

**LAW OFFICES OF SHARON E. DUGGAN**

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370 Grand Avenue Suite 5  
Oakland, CA 94610  
(510) 271-0825

Facsimile: (510) 271-0829

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Western Oregon Plan Revisions  
P.O. Box 2965  
Portland, OR 97208

RE: Draft Environmental Impact Statement for the Revision of the Resource Management Plans of the Western Oregon Bureau of Land Management Districts ("DEIS")

Dear BLM:

This letter is written on behalf of the Public Employees for Environmental Responsibility (PEER). PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY ("PEER") is a national, non-profit corporation based in Washington, D.C. with chapters throughout the United States. PEER represents current and former federal and state employees of land management, wildlife protection, and pollution control agencies who are frustrated by the failure of governmental agencies to enforce or faithfully implement the environmental laws entrusted to them by Congress. The ability of PEER's members to independently critique agency decisions frequently is compromised by conflicts between their duties as employees of a federal agency to uphold the law and the risk of disciplinary action for insubordination. Consequently, PEER's members rely on PEER to criticize agency action, including the use of litigation, on their behalf. PEER presents these comments in relation to the proposed OHV designations and use, particularly as concentrated in the Medford District.

The DEIS fails to disclose the environmental effects of the Western Oregon Plan Revision ("WOPR") proposed dramatic increase and concentration of OHV activity in Southern Oregon in the Medford District. It fails to identify standards or thresholds for measurement of impacts. The document contains reams of data, but many sections lack standards or objectives by which to not only compare impacts among the Alternatives, but to quantify the effects of each of the alternatives on the resource under discussion. Because there is no actual route designation it is impossible to evaluate the scope of impacts associated with the proposed plan, as it lacks site-specific analysis.

The DEIS fails to recognize that OHV use requires management, maintenance, and law enforcement far out of proportion to the opportunity it provides. A truck with a dirt bike or ATV

in tow gives visible evidence to the intent of that driver, but the majority of vehicles on public lands otherwise carry visitors whose intents and activities are much more benign and less damaging to forest resources and their fellow visitors. The binoculars of a birder, the magnifying glass of a botanist, the camera of wildlife photographers, the boots of a hiker or the rod and tackle of a fly-fisherman are invisible and innocuous, but they none-the-less are the equipment connected to the other the majority of people who recreate on the Bureau of Land Management ("BLM") lands. This proposed plan fails to provide balance. It fails to provide analysis of the impacts associated with this use, and the effect of lack of enforcement.

The DEIS fails to consider reasonable and feasible alternatives for OHV use which would limit their impact rather than intensify their presence across the landscape. OHV use should be reduced because of its well documented ecological, economic and social impact. The DEIS has no valid discussion of cumulative effects, particularly from OHV use in the Medford District, as well as in conjunction with timber extraction. We are aware OHV users habitually seize upon areas which BLM has logged, with little or no restraint imposed by your agency.

### **Executive Orders**

Executive Orders 11644 and 11989 are implemented on BLM lands through 43CFR8342.1. These executive orders and implementing regulations require that designation of areas and trails for off-road vehicles be done in compliance with the following criteria:

- (a) Areas and trails shall be located to minimize damage to soil, watershed, vegetation, air, or other resources of the public lands, and to prevent impairment of wilderness suitability.*
- (b) Areas and trails shall be located to minimize harassment of wildlife or significant disruption of wildlife habitats. Special attention will be given to protect endangered or threatened species and their habitats.*
- (c) Areas and trails shall be located to minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands, and to ensure the compatibility of such uses with existing conditions in populated areas, taking into account noise and other factors.*
- (d) Areas and trails shall not be located in officially designated wilderness areas or primitive areas. Areas and trails shall be located in natural areas only if the authorized officer determines that off-road vehicle use in such locations will not adversely affect their natural, esthetic, scenic, or other values for which such areas are established.*

We agree with the strong language above. OHVs should be permitted *only* where they do not excessively interfere with other recreational uses or damage natural resources. The WOPR's intended designation of OHV use areas violates these provisions, because no proper analysis has been provided which documents that such concentrated use will not damage soil, watershed, vegetation, and other resources, and will not harm or harass wildlife and their habitats. While it may appear that WOPR is seeking to segregate OHV use from other recreational use, there is nothing in the plan which ensures this. Rather, it is premised upon a large assumption, one which ignores the clear conflict because such designations and adjacent private property, among other things.

