babbitt, and the
document referenced, DSEIS 159, reflects only that Mr. Frampton was acting in the ordinary
course of his official duties as Assistant Secretary. Further, as previously noted, privilege has not
been asserted for deliberative documents associated with preparation of the FSEIS.

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3. Federal defendants have not disclosed confidential communications.

NFRC contends that because documents in the Administrative Record discuss the issue of management of O&CLA lands under an ecosystem approach, federal defendants have waived the right to assert privilege as to those privileged documents which also address this issue. NFRC Mem., pp. 11-12.

If NFRC's position was accepted, a person seeking legal advice with regard to a set of facts could protect a confidential communication to an attorney regarding those facts -- made for the purpose of seeking legal advice -- only by never discussing the same facts with any other third party. This is clearly not the rule. Rather, the mere discussion of the same facts, without disclosing the confidential communication itself, does not waive the attorney-client privilege. See, e.g., United States v. O'Malley, 786 F.2d 786, 794 (7th Cir. 1986) ("a client does not waive his attorney-client privilege 'merely by disclosing a subject which he had discussed with his attorney'); United States v. Cunningham, 672 F.2d 1064, 1073 (2nd Cir. 1982) ("an attorney client privilege is [not] lost by the mere fact that the information communicated is otherwise available to the public. The privilege attaches not to the information but to the communication of the information").

The documents NFRC references as allegedly disclosing confidential communications -- Exhibits A-E attached to the Rutzick Declaration -- simply reflect that this matter was the subject of much discussion within the agency decisionmaking process, just as it was within the context of the public notice and comment stage of this process, as reflected in the Comments of the Association of O&C Counties (AR 0073316) which are part of the Administrative Record. The facts and issues surrounding this matter were also, not surprisingly, the subject of confidential communications to attorneys who rendered advice based on the confidential communications. NFRC's contention that the former renders the latter non-privileged is groundless and is not a basis for reconsidering the Court's September 22 Order.

FED. DEFS. OPPOSITION TO NFRC'S
MOTION FOR RECONSIDERATION OF
SEPTEMBER 22, 1994 ORDER - 10

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1 Lastly, NFRC argues that the inclusion of one document -- FSEIS 591 -- in the voluminous
2 record before this Court specifically discloses the content of privileged document No. 34, a
3 memorandum from an attorney in the Department of the Interior. FSEIS 591 contains a quote from a
4 portion of one sentence of privileged document No. 34; further, FSEIS 591 was mistakenly included in
5 the Administrative Record because FSEIS 591 is privileged document No. 36.

6 Federal defendants submit that under these circumstances there has been no disclosure sufficient
7 to support a finding of waiver. The quoted material is quite limited and does not itself reveal the
8 confidential communication made to the attorney but rather discusses a general fact assumption. Further,
9 if a disclosure was made, it was inadvertent. The agencies asserted privilege for this document and its
10 mistaken inclusion in a record of the size of this Administrative Record -- which was prepared in an
11 expedited fashion -- should not result in a finding of waiver. Where an otherwise privileged document is
12 inadvertently disclosed, waiver is not always presumed, as NFRC contends. See, e.g., Lois Sportswear,
13 U.S.A. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) (inadvertent disclosure may not
14 result in waiver where, among other factors, efforts were made to protect privileged documents and the
15 extent of the disclosure was small). Thus, federal defendants submit that this Court should not compel
16 the disclosure of numerous documents containing legal advice and recommendations based on the
17 alleged disclosure.⁷

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20
21
22
23
24 ⁷ The other documents referenced by NFRC (NFRC Mem., p. 11) merely address this
25 much discussed issue in the normal course of the agency decisionmaking process.

IV. CONCLUSION

NFRC's motion for reconsideration should be denied because NFRC raises no legitimate grounds for seeking reconsideration. Further, allowing NFRC to obtain review of the arguments made would violate the Stipulation in which NFRC agreed to be bound by this Court's September 22 Order.

DATED this 11th day of October, 1994

Respectfully submitted,

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FED. DEFS. OPPOSITION TO NFRC'S
MOTION FOR RECONSIDERATION OF
SEPTEMBER 22, 1994 ORDER - 12

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 11, 1994, she caused one copy of the foregoing, **FEDERAL DEFENDANTS' OPPOSITION TO NFRC'S MOTION FOR RECONSIDERATION OF SEPTEMBER 22, 1994 ORDER**, to be served via telefacsimile machine and first-class United States mail, postage prepaid, upon the counsel of record hereinafter named.

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DATE: October 14, 1994

**NUMBER OF PAGES TO BE TRANSMITTED (including
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FROM: Paula Clinedinst, Legal Assistant, (202) 272-8019

MESSAGE: Attached is NFRC's Combined Reply Brief in
Support of Three Discovery Motions.

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IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF WASHINGTON
 AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

vs.

JAMES LYONS, in his official capacity as
 Assistant Secretary of Agriculture, et al.,

Defendants.

vs.

NORTHWEST FOREST RESOURCE
 COUNCIL,

Cross-Claim Defendant.

No. C92-479WD

NFRC'S COMBINED REPLY BRIEF
 IN SUPPORT OF THREE
 DISCOVERY MOTIONS

NFRC'S COMBINED REPLY BRIEF IN SUPPORT OF
 THREE DISCOVERY MOTIONS - 1

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1
2 **SAVE THE WEST,**3
4
5 **Plaintiff,****No. 94-758WD**6 **vs.**7 **JAMES LYONS, et al.,**8
9 **Defendants.**10 **NATIVE FOREST COUNCIL,**11 **Plaintiff,****No. C94-803WD**12 **vs.**13 **BRUCE BABBITT, et al.,**14 **Defendants.**15 **THE SIERRA CLUB,**16 **Plaintiff,****No. C94-820WD**17 **vs.**18 **MICHAEL ESPY, et al.,**19 **Defendants.**20 **Introduction**

21 NFRC's three discovery motions should be granted. NFRC is entitled to depose
 22 each of the 19 witnesses it has proposed. Each has personal knowledge of the subjects the
 23 Government has placed at issue in this case, and none will be burdened by a brief
 24 deposition in a matter as important as the Government claims this case is.

25 The motion for production of documents should also be granted. The Government
 26 may not sue NFRC and withhold the documents necessary for NFRC to defend the case.
 Its conceded waiver of privileges on some documents waives its privileges on all related
 documents.

**NFRC'S COMBINED REPLY BRIEF IN SUPPORT OF
 THREE DISCOVERY MOTIONS - 2**

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1 NFRC's motion for a four-week postponement should also be granted. Until the
2 court rules on the motion to compel depositions, it is impossible to know exactly how
3 much time will be needed to complete depositions and obtain and review transcripts. Four
4 weeks is a starting point. In addition, the Government still has not produced any of the
5 electronic communications it was ordered to release in August.

6 The Government is not, however, entitled to any additional time to reply to
7 NFRC's opposition. The Government suggested the current schedule and has resisted
8 every prior attempt to change it. The fact that NFRC and other parties would submit
9 substantial papers opposing the Government's position was surely foreseeable when it
10 proposed the current schedule. It has no basis for any additional time for its work
11 product.

12 Argument

13 **I. THE MOTION TO COMPEL 19 DEPOSITIONS SHOULD BE** 14 **GRANTED**

15 The Government's opposition to depositions proceeds from the faulty premise that
16 this is an action for judicial review against the Government under the Administrative
17 Procedure Act ("APA"), 5 U.S.C. § 701 et seq. It is not; the Government sued NFRC
18 and, as NFRC has previously shown, the APA does not authorize such a suit.

19 The rules governing discovery in this case are those applicable when the
20 Government is a plaintiff. Those rules are different than when the Government is
21 defending under the APA. Courts commonly order depositions of Government officials
22 when the Government is a plaintiff, while recognizing that "high government officials
23 enjoy a limited immunity from being deposed in matters about which they have no personal
24 knowledge." *United States v. Miracle Recreation Equipment Co.*, 118 F.R.D. 100, 104
25 (S.D. Ia. 1987) (allowing depositions of six government officials as to information
26 available to the agency and its ability to gather and evaluate data).

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1 A defendant may obtain a deposition of a government official on substantive
2 matters "upon a showing that the deposition is necessary in order to obtain relevant
3 information and that it would not significantly interfere with the ability of the official to
4 carry out his governmental responsibilities." *Martin v. Valley National Bank of Arizona*,
5 140 F.R.D. 291, 314 (S.D.N.Y. 1991) (emphasis added) (allowing deposition of Labor
6 Department Director of Enforcement "as to the status of the Department's knowledge and
7 intentions").

8 Contrary to the Government's argument, NFRC is not required to make a showing
9 of bad faith because the Forest Plan was not an adjudicative decision and there were not
10 "formal administrative findings." *Pension Benefit Guaranty Corporation v. LTV Steel*
11 *Corp.*, 119 F.R.D. 339, 343 (S.D.N.Y. 1988) (allowing deposition of PBGC Executive
12 Director to determine "what matters, whether discussed orally or committed to writing,
13 were considered in the course of the PBGC's deliberations"). Depositions of high-ranking
14 agency officials are proper "to examine the basis of the [agency's] decision" when the
15 written explanation "only contains conclusory recitals." *Resolution Trust Corporation v.*
16 *Diamond*, 137 F.R.D. 634, 645 (S.D.N.Y. 1991) (allowing deposition of Executive
17 Director of RTC); see *Brock v. Frank V. Panzarino, Inc.*, 109 F.R.D. 157, 159
18 (E.D.N.Y.) (directing Labor Department investigator to testify as to facts supporting
19 enforcement action).

20 Not only must the Government make its officials available for depositions, but it
21 must take care to see that its deponents are informed and knowledgeable about the subject
22 of the case. *Federal Deposit Insurance Corporation v. Butcher*, 116 F.R.D. 195, 198
23 (E.D. Tenn. 1986).

24 Under these principles, all the depositions sought by NFRC are proper and should
25 be allowed.

26 1. Administrative record witnesses. The Government concedes that discovery on

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1 the completeness and adequacy of the administrative record it has designated is proper. It
2 seeks to limit depositions to the four witnesses who signed declarations on that subject.
3 While these four witnesses are necessary, they do not possess all the information needed to
4 complete an adequate inquiry into the subject.

5 Robert T. Jacobs, now retired from federal service, was the head of the SEIS
6 Team. He was ordered to implement the document destruction policy for the team, and he
7 was responsible for implementing the policy throughout the process. It appears the only
8 reason he was not the Government's declarant (rather than his deputy, Mr. Holden) is that
9 he retired. His retirement from federal service reduces or eliminates any claim of
10 immunity for his testimony, and it should be allowed.

11 Martin Raphael, Richard Holthausen and Duane Dippon are federal employees who
12 served as leaders of the FEMAT Team directly under Dr. Thomas. Brian Greber is a
13 private citizen who served in a similar capacity. They implemented the FEMAT document
14 destruction policy described by Dr. Thomas, and are far more likely to be able to answer
15 the most important question: what documents were destroyed? Dr. Thomas testified in
16 *NFRC v. Espy* that he had little day to day contact with the FEMAT subgroups, and is
17 very unlikely to know what specific documents were destroyed.¹

18 James Pipkin was the Administration's on-site supervisor of FEMAT, and served as
19 a conduit for instructions from the White House and the agency heads to FEMAT. It is
20 probable he gave Dr. Thomas the instructions to shred documents, and he may know what
21 documents they intended to shred, and why.

22 David Cottingham was the White House staffer in Washington, D.C. assigned to
23 supervise the SEIS process (as reflected in such documents as DSEIS-4, DSEIS-10,
24 DSEIS-13 and ROD-42), and is likely to be able to provide additional information not
25

26 ¹ Conversely, Dr. Thomas is uniquely qualified to describe the origin and purposes of the document destruction policy.

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known to Mr. Pipkin as to the origin and purpose of the shredding policy, both for FEMAT and for the SEIS Team (which Mr. Pipkin did not work with, Mr. Cottingham now works in the Interior Department in Washington, D.C.).

None of these witnesses qualify as "high-ranking" officials by any definition. Jacobs and Greber don't even work for the Government. Raphael, Holthausen and Dillon are scientists who work in regional offices in the Northwest. Pipkin and Cottingham are staff level employees who hold no high position. All these witnesses should be available for depositions as to the completeness of the record, the purpose of the FEMAT and SEIS shredding policy, and the result of that policy.

2. Policy-making witnesses. NFRC seeks depositions of 11 Government officials and one retired official concerning the basis of the decision to adopt the ROD and what factors were considered in making that decision. *Resolution Trust Corporation v. Diamond*, 137 F.R.D. at 645; *Pension Benefit Guarantee Corporation v. TV Set Corp.*, 119 F.R.D. at 343. The ten officials are: Bruce Babbitt, George Frampton, Thomas Collier, James Pipkin, Michael Dombeck, Elaine Zielinski, Mike Espy, James [redacted], Katie McGinty, David Cottingham and Dr. Thomas. (Dr. Thomas, Mr. Pipkin and Cottingham would also, as explained above, be deposed on the completeness of the record.) The retired official is Dean Bibles, former Oregon state director for the BLM and a key participant in the BLM's work on the Forest Plan.

These depositions are necessary because the ROD either ignores or provides only the most conclusory comments on many of the key issues in the case:

1. What was the basis of the FCEC's ironclad mandate to FEMAT and the agencies to require an "ecosystem management" plan? The ROD disclaims responsibility for this decision, asserting that "the President charged us to use an ecosystem management approach." ROD at 5. This must refer to the FCEC's mission statement, since there is no other similar direction in the record. A fundamental part of NFRC's position is that this

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1 preliminary decision was unlawful and was not based on proper factors. Depositions of
2 decision-makers are needed to develop a record on which this issue can be resolved.

3 2. What standard did the Secretaries apply in determining whether Option 9
4 satisfied the Forest Service viability standard? The ROD is silent on this point.

5 3. Why did FEMAT decide, and the Secretaries agree, that "some system of
6 reserves was required" to satisfy the Forest Service viability rule? The ROD relied
7 entirely on FEMAT, and neither the FEMAT Report nor the existing record offer one
8 word of explanation for this key decision, which severely (and unlawfully) limited the
9 alternatives that could be considered.

10 4. If, as the Government argues, it has discretion to manage forests to avoid
11 future listings of species not currently threatened or endangered, why did the Secretaries
12 decide to exercise that discretion for these forests alone among the 154 forests in the
13 national forest system, and why did they decide they must attempt to maintain the viability
14 of every species found in these forests? The ROD is completely silent on this fundamental
15 issue. Depositions are needed to create a record for judicial review.

16 5. When did the Administration decide to apply the Forest Service viability rule
17 to BLM lands, and based on consideration of what factors? The record indicates that
18 Secretary Babbitt prejudged this issue in March 1993 and personally ordered FEMAT to
19 apply the Forest Service rule to BLM land in all its options. The markings of pre-decision
20 and bad faith are written all over this controversial decision, which the BLM questioned
21 internally throughout the process. The ROD conclusorily rationalizes this decision, but it
22 clearly was made a year earlier, and prejudiced the entire process. Depositions are needed
23 to create a record on this issue.

24 6. What criteria did FEMAT use to exclude 46 of the original 54 options it
25 reviewed in April 1993? The FEMAT Report, the FSEIS and the ROD all fail to offer
26 one word of explanation for this major decision. Depositions are needed to create a record

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on which a court can review this major decision.

7. What consideration, if any, did the Secretaries give to managing the late-successional and riparian reserves for timber or range? The ROD is silent on this point, but this consideration is mandated by the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § § 528-531.

8. What role was played in this decision by George Frampton, Assistant Secretary of Interior since January 1993, who before then as the President of the Wilderness Society had been litigating and lobbying against BLM land management policies since 1987, attempting to achieve the same land management policies the Government has now adopted? The record hints at major involvement by Mr. Frampton. DSEIS-159, and shows evidence of bad faith if any evidence were needed. If Mr. Frampton intervened in this decision to achieve a private advantage for his former employer, as appears to be the case, any decision based on his involvement would be unlawful. Depositions are required to uncover Mr. Frampton's role.

All these depositions are proper in this case, where the Government has gone to court, over NIFRC's strong objections, to seek affirmative relief from the court. All the depositions will be brief, and if this case is nearly as important as the Government keeps claiming (and as the Court has asserted on a number of occasions), the short time required for each official to give testimony is more than justified by the public interest in achieving a fair and just resolution to this controversy.

II. THE MOTION FOR RECONSIDERATION ON PRIVILEGED DOCUMENTS SHOULD BE GRANTED, AND ALL THE PRIVILEGED DOCUMENTS SHOULD BE RELEASED; ALTERNATIVELY THE CROSS-CLAIMS SHOULD BE DISMISSED

A. Waiver by filing suit.

The Government's brief opposing the motion for reconsideration is entirely silent on the first waiver ground: that the Government waived all its privileges in this case by

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1 choosing to file suit against NFRC and asking for review on a record which includes the
2 275 privileged documents it seeks to withhold. To say waiver is not automatic, as the
3 Government argues, is not responsive. The motion asserts that waiver occurred in this
4 case based on the nature of the claims asserted in this case and the relevance of the
5 documents as part of the administrative record in this case. The Government never
6 addresses the three widely-recognized factors for making the required case by case waiver
7 decision: 1) the plaintiff filed suit against the defendant, 2) the suit makes the privileged
8 information relevant, and 3) the application would deny the defendant information that is
9 relevant and material to his defenses. *Greater Newburyport Clamshell Alliance v. Public*
10 *Service Company*, 838 F.2d 13, 18 (1st Cir. 1988).

11 The Government's claim that judicial review is limited to facts in the record is
12 plainly contrary to well-settled law. Judicial review under the APA, as the Government
13 claims is applicable here, turns on two issues: whether the agency considered the relevant
14 factors, and whether it made a clear error of judgment. *Citizens To Preserve Overton*
15 *Park, Inc. v. Volpe*, 401 U.S. 402 (1971). While facts are certainly relevant, the court
16 must look at precisely the consideration of statutory and policy factors that the Government
17 admits is contained in the 275 privileged documents, and must determine the basis and
18 reasonableness of the judgment of the decision-makers. The privileged documents are
19 plainly relevant to this standard of review; where the Government chooses to file suit, its
20 privileges must give way to NFRC's right to defend against the Government's claims.

21 **B. Waiver by disclosure.**

22 The Government's position on the its disclosure of privileged documents is
23 hopelessly confused, and impossible to reconcile with its previous filings in this case. The
24 Government concedes it intentionally released 39 privileged documents in August 1994.
25 The Government now claims this was in furtherance of a policy that "federal defendants
26 have not asserted privilege regarding deliberative documents associated with preparation of

NFRC'S COMBINED REPLY BRIEF IN SUPPORT OF
THREE DISCOVERY MOTIONS - 9

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1 the FSEIS." Opposition to Motion For Reconsideration at 9 n. 5. It claims it intentionally
2 released four additional privileged documents in June pursuant to the same policy. (This
3 is an implausible statement on its face: if it had adopted the waiver policy in June, why
4 did it withhold the 39 documents it released in August?)

5 The Government would do well to look at its own privilege assertions (the
6 Unger/Meredith declaration of September 2, 1994), and its list of privileged documents.
7 Contrary to its current claim, the Government asserted deliberative process privilege in
8 September over approximately 50 documents "associated with preparation of the FSEIS":
9 1-40, 42, 51, 65, 68, 77, 83, 87, 99, 272, 273, and perhaps many more that cannot be
10 identified from the list. The Court upheld the deliberative process privilege as to most of
11 these documents, which were sought by either SAS or NFRC. Order On Motions Of SAS
12 And NFRC To Compel Production Of Documents Withheld On Claim Of Privilege,
13 September 22, 1994 at 4.

14 Based on the Government's current representation that it has waived the deliberative
15 process privilege on all these additional documents, the court should order them released.

16 The Government seeks to maintain the deliberative privilege for documents related
17 to the ROD while waiving it for documents relating to the FSEIS. Yet there is no
18 meaningful distinction between the two. By definition, all the documents in the
19 Government's administrative record relate to the ROD; if they didn't they wouldn't be in
20 the administrative record.

21 The fact that some privileged documents are allegedly more "important" is not a
22 justification for withholding them while releasing other privileged documents; to the
23 contrary, a party may not release the harmless or trivial privileged documents and withhold
24 those that undermine its case. The holder of a privilege "cannot be allowed, after
25 disclosing as much as he pleases, to withhold the remainder." *Weil v.*

26 *Investment/Indicators, Research & Management*, 647 F.2d 18, 24 (9th Cir. 1981), *quoting*

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VIII J. ~~Wigmore~~, Evidence (McNaughton rev. 1961) at 636; *Greater Newburyport Clamshell Alliance*, 838 F.2d at 20. By intentionally waiving the deliberative privilege as to all documents relating to the FSEIS, the Government has waived the deliberative privilege for the entire record.