It appears the BLM has a misunderstanding the requirements of the Executive Orders and implementing regulations. A mere mention of the Executive Orders does not constitute compliance; the document must also acknowledge the Forest's duty to minimize those impacts and explain how that will be accomplished, and by what standards "minimize" is measured. The intent of the E.O.s is to *minimize* the impacts of OHV use on forest resources and other recreationists and neighbors. The EIS must not only disclose and compare the impacts of each alternative, it must provide a plausible reasoning that the Decision that results from the disclosures in fact, minimizes those impacts. Moreover, these set a much higher bar for designating OHV areas, because the duty to minimize impacts requires more than simply meeting standards from other laws, such as the ESA and NEPA.

## **Impacts**

The WOPR designates several hundred thousand acres of OHV areas and trails as open or limited, without any analysis of the designations for consistency with the above criteria. The Executive Orders and federal regulations go beyond the disclosure of impacts required under NEPA; they prohibit the agency from designating areas or trails for OHV use when such use conflicts with wildlife or wildlife habitats, damages soil, watershed or vegetation, conflicts with other recreationists or neighboring private lands, considering noise and other factors.

The WOPR DEIS fails on both counts; it generally fails to analyze or disclose potential impacts and/or conflicts; and when the DEIS does admit impacts, those admissions fail to alter decisions to designate areas and trails for OHV use.

The WOPR designates several hundreds thousand acres of OHV areas and trails, but leaves site specific analysis of the areas and trails to some vague future planning effort. This is a violation of the Executive Orders and BLM's own regulations, which require the analysis prior to designation. If the agency is unable to provide the analysis now, it should not make the designations now.

The BLM should coordinate the designation of OHV areas with the State, USFS, counties, and cities, as stated in its 2001 National Management Strategy for Motorized Off-Highway Vehicle Use on Public Lands.

The DEIS fails to analyze or acknowledge predictable impacts, including conflicts with non-motorized recreationists. Table 123 shows the projected growth in the 13 primary recreation activities in Western Oregon. The highest growth is projected to be in non-motorized activities: non-motorized boating (7%), fishing (5.8%), and wildlife viewing, interpretation and nature study (5.2%). Wildlife viewing is already the primary recreation activity; by 2016 there will be over 4.7 million visitors seeking the peace and quiet that are necessary for their activity. The DEIS fails to disclose if or where they will find those. The DEIS must disclose the likely impacts on these quiet recreation activities of designating several hundred thousand acres for OHV activity.

### ***Invasive Plants***

According to the DEIS, *“Timber harvesting, road management activities, and off-highway vehicle use create susceptibility for invasive plant species introduction and spread. Infestations are introduced and spread more readily in areas that have more human activity (e.g., high recreational use areas).”* In spite of this admission, BLM shows no intention of addressing the serious threat posed by the spread of invasive noxious plants.

The DEIS admits “the risk of introducing invasive plant species would be greater under Alternative 2 than the No Action Alternative and Alternatives 1 and 3.” Given this disclosure, the BLM must restrict OHV use to those areas and routes that “minimize” the risk of furthering the spread of invasive plants. Since the DEIS fails to even disclose which areas and trails currently host invasive species or which areas and trails are vulnerable to invasion, all proposals for OHV designation need to be withdrawn. BLM is required by NEPA to make those disclosures, and is required by the Executive Orders and BLM regulations to not designate OHV use where it is likely to result in the spread of invasive plant species.

There is a double-standard applied to silviculture and recreation in the WOPR. A number of mitigation measures are identified (though not mandated) for timber operations:

- ▶ Use cable or aerial logging methods in fifth-field watersheds that are at high risk for the introduction of invasive plant species.
- ▶ Use clean heavy equipment on actions that would operate off of roads.
- ▶ In infested areas, where the transport of invasive plant species seeds or propagules on heavy equipment is likely, clean the heavy equipment before leaving the project site, except in emergency situations.
- ▶ Use weed-free straw and mulch.