C. Voluntary Release of Document FSEIS-591

The Government claims that its release of Document FSEIS-591 was inadvertent and does not constitute a waiver of the privilege of Privileged Document 34 and other related documents. Document FSEIS-591 was released to the public in June 1994 and has remained available to the public since then at the BLM Oregon State Office, 1515 S.W. Sixth Avenue, Portland, Oregon. In September the Government apparently included another copy of it as Privileged Document No. 36. The Government has made no effort to retrieve Document FSEIS-591 from the public record since then.

The burden of establishing a privilege lies with the party asserting it. *Weil*, 647 F.2d at 25. The asserting party must prove it has not waived the privilege. *Id.* A party's "bare assertion that it did not subjectively intend to waive the privilege is insufficient to make out the necessary element of non-waiver." *Id.* (footnote omitted). Thus, the Ninth Circuit has held flatly: "The voluntary delivery of a privileged communication by a holder of the privilege to someone not a party to the privilege waives the privilege." *United States v. Zenon*, 809 F.2d 1411, 1415 (9th Cir. 1987).

Government counsel's unsupported assertion of inadvertent release of Document FSEIS-591, not even backed up by an affidavit, is as a matter of law insufficient to prove non-waiver. *Weil*, 647 F.2d at 25. The waiver on Document FSEIS-591 waives all privileges on all documents related to the same subject matter -- compliance with the OGC Act. All the privileged documents on that subject should be released.

D. Alternative motion for dismissal

The Government failed to oppose NFRC's alternative motion for dismissal. If the

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Government wishes to maintain its privileges, it may not be permitted to proceed with the cross-claims against NFRC. Dismissal is the proper remedy. *Attorney General v. The IRISH PEOPLE, INC.*, 684 F.2d 928, 948-51 (D.C.Cir. 1982).

III. NFRC SHOULD BE GRANTED SUFFICIENT ADDITIONAL TIME TO COMPLETE ALL DISCOVERY ALLOWED BY THE COURT; THE GOVERNMENT SHOULD NOT BE GRANTED ANY ADDITIONAL TIME TO REPLY TO NFRC'S OPPOSITION
MEMORANDUM

The Government responded to NFRC's four-week postponement motion with a completely different proposal that does nothing for NFRC and merely gives the Government more time to write its opposition and reply briefs. NFRC's motion should be granted; the Government's request should be denied.

NFRC acknowledges that it is difficult to estimate how much time it needs since it does not know how much discovery the Court will allow it to conduct. A four week postponement of the briefing schedule seemed like a good place to start, and it still does. Additional time may be necessary based on the amount of discovery permitted and the availability of witnesses.

One point raised by the Government requires some clarification. In its response to the motion to compel the Government indicates that it "has made" its four declarants available for depositions the week of October 17. Response to Motion To Compel at 5. n. 7. This is not quite accurate. While the Government has indicated that the four witnesses can be available next week in Portland, it has not actually agreed to produce them, although tentative dates and times have been scheduled. Nonetheless, NFRC welcomes the cooperation expressed by Government counsel, which should expedite discovery.

Additionally, the Government still has not produced any of the electronic communications it was ordered to produce in August, and its briefs are silent as to when these communications can be expected.

NFRC asks the Court to permit it sufficient time to complete whatever discovery is

**NFRC'S COMBINED REPLY BRIEF IN SUPPORT OF
THREE DISCOVERY MOTIONS - 12**

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allowed.

NFRC strongly opposes the Government's backdoor effort to buy itself more time to file opposition and reply briefs in this case. For weeks the Government has castigated NFRC's efforts at what it perceived as "delay," and has urged the court to adhere to the briefing schedule the Government proposed in August. The Government agreed to a two-week period to file its reply brief, knowing that if it was successful in holding NFRC in this case it ~~could expect~~ thorough opposition to its summary judgment motion. The Government's plea for two additional weeks to file a reply brief contradicts its many calls for expedition, and should not be entertained.

As in the past, NFRC takes no position on whether the environmental plaintiffs' cases should be kept on the same schedule as the Government's cross-claims against NFRC. SAS and FCC suggest that their cases be separated from the cross claims if NFRC is allowed discovery. That is up to the Court. NFRC has no interest in delaying any other case.

Conclusion

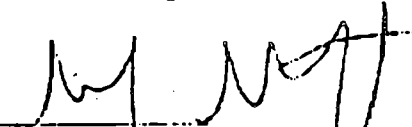
The Court should allow NFRC to take the depositions of the 19 current and former federal employees requested in its motion to compel, should order the Government to produce its privileged documents or, in the alternative, should dismiss the cross-claims if the documents are not produced, and should extend the briefing schedule a sufficient time.

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1 to allow NFRC to conduct whatever the discovery it permits, without giving the
2 Government more than the two-week reply period it proposed in the current schedule.

3 Dated this 13th day of October, 1994.

4 MARK C. RUTZICK LAW FIRM,
5 a Professional Corporation

6 By: 
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8 Alison Kean Campbell, WSB #19363

9 SMITH & LEARY

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11 By: _____
12 J. J. Leary, Jr., WSB #08776
13 James R. Hennessey, #19363

14 Of Attorneys for Cross-Claim
15 Defendant Northwest Forest
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,)
)
Plaintiffs,)

No. C92-479WD

CERTIFICATE OF SERVICE

vs.)

JAMES LYONS, in his official capacity as)
Assistant Secretary of Agriculture, et al.,)
)
Defendants,)

vs.)

NORTHWEST FOREST RESOURCE)
COUNCIL,)
)
Cross-Claim Defendant.)

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2 **SAVE THE WEST,**3 **Plaintiff,****No. 94-758WD**4 **vs.**5 **JAMES LYONS, et al.,**6 **Defendants.**7 **NATIVE FOREST COUNCIL,**8 **Plaintiff,****No. C94-803WD**9 **vs.**10 **BRUCE BABBITT, et al.,**11 **Defendants.**12 **THE SIERRA CLUB,**13 **Plaintiff,****No. C94-820WD**14 **vs.**15 **MICHAEL ESPY, et al.,**16 **Defendants.**17
18 The undersigned hereby certifies that on October 13, 1994, a copy of the following
19 document:20 1. NFRC's Combined Reply In Support of Three Discovery Motions
21 was served on the following persons in the manner designated:
22
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Dated this 13th day of October, 1994.

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Oil Pollution Act of 1990



UPDATE



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Office of Marine Safety, Security and Environmental Protection

OPA 90 Federal Register Publications

MARPOL Regulation 26 Final Rule

On October 7, 1994, the USCG published a final rule that requires all U.S. flag oil tankers of 150 gross tons (GT) and above and all other U.S. flag ships of 400 GT and above to carry approved shipboard oil pollution emergency plans on board (59 FR 51332). This final rule implements the requirements of Regulation 26 of Annex I of Marpol 73/78, which entered into force on April 4, 1995 for existing U.S. ships. This also requires foreign oil tankers of 150 GT and above and other foreign ships of 400 GT and above to carry evidence of compliance with Regulation 26 when in navigable waters of the U.S.

Regulation 26 does not apply to warships, or naval auxiliary ships owned or operated by a country when engaged in noncommercial service. The regulations also exempt barges or ships, which due to construction or operation, cannot carry petroleum in any form aboard as cargo. In addition, Canadian and U.S. ships operating exclusively on the Great Lakes or their connecting and tributary waters, or exclusively on the internal waterways of the U.S., are not required to comply with Regulation 26.

Regulation 26 requires plans to be prepared according to guidelines developed by the International Maritime Organization (IMO). For general discussion of Regulation 26, refer to the February edition of the *OPA 90 Update*, page 3.

Some of the provisions in the regulations are similar to those of the vessel response plan (VRP) interim final rule (IFR), issued under OPA 90 and

published on February 5, 1993 (58 FR 7376). However, Regulation 26 requirements are not as demanding as those established by the OPA 90 VRP IFR. The most striking difference between the two is OPA 90's requirements for pre-executed contracts at each port a ship enters. Regulation 26 does not require such formalized arrangements. The OPA 90 VRP IFR allows for the submission of a VRP that complies with OPA 90 and Regulation 26 response plan requirements. Tank vessel owners or operators interested in developing a combined shipboard oil pollution emergency plan would refer to section 155.103(j) of the OPA 90 VRP IFR for guidance.

For further information, contact LCDR Mike Smith at (202) 267-2611 or write Commandant (G-MEP-2), USCG Headquarters, 2100 Second Street SW, Washington 20593-0001.

Interim Rule on Tank Vessel Overfill Devices

The USCG will shortly publish regulations which will reduce the likelihood of oil spills caused by the overfilling of cargo tanks on oil tankers and barges.

The interim rule, which is mandated by OPA 90, applies to both U.S. and foreign tank vessels. It will reduce the likelihood of oil overfill spills from tank ships by requiring an alarm to sound when a tank has been filled to 98.5 percent of its capacity. This level is considered maximum capacity or fully loaded.

On tank barges, the interim rule allows owners and operators one of several options: (1) an alarm for each tank to

sound when a tank has been filled to its maximum capacity; (2) an automatic shutdown system for the entire barge/transfer facility, set to shut-down when a barge is fully loaded; or (3) high level indicating devices (stick gauges) installed on each tank.

Overfill devices must be installed on regulated U.S. flag oil tanker or barge at the next scheduled cargo tank international examination period following the effective date of the rule. For a regulated foreign flag tanker, overfill devices must be installed at the next cargo tank internal examination or drydocking required by a vessel's flag administration to meet the International Convention for the Safety of Life at Sea Convention of 1974, as amended, or the International Load Line Convention of 1966.

For additional information, contact LCDR Jeff Brager of the Office of Marine Safety, Security and Environmental Protection at (202) 267-1464 or write to the Commandant (G-MVI-1), USCG Headquarters, Washington, DC 20593-0001. Copies may be obtained by calling (202) 267-6740 or by faxing requests to (202) 267-4624.

OPA 90 Federal Register Publications

Notice of Public Meeting on Tank Level Pressure Monitoring Devices

The USCG is planning a public meeting to discuss proposed regulations that establish minimum performance standards for tank level, pressure monitoring, or leak and vapor detection devices for tank vessels that carry oil. The proposed regulations also would require the installation and use of the devices on certain newly constructed tank vessels that carry oil as their primary cargo. These regulations would not apply to existing tank vessels. The USCG is considering drafting these regulations to implement section 4110 of OPA 90.

The tank level and pressure monitoring devices would alert the tank vessel operator of that an accidental oil discharge is occurring, thereby reducing the size and impact of an accidental spill.

The meeting will allow the public an opportunity to comment on, and provide input to, the development of this regulation. The public meeting is scheduled from 9 a.m. to 3 p.m. on December 9, 1994 at USCG Headquarters, 2100 Second Street SW, Washington, DC, Room 2415.

Written comments may be submitted to the Executive Secretary, Marine Safety Council (G-LRA/3406)(CGD 90-071), USCG Headquarters, 2100 Second Street SW, Washington, DC 20593-0001. Comments must be received by January 9, 1995.

For further information, contact the Project Manager, Randy Creniwelge at (202) 267-6220.

USCG Federal Register Publications Related to OPA 90

EA of Differential Global Positioning System Gulf Intercoastal Region

On September 27, 1994, the USCG published a notice of availability of a Programmatic Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) (59 FR 49275). The EA and FONSI were prepared for implementing a Differential Global Positioning System (DGPS) Service in the Gulf Intercoastal Corridor Region of the U.S. The EA concluded that there will be no significant impact on the environment and that preparation of an Environmental Impact Statement will not be necessary.

DGPS, a new radionavigation service, improves upon the accuracy of the existing Global Positioning System (GPS). The increase in accuracy is critical for the precise electronic navigation required by vessels in harbors and harbor approaches. DGPS, because of its increased accuracy, should reduce the number of vessel groundings, collisions, personal injuries, fatalities, and potential hazardous cargo spills resulting from such incidents.

DGPS signal transmissions will be broadcast at low frequency and power levels. Signal transmissions at these low frequency and power levels have not been found to be harmful to the surrounding environment.

The USCG is soliciting comments on both the EA and FONSI. Comments must

be received on or before October 27, 1994. Comments may be mailed to the Executive Secretary, Marine Safety Council, USCG Headquarters, 2100 Second Street SW, Washington, DC 20593-0001; tel.: (202) 267-1477.

Copies of the EA and FONSI may be obtained by contacting LCDR George Privon at tel.: (202) 267-0297, or fax: (202) 267-4427. A copy of the EA is also available on the electronic bulletin board system at the GPS Information Center, (703) 313-5910.

For further information, contact LCDR George Privon, Radionavigation Division, (202) 267-0297.

USCG Circular on International Oil Pollution Prevention Certificates

The Coast Guard recently issued Navigation and Vessel Inspection Circular (NVIC) 6-94 which provides guidance regarding the issuance of International Oil Pollution Prevention (IOPP) Certificates under Annex I of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78).

As background, MARPOL entered into force October 2, 1983. The USCG is authorized by the Act of Prevent Pollution from Ships to issue IOPP Certificates to qualified ships. MARPOL 73/78 requires that each tanker of 150 gross tons or more and any other ship 400 gross tons or

USCG Federal Register Publications Related to OPA 90

IOPP Certificates (cont.)

more which engages in a voyage between countries party to MARPOL 73/78 be surveyed and obtain an IOPP Certificate. New ships were required to have an IOPP Certificate on board by October 2, 1983; other ships had until October 2, 1984.

The guidance for surveying ships and issuing IOPP Certificates is basically unchanged from that given in NVIC 9-86. The current NVIC updates and corrects NVIC 9-86 to account for actions taken by the IMO regarding the acceptance and entering into force of requirements dealing with the design of new tankers to be built on or after July 6, 1993; measures for existing tankers; new oil discharge criteria for oil filtering equipment and control systems, including the instantaneous rate to discharge oily cargo mixtures; and policy determinations that have been made since NVIC 9-86 was promulgated.

Please Note:

Refer to the September 15, 1994, issue of the OPA 90 Update, No. 34, page 5, where it is stated that the National Response Center (NRC) may be contacted via the Internet. Only the vessel response plan staff has access to the Internet, and not the NRC.

Publications of Other Agencies Related to OPA 90

NCP Final Rule

On September 15, 1994, the EPA published a final rule which promulgates revisions to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (59 FR 47416). The revisions incorporate changes made by OPA 90 that have expanded federal removal authority, added responsibilities for federal On-Scene Coordinators (OSCs), and broadened coordination and preparedness planning requirements. These revisions affect all NCP subparts except F (State Involvement in Hazardous Substance Response) and I (Administrative Record for Selection of Response Action).

OPA 90 specifies a number of revisions to the NCP that enhance and expand upon the current framework, standards, and procedures for response. The last revisions to the NCP were promulgated on March 8, 1990 (55 FR 8666). The proposed revisions on which this rulemaking is based were published on October 22, 1993 (58 FR 54702).

The major revisions implemented by this final rule reflect OPA 90 revisions to section 311 of the CWA. These changes increase Presidential authority to direct cleanup of oil spills and hazardous substance releases and augment preparedness and planning activities on the part of the federal government, as well as vessel and facility owners and operators.

Also, the final rule revises the NCP to implement a strongly coordinated, multi-level national response strategy primarily contained in subparts B and D of the NCP regulations (40 CFR part 300).

The effective date of this rule is October 17, 1994.

For further information, contact Richard Norris, Emergency Response Division (5202G), U.S. Environmental Protection Agency, 401 M Street, SW, Washington DC 20460, tel.: (202) 603-9053.

Final EIS for Exxon Valdez Oil Spill Restoration Plan

The Department of Agriculture's Forest Service and the Department of Interior's Office of the Secretary announced the availability of the Final Environmental Impact Statement (FEIS) for the *Exxon Valdez* Oil Spill Restoration Plan (59 FR 49232; September 27, 1994). The Restoration Plan will establish management direction and guide all natural resource restoration activities covered by the civil settlement to the *Exxon Valdez* oil spill.

On October 8, 1991, a federal court approved a settlement between Exxon and State and Federal governments under which Exxon will pay \$1 billion in criminal restitution and civil damages over 10 years. The funds will be used to restore as closely as possible to their pre-spill condition the natural resources and the services they provide which were damaged in the *Exxon Valdez* oil spill.

The Exxon Valdez Trustee Council, composed of three State trustees and three Federal trustees, is responsible for decisions relating to the assessment of injuries, uses of the restoration funds, and all restoration activities including the preparation of a Restoration Plan. The Trustee Council released a Draft Restoration Plan in November 1993, which was the proposed action for the analysis conducted in the FEIS. The Draft Environmental Impact Statement was published on June 17, 1994 (59 FR 31191).

Copies of a Summary of the FEIS, or of the FEIS itself, are available upon request from the Oil Spill Public Information Office, 645 G Street, Anchorage, Alaska 99501, tel.: (907) 278-8008 or, within Alaska, (800) 478-7745, outside Alaska (800) 283-7745. Copies of the FEIS will be sent to the public libraries in Anchorage, Juneau, Fairbanks, Valdez, Cordova, Kodiak, Homer, and Seward, Alaska.

News

Disabled Tanker Towing Study

The Disabled Tanker Towing Study Group (DTTSG), consisting of representatives from the Prince William Sound (PWS) Tanker Association, the PWS Regional Citizen's Advisory Council (PWSRCAC), Alyeska Pipeline Service Co., the Alaska Department of Environmental Conservation, and the USCG, completed the second part of a two-part study of tanker operations in PWS.

Part One of the study, published last Fall and reported on in the November, 1993 issue of the *OPA 90 Update*, evaluated the existing capability for emergency tanker towing in PWS. Part One, performed by an experienced salvage towing master, evaluated existing tugs, escort vessels and emergency towing equipment. The focus was on the capabilities of tugs or escort vessels to control a tanker experiencing a loss of propulsion and/or steering control. In addition, Part One discussed alternative types of tugs.

The DTTSG has now released Part Two of the study. Part Two evaluates alternative equipment and deployments that could improve response safety and cost-effectiveness. Using computer simulations, Part Two examines the emergency assist capability of existing escort vessels as well as alternatives which could be used in a worst case failure scenario in PWS. The study also investigates variants from the worst case.

The worst case tanker failure in the context of Part Two entails placing the highest control demands on the tug(s) to prevent a grounding incident. Parameters for the worst

case scenario include a hard-over rudder failure, a time delay for recognition of rudder failure, a loss of power, and extreme weather conditions. A response scenario is considered a failure if the tugs could not prevent the tanker from veering outside the navigational limits of the waterway. The parametric variations involved investigating less-than-worst-case scenarios to identify the performance limits of the escort vessels.

The computer simulation included three representative tanker sizes and a representative of each class of tugs currently on charter for PWS escorting operations. Additionally, the researchers modeled and analyzed four other tug designs as possible alternatives to enhance the current charter fleet's capabilities.

The results of the study indicated that --

- a) Three alternative emergency assist strategies proved successful for several transit speed and wind condition combinations. These are: the tethered rudder tug, the European-style short-line tether, and the stopping assist and reversing the tanker engine with tug assist;
- b) All of the current escort tugs have adequate power to tow a disabled tanker in the worst case climatology of Valdez Arm and most other areas of PWS. However, there is insufficient sea room in many areas of the Sound to allow time for the tug to rig its towline and begin towing; and
- c) None of the investigated tugs can tow the modeled 170,000 and 265,000 DWT vessels to windward in the worst case climatology identified for the Gulf of Alaska.

The National Technical Information Service is publishing the study. When available for distribution, ordering information will appear in the *OPA 90 Update*.

DRAT Equipment Specialists Meet at NSFCC

A meeting to discuss DRAT oil spill response equipment issues was held at the National Strike Force Coordination Center on 13-14 September 1994. The meeting was well attended with representation from most USCG Districts, the Office of Marine Environmental Protection, the Office of Environmental Compliance and Restoration, the National Strike Force (NSF) and the U.S. Navy Supervisor of Salvage (SUPSALV).

Many items concerning the storage, use, proper cleaning, maintenance, repair training and current engineering modifications of the USCG's pre-positioned oil spill response equipment were discussed. The meeting provided an excellent forum for all involved with this equipment to share their experience and benefit from the lessons that have been learned through exercise and actual spill employment of the equipment. Common casualties, their causes, and improvements to the system were also discussed.

In addition to the specific equipment discussions, valuable information was exchanged concerning the roles of the NSFCC, the DRAT's and SUPSALV with regard to the management and use of the systems. This information will be helpful as the USCG starts its second year of full equipment deployment, scheduled preventive maintenance, and training.