- ▶ Consistent with project objectives, retain native vegetation in and around project locations and minimize soil disturbance.

While OHV use poses even greater risk of spreading noxious weeds, due to the numbers of vehicles and the number of miles traveled by each vehicle, no mitigations are identified, let alone required.

### ***Wildlife***

The DEIS states: *“Under all action alternatives, off-highway vehicle activity would be designated as limited to designated roads and trails on most of the 330,000 acres currently designated as open to off-highway vehicles under the No Action Alternative. A total of 77 acres are designated as open under the action alternatives. This would result in a reduction to the amount of damage to occupied habitat and populations for all habitat groups compared to the No Action Alternative.”*

The above statement is conclusory and unsubstantiated by any analysis in the DEIS. The Executive Orders and federal regulations require the minimization of impacts to wildlife and wildlife habitat. The BLM must analyze impacts to wildlife and wildlife habitat by this proposal, and designate only those areas and trails that comply.

### ***Other Impacts***

Unregulated and rampant ORV activity on BLM lands has been ongoing in the Medford District for decades, where most of the designated OHV use is now proposed. BLM is well aware of the conflict this use has caused. OHV users have little regard for BLM’s existing routes. As a consequence people are subjected to nuisance, air pollution, conflict, physical harassment and threatening conduct by OHV users. The high-impact nature of off-road vehicle recreation (due to noise, pollution from two-stroke engines, and dust that extend far beyond the trail itself) diminishes the quality of the natural experience and often completely displaces non-motorized visitors. The damage caused by OHV use has been well documented. Private landowners are subjected to ongoing trespass, erosion, fire risk, damage to natural resources and water and property — all as a consequence of this unregulated activity knowingly facilitated by the BLM. Good governance requires the BLM to have adequate staff and resources to effectively manage the activities it legitimizes. The BLM in the Medford District has failed to provide this good governance. Yet the DEIS assumes that all is well, and all will be well. It fails to evaluate the environmental and social impacts associated with such unrestrained OHV activity. It fails to consider the nuisance imposed on private landowners who are subjected to pervasive OHV use. It fails to consider the cost to private landowners associated with OHV use, and the need to patrol and conduct self-enforcement in the absence of good governance.

The DEIS assumes that limiting OHV use to designated roads and trails will be better for other recreational users and will concentrate use into those areas of designated use. This is not supported. First, it assumes that OHV use will actually be limited to designated routes. There is no evidence to support that claim, and experience documents just the opposite: OHV users have little regard for remaining on so-called designated routes. Second, there is no credible mechanism for enforcement and monitoring to require OHV users to remain on designated areas. And in the absence of any actual designations in this DEIS, it is impossible to assume that this will provide some measure of distance and separation between OHV users and all other recreational and ecological interests. Moreover, because there are routine user conflicts and lack of enforcement, this DEIS should have evaluated those impacts. It failed to do so. The DEIS also fails to adequately disclose how newly designated routes will be established.

It has been documented by the California Air Resources Board (“CARB”) that off-road motorcycles and ATVs emit 118 times as much smog precursors as modern automobiles on a per-mile basis. A two-stroke engine emits 10 times as much smog precursors as a four-stroke engine for each mile traveled. These two-stroke engines are responsible for ninety percent of the thirty-four tons of smog precursors currently emitted each day in California by off-road motorcycles and ATVs.<sup>1</sup> According to the American Motorcyclists Association (AMA), two-stroke models comprise seventy percent of off-road motorcycle sales in California.<sup>2</sup> The DEIS should disclose the effects of all these pollutants on hikers, when they encounter OHVs. While riders can bring spare air filters with them, hikers must breathe the dust and other particulates and emissions created by OHV activity.