News

DRAT Equipment (cont.)

This meeting proved to be very successful and the NSF plans to host future meetings of this group on a periodic basis.

MARAD Reorganization

On October 5, 1994, Transportation Secretary Frederico Pena announced the long-awaited reorganization plan for the Maritime Administration. The reorganization plan, developed by VADM Herberger, the Maritime Administrator, is designed to support the enactment of maritime reform legislation, the administration's shipbuilding initiative, and the Secretary's priorities in the areas of intermodalism, port development, economic development, and the environment.

Major areas within the agency are:

- a) associate administrator for national security, under whom will be the office of sealift support;
- b) associate administrator for shipbuilding technology and development, with an office of shipyard revitalization;
- c) associate administrator for ship financial assistance and cargo preference;
- d) associate administrator for port, intermodal and environmental activities, including offices of intermodal development and environmental activities;
- e) associate administrator for policy, international trade, and marketing, including an office of statistical and economic analysis.

MARAD has changed the boundaries of its five regions. A new marketing field office will be in Miami and a new field office for marketing, ports and domestic shipping will be created in St. Louis.

Washington State Improves Small Spill Enforcement

The Washington State Department of Ecology (Ecology) is testing a new way to make sure that small oil spills on State waters are reported and cleaned up just as vigorously as the big ones.

Ecology has given a group of specially trained spill inspectors authority under state oil spill laws to write "field citations", which are similar to traffic tickets, for spills of less than 500 gallons when there is a clear-cut violation of state-law. Field citation ticket books will be carried by the inspectors as of September 1, 1994.

"Our goal here is not to write a lot of tickets, but to make people aware that even a small spill can hurt, and that you need to report it to the proper authorities and clean it up," said Ecology Spill Operations Supervisor Steve Hunter. "If you've made an honest mistake and you're making a good attempt to correct it, you'll probably receive a warning and some help to avoid making the same mistake again."

During an average year, Ecology usually handles a handful of oil spills over 500 gallons. But during a one-year period in 1992-1993, for example, 118 spills under 500 gallons were reported to the state, and 83 percent of those spills were less than 50 gallons in size.

"We've all seen the harm caused by a big spill, but even a 25-gallon spill can damage the environment," said Hunter.

An oil spill field citation can be used as a warning or monetary penalty for —

- a) Unlawful discharge of a petroleum product into State waters from a ship, boat or oil handling facility: such a discharge could result in a maximum penalty of \$1,000;
- b) Failure to immediately notify the proper authorities of a petroleum product spill to state waters: such failure could result in a maximum penalty of \$500. (To report a spill, call 1-800-258-5990. Marine spills must also be reported to the USCG, 1-800-424-8802.); or
- c) Failure to immediately collect, remove or contain petroleum products spilled from a ship, boat or oil handling facility such a failure could result in a maximum penalty of \$500.

Hunter said Ecology did not have an effective way to enforce spill laws at small spills because the existing enforcement process was designated to deal with larger spills. "We're counting on contact between our inspectors and the public to help spread the word to those who want to do the right thing, and appropriate penalties for those who don't," he added.

Hunter said Ecology will review the results of the field citation program in six months.

For further information, contact Bill Zachmann, Ecology Spill Response, at (206) 407-7447 or Ron Langley, Ecology Public Information, (206) 407-6162.

News

Another Method to Meet OPA 90 COFR Requirements Announced

The USCG interim rule issued on July 1, 1994, requires all tankers sailing in U.S. waters after December 28, 1994 to obtain Certificates of Financial Responsibility (COFRs) (59 FR 34227). A COFR indicates that the vessel has evidence of financial capability for liability claims in the event of an oil spill. Vessel owners are required to obtain COFRs by section 1016 of OPA 90. Owners can establish evidence of financial responsibility through insurance, surety bond, self-insurance, financial guaranty, and other evidence of financial responsibility.

Another option to meet these requirements of OPA 90 is being offered. OPAClub, designed by Willis Corroon and C.A. Shea & Co., Inc., is a new surety program that exclusively assists vessel owners in complying with OPA 90 financial responsibility requirements. The program does not financially discriminate between small, medium or large vessel owners, provided they are members of one of the P&I Clubs within the International Group and carry U.S. pollution coverage.

OPAClub proposes to enable its members to comply with OPA 90 on a mutual basis with premiums ranging from \$250,000 for smaller organizations to \$2,000,000 for the largest. The program requires members to support their membership with Letters of Credit. The OPAClub proposal uses U.S. Treasury listed surety companies as required by the USCG.

NOSAC Meeting To Be Held

The National Offshore Safety Advisory Committee (NOSAC) will meet to discuss various offshore safety related issues. The meeting will be held on Monday, November 14, 1994, from 12:30 p.m. to 4:00 p.m. at the Shell Annex Auditorium (2nd Floor of the Parking Building), 701 Poydras Street, New Orleans, Louisiana. This meeting will be open to the public.

The agenda will include discussion of the following topics:

- a) Clean Air Act of 1990;
- b) International Shipping Management Code Implementation for the Offshore Industry;
- c) Status of Coast Guard Maritime Regulatory Reform (MRR);
- d) Revision of subchapter "L" on Offshore Supply Vessels (OSVs) and Liftboats;
- e) Legislative initiatives on a new category of larger OSVs; and
- f) IMO items affecting the offshore industry.

With advance notice, and at the discretion of the Chairman, members of the public may make oral presentations at the meeting. Persons wishing to make oral presentations should notify Commandant (G-MVI-4), U.S. Coast Guard, 2100 Second Street SW, Washington, DC 20593, Attention: CDR Adan Guerrero, Executive Director, tel.: (202) 267-2307, no later than November 13, 1994. Written statements or materials can be submitted at any time,

but to ensure distribution to each Committee member, 20 copies of the written materials should be submitted to CDR Guerrero by October 28, 1994.

Space Shuttle Tests Radar on Oil Spills

On October 6, 1994, the Space Shuttle *Endeavor* flew over the North Sea to test the radar capabilities of the most sophisticated civilian space radar. Radar scans of the surface of earth were conducted within the framework of the SIR/X-SAR experiment. "SIR" is the acronym for the American Shuttle Imaging Radar, and "X-SAR" stands for the German-Italian X-band Synthetic Aperture Radar. The experiments included observations of preplanned oil spills in the North Sea. The oil spill experiment was developed by the Research Group for Satellite Oceanography of the Institute of Oceanography at the University of Hamburg.

SIR/SAR-X images provided researchers with measurements from the oil spills of radar signatures of natural surface films. The measurements were designed to provide information on the circumstances and the way in which natural surface films damp short ocean waves and whether radar processes are capable of differentiating between these natural surface films and the ones from mineral oils. Surface films are detected as dark signatures in the SIR/X-SAR images as a result of the dampening effect.

News

Space Shuttle Radar (cont.)

The experiment involved monomolecular surface films in pure and dissolved form being spread across the ocean water with a half sea mile in between to prevent overlap. In addition, mineral oil films also in pure and dissolved form were applied. The distance between the two types of films was one sea mile. These films were applied simultaneously in order to investigate their different dampening behavior under the same oceanographic and meteorological conditions. The substances applied during the experiment were trioleine, oleic methyl ester, oleic alcohol, diesel oil, and heavy heating oil.

According to a representative of the German space agency, DARA, scientists were able to determine within a few minutes the composition of the spills through a computer enlargement of the radar images. Once the radar processes are automated, scientists will be able to determine the composition of spills within seconds.

INTERTANKO's Viewpoint On OPA 90

A speech delivered by Miles Kulukundis at Marine Log's Conference "Tanker Legislation '94" in Washington D.C. on September 29, described how the international tanker industry is adjusting to OPA 90 regulations. Mr. Kulukundis reported that tanker owners have actively participated with the USCG to implement OPA 90 regulations. He emphasized the need for partnerships between shipowners, shore bodies, and others to improve safety at sea and reduce the risks of pollution.

Mr. Kulukundis observed that OPA 90 enacts degrees of prevention, for example, the

requirement for the phase-in of double hull construction for tankers. IMO's Rule 13G embraces OPA 90's double hull tanker construction, and the industry's compliance with the double hull design can be seen in almost every new contract for a deep sea tanker.

Tanker owners point out that they have only partial control over casualty factors. The help and support of many parties is needed for the proper navigation of a big ship. Mr. Kulukundis pointed out the shared responsibility involved in developing adequate thought-out vessel control, charts, and traffic separation schemes. Attention to these areas is necessary to reduce dangerous traffic conditions and risks of accidents in U.S. waters. Also, INTERTANKO would like to see partnerships between responsible, competent and qualified U.S. pilots, officers, crew, and shore and office personnel to navigate ships safely through U.S. waters.

Mr. Kulukundis pledged INTERTANKO's support for the USCG initiative of targeting substandard ships, but suggested the USCG examine the cargo owners who employ and give support to higher-risk ships.

Events

Natural Resource Damages Conference

Title: Natural Resource Damages: The Latest Trends and Developments

Sponsor: Executive Enterprises, Inc.

Date: October 24-25, 1994

Location: The Grand Hotel, 2350 M Street, NW, Washington, DC 20037.

Contact: Tel: (800) 831-8333, Environmental Enterprises, Inc.

The conference will provide the latest information on the impact of Natural Resource Damages (NRD) rulemakings and strategic options for organizations. Main topics of this conference include: the latest developments in NRD assessment regulations, different ways to minimize causation exposure, state NRD claims, restoration and remediation, contingent valuation methods (pro and con), valuing natural resource damages, and the future of NRD.

To register, call (800) 831-8333, fax (212) 645-8689, or mail registration form to: Executive Enterprises, Inc., 22 West 21st Street, New York, NY 10010-6990. The tuition fee per person is \$1,195.

Double Hull Technical Symposium

Title: Advanced (Unidirectional) Double Hull Technical Symposium

Sponsors: U.S. Navy and the Maritime Administration, coordinated by Lehigh University's Advanced Technology for Large Structural Systems Engineering Center.

Date: October 25-26, 1994, Conference hours are 8:00 a.m. to 5:00 p.m. both days.

Location: National Institute of Standards and Technology, Gaithersburg, MD

Contact: Mr. J. William Jahn, tel: (610) 758-6259; fax: (610) 758-6188; E-mail: ADHSYMP@lehigh.edu.

Events

Double Hull Symposium (cont.)

The purpose of the symposium is to transfer to the U.S. maritime industry advanced (unidirectional) double hull technical knowledge generated by the various advanced double hull projects sponsored by the U.S. Government during the past five years. Objectives of the Advanced Double Hull Technical Symposium include providing a focused technology discussion of double hull structural design and related issues; providing a forum for both participants and researchers to present, discuss and debate the double hull research and development activities of the past five years; providing a setting to discuss the emerging and required technologies for future development and information transfer; and publishing symposium proceedings that will bring issues to the surface and provide a repository for technical papers.

The symposium will be of interest to employees of U.S. businesses or government agencies involved in the ownership, operation, design, fabrication, and repair of large ships, including equipment and material suppliers.

Registration fees are \$200 per participant by September 30, and \$225 after September 30. The conference fee includes working lunch on Tuesday and Wednesday, two breaks each day, Tuesday banquet, and printed materials. Registration is being coordinated by the Bursar's Office, Lehigh University, 27 Memorial Drive West, Bethlehem, PA 18015-3093, fax: (610) 758-3198.

Hotel rooms are available at the Gaithersburg Hilton, 620 Perry Parkway, Gaithersburg, MD, 20877. Reservations can be made by calling (301) 977-8900 or (800) 599-5111. A rate of

\$70.00 has been made available to conference participants, if a reservation is made prior to October 3, 1994.

Clean Gulf 94

Title: Government and Industry: Forming a Partnership in Oil Spill Prevention, Preparedness and Response

Sponsors: Florida Spillage Control Association and Florida Department of Environmental Protection

Date: November 1-4, 1994

Location: Twin Towers Hotel and Convention Center, Orlando, FL.

Contact: Mr. Steve Babb, Clean Gulf '94, 20 N. Orange Ave., Suite 907-E, Orlando, FL 32801, tel: (407) 425-8184, fax: (407) 425-7738.

The fourth annual Clean Gulf Conference & Exhibition will address the critical need of government and industry working together in the management of oil spill prevention, preparedness, and response. The realities of dealing with the myriad of oil spill legislation and regulations implemented in the last few years will be examined along with a discussion of lessons learned from recent spills.

A rate of \$75.00, single or double occupancy, has been negotiated at the Twin Towers Hotel and Convention Center where all functions are scheduled. Conference registration includes unlimited access to conference sessions and exhibits, all food and beverage functions, and the official conference program guide. The individual full conference registration is \$295 before October 1, 1994, and \$325 after October 1, 1994. The individual single day registration is \$150 before October 1, 1994, and \$175 after October 1, 1994. Exhibition only registration is \$15 on any day.

IADC Well Control

Conference of the Americas

Title: International Association of Drilling Contractors 1994 Well Control Conference of the Americas

Sponsors: Chevron and Parker Drilling Company

Date: November 16-17, 1994

Location: Adam's Mark Hotel, Houston, TX.

Contact: Rose Mary Lyons, IADC, P.O. Box 4287, Houston, TX 77210, tel: (713) 578-7171, fax: (713) 578-0589.

The third annual IADC Well Control Conference of the Americas has as its theme "Training & Technology to Meet the Challenges of the '90s." The conference is designed for employees of producing, drilling, and associated service companies, or regulatory agencies who are involved with or have an interest in well control training, equipment, engineering or operations. More than 20 original technical papers will be presented, with participants receiving a complete published copy of the proceedings. Cynthia Quarterman, Acting director of the U.S. Minerals Management Service, has been invited as keynote speaker. An exhibition of products and services relating to well control is also featured. The 1993 Conference attracted more than 200 well control professionals from 11 countries.

A rate of \$89 single occupancy, \$99 double occupancy has been negotiated with the Adam's Mark Hotel if reservations are made by November 1. Participant registration is \$175 per person for employees of IADC member companies and \$225 per person for employees of non-member companies. To reserve lodging, call (800) 444-2326 or (713) 978-7400. A limited amount of exhibit space is available at \$150 per table.

Events

SNAME 1994 Annual Meeting, New Orleans

Title: 1994 Annual Meeting and International Maritime Exposition

Sponsor: The Society of Naval Architects and Marine Engineers (SNAME)

Date: Nov 16-19, 1994

Location: Fairmont Hotel, New Orleans, LA

Contact: Mr. Steven Cherry, Publications Coordinator at (201) 798-4800

The Society of Naval Architects and Marine Engineers is holding a symposium in conjunction with its annual meeting on November 16-19, 1994. The symposium, which is entitled "Ship Design and Operation in Harmony with the Environment," will be held in New Orleans at the Fairmont Hotel. Senator John Breaux has been invited to speak at the banquet. Dr. Watson of the Environmental Division of the White House's Office of Science and Technology Policy has been invited to be the keynote speaker. Additional presentations will be made by Mr. Clif Curtis, Ocean Ecology Policy Advisor, Professor Wenk of the University of Washington, and Ivar Manum of the Norwegian Maritime Directorate.

In the afternoon, there will be a round table discussion on the following topics: Regulations: State and Local Issues; Regulations: An Operating Perspective, Environmental Technology - State-of-the-Art Assessment; and Environmental Technology - An R&D Perspective. Papers on environmental protection design issues will be presented in parallel sessions.

For additional information contact the SNAME membership department at (201) 798-480, ext. 3035, 3036, or 3037, or fax: (201) 798-4975.

ASTM F-25 Meeting

Title: Ships and Marine Technology

Sponsor: American Society for Testing and Materials

Date: December 6-8, 1994

Location: Holiday Inn Crown Plaza, Phoenix, Arizona

Contact: Ms. Teresa Cendrowska or Ms. Barbara Lake, tel: (215) 299-5546

The guest speaker at the main meeting will give a tutorial on the maritime infrastructure of Mexico to include the shipbuilding and ship design communities, the merchant marine, the port organization, and its Navy.

There is no registration fee to attend ASTM technical committee meetings, but a registration form must be completed on-site.

After November 4, 1995, the hotel will release unsold rooms to the general public. Contact the Holiday Inn Crowne Plaza to make reservations, 111 North Central, Phoenix, AZ 85001-1000, tel.: (602) 257-1525; fax: (602) 253-9755.

For additional information concerning accommodations, travel, logistics, etc., contact the Meetings Department at (215) 299-2613.

Oil Spill Conference 95

Title: 14th Biennial International Oil Spill Conference: Achieving and Maintaining Preparedness

Sponsors: EPA, USCG, the American Petroleum Institute, the IMO, and the International Petroleum Industry Environmental Conservation Association.

Date: February 27- March 2, 1995

Location: Long Beach, CA.

Contact: 1995 International Oil Spill Conference, 665 15th Street NW, Suite 300, Washington, DC 20005; tel.: (202) 639-4202, or fax: (202) 247-6109.

The conference will focus on a wide variety of topics including oil pollution prevention, preparedness, new or improved technologies for oil spill prevention and response, oil spill management, mitigation, and liability.

Coastal Zone 95

Title: Coastal Zone 95

Sponsors: National Oceanic and Atmospheric Administration's National Ocean Service, Texas A&M University, State of Florida's Coastal Management Program

Date: July 17-22, 1995

Location: Tampa Convention Center in Tampa, FL.

Contact: Mr. Matt Manashes, tel: (301) 713-3086, or Ms. Kathy Mason, tel: (301) 713-3155.

Registration fees will be announced in the preliminary program which will be mailed in March 1995. Coastal Zone 95 provides an excellent opportunity to reach out to a broad audience and highlight programs, expertise, and accomplishments in ocean and coastal resource management. Incentives for participation include a photo and poster contest; opportunity to attend conjunctive meetings; networking opportunities; reception at the Florida Aquarium (opening in 1995) and other social events; a town meeting featuring special guests; and significantly reduced registration fees.

Company News

The information contained in "Company News" has been provided to the OPA 90 Update by the subject companies. The USCG has made no attempt to check the validity and accuracy of the claims regarding products or services. Publication of information provided below does not constitute USCG endorsement.

Det Norske Veritas and the USCG Enter Into Passenger Ship Control Agreements

On September 12, 1994, the President of Det Norske Veritas (DNV) Classification, Tor Christian Mathiesen, signed two agreements on passenger ship control verification with the USCG's chief of Marine Safety, Security and Environmental Protection, Rear Admiral J.C. Card.

The "Outlines of Cooperation" will permit DNV to ensure that the applicable USCG standards are complied with during the design and construction or modification of any non-U.S. flag passenger vessel classed by DNV. This will be accomplished through full cooperation between the two entities and by DNV conducting approval of basic design, conferring with the USCG on interpretive matters, and providing the USCG with DNV approved plans and related information. In addition, there will be oversight visits by the USCG at DNV offices. Det Norske Veritas will act as the point of contact with the USCG during the examination process, permitting the shipyard and the owner to have a single and hopefully clearer line of communication.

The purpose of the additional service is to identify and resolve problems for the owner at an early stage in the project. Also, this agreement will likely reduce or limit the amount of time the USCG needs to spend aboard the vessel both at the construction site as well as at the first U.S. port of call. It is expected that this agreement will further help minimize unforeseen difficulties and to facilitate satisfactory USCG final acceptance of the ship in a U.S. port of entry. For more information about this or other DNV Classification services please contact the DNV Regional Manager Ioannis Kourmatzis at (201) 488-0112.

Biodegradable Absorbents

Industrial Petroleum Supply, Inc. (IPS) manufacturers and markets a line of biodegradable absorbents marketed under the IPS BIO-ZORB brand name. The all natural absorbents are made from a blend of wool and cotton. IPS absorbents can be wrung out and reused eight or more times.

The environmentally friendly absorbents are available in 3", 5" and 8" X 5', 10' and 20' booms, in pillows and in 18" X 18" mats. Shoreline mats are available in rolls, and absorbent, non-skid, heat resistant walkway mats made from the same material are also available. On deck and shore spill kits are also featured in the line.

For further information, contact Steve K. Smith or K.E. Eseray at (502) 926-4606, or by fax at (502) 926-4608, or by mail to IPS, Inc., 3520 New Hartford Road, Owensboro, KY 42303.

Petroleum Hydrocarbon Remediation and Cleanup

Foss Environmental Services announced that it has agreed to distribute Petroleum Environmental Services, Inc. (PES) line of petroleum hydrocarbon remediation and cleaning products. The Product line presently includes PES-51©, PES-41©, and PES-31©.

PES-51© is composed of hydrocarbon cleaning components that lift and remove oil from porous and non-porous surfaces, such as rocks, concrete, metal, fiberglass, rubber and plastic. Formulated to aid in shoreline cleanup during an oil spill, PES-51© is composed of all natural microbial by-products which create surface tension reduction at the hydrocarbon interface allowing hydrocarbons to be lifted from impacted surfaces. To further aid in the oil spill cleanup, a biodegradable protein film temporarily (48 to 92 hours) remains on cleaned surfaces to reduce any re-adhesion of oil, as often occurs during the cleaning operations.

PES-41© Pavement Treatment System is a blend of naturally occurring, hydrocarbon digesting bacteria and a natural, non-chemical dispersant. It is formulated to lift hydrocarbons from surfaces and, from the moment of application, begin digestion of the hydrocarbons.

PES-31© is a bioremediation product for cleanup of soil, waste water, and sludge which has become contaminated with

Company News

FOSS Env. (cont.)

toxic organics such as hydrocarbons. PES-31© was developed by the University of Texas at San Antonio (UTSA) and is composed of a synergistic mixture of microbes that sequentially degrade the hydrocarbon molecule.

Foss Environmental offers a full range of environmental services including spill response, site remediation, industrial cleaning, training and pollution control equipment sales from four West Coast locations.

For further information, contact Foss Environmental Services Company, 7440 West Marginal Way South, Seattle, Washington 98108; tel: (206) 767-0441, or fax: (206) 767-3460.

OILMAP Oil Spill Response Management System

OILMAP is a user friendly, DOS-based oil spill model system suitable for use in oil spill response and contingency planning. It requires no knowledge of oil spill modeling. OILMAP uses graphical procedures for entering wind data and specifying a spill scenario. The system incorporates an embedded Geographic Information System (GIS) for storing any type of geographically referenced data and can be used to display model predictions in relation to important or sensitive resources.

OILMAP modules are available to —

- a) predict the surface and subsurface trajectories of spilled oil;
- b) predict the weathering of spilled oil parameterizations for vertical entrainment, spreading, evaporation, emulsification and shoreline stranding;
- c) perform risk assessments for important resources;
- d) forecast the probabilities of various areas being impacted by a spill from any given risk site;
- e) assess the vulnerability of sensitive sites to oiling using reverse trajectory calculations for risk assessment;
- f) assess the effectiveness of differing cleanup and response options;
- g) import Oil-Tracker buoy locations in real-time for monitoring current spill locations; and
- h) animate oil spill trajectories on computer screen or print predictions.

For further detailed information, contact: Brian King, Australian Institute of Marine Science, PMB 3, Townsville MC. Qld 4810, Australia, tel.: +61 77 789 211, or fax: 725 852.

OSRO Classification

Since few new Oil Spill Removal Organizations (OSROs) receive Interim or Final Classification by the National Strike Force Coordination Center (NSFCC) each month, the monthly *OPA 90 Update* will only print additions or changes to the list. The *Update* will print the entire list once per quarter.

OSROs listed below have received changes in Classification since September 15, 1994. A bullet (•) indicates Final Classification received via on-site inspections by USCG Strike Team Personnel.

Classification is by recovery capacity—Level E is the highest, Level A the lowest. For additional information, contact LT Rick Johnson at (919) 331-6000, ext. 3015; SKC Jakway at (919) 331-6000, ext. 3029; or MST1 Terry Roberts at (919) 331-6000, ext. 3030.

The following abbreviations are used: R/C for Rivers/Canals, I/N for Inland/Nearshore, GL for Great Lakes, and O/OO for Offshore/Open Ocean.

For a complete OSRO Classification listing, consult the September 15, 1994 edition of the *OPA 90 Update*. The next complete list will be published in the December 15, 1994 edition.

The following OSRO has received final classification:

CLASS D

- So. Cal. Ship Services
Long Beach, CA
R/C

CLASS B

- So. Cal. Ship Services
Long Beach, CA
I/N

Studies, Reports, and Rulemakings

The OPA 90 Update has received a letter suggesting that it provide fax numbers for persons listed as contacts. Where available, these numbers have been included. The fax number for the Update is (202) 267-4624.

OPA 90 projects are subject to review by the Office of Management and Budget (OMB). This review may delay the publication of some projects by several months.

Projects are arranged sequentially according to the section number of the Act.

The number in parentheses following the abbreviated project title is the OPA 90 project number. When calling to request additional information, please reference this number.

The completion dates for all regulatory projects have been recalculated to allow for early public consultation as provided for in Executive Order 12866, a minimum 90 day public comment period, and new review schedules. In some cases, this recalculation has resulted in projected completion dates that are later than those carried in previous editions of the Update.

SEC.1004(d)(2)(A) & (B) Deepwater Ports Study(2):

Requires the Secretary to conduct an operational and environmental risk study of deepwater ports and report findings to Congress.

Status: The study has been completed and delivered to Congress and is available through NTIS.

Contact: Mr. Jordan, tel.: (202) 267-6751, fax: (202) 267-4624.

SEC.1004(d)(2)(c) Rulemaking for Establishing Limits of Liability for Deepwater Ports (3):

OPA 90 directs the Secretary of Transportation to initiate a rulemaking establishing limits of liability between \$50 million and \$350 million, as appropriate. Because the environmental impact and costs of an oil spill from a facility is site-specific, limits of liability must be set on a case-by-case basis. The only U.S. deepwater port at present is the Louisiana Offshore Oil Port (LOOP) in the Gulf of Mexico 18 miles off the Louisiana coast.

Status: NPRM is currently in review.

Projected publication date: December 1994

Contact: Mr. Jordan, tel.: (202) 267-6751, fax: (202) 267-4624.

SEC.1012(a), SEC.6002(b) Access to the Oil Spill Liability Trust Fund by Federal Agencies (98):

Addresses costs incurred by Federal authorities for removal activities or by natural resource trustees initiating damage assessments to be paid by the Fund.

Status: NPRM is awaiting review by OMB.

Projected publication date: March 1995.

Contact: Mr. Thuring, tel.: (703) 235-4746, fax: (703) 235-4838.

SEC.1012(d) and (e) Access to the Oil Spill Liability Trust Fund by State Officials (7):

Addresses the manner in which the Fund may be obligated upon the request of the Governor of a State or pursuant to an agreement with a state for payment of removal costs.

Status: First-phase IFR published Nov 13, 1992. Second-phase NPRM, which awaits review by OMB, will address specific agreements with states.

Projected publication date: April 1995.

Contact: Mr. Thuring, tel.: (703) 235-4746, fax: (703) 235-4838.

SEC.1013(e) Claims Procedures (8) and SEC.1014(b) Designation of Source and Advertisement (9):

Addresses the presentation, filing, processing, settlement and adjudication of claims against the Fund, as well as the advertisement of designation and the notification of claims procedures.

Status: Final Rule is on hold pending resolution of whether Federal Trustees can be paid through the provisions of section 1013(e).

Projected completion date: Undetermined.

Contact: Ms. Burdette, tel.: (703) 235-4762, fax: (703) 235-4838.

SEC.1016(a) Financial Responsibility (10):

Requires vessel owners and operators to demonstrate and maintain evidence of financial responsibility meeting the limits of liability established by OPA 90 Sec.1004(a).

Status: Interim Final Rule published July 1, 1994 (59 FR 34210).

Contact: Mr. Horowitz, tel.: (703) 235-4792, fax: (703) 235-4838.

Studies, Reports, and Rulemakings

SEC.3002 U.S.-Canada Great Lakes Oil Spill Cooperation and

SEC.3003 U.S.-Canada Lake Champlain Oil Spill Cooperation (12&87):

Requires the Department of State to review international agreements and treaties with the Government of Canada regarding the prevention of oil discharges, assurance of removal of oil, and full compensation to those injured by a discharge on the Great Lakes and Lake Champlain.

Status: Discussions ongoing between U.S. and Canada. Project completion date dependent upon outcome of U.S.-Canada discussions.

Contact: Ms. Sullivan, tel.: (202) 267-6404, fax: (202) 267-4624.

SEC.3004/4202(a)(6)(a) National And International Inventories of Removal Equipment and Personnel (49&89):

Computer database of oil spill removal resources.

Status: NSFCC database is on line.

Contact: NSFCC Staff, (919) 331-6000.

SEC.4101(a) and (b) Review of Drug Abuse in Issuing Licenses, Certificates of Registry, and Merchant Mariner's Documents (14&15):

Requires merchant marine credential candidate applicants to be tested for the use of dangerous drugs.

Status: NPRM published March 4, 1994 (59 FR 10544). Comment period closed May 3, 1994.

Projected completion date: January 1995.

Contact: Mr. Cratty, tel.: (202) 267-6742, fax: (703) 267-4624.

SEC.4102(e) Criminal Record Review (18), SEC. 4105 Access to National Driver Register (21):

Provides discretionary authority to review the criminal record of each merchant mariner credential applicant, and requires applicants to make available information in the National Driver Register.

Status: NPRM is in review. OMB has waived review of the NPRM.

Projected publication date: November 1994.

Contact: Mr. Cratty, tel.: (202) 267-6742, fax: (202) 267-4624.

SEC.4102(b)(c) and (d) Term of Validity for Certificates of Registry and Merchant Mariners' Documents (16,17&17A):

Establishes a 5 year term of validity and provides a schedule for the expiration of existing certificates of registry and merchant mariners' documents.

Status: Final rule was published September 27, 1994 (59 FR 49294).

Contact: Mr. Cratty, tel.: (202) 267-6742, fax: (202) 267-4624.

SEC.4103 Suspension and Revocation of Licenses, Certificates of Registry, and Merchant Mariner's Documents for Alcohol and Drug Abuse (19):

Will allow the USCG to temporarily suspend and take possession of a license, COR, or MMD before a hearing under certain circumstances; adds two new bases under which merchant

mariner credentials may be suspended or revoked, and imposes a new requirement on a mariner that must be satisfied before merchant mariner credentials can be issued after revocation.

Status: NPRM being drafted. (See Projects 18 and 21)

Projected publication date: May 1995.

Contact: Mr. Cratty, tel.: (202) 267-6742, fax: (202) 267-4624.

SEC.4106(a) Manning and Crew Standards for Foreign Tank Vessels (22):

Revises the requirements for evaluating manning and crew standards of foreign countries which operate in U.S. waters.

Status: Regulations are being developed. A public meeting is scheduled for October 19, 1994 to obtain industry input on this project.

Projected publication date: NPRM, July 1995.

Contact: Ms. Landman, tel.: (202) 267-6770, fax: (202) 267-4624.

SEC.4106(b) Reporting Marine Casualties (23):

Requires that oil and hazardous materials discharges be reported to the USCG. Adds "significant harm to the environment" to the list of reportable marine casualties.

Status: Regulations are being developed.

Projected publication date: NPRM, April 1995.

Contact: Ms. Pamela Pelcovits, tel.: (202) 267-6778, fax: (202) 267-4624.

Studies, Reports, and Rulemakings

SEC.4107(a) Vessel Traffic Service Authority (24):

Establishes the requirements and procedures that allow the Secretary to make participation in appropriate VTS mandatory.

Status: Final rule published July 15, 1994.

Contact: Ms. Hoffman,
tel.: (202) 267-6277
fax: (202) 267-4826.

SEC.4109 Periodic Gauging of Plating Thickness (27):

Establishes minimum plating thickness standards for tank vessels and requires periodic gauging of vessels over 30 years old.

Status: Final rule published Oct 8, 1993 (58 FR 52599).
Project complete.

Contact: Mr. Jordan,
tel.: (202) 267-6751,
fax: (202) 267-4624.

SEC.4110(b)(1) Overfill Devices (28):

Requires devices and standards to warn of tank overfills on oil cargo vessels.

Status: Revised RE published Oct 21, 1993 (58 FR 54315).
IFR will be published shortly.

Contact: Mr. Grenwelge,
tel.: (202) 267-6220,
fax: (202) 267-4624.

SEC.4110(b)(2) Tank Level or Pressure Monitoring Devices (29):

Requires tank level or pressure monitoring devices be used for leak detection.

Status: RE being revised to reflect an additional proposed method of tank level monitoring, which will be included in the NPRM. A public meeting has been scheduled for December 9, 1994 to obtain early public participation on this project.

Projected publication date: February 1995.

Contact: Mr. Grenwelge,
tel.: (202) 267-6220,
fax: (202) 267-4624.

SEC.4111 Study on Tanker Navigation Safety Standards (30):

Requires the Secretary to report on the adequacy of existing laws and regulations to ensure the safe navigation of vessels transporting oil.

Status: Study is being conducted in 12 parts. Congress will review periodic reports as sub-studies are completed.

Projected completion date: September 1995.

Contact: Ms. Meers,
tel.: (202) 267-6758,
fax: (202) 267-4624.

SEC.4113 (a&b) Use of Liners (33):

EPA is determining if liners should be used to prevent leaking at onshore facilities located near navigable waters that are used for the bulk storage of oil.

Status: EPA will make recommendations in a report which is currently being drafted. Next action undetermined.

Contact: Mr. Mould,
tel.: (703) 603-8728,
fax: (703) 603-9116.

SEC.4114 (a) Autopilot and Unattended Engine Room (35 & 35a) and 4116(b) Second Licensed Officer on the Bridge (43):

Establishes tanker navigation regulations which govern the use of autopilots and establish minimum bridge manning levels.

Status: Final rule became effective July 9, 1993. The effective date for the portion of the rule that governs the use of INS in certain sections of the navigable waters of the U.S. has been suspended

because adequate technology does not currently exist. A new rulemaking will be initiated when appropriate technology is available.
Project complete.

Contact: Ms. Hegy,
tel.: (202) 267-0415.

SEC.4114 (b) through (e) Manning Standards for U.S. Tank Vessels (36):

OPA 90 requires the USCG to maintain "computerized" vessel manning records. The USCG has revised its record-keeping procedures to meet this requirement of the Act.

Status: Project complete.

Contact: G-MVP Division,
tel.: (202) 267-0214.

SEC.4115(a) Establishment of Double Hull Requirements (38) & (81):

This section of OPA 90 establishes a double hull requirement for tank vessels. However, the Act does not define what constitutes a double hull. The USCG published an IFR on August 12, 1992, setting forth standards. That IFR is currently effective. To determine the most effective structural requirements for double hulls, the USCG initiated non-mandated studies to evaluate configurations, construction, and structural systems of double hulls. Completed studies have been presented to IMO as papers.

Status: Comments on the IFR have been reviewed and the final rule is under review. Publication of the final rule will be dependent upon the length of the review process.

Projected completion date: December 1994.

Contact: Mr. Gauvin,
tel.: (202) 267-1181.

Studies, Reports, and Rulemakings

SEC.4115(a) Research in Tanker Groundings(38A):

This non-mandated study is being conducted by the USCG to determine if regulations are needed to implement this section of the Act. This study explores the behavior of tanker structures during groundings.

Status: Research is being conducted at MIT and is scheduled for completion in December 1995.

Contact: Mr. Sirkar, tel.: (202) 267-2988.

SEC.4115(a) Stability Criteria for Double-Hulled Tank Vessels (80)

Requires vessels constructed or adapted to carry oil in bulk or as cargo residue, for which a contract was placed after June 30, 1990, to be equipped with double hulls.

Status: NPRM is being drafted. Projected publication date has been revised to allow completion of other high priority projects.

Projected publication date: December 1994.

Contact: Mr. Jordan, tel.: (202) 267-6751, fax: (202) 267-4624.

SEC.4115(b) Existing Tank Vessel Requirements (37):

Requires additional structural and operational measures for single-hull tank vessels, of 5000 gross tons or more, until the phase-out date, to reduce pollution.

Overall Status: NPRM was published October 22, 1993 (58 FR 54870). Based on the public meeting held January 20, 1994, in Washington, DC, and on comments received to date, the USCG

has broken this project into three distinct phases to accelerate portions that are non-controversial. The new phases will include specific operational measures. In addition, the USCG will reexamine structural requirements. For a more complete discussion see the May 15, 1994 and the February 15, 1994 editions of the *OPA 90 Update*.

Phase I: A final rule consisting of requirements for lightering equipment and the reporting of a vessel's international IMO number prior to port entry was published August 5, 1994 (59 FR 40186).

Phase II: A supplemental NPRM outlining proposed operational measures, survey requirements, and maneuverability standards which will focus on reducing the risk of these vessels being involved in a mishap.

Projected publication date: March 1995.

Phase III: A supplemental NPRM detailing the structural requirements for these vessels and also including some alternative measures for reducing the outflow of oil if the vessel becomes damaged.

Projected publication date: October 1995.

Contacts: Phase I & III: Mr. Crenwelge, tel.: (202) 267-6220, fax: (202) 267-4624.

Phase II: LCDR Englebert, tel.: (202) 267-6490, fax: (202) 267-4624.

SEC.4115(d)/1004 Lightering Requirements (39):

Requires evidence of financial responsibility and compliance with the FWPCA

and regulations issued under it for offshore lightering.

Status: Final rule published September 15, 1993 (58 FR 48434). Project complete.

Contact: LCDR Hunt, tel.: (202) 267-6230, fax: (202) 267-4624.

SEC.4115(e)(1) Alternative Vessel Design (40):

The Secretary of Transportation conducted a study of potential structural and operational tank vessel requirements as required by OPA 90.

Status: The Secretary's report was submitted to Congress on January 4, 1993. Project complete.

Contact: LCDR Cruder, tel.: (202) 267-1181.

SEC.4116(c) Escorts for Certain Tankers (44):

Designates certain U.S. waters (PWS, Rosario Strait and Puget Sound, WA) where at least two towing vessels must escort single hull tankers greater than 5000 GT.

Status: Final rule published August 1994. Project complete.

Contact: Ms. Hegy, tel.: (202) 267-0415.

SEC.4116(c) Escorts for Certain Tankers; Other Geographic Areas (44a):

Designates certain U.S. waters other than PWS, Rosario Strait and Puget Sound, WA, where at least two towing vessels must escort single hull tankers greater than 5000 GT.

Status: USCG is reviewing comments from the ANPRM and public hearings. NPRM delayed as a result of USCG consideration of public comments. NPRM is being drafted.

Projected publication date: NPRM, April 1995.

Contact: Mr. Jordan, tel.: (202) 267-6751, fax: (202) 267-4624.

Studies, Reports, and Rulemakings

SEC.4201 Delegations of Authority (FWPCA, OPA 90 and CERCLA) (47):

Redesignates and revises certain regulations relating to delegation of authority. The changes incorporate new functions under both OPA 90 and the amended section 311 of the FWPCA relating to the prevention of and response to discharges of oil and hazardous substances. Requires the revision of the Federal removal authority in the NCP. This rule also delegates authority to designated USCG officials under CERCLA relating to enforcement of financial responsibility requirements, including assessment of civil penalties.

Status: Final rule is in review. Projected publication date has been revised to allow completion of other high priority projects.

Projected completion date: November 1994.

Contact: Ms. Sullivan, tel.: (202) 267-6404, fax: (202) 267-4624.

SEC.4201(c) Revision of NCP (48):

OPA 90 requires preparation of a National Contingency Plan (NCP) for removal of oil and hazardous substances. The plan must assign duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, and must address USCG strike teams.

Status: Final rule published September 15, 1994 (59 FR 47384).

Contact: Mr. Norris, tel.: (703) 603-9053.

SEC.4202 (FWCPA 1321(j)(6)) Removal Equipment Requirements and Inspection (51):

Requires vessels carrying oil as bulk cargo to carry appropriate removal equipment that is the best technology economically feasible and compatible with the safe operation of the vessel.

Status: IFR published Dec 22, 1993 (58 FR 67988). Correction notice published Jan 26, 1994 (59 FR 3749).

Projected completion date: September 1995.

Contact: Ms. Landman, tel.: (202) 267-6603.

SEC.4202(a) (FWPCA 1321(j)(6)) Removal Equipment Requirements & Inspection/Contractor Classification (90) & (91):

Requires the inspection of containment booms, skimmers, vessels, and other major equipment used to remove discharges. To facilitate compliance by industry and verification of compliance by the Federal Government with this provision and with the response plan requirements, the USCG is working with ASTM to develop consensus standards for terminology, guidelines, recommended practices, and equipment test methods. Also, although not specifically required by OPA 90, standards for classifying OSROs by their estimated capacity to contain and remove oil spills facilitates response plan preparation by industry, plan review by the Federal Government, and OSROs' ability to evaluate their own capability.

Status: NVIC 12-92 published in Dec, 1992. Seventeen standards are in various stages of development.

Contact: Mr. Wood, tel.: (202) 267-6770, fax: (202) 267-4624.

SEC.4202(a) Tank Vessel Response Plans: Hazardous Substances (95):

Requires owners or operators of tank vessels carrying hazardous substances to submit a response plan for worst case discharges.