The DEIS fails to address Greenhouse Gases. With the entire world talking about Climate Change, the BLM has an obligation to disclose the contribution to greenhouse gases from recreational vehicle use on public lands. Public lands make up a huge portion of the North American Continent; cumulatively, millions of highly polluting vehicles making use of thousands of miles of federal roads and trails are not an insignificant consideration. Motor vehicle climate change emissions include: carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>) and nitrous oxide (N<sub>2</sub>O) emissions resulting directly from operation of the vehicle. The BLM’s policies on recreational vehicle use also contribute to unhelpful public attitudes; encouraging the frivolous use of fossil fuels and countering messages intended to encourage personal responsibility for change.

What the BLM proposes to now do is institutionalize more intensive ecological and economic impacts, without providing an assessment of those impacts, a mechanism to mitigate

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<sup>1</sup> CARB, Program update for Off-Highway Motorcycles and ATVs, 5/1/96.

<sup>2</sup> District 36 Legislative Action, Office, AMA, Rationale for Regulation Modification: CARB Emission Regulations for Off-Road Motorcycles and ATVs, (undated).

those impacts, and provisions to compensate landowners for this harm. And it proposes to significantly intensify the use and those impacts, without consideration of the overall effects on water quality, soil and erosion, plant and wildlife species, and potential for fire. The DEIS's vague and conclusory limited approach to these issues is wholly inadequate, and fails to address the consequences of the proposed OHV use and designations. A glaring example of the DEIS's failure to provide the necessary robust analysis of potential impacts, as well as alternatives, is evidence by characterizing the significant increase and intensity of use in the Medford District as "small changes."

### **Federal Clean Water Act**

The BLM is also subject to permitting requirements for designation of its OHV trails and roads, and must comply with requirements of the federal Clean Water Act. The DEIS fails to effectively evaluate the environmental effects associated with noncompliance, as required by the NEPA. Should the BLM proceed without obtaining required permits, it violates the law. *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9<sup>th</sup> Cir. 2002).

Under the federal Clean Water Act, any discharge of pollutants from a point source requires a federal NPDES permit. This is true for discharges from ditches, erosion gullies, and other "discrete conveyances" associated with OHV trails and roads. An NPDES permit is required when a party (1) discharges (2) a pollutant (3) to navigable waters (4) from a point source. *Headwaters Inc v. Talent Mokolumne District*, 243 F.3d 526, 532 (9<sup>th</sup> Cir. 2001); *Committee to Save the Mokolumne River v. East Bay Municipal Utility Dist.*, 13 F.3d 305, 208 (9<sup>th</sup> Cir. 1993). Discharges have an independent duty to apply for a NPDES permit. 40 C.F.R. § 122.21(a) ("Duty to apply. (1) Any person who discharges or proposes to discharge pollutants . . . must submit a complete application to the Director in accordance with this section") (emphasis added); § 122.21(b) ("it is the operator's duty to obtain a permit").

"The term 'discharge' when used without quantification includes a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16). Discharge of a pollutant or pollutants means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The term pollutant is defined as including, among other examples, "solid waste, . . . heat, . . . rock, sand, . . . and industrial . . . waste discharged into water." 33 U.S.C. § 1362(6). Sediment has been identified as a pollutant under the CWA. *Pronsolino v. Marcus*, 91 F.Supp.2d 1337, 1351 (N.D. Cal. 2000), *aff'd*, *Pronsolino v. Natri*, 291 F.3d 1123 (9<sup>th</sup> Cir. 2002), *cert. Denied*, 539 U.S. 926; *North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates, LLC*, 278 F.Supp.2d 654, 676 (E.D.N.C. 2003).

A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock,

concentrated animal feeding operation, or vessel or other floating craft, from which pollutants may be discharged.” 33 U.S.C. § 1352 (14). Congress’ definition of “point source” is “broadly construed” in order to effectuate the remedial purpose of the Clean Water Act. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10<sup>th</sup> Cir. 1979); *see also Community Ass’n for Restoration of the Environment v. Henry Bosna Dairy*, 305 F.3d 943, 955 (9<sup>th</sup> Cir. 2002).