Status: Project is in its preliminary stages. Project was recently approved for development by the Marine Safety Council. Target dates have been modified to accurately reflect development time from the approval date.

Projected publication date: ANPRM, April 1995.

Contact: Ms. Landman, tel.: (202) 267-6770, fax: (202) 267-4624.

SEC.4202(a) Facility Response Plans: Hazardous Substance (96):

Requires owners or operators of onshore marine transportation-related facilities to submit a response plan for worst case discharges of hazardous substances.

Status: Project is in its preliminary stages.

Project was recently approved for development by the Marine Safety Council. Target dates have been modified to accurately reflect development time from the approval date.

Projected publication date: ANPRM, April 1995.

Contact: LCDR Hunt, tel.: (202) 267-6230, fax: (202) 267-4624.

SEC.4202(b)(1)(a) Appointment of Area Committee Members; Area Committee Responsibilities (50):

This section of the Act requires appointment of area committees and preparation of area committee plans.

Studies, Reports, and Rulemakings

Status: A final notice of policy on area committee appointment and responsibilities was published July 15, 1993 (58 FR 38156). Project complete.

Contact: LCDR Giacomia, tel.: (202) 267-2616.

SEC.4202(b)(3) District Response Groups (56):

This section of the Act requires formation of District Response Groups and District Response Advisory Teams.

Status: Groups and teams have been formed. Project complete.

Contact: G-MEP Division, tel.: (202) 267-0518.

SEC.4202(b)(4) Vessel Response Plans (57):

Requires owners or operators of tank vessels to prepare and submit a response plan for a worst case discharge of oil. The USCG issued guidance to the industry and published an IFR that is currently in effect.

Status: Comments from the IFR are being reviewed in preparation for issuing the final rule. Issuance of final rule delayed to coordinate response planning rules with other agencies.

Projected completion date: September 1995.

Contact: Hotline, tel.: (202) 267-6739.

SEC.4202(b)(4) Facility Response Plans (88):

Requires owners or operators of marine transportation-related onshore facilities to prepare and submit a response plan for a worst case discharge of oil. The USCG published an IFR that is currently in effect.

Status: Comments from the IFR are being reviewed in preparation for issuing the final rule. Issuance of final rule delayed to coordinate with other agencies.

Projected completion date: September 1995.

Contact: Hotline, tel.: (202) 267-6740.

SEC.4301(b) FWPCA Penalties (61):

Creates new "class II" FWPCA civil penalties.

Status: Final rule published March 30, 1994 (59 FR 15022). Project complete.

Contact: Marine Investigation Division (G-MMI), tel.: (202) 267-1430.

SEC.4305 Inspection and Entry (64):

Provides the USCG with authority to inspect and enter facilities and to review relevant records.

Status: Internal policy guidance is being drafted for Marine Safety Manual. No rulemaking will result.

Contact: LCDR Kantz, tel.: (202) 267-0038, fax: (202) 267-4624.

SEC.5002 Terminal and Tanker Oversight and Monitoring (67):

Citizens' committees were created to oversee and monitor terminals and tankers in PWS and Cook Inlet, AK.

Status: PWS and Cook Inlet RCACs recertified through spring 1994. Project complete.

Contact: Ms. Jackson, tel.: (202) 267-0500.

SEC.6003(e) Outer Banks Protection (73):

Requires the Department of the Interior to establish the Environmental Sciences Review Panel and conduct certain studies.

Status: Both benthic and socioeconomic studies recommended by the Environmental Sciences Review Panel have been completed.

Contact: Benthic Study: Dr. Robert Avent, tel.: (504) 736-2899. Socio-economic Study: Dr. Harry Luton (504) 736-2784.

46 U.S.C. 3703 Oil Spill Response Vessels (92):

Formalizes the requirements for the inspection and certification of oil spill response vessel as noted in G-MVI policy. A public meeting was held October 5, 1994, to obtain early public participation on this project.

Status: NPRM being drafted.

Projected publication date: August 1995.

Contact: Mr. Crenwelge, tel.: (202) 267-6220, fax: (202) 267-4624.

COTP Zones (97):

This rulemaking establishes boundaries of the COTPs out through the EEZ and makes minor adjustments to the inshore boundaries.

Status: Final rule published Oct 4, 1993 (58 FR 51726). Corrections published Nov 8, 1993 (58 FR 59364), Dec 22, 1993 (58 FR 67909), and Jan 7, 1994 (59 FR 947).

Project complete.

Contact: CDR Pond, tel.: (202) 267-6860, fax: (202) 267-4624.

Studies, Reports, and Rulemakings

MARPOL Reg 26 (93):

MARPOL Regulation 26 requires certain oil tankers and other ships to carry an approved oil pollution emergency response plan on-board.

Status: Final rule published on October 7, 1994 (59 FR 51332).

Contact: Ms. Jacqueline Sullivan, tel.: (202) 267-6404, fax: (202) 267-4624.

LOOP: Extension of Safety Zone (94):

This rule enlarged the existing safety zone to include two existing "ex-

cursion zones," which would provide a broader entrance to LOOP and simplify the maneuvering of arriving and departing tank vessels.

Status: Final rule published April 13, 1994 (59 FR 17480). Project complete.

Contact: LT Jonathan Burton (G-MEP), tel.: (202) 267-0426.

Lightering Zones (101):

The USCG has received requests to establish lightering zones in the Gulf of Mexico to permit the lightering of oil by single-hulled vessels otherwise

prohibited from trading in the U.S. exclusive economic zone.

Status: Notice of petitions for rulemaking published Dec 2, 1993 (58 FR 63544). Public meeting held Jan 18, 1994. A notice of proposed rulemaking to establish lightering zones in the Gulf of Mexico is being drafted.

Project completion date: September, 1995.

Contact: LCDR Kantz, tel.: (202) 267-0038, fax: (202) 267-4624.

Completed Actions

OPA 90 Signed	18 Aug 90
Bligh Reef Light Installed	04 Sep 90
National Pollution Funds Center (NPFC) Created	Jan 91
OPA 90 Staff Created	Jan 91
National Strike Force Coordination Center Commissioned	03 Sep 91
Third Strike Team Commissioned	05 Sep 91
President Issues Executive Order 12777, Implementation of Section 311 of the Federal Water Pollution Control Act of October 18, 1972, as Amended, and the Oil Pollution Act of 1990	22 Oct 91 (56 FR 54757)
Documentation of Cleanup Vessels	
NPRM	11 Sep 91 (56 FR 46268)
Final Rule	03 Mar 92 (57 FR 7640)
Port Needs Study Report Submitted to Congress	05 Mar 92
Delegation of Authority to Commandant, USCG	11 Mar 92 (57 FR 8581)
Environmental Sciences Panel Review Report to Congress	06 Apr 92
Interagency Coordinating Committee Plan Submitted to Congress	Apr 92
Vessel Communications Equipment	
NPRM	18 Nov 91 (56 FR 58292)
Final Rule	21 Apr 92 (57 FR 14483)
VTS Valdez Regulations	
NPRM	26 Sep 91 (56 FR 48771)
Final Rule	17 Jul 92 (57 FR 31660)
Revised Penalty Provisions: Final Rule	27 Jul 92 (57 FR 33260)
Contractor Classification NVIC 12-92 Issued	04 Dec 92
VTS - PWS Feasibility Study Submitted to Congress	18 Dec 92
Report on Alternatives to Double Hulls Submitted to Congress	04 Jan 93
District Response Groups Formation Completed	21 Jan 93
Organization and Delegation of Powers to Regulate Motor Carriers and Railroads: Final Rule	27 Jan 93 (58 FR 6194)

Completed Actions

Tank Level/Pressure Monitoring Devices Study:

Notice of Availability 05 Feb 93 (58 FR 7292)

First Pre-positioned Site Opened: Galveston, TX 08 Feb 93

Prince William Sound Pilotage

NPRM 26 Oct 92 (57 FR 48554)

Final Rule 10 Mar 93 (58 FR 13360)

RCAC Certification

President Certifies PWS RCAC 21 Mar 91

President Certifies Cook Inlet RCAC 06 Aug 91

U.S. Coast Guard Recertifies Cook Inlet RCAC 24 Jul 92

U.S. Coast Guard Recertifies PWS RCAC 24 Jul 92

Terminal and Tanker Oversight and Monitoring: Notice 31 Dec 92 (57 FR 62600)

Recertification of Cook Inlet RCAC 28 May 93 (58 FR 34295)

Recertification of PWS RCAC 28 May 93 (58 FR 34296)

Notice of Application for Recertification of Cook Inlet RCAC 19 April 94 (59 FR 18592)

Notice of Application for Recertification of PWS RCAC 5 May 94 (59 FR 23251)

Certification of Cook Inlet RCAC 24 June 94 (59 FR 32745)

Certification of PWS RCAC 04 Aug 94

Navigation Underway: Tankers

Second Officer on the Bridge: NPRM 02 Oct 92 (57 FR 45664)

Unattended Engine Room : NPRM 09 Apr 92 (57 FR 12378)

Unattended Engine Room: SNPRM 02 Oct 92 (57 FR 45662)

Use of Auto-Pilot: NPRM 06 Jan 92 (57 FR 514)

Use of Auto-Pilot: SNPRM 02 Oct 92 (57 FR 45667)

Final Rule 10 May 93 (58 FR 27628)

Partial Suspension of Effectiveness 06 Jul 93 (58 FR 36141)

Appointment of Area Committee Members and Designation of

Area Committee Responsibility: Notice 16 Jan 92 (57 FR 1933)

Designating Areas For Area Committees: Notice of Intent 22 Jul 91 (56 FR 33481)

Designating Areas For Area Committees: USCG Notice 24 Apr 92 (57 FR 31660)

Designation of Areas and Area Committees Under the

Oil Pollution Act of 1990: EPA Notice 24 Apr 92 (57 FR 15198)

Establishment of Area Committees and Area Contingency

Plans: Commandant Notice 16471 30 Sep 92

Area Committee Membership: Final Notice 15 Jul 93 (58 FR 38156)

Lightering Requirements

NPRM 05 Jan 93 (58 FR 452)

Comment Period Closed 19 Feb 93

Final Rule 15 Sep 93 (58 FR 48434)

Plate Gauging

NPRM 23 Mar 93 (58 FR 15740)

Comment Period Closed 07 May 93

Final Rule 08 Oct 93 (58 FR 52599)

Deepwater Ports Study

National Preparedness for Response Exercise Program (PREP)

Notice of Availability 19 Oct 93 (58 FR 53990)

Notice of PREP Exercise Evaluation Workshop 14 Dec 93 (58 FR 65421)

Captain of the Port Zone Boundaries NVIC 13-92 Issued

Final Rule 15 Dec 92

Corrections to Final Rule 04 Oct 93 (58 FR 51726)

Correction to Final Rule 08 Nov 93 (58 FR 59364)

Correction to Final Rule 22 Dec 93 (58 FR 67909)

Correction to Final Rule 07 Jan 94 (59 FR 947)

Civil Penalty

IFR 06 Apr 93 (58 FR 17926)

Comment Period Closed 07 Jun 93

FR 30 Mar 94 (59 FR 15022)

Correction to FR 02 Sept 94 (59 FR 45757)

LOOP: Extension of Safety Zone

NPRM 17 Feb 94 (59 FR 8096)

Comment Period Closed 18 Mar 94

Final Rule 13 Apr 94 (59 FR 17480)

Completed Actions

National VTS	
NPRM	01 Aug 91 (56 FR 36910)
Comment Period Closed	30 Sep 91
Final Rule	15 Jul 94 (59 FR 36321)
Escort Vessels for Certain Oil Tankers	
NPRM	07 Jul 92 (57 FR 30058)
Comment Period Closed	08 Sep 92
Comment Period Reopened	26 Mar 93 (58 FR 16391)
Comment Period Closed	24 Jun 93
Disabled Tanker Towing Study Part 1: Notice of Availability	10 Jan 94 (59 FR 1411)
Final Rule	19 Aug 94 (59 FR 42968)
Five-Year Term of Validity for Certificates of Registry and Merchant Mariner's Documents	
NPRM	16 Sep 93 (58 FR 48572)
Comment Period Closed	15 Nov 93
Final Rule	27 Sept 94 (59 FR 49294)

Publication Dates

Access to the Oil Spill Liability Trust Fund by State Officials: IFR	13 Nov 92 (57 FR 53968)
Chemical Testing for Dangerous Drugs	
NPRM	04 Mar 94 (59 FR 10544)
Comment Period Closed	03 May 94
Claims Under OPA 90	
IFR	12 Aug 92 (57 FR 36314)
Comment Period Closed	10 Dec 92
COFR	
NPRM	26 Sep 91 (56 FR 49006)
Extended Comment Period	02 Dec 91 (56 FR 61216)
Comment Period Closed	24 Jan 92
Preliminary RIA: Notice of Availability	21 Jul 93 (58 FR 38993)
Comment Period Closed	20 Sep 93
IFR	1 July 1994 (59 FR 34210)
Comment Period Closed	29 Sep 94
Designation of Source and Advertisement	
IFR	12 Aug 92 (57 FR 36314)
Comment Period Closed	10 Dec 92
Discharge Removal Equipment	
NPRM	29 Sep 92 (57 FR 44912)
Comment Period Extended	26 Oct 92 (57 FR 48489)
Comment Period Closed	16 Nov 92
IFR	22 Dec 93 (58 FR 67988)
Comment Period Closed	22 Feb 94
Correction Notice	26 Jan 94 (59 FR 3749)
Double Hull Standards	
NPRM	05 Dec 90 (55 FR 50192)
Comment Period Reopened	06 Sep 91 (56 FR 44051)
Comment Period Closed	07 Oct 91
Notice of Availability: RIA Double Hulls	15 Jan 92 (57 FR 1854)
Comment Period Closed	14 Feb 92
IFR	12 Aug 92 (57 FR 36222)
Comment Period Closed	13 Oct 92
Comment Period Reopened	18 Dec 92 (57 FR 60402)
Comment Period Closed	26 Feb 93
Escort Vessels for Certain Oil Tankers—Other Areas	
ANPRM	27 April 93 (58 FR 25766)
Comment Period Closed	28 June 93
Escort Vessel Notice of Public Hearings	29 Apr 93 (58 FR 25959)
Facility Response Plans	
ANPRM	11 Mar 92 (57 FR 8708)

Publication Dates

Comment Period Closed	27 Apr 92
NVIC 7-92 Issued	15 Sep 92
Change 1 to NVIC 7-92 Issued	04 Dec 92
Change 2 to NVIC 7-92 Issued	15 Jan 93
IFR	05 Feb 93 (58 FR 7330)
Response Plans Due	18 Feb 93
Corrections to the IFR	12 Mar 93 (58 FR 13550)
Comment Period Closed	06 Apr 93
Plan Implementation Deadline	18 Aug 93
Lightering Zones	
Notice of Petitions for Rulemaking and Request for Comments	02 Dec 93 (58 FR 63544)
Comment Period Closed	03 Jan 94
Notice of Public Meeting	16 Dec 93 (58 FR 65683)
Comment Period Extended	30 Dec 93 (58 FR 69313)
Comment Period Closed	02 Feb 93
Manning, Training, and Watchkeeping Standards for Foreign Tank Vessels	
Notice of Public Meeting	23 Sep 94 (59 FR 48845)
Overfill Devices	
NPRM	12 Jan 93 (58 FR 4040)
Comment Period Closed	15 Mar 93
Notice of Public Meeting and Availability of Revised Regulatory Evaluation	21 Oct 93 (58 FR 54315)
Comment Period Closed	22 Nov 93
IFR	Oct 94
Structural and Operational Measures to Reduce Oil Spills From Existing Tank Vessels Without Double Hulls	
ANPRM	01 Nov 91 (56 FR 56284)
Comment Period Extended	13 Jan 92 (57 FR 1242)
Comment Period Closed	30 Jan 92
NPRM	22 Oct 93 (58 FR 54870)
Corrections to the NPRM	19 Nov 93 (58 FR 61143)
Corrections to the NPRM	14 Dec 93 (58 FR 65298)
Notice of Public Meeting and Comment Period Extended	16 Dec 93 (58 FR 65683)
Comment Period Closed	21 Feb 94
Final Rule; Phase I	05 Aug 94 (59 FR 40186)
Tank Level/Pressure Monitoring Devices	
ANPRM	07 May 91 (56 FR 21116)
Comment Period Closed	04 Oct 91
Notice of Public Meeting	Nov 94
Comment period closes	09 Jan 95
Vessel Response Plans	
ANPRM	30 Aug 91 (56 FR 43534)
Comment Period Closed	16 Oct 91
Workshop	14 Nov 91
Negotiated Rulemaking Notice	18 Nov 91 (56 FR 58202)
Supplemental Notice	29 Nov 91 (56 FR 60949)
Contingent Notice	24 Dec 91 (56 FR 66611)
Committee Established	10 Jan 92 (57 FR 1139)
Reg-Neg Meetings Schedule	16 Jan 92 (57 FR 1890)
NPRM	19 Jun 92 (57 FR 27514)
NPRM Correction	01 Jul 92 (57 FR 29354)
Notice of Meetings	28 Jul 92 (57 FR 33287)
Comment Period Closed	03 Aug 92
NVIC 8-92 Issued	15 Sep 92
Change 1 to NVIC 8-92 Issued	04 Dec 92
Change 2 to NVIC 8-92 Issued	15 Jan 93
IFR	02 Feb 93 (58 FR 7330)
Response Plans Due	18 Feb 93
Corrections to the IFR	12 Mar 93 (58 FR 13550)
Comment Period Closed	06 Apr 93
Plan Implementation Deadline	18 Aug 93

Related USCG Publications

Merchant Mariner Drug Test Exemptions: Final Rule	28 May 93 (58 FR 31104)
Testing of American Underpressure Oil Spill Prevention System: Notice	07 Jul 93 (58 FR 36508)
Double Hull Standards for Vessels Carrying Oil in Bulk: U.S. Position on International Standards for Tank Vessel Designs: Notice	21 Jul 93 (58 FR 39087)
Federal Pilotage Requirement for Foreign Trade Vessels NPRM	09 Jul 93 (58 FR 36914)
Comment Period Closed	07 Sep 93
Oil Record Book Required for Vessels: Notice of International Requirements ...	08 Nov 93 (58 FR 59293)
Amendment of Oil Discharge Criteria to Annex I of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution From Ships, 1973 (MARPOL 73/78): Notice	12 Nov 93 (58 FR 60080)
NVIC 6-94 Issued	03 Aug 94
Oil Pollution Placard Language: Final Rule	26 Nov 93 (58 FR 62261)
Notice of Proposed Revision of Agency Procedures and Policy	20 Jan 94 (59 FR 3152)
Comment Period Closed	07 Mar 94
Licensing of Pilots and Manning of Vessels by Pilots IFR	02 Feb 94 (59 FR 4839)
Comment Period Closed	21 Mar 94
Shipboard Oil Pollution Emergency Plans (Reg. 26) NPRM	17 Feb 94 (59 FR 8086)
Comment Period Closed	18 Apr 94
Corrections to the NPRM	15 Mar 94 (59 FR 12032)
Final Rule	07 Oct 94 (59 FR 51332)
Marine Safety Issues Related to Uninspected Towing Vessels Notice of Meeting and Study Availability	02 Mar 94 (59 FR 10031)
Licensing of Officers and Operators for Mobile Offshore Drilling Units; Final Rule	08 Mar 94 (59 FR 10753)
Announcement of GPS IOC and its Impact on Vessel Carriage Regs; Notice	23 Mar 94 (59 FR 13757)
Simplified Alternative Procedure for resolving Civil Penalty Cases; IFR	07 Apr 94 (59 FR 16558)
Proof of Commitment to Employ Aboard U.S. Merchant Vessels: FR	03 Jun 94 (59 FR 28791)
Safety Standards for Self-Propelled Vessels Carrying Bulk Liquefied Gases: NPRM	06 Jun 94 (59 FR 29259)
Comment Period Closed	05 Aug 94
Ballast Water Management For Vessels Entering the Hudson River	21 Jun 94 (59 FR 31959)
Comment Period Closed	22 Aug 94
Environmental Assessment of DGPS Northwest Region	24 Jun 94 (59 FR 32745)
Comment Period Closed	25 Jul 94
Port-State Control Initiative; Notice of Implementation	19 Jul 94 (59 FR 36862)
Delegation of Authority to Commandant, USCG, for Tank Vessel Emissions	08 Aug 94 (59 FR 40313)
Bulk Hazardous Materials, Final Rule	31 Aug 94 (59 FR 45132)
Noxious Liquid Substances, Final Rule	31 Aug 94 (59 FR 45146)
Bulk Hazardous Materials, ANPRM	31 Aug 94 (59 FR 45150)
Comment Period Closes	29 Nov 94
Environmental Assessment of DGPS Gulf Intercoastal Region	27 Sep 94 (59 FR 49275)
Comment Period Closes	27 Oct 94

Related Publications of Other Agencies

DOT-RSPA

Response Plans for Onshore Oil Pipelines: IFR	05 Jan 93 (58 FR 244)
Oil Spill Prevention and Response Plans (Motor Carriers & Rail):	
IFR	02 Feb 93 (58 FR 6864)
2nd IFR	16 Jun 93 (58 FR 33302)
Office of Pipeline Safety; Risk Assessment Prioritization: Request for	
Information	01 Oct 93 (58 FR 51402)
Pipeline Safety Advisory Bulletin ADB-93-05 Drug Testing Information: Drug	
Testing Information for Pipeline Operators and Contractors	10 Dec 93 (58 FR 65011)

DOI

Response Plans for Offshore Facilities Including State Submerged	
Land and Pipelines: IFR	08 Feb 93 (58 FR 7489)
Oil Spill Financial Responsibility for Offshore Facilities Including State	
Submerged Lands and Pipelines: ANPRM	25 Aug 93 (58 FR 44797)
Notice of Extension of Public Comment Period	20 Dec 93 (58 FR 66320)
Comment Period Closed	28 Feb 94
Notice of Public Meeting	31 Jan 94 (59 FR 4261)
Memorandum of Understanding Establishing Jurisdictional Responsibilities	
for Offshore Facilities: Notice	28 Feb 94 (59 FR 9494)
Natural Resource Damage Assessments: NPRM	04 May 94 (59 FR 23098)
Comment Period Closed	07 Jul 94
Proposed Rule	08 Aug 94 (59 FR 40319)
Comment Period Closes	7 Nov 94

EPA

Response Plans for Non-Transportation-Related Facility: NPRM	17 Feb 93 (58 FR 8824)
NCP; Cooperative Agreements and Superfund State Contracts for	
Superfund Response Actions: Proposed Rule	18 Oct 93 (58 FR 53688)
Final Rule; Technical Revisions	14 Jul 94 (59 FR 35852)
NCP: Proposed Rule	22 Oct 93 (58 FR 54702)
Comment Period Closed	20 Dec 93
Comment Period Reopened	06 Jan 94 (59 FR 714)
Comment Period Closed	14 Jan 94
Final rule	15 Sep 94 (59 FR 47384)
Federal Standards for Marine Tank Vessel Loading and Unloading Operations	
and National Emissions Standards for Hazardous Air Pollutants for	
Marine Tank Vessel Loading and Unloading Operations: NPRM	13 May 94 (59 FR 25004)
Comment Period Closed	18 Jul 94
Notice of Availability of HAZMAT Accident Safety Report	11 Jul 94 (59 FR 35339)
Comment Period Closed	31 Aug 94

NOAA

Natural Resource Damage Assessments: NPRM	07 Jan 94 (59 FR 1062)
Notice of Public Meetings	07 Jan 94 (59 FR 1189)
Notice of Cooperative Prespill Planning	07 Jan 94 (59 FR 1190)
Notice of Public Meeting and Extension of Comment Period	01 Mar 94 (59 FR 9688)
Notice of Extension of Comment Period	22 Jun 94 (59 FR 32148)
Comment Period Closed	07 Oct 94
Notice of Guidance on Fish and Wildlife and Sensitive Environments	29 Mar 94 (59 FR 14713)
Correction to Notice	25 April 94 (59 FR 19753)

Presidential Documents

North American Agreement on Environmental Cooperation: E.O. 12915	13 May 94 (59 FR 25775)
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USDA Forest Service

Notice of Intent to Prepare an Environmental Impact Statement	14 Jan 94 (59 FR 2352)
Notice of Availability of the	
Draft EIS for the Valdez Oil Spill Restoration Plan	17 Jun 94 (59 FR 31191)
Comment Period Closed	01 Aug 94
Public Advisory Group Nominations	6 Jul 94 (59 FR 34647)
Notice of Availability of the	
Final EIS for the Valdez Oil Spill Restoration Plan	27 Sep 94 (59 FR 49232)

S H C A N D I M O C A L E N D A R

Shipping Coordinating Committee and U.S. SOLAS Working Group Meetings:

Shipping Coordinating Committee/Working Group on Communications	20 Oct 94
Shipping Coordinating Committee/Working Group on Communications	26 Oct 94
Technical Cooperation Committee 40th Session	02 Nov 94
Shipping Coordinating Committee/Safety of Navigation	09 Nov 94
Shipping Coordinating Committee/Working Group on Communications	17 Nov 94
Shipping Coordinating Committee/Legal and Communications - Joint Meeting	17 Nov 94
Marine Safety Committee/SOLAS	30 Nov 94
Shipping Coordinating Committee/Working Group on Communications	15 Dec 94

IMO Meetings in London:

International Oil Pollution Compensation Fund Assembly	17-21 Oct 94
Facilitation Committee 23rd Session	24-28 Oct 94
Marine Environment Protection 36th Session and MARPOL Conference*	31 Oct-04 Nov 94
Council 73rd Session*	14-18 Nov 94
Technical Cooperation Subcommittee 40th Session*	17 Nov 94
Maritime Safety Committee 64th Session*	05-09 Dec 94
Standards of Training and Watchkeeping Subcommittee 27th Session*	12-16 Dec 94
Flag State Implementation Subcommittee 3rd Session	20-24 Feb 95

* = TENTATIVE

C A L E N D A R

Public Meeting on ISM Code	18 Oct 94
Public Meeting on Standards for Foreign Tank Vessels	19 Oct 94
Natural Resource Damages Conference	24-25 Oct 94
Double Hull Technical Symposium	25-26 Oct 94
Close of Comment Period for DGPS Gulf Intercoastal Region	27 Oct 94
Clean Gulf '94	01-04 Nov 94
Public Meeting on Metrication	02 Nov 94
Close of Comment Period for DOI NRDA Proposed Rule	07 Nov 94
TSAC Meeting	09 Nov 94
NOSAC Meeting	14 Nov 94
Deadline for submission of R&D full proposals for ADEC and ASTF	15 Nov 94
IADC Well Control Conference	16-17 Nov 94
SNAME 1994 Annual Meeting, International Maritime Exposition: New Orleans, LA	16-19 Nov 94
Close of Comment Period for Bulk Hazardous Substances ANPRM	29 Nov 94
ASTM F-25 Meeting, Phoenix, AZ	06-08 Dec 94
Tank Level Pressure Monitoring Devices Public Meeting	09 Dec 94
Close of comment period for TLPM	09 Jan 95
Deadline for Submission of Papers for IMO R&D Forum	15 Jan 95
SNAME Ship Production Symposium, San Diego, CA	Week of 23 Jan 95
Oil Spill Conference 95	27 Feb -02 Mar 95
Coastal Zone 95	17-22 Jul 95
International Conference on Technologies for Marine Environment Preservation	24-29 Sep 95

LIST OF ABBREVIATIONS

ANPRM	Advance Notice of Proposed Rulemaking	MEP	Marine Environmental Protection	OPA 90	Oil Pollution Act of 1990
ASTM	American Society for Testing and Materials	MEPC	Marine Environment Protection Committee	OSRO	Oil Spill Removal Organization
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act	MERPAC	Merchant Marine Personnel Advisory Committee	PREP	National Preparedness for Response Exercise Program
CFR	Code of Federal Regulations	MMS	Minerals Management Service	PWS	Prince William Sound
COFR	Certificate of Financial Responsibility	MRR	Maritime Regulatory Reform	RCAC	Regional Citizens' Advisory Council
COTP	Captain of the Port	MSC	Maritime Safety Committee	RE	Regulatory Evaluation
CTAC	Chemical Transportation Advisory Committee	MSO	Marine Safety Office	RSPA	Research and Special Programs Administration
CWA	Clean Water Act	NCP	National Oil and Hazardous Substances Pollution Contingency Plan	SHC	Shipping Coordination Committee
DOD	Department of Defense	NOAA	National Oceanic and Atmospheric Administration	SNAME	Society of Naval Architects and Marine Engineers
DOI	Department of the Interior	NPRM	Notice of Proposed Rulemaking	SNPRM	Supplemental Notice of Proposed Rulemaking
EPA	Environmental Protection Agency	NPFC	National Pollution Funds Center	SOLAS	Safety of Life at Sea
FOSC	Federal On-Scene Coordinator	NRT	National Response Team	STW	Standards of Training and Watchkeeping
FR	Federal Register	NSFCC	National Strike Force Coordination Center	TSAC	Towing Safety Advisory Committee
FRP	Facility Response Plan	NTIS	National Technical Information Service	USCG	U.S. Coast Guard
FSI	Flag State Implementation	NVIC	Navigation and Vessel Inspection Circular	USDA	U.S. Department of Agriculture
FWPCA	Federal Water Pollution Control Act			VOSS	Vessel of Opportunity Skimming System
IFR	Interim Final Rule			VRP	Vessel Response Plan
IMO	International Maritime Organization				

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*File F.I.
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MEMORANDUM

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DATE: October 12, 1994

NUMBER OF PAGES TO BE TRANSMITTED (including
cover): 15

FROM: Paula Clinedinst, Legal Assistant, (202) 272-8019

MESSAGE: Attached is Federal Defendants' and Cross-
Claimants' Response to NFRF's Motion for
Four-Week Postponement of Summary Judgment
Schedule, Proposing a Modified Extended
Schedule.

THE HONORABLE WILLIAM L. DWYER

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,)

Plaintiffs,)

v.)

Civ. No. C92-479WD

JAMES LYONS, in his official)
capacity as Assistant Secretary of)
Agriculture, and the United States)
Forest Service, an agency of the)
United States,)

Defendants and cross-claimants,)

and)

WASHINGTON CONTRACT LOGGERS)
ASSOCIATION, et al.,)

Defendants-Intervenors and cross-)
defendants.)

SAVE THE WEST,)

Plaintiff,)

v.)

Civ. No. C94-758WD

JAMES LYONS, et al.,)

FED. DEFS. AND CROSS-CLAIMANTS' RESPONSE
TO NFRC'S MOTION FOR FOUR-WEEK POSTPONEMENT,
PROPOSING A MODIFIED EXTENDED SCHEDULE - 1

United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
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Washington, D.C. 20044-0663
Telephone: (202) 272-8056

Defendants.)

NATIVE FOREST COUNCIL,)

Plaintiff,)

Civ. No. C94-803WD

v.)

BRUCE BABBITT, et al.,)

Defendants.)

THE SIERRA CLUB)

Civ. No. C94-820WD

v.)

MICHAEL ESPY, et al.,)

Defendants.)

**FEDERAL DEFENDANTS AND
CROSS-CLAIMANTS' RESPONSE
TO NFRC'S MOTION FOR
FOUR-WEEK POSTPONEMENT
OF SUMMARY JUDGMENT
SCHEDULE, PROPOSING A
MODIFIED EXTENDED
SCHEDULE**

INTRODUCTION

In response to the motion of NFRC for a four-week postponement of the briefing schedule in this case, federal defendants propose that the following modified extended schedule be approved by the Court:

November 4, 1994: Opposition to cross motions¹

December 1, 1994: Replies

December 7, 1994: Oral argument

¹ This schedule is the same as that sought by NFRC except that the date proposed for Opposition briefs by NFRC was November 16, 1994.

FED. DEFS. AND CROSS-CLAIMANTS' RESPONSE
TO NFRC'S MOTION FOR FOUR-WEEK POSTPONEMENT,
PROPOSING A MODIFIED EXTENDED SCHEDULE - 2

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1 For the reasons set forth herein, federal defendants strongly urge that this proposed
2 schedule be adopted.

3 ARGUMENT

4 1. A Reasonable Extension to the Briefing Schedule will Protect 5 the Judgment of this Court from NFRC's Claims of Lack of Full and 6 Fair Opportunity to Litigate.

7 Cross-claim defendant Northwest Forest Resources Council ("NFRC") has sought by
8 motion an extension of the current briefing schedule to accommodate certain concerns regarding
9 discovery and other matters in this action. Federal defendants have a strong interest in insuring
10 that any judgment obtained against NFRC on its cross-claims is binding upon NFRC and others
11 legally subject to be bound, under the principles of res judicata and collateral estoppel. While
12 federal defendants do not concede that the current schedule would limit NFRC's full and fair
13 opportunity to litigate its claims, nor do they acknowledge in any respect the arguments
14 advanced by NFRC in support of its motion, they nevertheless are in favor of a reasonable
15 extension to the schedule in order to eliminate any contention by NFRC that it has not had a full
16 and fair opportunity to litigate matters in this Court by reason of the matters alleged in its
17 motion. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 n. 15 (1979) (noting that inability
18 to pursue full suite of available procedural opportunities, including discovery, "may sometimes
19 justify not allowing a prior judgment to have estoppel effect in a subsequent action"); Intel Corp.
20 v. Hartford Accident & Indemnity Co., 952 F.2d 1551, 1556 (9th Cir. 1991)(addressing claim
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FED. DEFS. AND CROSS-CLAIMANTS' RESPONSE
TO NFRC'S MOTION FOR FOUR-WEEK POSTPONEMENT,
PROPOSING A MODIFIED EXTENDED SCHEDULE - 3

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1 that summary judgment was improper because party did not have sufficient opportunity to
2 conduct discovery, and thus, was denied "a full and fair opportunity to litigate").

3 To meet this concern, federal defendants propose an extension of the overall schedule
4 which is the same as that sought by NFRC, but modifies the proposed date for filing of
5 Opposition Briefs from 11/16 to 11/4 so that the federal defendants have more time for reply.
6 This modification reflects the fact that NFRC will file its major brief in opposition to the motion
7 for summary judgment, and has this day applied for permission to file a brief of 130 pages in
8 length. Both of these facts were unknown at the time the initial schedule was adopted. Federal
9 defendants do not expect to be able to respond to NFRC's brief in the short time afforded by
10 either the current or NFRC's proposed schedule for Reply Briefs.
11

12 **2. An Extension of the Schedule is Needed to Avoid Prejudice to the Federal Defendants**
13 **from the Environmental Plaintiffs' Excessive and Unforeseen Filing of Litigation**
14 **Affidavits.**

15 Federal defendants also urge that the proposed four week adjusted Schedule be adopted
16 by the Court to offset, from a scheduling standpoint, the prejudice caused to them by reason of
17 environmental plaintiffs' having submitted detailed litigation affidavits with their motion for
18 summary judgment.
19

20 We note first that the initial schedule ordered by the Court allowed four weeks for the
21 filing of Opposition Briefs, but that one week was eliminated from this Schedule by the Court's
22 extension of the time for filing of initial briefs. We further call the Court's attention to the fact
23 that the Opposition Brief, from defendants' standpoint, is extremely important, because as a
24

25 **FED. DEFS. AND CROSS-CLAIMANTS' RESPONSE**
26 **TO NFRC'S MOTION FOR FOUR-WEEK POSTPONEMENT,**
PROPOSING A MODIFIED EXTENDED SCHEDULE - 4

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1 general matter it is often only with the filing of the plaintiffs' opening brief that federal
2 defendants can divine the precise thrust of plaintiffs' arguments and know how they must
3 respond.

4 This customary disadvantage is aggravated in this case by environmental plaintiffs having
5 filed some 120 pages of litigation affidavits in support of their motion for summary judgment.
6 Many of these affidavits contain arguments and raise issues which were not presented during the
7 administrative process. Federal defendants' position is that plaintiffs have waived the right to
8 advance these positions. See Vermont Yankee Nuclear Power Corp. v. Natural Resources
9 Defense Council, 435 U.S. 519, 554 (1978); Havasupai Tribe v. Robertson, 943 F.2d 32 (9th Cir.
10 1991).

11
12 Nevertheless, a prudent defense, as well as public policy and litigation efficiency
13 concerns, requires that federal defendants' Opposition Brief demonstrate, in the alternative, that
14 the record addresses the objections raised. This effort will require a considerable expenditure of
15 time that was not anticipated at the time the initial schedule was negotiated. The extension of the
16 time to November 4, 1994 for filing the opposition briefs, reflected in the proposed schedule, is
17 necessary to effectively respond to these declarations.
18

19
20 **3. The Plaintiffs will not be Prejudiced by this Extension.**

21 Federal defendants anticipate, based upon prior filings, that the environmental plaintiffs
22 will object to any extended schedule on the grounds that it will permit more timber sales in Late-
23 Successional and Old-Growth forests to go forward pending a resolution of their complaints.
24

25
26 **FED. DEFS. AND CROSS-CLAIMANTS' RESPONSE
TO NFRC'S MOTION FOR FOUR-WEEK POSTPONEMENT,
PROPOSING A MODIFIED EXTENDED SCHEDULE - 5**

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1 Federal defendants note, however, that the thirty-day notice requirement ordered by the Court
2 has to this date been effective to avoid a motion for preliminary injunction, and that the remedy
3 of preliminary injunction remains available to plaintiffs in the event the parties are unable to
4 work out their differences regarding noticed sales. In any event, this concern must be balanced
5 with fairness to the federal defendants in responding to matters unforeseen at the time of the
6 negotiation of the initial schedule.
7

8 This Court has expressly recognized that the prompt and efficient adjudication of all
9 challenges to the strategy for management of federal old-growth forests within the range of the
10 northern spotted owl benefits the parties, the Court and the public. Federal defendants share that
11 concern and do not propose to seek further adjournments of the schedule in this action.
12

13 CONCLUSION

14 For the reasons set forth, federal defendants respectfully request that the Court extend the
15 briefing schedule in accordance with the proposal advanced in this memorandum.

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26 FED. DEFS. AND CROSS-CLAIMANTS' RESPONSE
TO NFRC'S MOTION FOR FOUR-WEEK POSTPONEMENT,
PROPOSING A MODIFIED EXTENDED SCHEDULE - 6

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1 Dated this 11th day of October, 1994.

2 Respectfully submitted,

3 LOIS J. SCHIFFER
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5 PETER D. COPPELMAN
6 Deputy Assistant Attorney General

7 KATRINA C. PFLAUMER
8 United States Attorney

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26 FED. DEFS. AND CROSS-CLAIMANTS' RESPONSE
TO NFRC'S MOTION FOR FOUR-WEEK POSTPONEMENT,
PROPOSING A MODIFIED EXTENDED SCHEDULE - 7

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THE HONORABLE WILLIAM L. DWYER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,)

Civ. No. 92-479WD

Plaintiffs,)

v.)

JAMES LYONS, in his official)
capacity as Assistant Secretary of)
Agriculture, and UNITED STATES)
FOREST SERVICE, an agency of the)
United States,)

Defendants,)

and)

WASHINGTON CONTRACT LOGGERS)
ASSOCIATION, et al.,)

Defendant-Intervenors.)

SAVE THE WEST,)

Plaintiff,)

Civ. No. C94-758WD

v.)

JAMES LYONS, et al.,)

Defendants.)

NATIVE FOREST COUNCIL,)

United States Department of Justice
Environment & Natural Resources Division
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1 The Clerk is directed to mail a copy of this Order to all counsel of record in the
2 above-captioned action.

3 DATED this ____ day of ____, 1994.

4
5 WILLIAM L. DWYER
6 United States District Judge

7 Presented by:

8 LOIS J. SCHIFFER
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10 PETER D. COPPELMAN
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Attorneys for federal defendants

DATED: October 11, 1994

[PROPOSED] ORDER ADOPTING FEDERAL DEFENDANTS'
PROPOSED REVISION TO BRIEFING SCHEDULE - 3

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 11, 1994, she caused one copy of the foregoing, **FEDERAL DEFENDANTS AND CROSS-CLAIMANTS' RESPONSE TO NFRC'S MOTION FOR FOUR-WEEK POSTPONEMENT OF SUMMARY JUDGMENT SCHEDULE, PROPOSING A MODIFIED EXTENDED SCHEDULE AND [PROPOSED] ORDER ADOPTING FEDERAL DEFENDANTS' PROPOSED REVISION TO BRIEFING SCHEDULE**, to be served via telefacsimile machine and first-class United States mail, postage prepaid, upon the counsel of record hereinafter named.

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MEMORANDUM

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DATE: October 12, 1994

NUMBER OF PAGES TO BE TRANSMITTED (including
cover): 35

FROM: Paula Clinedinst, Legal Assistant, (202) 272-8019

MESSAGE: Attached is Federal Defendants' Response to
NFRC's Motion to Compel, Proposed Order
Denying NFRC's Motion to Compel and
Alternative Proposed Order Allowing Limited
Depositions.

THE HONORABLE WILLIAM L. DWYER

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

v.