“The term ‘navigable waters’ means the waters of the United States . . .” 33 U.S.C. §1362(7). These include “intrastate lakes, rivers, streams (including intermittent streams) . . . the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce,” and “tributaries of [those] waters.” 40 C.F.R. § 122.22 ©, (e). Tributaries that flow intermittently and ephemeral streams are waters of the United States. *Headwaters*, 243 F.3d at 435. A discharge into an ephemeral tributary that is not flowing at the time but is expected to flow at some point is a discharge to waters of the United States. *United States v. Ashland Oil and Transpo. Co.*, 504 F.2d 1317, 1329 (6<sup>th</sup> Cir. 1974) (where violation of the CWA is a discharge to a tributary, there is no threshold requirement to prove “that, in fact, the [pollutant] reached and polluted the navigable river”); *United States v. Texas Pipeline Co.*, 611 F.2d 345, 347 (10<sup>th</sup> Cir. 1979) (oil spill into tributary a discharge to waters of the United States despite absence of any evidence that tributary was flowing at time of spill”); *United States v. Moses*, 2006 WL 1459846\*7 (D.Idaho 2006) (“There is no requirement that there be water in the streambed at the time of the discharge”).

Storm water discharges are covered under section 402(p) of the CWA, which applies the NPDES permitting program to “industrial” storm water discharges as well as municipal discharges. 33 U.S.C. § 1342(p). As of 1994, all stormwater discharges containing any pollutants must obtain a NPDES permit. The CWA provides no express exemption for either OHV routes or recreation areas.

BLM has a Memorandum of Agreement with Oregon Department of Environmental Quality, which provides no exemption for OHV use from these permitting requirements.

OHV trails and roads will discharge pollutants into waters of the United States through point source conveyances. Sediment is a pollutant, as are other contaminants such as petroleum products. The DEIS documents sedimentation and discharge occurs and reaches waters of the United States, from discrete point source conveyance, as well as from nonpoint source pollution. The DEIS lacks adequate information to enable review as to the impacts associated with point and nonpoint source discharge as a result of OHV use, including lack of adequate on-the-ground verification and failure to ensure monitoring and enforcement. The DEIS simply fails to adequately disclose and document conditions to enable analysis of these impacts. The lack of enforcement and maintenance will contribute to point source discharges.

## **BLM Budget**

It is assumed that all four alternatives would be adequately funded to implement the alternatives as designed. There is absolutely no basis for this assumption. BLM's recreation and law enforcement budgets are currently and have historically been seriously underfunded. A recent PEER survey of BLM Law Enforcement Rangers found that 76 % of respondents believe their agency does not devote adequate resources to addressing ORV problems. This lack of regulation and enforcement is the pattern, not the exception. Reckless off-road vehicle abuse of public lands is spinning out of control. Tougher penalties and a new enforcement emphasis are critically needed, according to vast majority of Forest Service and BLM rangers polled in a five-state Southwest region, including California. This survey of federal rangers' views on ORV issues leaves little doubt that law enforcement officers on the ground perceive the situation as extremely serious and worsening:

- ▶ More than nine out of ten (91%) of respondent rangers agree that "off-road vehicles present a significant law enforcement problem in my jurisdiction";
- ▶ More than half (53%) feel "off-road vehicle problems in my jurisdiction are out of control"; and
- ▶ Nearly three out of four (74%) say that off-road abuses "are worse than they were five years ago" while fewer than one in six (15.2%) believe the situation is improving.

A copy of this report is provided. These same issues and lack of enforcement plague OHV use on BLM lands in Oregon.

## **Conclusion**

The WOPR and its DEIS are clearly and primarily designed to serve the timber industry's demands. The DEIS focuses on timber harvesting and lacks any specific and credible analysis of impacts from OHV use, in relation to timber use or otherwise. Many have submitted comments on the extensive defects of the DEIS. Certainly it fails to comply with NEPA with regard to the proposed OHV designations and use, as well as the Executive Orders and BLM's implementing regulations which govern OHV use. It must be withdrawn.

Very truly yours,

/s/ Sharon E. Duggan

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cc: Karen Schambach, PEER

Enc. *Off-Road Vehicle Issue Survey of SW Law Enforcement Professionals Bureau of Land Management (BLM) and Forest Service (FS), PEER*