Civ. No. C92-479WD

JAMES LYONS, in this official
capacity as Assistant Secretary of
Agriculture, and the UNITED STATES
FOREST SERVICE, an agency of the
United States,

Defendants,

and

WASHINGTON CONTRACT LOGGERS
ASSOCIATION, et al.,

Defendant-Intervenors.

SAVE THE WEST,

Plaintiff,

v.

Civ. No. C94-758WD

JAMES LYONS, et al.,

United States Department of Justice
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Defendants.)

1

2

NATIVE FOREST COUNCIL,)

3

Plaintiff,)

4

v.)

5

BRUCE BABBITT, et al.,)

6

Defendants.)

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8

THE SIERRA CLUB,)

9

Plaintiff,)

10

v.)

11

12

MICHAEL ESPY, et al.,)

13

Defendants.)

14

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**FEDERAL DEFENDANTS' RESPONSE TO NFRC'S
MOTION TO COMPEL**

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Civ. No. C94-803WD

Civ. No. C94-820WD

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Environment & Natural Resources Division
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<u>Portland Audubon Soc'y v. Endangered Species Comm.</u> , 984 F.2d 1534 (9th Cir. 1993)	11
<u>Simplex Time Recorder Co. v. Secretary of Labor</u> , 766 F.2d 575 (D.C. Cir. 1985)	11, 15
<u>Sweeney v. Bond</u> , 669 F.2d 542 (8th Cir. 1982)	14
<u>United States v. Morgan</u> , 313 U.S. 409 (1941)	8, 10, 11, 16
<u>United States v. Northside Realty</u> , 324 F. Supp. 287 (N.D. Ga. 1971)	7, 11, 14, 17

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Village of Arlington Heights v. Metropolitan

1	<u>Housing Development Corp, 429 U.S. 252 (1977)</u>	8
2	<u>Warren Bank v. Camp, 396 F.2d 52 (6th Cir. 1968)</u>	15
3	<u>Weisberg v. Dept. of Justice, 627 F.2d 365 (D.C.</u> Cir. 1980)	7
4	STATUTES	
5	Administrative Procedure Act	9, 10, 11
6	MISCELLANEOUS	
7	Fed. R. Civ. P. 26(b) & (c)	4
8	Wright & A. Miller, Federal Practice and	
9	Procedure, § 2036 (1970)	4

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INTRODUCTION

NFRC brings a motion to compel the deposition of a total of nineteen persons. Sixteen of the proposed deponents are government officials, most of whom are high ranking policy makers, including two Cabinet Secretaries and a White House official.¹ NFRC seeks to depose eight of these government officials to ascertain the completeness of the administrative record and to inquire into the process by which it was assembled.² Memorandum in Support of Motion to Compel, at 3 ("NFRC Compel Brf."). NFRC further asks to be allowed to depose eleven officials "regarding the substantive decisions leading up to and including the adoption of the ROD"³ (three officials fall into both categories). *Id.* at 8.

¹ Three of the people NFRC seeks to depose are not employees of the federal government. Robert Jacobs, former SEIS Team Leader, is now retired, as is Dean Bibles, former Oregon State Director for the Bureau of Land Management (BLM) and Brian Greber, formerly a professor at Oregon State University and FEMAT member is now an employee of Weyerhaeuser. In addition to the fact that Messrs. Jacobs, Bibles and Greber are arguably outside the proper scope of NFRC's Motion, the government also objects to their depositions as testimony outside the administrative record and on the ground that they would merely be duplicative. NFRC also pursues the identification of a single document. As discussed *infra*, the government is providing a copy of that document to NFRC, without waiver of its objection to the document's use as evidence in these proceedings.

² The deponents proposed for this purpose are (1) Dr. Jack Ward Thomas, Chief of the Forest Service and former FEMAT Team Leader; (2) Martin Raphael, former Assistant FEMAT Team Leader; (3) Richard Holthausen, National Wildlife Ecologist for the Forest Service; (4) James Pipkin, Special Assistant and Counselor to the Secretary of the Interior; (5) Lynn Vancil, Director of Management Systems for the Pacific Northwest Regional Office of the Forest Service; (6) Duane Dippon, Geographic Information Systems Specialist for the Bureau of Land Management; (7) Robert Jacobs, former SEIS Team Leader, now retired from government service; (8) David Cottingham, Counselor to the Assistant Secretary of the Department of the Interior for Water and Science; (9) Arnold Holden, former Assistant SEIS Team Leader; and (10) Brian Greber, former FEMAT member. This group of proposed depositions will hereinafter be referred to as "the record depositions."

³ The deponents proposed for this purpose are (1) Bruce Babbitt, Secretary of the Interior; (2) George Frampton, Assistant Secretary of the Interior for Fish and Wildlife and Parks; (3) Thomas Collier, Chief of Staff for the Department of Interior; (4) Michael Dombeck, Acting Director of the Bureau of Land Management; (5) Dean Bibles, former Oregon State Director for the BLM, now retired
(continued...)

FEDERAL DEFENDANTS' RESPONSE TO
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1 NFRC's requested discovery falls outside the bounds set by this Court within
2 which NFRC was granted leave to pursue discovery and must be denied on that basis. Should
3 the Court find NFRC's request to have been timely made, the maximum permissible scope of the
4 depositions NFRC seeks must be limited to those persons whose declarations federal defendants
5 have submitted and to the topics addressed in those declarations, namely, composition and
6 content of the administrative record.
7

8 In no event should depositions be allowed of any non-declarant, or for any other
9 purpose than examination into the composition and content of the record. Indeed, the subject
10 matter of the proposed merits depositions is clearly inappropriate; it has long been established
11 that inquiry into the thought processes of government decision-makers and the merits of their
12 decisions is improper. Moreover, NFRC requests the deposition testimony of a cadre of top
13 government officials--including two Cabinet members--to explore the merits of a single decision,
14 without even an attempt at showing why the deposition testimony of the particular officials is
15 necessary.
16

17 In addition, NFRC seeks to compel the depositions of eight government officials
18 to further probe the document retention issues examined in the declarations of Dr. Thomas and
19
20
21

22
23 ³(...continued)
24 from government service; (6) Elaine Zielinski, Oregon State Director for the BLM; (7) Mike Espy,
25 Secretary of Agriculture; (8) James Lyons, Assistant Secretary of Agriculture; (9) Katie McGinty,
26 Director of the White House's Office on Environmental Policy; (10) Dr. Thomas; (11) Mr. Pipkin; and
(12) Mr. Cottingham. NFRC Compel. Brf. at 3. This group of proposed depositions will hereinafter be
referred to as "the merits depositions."

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1 Messrs. Holden, Gant and Vancil ("the declarants")⁴ but fails to explain why deposing the
2 declarants would be insufficient to allow it to obtain the information it seeks. Thus, NFRC's
3 request is over-broad and burdensome.

4 Finally, should this Court provide for the deposition of the four declarants, federal
5 defendants request that this Court enter an Order strictly limiting their scope to questions
6 regarding the composition and compilation of the administrative record.
7

8 In sum, NFRC's Motion to Compel is untimely, seeks clearly improper testimony,
9 contains duplicative requests for depositions and imposes undue burdens upon government
10 functions. The Motion should be denied in toto. Alternatively, at most this Court should issue
11 an Order compelling the declarants' testimony but barring inquiry other than on the compilation
12 and composition of the record. This limited testimony by the declarants best accommodates the
13 interests of justice by allowing NFRC to depose the officials best qualified to address the issue
14 upon which discovery is appropriate, while minimizing the burden imposed upon the operations
15 of the government and maintaining consistency with the rule against probing government
16 officials' thought processes.
17

18 STANDARD OF REVIEW

19
20 The discovery rules vest this Court with broad discretion to control the discovery
21 process. Where necessary, the Court may grant appropriate orders to deny, limit or qualify
22 discovery in order to protect a party from undue burden or expenses or to promote the ends of
23

24 ⁴ NFRC did not seek to compel the deposition of the fourth Federal declarant, John Gant.
25 However in subsequent filing NFRC indicated a desire to depose Mr. Gant. Memorandum in Support of
26 NFRC's Motion for Four Week Postponement of Summary Judgment Briefing Schedule, at 4 (Oct. 4,
1994).

FEDERAL DEFENDANTS' RESPONSE TO
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justice. Fed. R. Civ. P. 26(b) & (c). See also Century 21 Real Estate Corp. v. Sandlin, 846 F.2d 1175, 1181 (9th Cir. 1988)(District Court has discretion to refuse to extend discovery period); Little v. City of Seattle, 863 F.2d 681, 685 (9th Cir. 1988). Given this generous discretion, the Court "should not hesitate to exercise appropriate control over the discovery process." Herbert v. Lando, 441 U.S. 153, 177 (1979). In doing so, this court should "be as inventive as the necessity of [this] particular case requires." 8 C. Wright & A. Miller, Federal Practice and Procedure, § 2036 (1970).

ARGUMENT

I. NFRC'S MOTION TO COMPEL IS UNTIMELY AND THEREFORE MUST BE DENIED.

NFRC's motion to compel should be denied in its entirety for the simple reason that it is untimely. NFRC had no deposition requests outstanding at the time this Court issued the Order of September 14^s allowing NFRC to file a motion to compel "any remaining discovery." As the depositions NFRC now seeks to compel are not "remaining discovery" within the terms of that Order, they should be rejected. NFRC presents no compelling reason to find otherwise.

NFRC cannot claim these issues are newly arisen. The merits issues NFRC now seeks to explore have been extant since the adoption of the ROD. The record composition issues are nearly as old, having been a matter of public knowledge at least since the government's filing of the index to the administrative record and supporting declarations on June 20, 1994. Indeed,

^s The government's Response to NFRC's Motion to Shorten Time inadvertently indicated this Order had been entered on September 9. The government regrets any confusion this error may have caused.

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1 allegations relating to document retention were discussed in the parties' status report of July 8.

2 Rather than joining the other parties in raising discovery related issues, NFRC elected not to

3 participate in the report. See Joint Status Report Re: Discovery, at 6 (July 8, 1994). In response

4 to the joint status report, this Court set a deadline for the completion of discovery of September

5 9, 1994. Order Amending Schedule (August 23, 1994). As of September 9, NFRC still had yet

6 to request depositions.

7
8 NFRC seeks to excuse its dilatoriness by blaming federal defendants for problems

9 NFRC engendered through its repeated efforts to avoid litigating in this Court claims it has

10 brought against the federal late successional and old-growth forest management strategy

11 ("federal LSOG strategy").⁶ NFRC makes a variety of accusations relating to the government's

12 efforts to "cause" NFRC to delay bringing its discovery requests in a timely manner. NFRC

13 Compel Brf. at 6. These accusations cannot be sustained.

14
15 NFRC contends the federal defendants' August 26, 1994 response to NFRC's

16 Second Set of Interrogatories (addressing, inter alia, the document retention issues central to its

17 present discovery efforts) somehow prevented it from requesting depositions prior to September

18 9, 1994. NFRC, however, fails to provide any explanation as to why, having received that

19 response on August 26, 1994, it did not request depositions until September 20, and then only

20 after prompting by the government's letter of September 15. See Attachments B and A to NFRC

21 Compel Brf.

22
23
24 ⁶ Those efforts have been well documented and need not be elaborated upon here. See e.g. Order
25 Granting Leave to Federal Defendants to Amend Answer to Assert Cross-Claims, Denying Motion to
26 Join Additional Parties and Making Other Provisions, at 3-6 (Aug. 5, 1994).

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selectively discarded is groundless. Indeed a record containing in excess of 5,000 documents and numerous conflicting views of agency personnel has been presented for review.

In addition, the declarations filed in conjunction with the administrative record discuss at length the document retention practices used in the FEMAT and SEIS processes. In the same vein, the government has expressed a willingness to provide deposition testimony on the compilation of the record since the beginning of this litigation. E.g., NFRC Compel Brf. at 4 (citing Transcript of Proceedings, May 31, 1994 at 20).¹⁰

- B. Many of the Officials Whose Decisions NFRC Seeks to Probe Are Cabinet Members and Their Closest Advisors and/or Heads of Government Agencies and Their Depositions--Particularly to the Extent They Seek Inquiry into the Merits--Should be Rejected on That Basis.

Among the decision-makers whose thought processes NFRC seeks to probe are two Cabinet Members, three of their closest Assistants, the Chief of Staff of the Interior Department, the Director of the White House's Office on Environmental Policy, the Chief of the Forest Service, and a State Director for the BLM. These are government officials of the highest order who (with the exception of Dr. Thomas who admittedly has unique information

¹⁰ NFRC also raises allegations regarding retention of computer data. As NFRC notes, it has filed a motion in Judge Jackson's court addressing the same allegations. See NFRC Compel Brf. at 5, n.1. In support of its allegations, NFRC cites the declaration of Mr. Vancil, which discussed the Department of Agriculture's Data General (DG) computer system. As is explained in the Second Declaration of Arnold Holden, neither the FEMAT Report nor the SEIS was drafted on the DG system and the system was not a standard means of communication among either team's members. Instead, "the DG system was used almost exclusively by Forest Service employees for purposes such as checking electronic mail from their home units and to file, with their home units, their time and attendance reports." Second Declaration of Arnold G. Holden, at 1-2 (Sept. 8, 1994). The government will address the allegations made by NFRC more thoroughly in response to the papers NFRC has filed in Judge Jackson's court.

In sum, NFRC's proposed depositions fall outside the bounds of "remaining discovery" and NFRC's Motion to Compel should be denied as untimely.

II. IF THIS COURT DETERMINES NFRC'S MOTION IS TIMELY, THE SCOPE OF ANY DEPOSITIONS ALLOWED SHOULD BE LIMITED TO THE PERSONS AND ISSUES RAISED IN FEDERAL DEFENDANTS' DECLARATIONS REGARDING COMPOSITION OF THE ADMINISTRATIVE RECORD.

As NFRC notes, the federal defendants have previously indicated they would not oppose reasonably tailored discovery which addresses composition of the record. NFRC Compel Brf. at 4 (quoting Transcript of Proceedings, May 31, 1994 at 20). Consistent with this position, federal defendants submit that if any depositions are allowed they must be confined to the declarants and the matters related to composition of the record addressed in the declarations.⁷

Where the government has appointed representatives to speak for the agencies, other agency officials should not be required to submit to depositions. Community Fed. Sav. & Loan V. Fed. Home Loan Bank Bd., 96 F.R.D. 619, 621 (D.D.C. 1983). This proposition applies with particular force where the agency has responded institutionally by compiling an administrative record and by answering written discovery, as the government has here. Id. Thus, if this Court permits depositions at all, it should deny NFRC's Motion to Compel and instead require the depositions of Dr. Thomas, Mr. Holden, Mr. Gant and Mr. Vancil.

Further, in recognition of the firm rule against inquiry into decision-makers' thought processes and the merits of an administrative decision (see section III.A.2., infra), this

⁷ Without prejudice to its position that NFRC's Motion is untimely, the government has made each of the officials who provided declaration testimony, in this litigation, on the issue of document retention available to NFRC for deposition during the week of October 17.

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1 Court should issue an Order enumerating the limited purposes for which inquiry can properly be
2 made (namely into issues addressed in the declarations relating to the contents and compilation
3 of the record) and protecting the witnesses from inquiry beyond that scope. United States v.
4 Northside Realty, 324 F. Supp. 287, 293, 295 (N.D. Ga. 1971) (citing Union Savings Bank of
5 Pathoque, N.Y. v. Saxon, 209 F. Supp. 319 (D.D.C. 1962))(noting that where depositions of
6 government officials have gone forward, courts have entered protective orders "to prohibit the
7 deposing party from probing into the mental process by which the official's decision has been
8 reached" and refusing to allow deposition of two Cabinet members). See also Weisberg v. Dept.
9 of Justice, 627 F.2d 365, 371 (D.C. Cir. 1980)("Courts have ample authority to protect agencies
10 from oppressive discovery--for example, by limiting the scope of permissible questions").
11

12 As evidenced in their declarations, depositions of the declarants would provide
13 NFRC with ample testimony on issues concerning composition of the administrative record,
14 while minimizing the burden posed on government functions. Dr. Thomas and Messrs. Holden
15 and Gant discuss instructions given to FEMAT and SEIS team members, respectively,
16 concerning document retention. Mr. Gant addresses the mechanics of how the administrative
17 record was compiled. Mr. Vancil addresses policies relating to the retention of computer records,
18 and Mr. Holden can speak to the utilization of the DG computer systems during the pendency of
19 the FEMAT and SEIS Teams.
20

21 For these reasons and as set forth below, regardless of the Court's disposition on
22 the timeliness of NFRC's Motion, deposition testimony beyond that of the declarants should be
23 rejected.
24
25

26 FEDERAL DEFENDANTS' RESPONSE TO
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1 III. THIS COURT SHOULD NOT PERMIT DEPOSITIONS BEYOND THOSE OF THE
2 DECLARANTS AND IN ANY EVENT SHOULD BAR INQUIRY INTO THE
3 MERITS OF THE CHALLENGED DECISION AND THE DECISION-MAKERS'
4 THOUGHT PROCESSES.

5 A. NFRC's Proposal to Conduct Depositions "Regarding the Substantive Decisions
6 Leading Up To and Including the Adoption of the ROD" Violates the Well-
7 Established Rules Against Inquiry into the Merits of the Decision and the
8 Decision-makers' Thought Processes.

9 NFRC seeks to depose eleven government officials as to the "basis and
10 justification for the decision" to adopt the federal LSOG strategy. NFRC Compel Brf. at 3. In
11 other words, NFRC seeks to probe into the thought processes of Cabinet members, heads of
12 government agencies and other senior government officials to inquire into the merits of their
13 decisions.

14 Depositions of such persons and for this purpose are improper.

15 It is a bedrock principle of law that the judiciary is not to second guess a decision
16 of the executive branch by allowing elicitation of testimony into the merits of that decision. E.g.
17 Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)("[t]he court is not
18 empowered to substitute its judgment for that of the agency"); Village of Arlington Heights v.
19 Metropolitan Housing Development Corp., 429 U.S. 252, 268 n.18 (1977) (judicial inquiries into
20 executive motivation represent a substantial intrusion into the workings of the executive). In
21 addition, courts have long been hostile to allowing depositions and other forms of discovery
22 which seek to probe the thought processes of government officials. E.g. United States v.
23 Morgan, 313 U.S. 409, 422 (1941). The merits depositions NFRC seeks would contravene these
24 principles and should not be allowed.

25
26 FEDERAL DEFENDANTS' RESPONSE TO
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1. That NFRC's claims are being resolved pursuant to cross-claims for declaratory judgment does not alter the prohibition against eliciting testimony concerning the merits of agency decision-making.

NFRC admits the line of inquiry contemplated by its merits depositions would not normally be allowed, "if NFRC were suing the Government under the APA." Id. at 8.

Nonetheless, NFRC insists that because NFRC's challenges to the federal LSOG strategy are being resolved by the vehicle of cross-claims asserted by the government, "NFRC is entitled to the full range of discovery under the Federal Rules of Civil Procedure to defend the cross-claims." Id. NFRC's assertion is unfounded; that NFRC's claims are being litigated in the context of declaratory judgment action does not make the strictures of the APA and general principles of judicial review of agency decision-making any less applicable.

- a. The limited scope of review statutorily mandated by the APA applies to resolution of the cross-claims.

NFRC's sole argument for rendering the APA and normal administrative law principles irrelevant is that the government is not a person within the meaning of the Administrative Procedure Act (APA) and accordingly the discovery limitations imposed pursuant to the APA are inapplicable here. NFRC Compel Brf. at 7, n.2. NFRC's argument carries no weight as the claims being litigated in the cross-claims are claims brought under the APA by NFRC itself. Thus, it follows that discovery in this matter should remain within the scope of judicial review statutorily adopted pursuant to the APA. As NFRC appears to acknowledge, those strictures clearly preclude deposition testimony "regarding substantive decisions leading up to and including the adoption of the ROD." E.g. Asarco, Inc. v. E.P.A., 616 F.2d 1153, 1159 (9th Cir. 1980) ("the focus of judicial review is not on the wisdom of the

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agency's decision but on whether the process employed by the agency to reach its decision took in all relevant factors").

While the APA clearly precludes the merits depositions NFRC seeks, the APA is not the sole source of the courts' hostility toward the inquiries into the merits of the challenged decision NFRC requests. Thus, whether or not this Court ultimately decides this case should be governed by the APA, NFRC's attempts to take deposition testimony on the merits of the challenged decision should be rejected.

- b. The rule against probing agency officials' decision-making processes and the merits of their decisions has a strong jurisprudential history that pre-dates the APA and is still well-founded.

NFRC's request to inquire "as to the basis and justifications for the decision" is a blatant attempt to explore not only the merits of the challenged decision but also the very thought processes involved in reaching that decision. NFRC Compel Brf. at 3. Since well before the passage of the APA, Courts have protected executive officials from this sort of probing, because to allow such inquiry undermines the "integrity of the administrative system."⁸ United States v. Morgan, 313 U.S. 409, 422 (1941).

Indeed it has long been established that members of the Cabinet, agency heads and other senior officials of executive departments "should not be called upon to give [a] deposition if such deposition is taken in order to probe the mind of the official to determine why

⁸ This form of prying into the government decision-making process has been compared to cross-examination of judges on their decisions. E.g., Morgan, 313 U.S. at 422 ("Just as a judge cannot be subject to such a scrutiny...so the integrity of the administrative process must be equally respected").

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he exercised his discretion as he did in regard to a particular matter." United States v. Northside Realty Assocs., 324 F. Supp. 287, 293 (N.D. Ga. 1971) (citing e.g. DeCambra v. Rogers, 189 U.S. 119, 122 (1903)); Morgan, 313 U.S. at 422; Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586-87 (D.C. Cir. 1985) (refusing to allow examination of Labor Department officials on their discretionary decisions). See also Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1549 (9th Cir. 1993)(distinguishing discovery going to the "mental processes of individual agency members" as improper). Moreover, barring such testimony is consistent with the limited focus of judicial review of agency actions. E.g. Asarco, 616 F.2d at 1160 ("when a reviewing court considers evidence that was not before the agency it inevitably leads the reviewing court to substitute its judgment for that of the agency"). These principles apply with even greater force to more senior officials such as the Secretaries, their Assistants and Ms. McGinty. See Community Fed. Sav. & Loan v. Fed. Home Loan Bank, 96 F.R.D. 619, 621 (D.D.C. 1983)(citations omitted).

In short, the merits depositions proposed by NFRC must be refused as they are contrary to the strictures imposed by the APA and seek to probe the mental processes of agency decision-makers.

2. NFRC has not attempted to, and cannot, make the strong showing of bad faith necessary to probe into the merits of the decision.

The Morgan rule against inquiry into the decision-makers' thought processes was reaffirmed in Overton Park. National Nutritional Foods Ass'n v. Food & Drug Admin., 491 F.2d 1141, 1144-45 (2nd Cir. 1974). In Overton Park the Court reiterated that "inquiry into the mental processes of administrative decision-makers is usually to be avoided." 401 U.S. at 420

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(citing Morgan, 313 U.S. at 422)" It emphasized that where an administrative record accompanies the decision, "there must be a strong showing of bad faith or improper behavior" before testimony into the reason for a decision may be taken.⁹ Id. (emphasis added). As one court has explained:

if an administrative record was made in conjunction with the decision to be reviewed, there must be a showing of grounds to suspect bad faith or improper behavior not apparent from the administrative record before a discovery deposition of the decision makers is appropriate, and the more senior the official to be deposed, the stronger the showing to be demanded.

Community Fed. Sav. & Loan v. Fed. Home Loan Bank, 96 F.R.D. 619, 621 (D.D.C.

1983)(citations omitted). None of the various allegations made in support of NFRC's Motion reflect any degree of bad faith, let alone a strong showing of such, or any improper behavior.

In arguing that it should be allowed to conduct depositions into the compilation of the record, NFRC raises allegations relating to the document retention issues discussed in the government's declarations. The document retention practices in compiling the administrative record do not evince "bad faith." There were sound and supportable reasons for the manner in which the federal defendants handled the paper flow associated with preparation of the FEMAT Report and SEIS. See Declaration of Jack Ward Thomas ¶ 3 and Declaration of Arnold Holden ¶ 5 (July 20, 1994). The record itself reflects that NFRC's insinuation that documents were

⁹ Although in Overton Park the Supreme Court allowed inquiry into the mental processes of the decision-makers, that case is readily distinguished as no formal findings were made in support of the decision. Here, in contrast, the ROD contains explicit findings that the decision complies with each of the applicable statutes and regulations and generally explaining the reasons supporting the adoption of the federal LSOG strategy. In addition, the government has compiled an administrative record which contains well over 5,000 documents and many conflicting views expressed by agency personnel.

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1 selectively discarded is groundless. Indeed a record containing in excess of 5,000 documents and
2 numerous conflicting views of agency personnel has been presented for review.

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4 discuss at length the document retention practices used in the FEMAT and SEIS processes. In
5 the same vein, the government has expressed a willingness to provide deposition testimony on
6 the compilation of the record since the beginning of this litigation. E.g., NFRC Compel Brf. at 4
7 (citing Transcript of Proceedings, May 31, 1994 at 20).¹⁰
8

9 B. Many of the Officials Whose Decisions NFRC Seeks to Probe Are Cabinet
10 Members and Their Closest Advisors and/or Heads of Government Agencies and
11 Their Depositions--Particularly to the Extent They Seek Inquiry into the Merits--
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17
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19 ¹⁰ NFRC also raises allegations regarding retention of computer data. As NFRC notes, it
20 has filed a motion in Judge Jackson's court addressing the same allegations. See NFRC Compel
21 Brf. at 5, n.1. In support of its allegations, NFRC cites the Declaration of Mr. Vancil, which
22 discussed the Department of Agriculture's Data General (DG) computer system. As is explained
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24 drafted on the DG system and that system was not a standard means of communication among
25 either team's members. Instead, "the DG system was used almost exclusively by Forest Service
26 employees for purposes such as checking electronic mail from their home units and to file, with
their home units, their time and attendance reports." Second Declaration of Arnold G. Holden, at
1-2 (Sept. 8, 1994). The government will address the allegations made by NFRC more
thoroughly in response to the papers NFRC has filed in Judge Jackson's court.

FEDERAL DEFENDANTS' RESPONSE TO
NFRC'S MOTION TO COMPEL - 13

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1 due to his role as FEMAT Team Leader) should not be compelled to testify in any capacity or as
2 to any issue.

- 3 1. High ranking government officials are normally not available for
4 deposition.

5 Even if NFRC were entitled to take depositions at this point in the litigation,
6 NFRC erroneously seeks to take the depositions of high-ranking government personnel without
7 demonstrating why such exceptional discovery is warranted.

8 The Ninth Circuit has made clear that heads of government agencies are not
9 normally subject to depositions.¹¹ Kyle Eng'g Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979)
10 (citing Peoples v. United States Department of Agriculture, 427 F.2d 561, 567 (D.C. Cir. 1970)).
11 Depositions are the most burdensome form of discovery; therefore, NFRC should first be
12 required to demonstrate why other forms of discovery, or other avenues to obtain the information
13 sought are insufficient. See United States v. Northside Realty Assocs., 324 F. Supp. at 287, 293
14 (N.D. Ga 1971); Sweeney, 669 F.2d at 546 (must show information in possession of highest-
15 ranking officials cannot be obtained from lower level officials); see also Kyle Eng'g, 600 F.2d at
16 231-32 (affirming order of district court requiring discovery by interrogatory in lieu of
17 deposition). The government has already responded to NFRC's interrogatories and requests for
18 productions addressing record compilation. Yet, NFRC has not even attempted to explain why it
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24 ¹¹ A decision from the Eighth Circuit suggests that the Secretaries and possibly other of the
25 highest-ranking officials have a qualified immunity to deposition. Sweeney v. Bond, 669 F.2d 542, 546
26 (8th Cir. 1982) (state governor has qualified immunity).

FEDERAL DEFENDANTS' RESPONSE TO
NFRC'S MOTION TO COMPEL - 14

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1 must have depositions on the same subject or why lower-ranking officials cannot address the
2 subject.

3 This rule against free availability of deposition testimony from government
4 officials is not limited to Cabinet members and agency heads, but rather it extends to "high
5 administration officials who make legislative or policy decisions." See Doubleday v. Ruh, 149
6 F.R.D. 601, 608 (E.D. Cal. 1993); Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d
7 575, 586-87 (D.C. Cir. 1985)(absent extraordinary circumstances, "top Department of Labor
8 officials" should not be called to testify regarding their reasons for taking official actions);
9 Warren Bank v. Camp, 396 F.2d 52, 56 (6th Cir. 1968)(precluding deposition testimony of
10 Comptroller of the Currency and two "subordinate officials"). As is explained immediately
11 below, this rule not only is intended to protect the integrity of the administrative process and
12 thereby uphold the principles of separation of powers, it also is designed to prevent the burden
13 which would be imposed upon the government if its senior officials were routinely available for
14 deposition testimony.

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17 2. Depositions of these senior government officials would impose an undue
18 burden on government functions.

19 As previously explained, "an agency official--even if nominally a party--is
20 generally not to be required to submit to an oral discovery deposition in connection with civil
21 litigation." Community Fed. Sav. & Loan, 96 F.R.D. at 621. The reasons for this policy
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23 are obvious. Not only must the integrity of the administrative
24 process be protected, but public policy requires that the time and
25 energies of public officials be conserved for the public's business
26 to as great an extent as may be consistent with the ends of justice
in particular cases. Considering the volume of litigation to which

FEDERAL DEFENDANTS' RESPONSE TO
NFRC'S MOTION TO COMPEL - 15

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1 the government is a party, a failure to place reasonable limits upon
2 private litigants' access to responsible governmental officials as
3 sources of routine pre-trial discovery would result in a severe
4 disruption of the government's primary function.

5 Id. (citation omitted).

6 Here, NFRC has noticed the depositions of Cabinet Members, their assistants, the
7 heads of several government agencies, and other high-ranking government officials. Each of the
8 proposed deponents has a vital role in the "primary function" of his or her agency which would
9 be disrupted if they were subject to deposition.¹² These officials' important duties should not be
10 disrupted by a "failure to place reasonable limits upon private litigants' access to responsible
11 government officials." Id.

12 In short, the Secretaries and their Assistants, Ms. McGinty, Mr. Dombeck, and
13 Ms. Zielinski as heads of executive agencies or significant component parts of agencies (or direct
14 assistants to those heads), should not be subject to deposition at all.¹³ Kyle Eng'g. Co., 600 F.2d
15 at 231.

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19 ¹² NFRC may argue that the depositions it seeks will not require much of the officials' time. As the
20 Community Federal Savings court made clear, this argument must be viewed in the context of the
21 tremendous amount of litigation the government faces. 96 F.R.D. at 621. Thus to argue that these
22 particular depositions will not unduly burden the agency's function misses the point.

23 ¹³ A limited exception exists for Jack Ward Thomas, now chief of the Forest Service, concerning
24 those issues addressed in his declaration. Dr. Thomas led the initiative to develop the FEMAT Report
25 and has submitted a declaration concerning oral document retention instructions he gave to FEMAT. See
26 e.g. D.C. Fed'n of Civic Assocs. v. Volpe, 316 F. Supp. 754, 760-61 n.12 (D.D.C. 1970) rev'd on other
grounds, 459 F.2d 1231 (D.C. Cir.), cert. denied, 405 U.S. 1030 (1971). However, even where
exceptions are made to this rule, the resulting depositions must not go beyond "the actions which [the
official] took and the materials which he considered as the basis for his determination, rather than his
mental process in considering those materials." Id.

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NFRC'S MOTION TO COMPEL - 16

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C. Testimony Beyond That of the Declarants Regarding the Document Retention Issues Is Unnecessary and Would be Duplicative.

NFRC seeks to depose a total of eight government officials, many of whom are high-ranking, on the document retention issues.¹⁴ As explained above, high-ranking government officials are available for deposition only upon a showing of necessity. See Northside Realty, 324 F. Supp. at 293 (citing Wirtz v. Local 30, Int'l Union of Operating Engineers, 34 F.R.D. 13 (S.D.N.Y. 1963)). NFRC has not made such a showing. The declarants' availability for deposition renders the additional proposed deponents unnecessary. Additional testimony on those issues would merely be duplicative and would impose undue burden on the government. See Pension Benefit Guar. Corp. v. LTV Steel Corp., 119 F.R.D. 339, 343 (S.D. N.Y. 1988) (discovery undertaken to ensure the completeness of the record should be tailored to achieve that limited goal). Deposition of the non-declarants also is unnecessary because they have not submitted any written testimony to this court for any purpose.¹⁵ In short, NFRC cannot make the

¹⁴ Although NFRC never explains why any of the eight officials proposed for the record depositions are necessary to adequately explore the compilation of the record, NFRC goes to great length to assert its need to conduct such inquiry. NFRC's arguments are largely mooted by the fact that the government does not oppose the substance of NFRC's proposed record depositions; rather the government opposes the record depositions because they are untimely and unduly burdensome. Nonetheless, the government must take exception to NFRC's assertion that judicial review based upon the current record is "difficult or impossible." NFRC Compel Brf. at 5. As addressed in the government's Reply Brief in Support of Motion for Protective Order, at 10-14 (August 24, 1994), the record assembled (containing in excess of 5,000 documents exclusive of voluminous public comments) is more than adequate to support judicial review.

¹⁵ The burden that would be imposed by the depositions NFRC seeks has continued to balloon. NFRC's letter of September 20, 1994 first proposed deposing twelve current government officials. Now NFRC seeks to compel the deposition of seventeen officials, yet it provides no explanation as to why the depositions of the five additional officials are necessary. The Government suggests that with the exception of Mr. Vancil who admittedly has unique knowledge of the DG system, the other newly proposed deponents are unnecessary and should be refused on that basis (this would apply to Mr. (continued...))

FEDERAL DEFENDANTS' RESPONSE TO
NFRC'S MOTION TO COMPEL - 17

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1 showing of necessity required to compel additional deposition testimony, beyond that of the
2 declarants, on the record issues.¹⁶

3 CONCLUSION

4 NFRC's Motion to Compel Discovery falls outside the bounds of this Court's
5 order of September 14, 1994 and must be denied on that basis. Should this Court determine
6 NFRC's Motion to be timely, it must reject all inquiry into the merits of the challenged decision
7 and the decision-maker's thought processes. The exceptional circumstances which can warrant
8 an exception to this well founded rule are absent here. Moreover, testimony on the record issues
9 should be limited to that of the declarants. NFRC has not made a showing that testimony on the
10 record issues beyond that of the declarants is necessary. Any additional deposition testimony
11 would simply be duplicative and impose undue burden upon government functions. For all the
12 above stated reasons, NFRC's motion should be denied in full. In the alternative, the motion
13 should be granted only insofar as it seeks depositions of federal defendants' declarants on issues
14 addressed in their declarations related to composition of the administrative record.
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22 ¹⁵(...continued)
23 Dippon, Mr. Holthausen, Dr. Frampton and Dr. Raphael).

24 ¹⁶ Finally, the government is providing NFRC with the "matrix" it seeks by separate letter. The
25 government submits that the "matrix" was never used in the decision-making process and therefore is not
26 properly part of the administrative record. Thus, the government objects to those documents being
submitted as evidence before this Court.

FEDERAL DEFENDANTS' RESPONSE TO
NFRC'S MOTION TO COMPEL - 18

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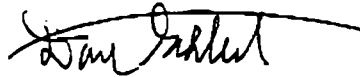
1 Dated this 11th day of October, 1994.

2
3 Respectfully submitted,

4 LOIS J. SCHIFFER
5 Acting Assistant Attorney General

6 PETER D. COPPELMAN
7 Deputy Assistant Attorney General

8 KATRINA C. PFLAUMER
9 United States Attorney

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26 FEDERAL DEFENDANTS' RESPONSE TO
NFRC'S MOTION TO COMPEL - 19

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THE HONORABLE WILLIAM L. DWYER

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLESEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

v.

Civ. No. C92-479WD

JAMES LYONS, in this official
capacity as Assistant Secretary of
Agriculture, and the UNITED STATES
FOREST SERVICE, an agency of the
United States,

Defendants,

and

WASHINGTON CONTRACT LOGGERS
ASSOCIATION, et al.,

Defendant-Intervenors.

SAVE THE WEST,

Plaintiff,

v.

Civ. No. C94-758WD

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1 JAMES LYONS, et al.

2 Defendants.

4 NATIVE FOREST COUNCIL,

5 Plaintiff,

6 v.

8 BRUCE BABBITT, et al.

9 Defendants.

11 THE SIERRA CLUB,

12 Plaintiff,

13 v.

14 MICHAEL ESPY, et al.

15 Defendants.

Civ. No. C94-803WD

Civ. No. C94-820WD

[ALTERNATIVE PROPOSED]
ORDER ALLOWING
LIMITED DEPOSITIONS

17 Cross-Claim Defendant/Intervenor Northwest Forest Resource Council ("NFRC")

18 having so moved, and good cause having been shown in response thereto by Federal Defendants,

19 IT IS HEREBY ORDERED that NFRC's Motion to Compel is DENIED except

20 insofar as it seeks the depositions of Jack Ward Thomas, Arnold Holden, John Gant and Lynn

21 Vancil, and only as to issues raised in these person's declarations related to the composition and

24 [ALTERNATIVE PROPOSED] ORDER

25 ALLOWING LIMITED DEPOSITIONS - 2

26

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1 compilation of the administrative record. No other persons may be deposed and no other issues
2 addressed.

3 The Clerk is directed to mail a copy of this Order to all counsel of record in the
4 above-captioned action.

5 DATED this ____ day of ____, 1994.

6
7 WILLIAM L. DWYER
United States District Judge

8 Presented by:

9 LOIS J. SCHIFFER

10 Acting Assistant Attorney General

11 PETER D. COPPELMAN

12 Deputy Assistant Attorney General

13 KATRINA C. PFLAUMER

14 United States Attorney

15 *David W. Gehlert*

16 WELLS D. BURGESS

17 STEPHEN J. ODELL

18 DAVID W. GEHLERT

19 JEAN E. WILLIAMS

20 ANDREA L. BERLOWE

21 U.S. Department of Justice

22 Environment and Natural Resources
23 Division

24 Attorneys for defendants

25 DATED: October __, 1994

26 [ALTERNATIVE PROPOSED] ORDER

ALLOWING LIMITED DEPOSITIONS - 3

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SEATTLE AUDUBON SOCIETY, et al.,

12

Plaintiffs,

13

v.

14

15

JAMES LYONS, in this official
 capacity as Assistant Secretary of
 Agriculture, and the UNITED STATES
 FOREST SERVICE, an agency of the
 United States,

18

Defendants,

19

and

20

21

WASHINGTON CONTRACT LOGGERS
 ASSOCIATION, et al.,

22

Defendant-Intervenors.

23

24

SAVE THE WEST,

25

Plaintiff,

26

v.

THE HONORABLE WILLIAM L. DWYER

IN THE UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF WASHINGTON
 AT SEATTLE

Civ. No. C92-479WD

Civ. No. C94-758WD

United States Department of Justice
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1 JAMES LYONS, et al.

2 Defendants.

3
4 NATIVE FOREST COUNCIL,

5 Plaintiff,

6 v.

7 BRUCE BABBITT, et al.

8 Defendants.

9
10 THE SIERRA CLUB,

11 Plaintiff,

12 v.

13 MICHAEL ESPY, et al.

14 Defendants.

Civ. No. C94-803WD

Civ. No. C94-820WD

[PROPOSED] ORDER
DENYING NFRC'S MOTION
TO COMPEL

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18 Cross-Claim Defendant/Intervenor Northwest Forest Resource Council's

19 ("NFRC") Motion to Compel having been filed after the discovery deadline established by this
20 Court's Order of August 23, 1994, NFRC's Motion is hereby DENIED.

21 The Clerk is directed to mail a copy of this Order to all counsel of record in the
22 above-captioned action.

23
24 [PROPOSED] ORDER DENYING
25 NFRC'S MOTION TO COMPEL - 2

26

United States Department of Justice
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DATED this ____ day of _____, 1994.

WILLIAM L. DWYER
United States District Judge

Presented by:

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Acting Assistant Attorney General

PETER D. COPPELMAN
Deputy Assistant Attorney General

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Attorneys for Defendants

DATED: October __, 1994

[PROPOSED] ORDER DENYING
NFRC'S MOTION TO COMPEL - 3

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 11, 1994, she caused one copy of the foregoing, **FEDERAL DEFENDANTS' RESPONSE TO NFRC'S MOTION TO COMPEL, PROPOSED ORDER DENYING NFRC'S MOTION TO COMPEL AND ALTERNATIVE PROPOSED ORDER ALLOWING LIMITED DEPOSITIONS**, to be served via telefacsimile machine and first-class United States mail, postage prepaid, upon the counsel of record hereinafter named.

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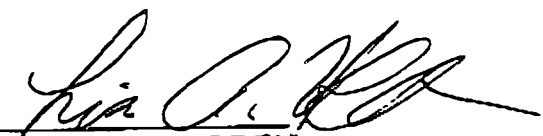
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LISA A. HOLDEN

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