

6.0. REGULATORY MANDATES APPLICABLE TO THE JACKSON CREEK WATERSHED¹

6.1. Legislative Mandates.

There are multiple Federal, State of Oregon, and local government regulatory mandates that apply to the Jackson Creek watershed, which include the Federal Clean Water Act of 1990, Coastal Zone Act Reauthorization Amendments of 1990, Endangered Species Act, Division of State Lands/Army Corps of Engineers Removal-Fill 404 permits, and Oregon Department of Environmental Quality water quality standards, SB1010 Agricultural Practices Act, Oregon Endangered Species Act of 1987, Jackson County riparian ordinances, and the cities of Central Point, and Jacksonville riparian ordinances. The federal mandates specify water quality and environmental requirements for state agencies to implement and oversee. The mandates apply to both public and private lands, and have enforcement provisions for non-compliance.

6.1.1. Federal Clean Water Act Mandates (CWA). The Clean Water Act of 1972 was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nations's waters."² The CWA set national goals and policies for the restoration of water quality and eliminating of pollution in navigable waters to provide protection for fish and wildlife, recreation and other beneficial water uses.

The Act implemented point source and nonpoint source controls to achieve water quality standards. States were required to initiate and oversee planning and enforcement of water standards through creating *Total Maximum Daily Loads* (TMDL) for pollution and discharge in the public waterways. Point sources of pollution are controlled through the National Pollution Discharge Elimination System (NPDES) permit process, which is implemented by the states under EPA supervision. Nonpoint sources of pollution (which are the more numerous within a watershed, such as forestry, agriculture, and urban stormwater runoff) are to be regulated and managed through the use of "Best Management Practices."

The State is directed to establish "designated uses" of a waterway (for example, fish and wildlife or human consumptive uses), and set criteria to protect these uses through setting TMDLs. The water quality parameters which may cause a water body to be listed are: (1) aquatic weeds or algae, (2) bacteria (*E. coli*) - an indicator of fecal coliforms, (3) biological criteria, (4) chlorophyll A, (5) dissolved oxygen, (6) habitat modification, (7) flow modification, (8) nutrients, (9) pH,

¹ This section is derived from Kelly Nolan , *Integrating the Planning Mandates of the Clean Water Act, The Coastal Zone Act Reauthorization Amendments of 1990, and The Endangered Species Act: Toward A Comprehensive Approach To Watershed Management Planning*. Northwest Water Law and Policy Project, Northwestern School of Law of Lewis & Clark College, and the Rogue Valley Council of Governments, Research Publication PO99-2, May 1999.

² 33 USC § 125(a)

(10) sedimentation, (11) temperature, (12) total dissolved gas, (13) toxics, and (14) turbidity.³

In addition, landowners proposing activities that discharge dredged or fill material into streams are required to obtain a "404 permit" from the Army Corps of Engineers, to protect water quality and beneficial uses of public waterways.

Local watershed councils and governmental entities are expected to develop watershed planning and management practices and priorities to comply with water quality standards, and protect future beneficial uses of the waterways. Failure to take appropriate and sufficient action can result in criminal penalties, fines up to \$25,000/day, and restriction upon commercial operations. The ODEQ (in coordination with the Federal Environmental Protection Agency (EPA)) is designated with responsibility for ensuring planning and compliance with the CWA, and is the main contact agency for this effort.

6.1.2. Federal Coastal Zone Act Reauthorization Amendments of 1990 (CZARA). The CZARA requires states to develop comprehensive and enforceable management programs regulating land and water uses and coastal development. The authority of this program extends upstream to all waters flowing to the sea from coastal states. The amendment requires that water quality standards be developed, and mandates compliance to those standards.

For the most part, watershed planning and actions to comply with the TMDLs and beneficial uses of the Clean Water Act will also satisfy CZARA requirements for the Jackson Creek watershed, although care must be taken to consult with all appropriate agencies.

6.1.3. Federal Endangered Species Act (ESA). The Endangered Species Act (ESA) of 1973 provides for listing of native animal and plant species as endangered, provides means for their protection, and specifies procedures for planning for recovery of species population. The ESA defines *endangered* as any species "in danger of extinction throughout all or a significant portion of its range," and *threatened* as any species likely to become endangered within the foreseeable future throughout all or a significant portion of its range. The US Fish and Wildlife Service (USFWS) is responsible for administering the law for inland fish, wildlife, and plants, and the National Marine Fisheries Service (NMFS) is responsible for marine and anadromous fish. All Federal, State, and private landholders are required to *consult* with the NMFS or USFWS before proceeding on any action that may affect endangered species. The ESA also applies broad *take* prohibitions to all threatened and endangered animal species. Failure to take action to restore habitat quality is also defined as a "taking," and can result in fines and penalties to local governmental entities and landholders.

Both federal and private landholders associated with public waterways are directed to prepare *Habitat Conservation Plans* (HCP) for the protection and recovery of endangered species, to be approved by the NMFS, and to be granted an *incidental take permit* for activities associated with

³ Listing Criteria for Oregon's 1998 303 (d) List of Water Quality Limited Water Bodies, ODEQ, October 1998.

anadromous fish-bearing streams. Watershed councils or local governmental entities can assume the planning, administrative, and monitoring responsibility for local landholders, but compliance and habitat restoration remains the responsibility of local landholders and managers.

An “**endangered species**” is any species that is in danger of extinction throughout all or a significant part of its range (16 USC § 1532(6)).

“**Critical Habitat**” is the area on which are found physical or biological features that are essential to the conservation of a species and which may require special management or protection (16 USC § 1532(5)(A)).

“**Harm**” refers to alteration of habitat or a threat to the potential for survival or recovery of a species.

“**Taking**” refers to any activity that “harasses, harms, pursues, hunts, shoots, wounds, kills, captures, or collects a listed species, or attempts to do so, as well as any modification of habitat that would result in the above.” (16 USC § 1532(19)).

The “**NMFS 4(d) Rule**” is a provision whereby the FWS and NMFS can forestall enforcement of a *taking* action on behalf of state and local planning entities, as long as habitat restoration actions are beneficial or benign (16 USC § 1533(d)). The purpose of the rule is to enable communities to undertake restoration actions without threat of enforcement, when taking might occur within the process of restoring habitat quality.

Landowners/managers are encouraged to prepare a **Habitat Conservation Plan (HCP)** to outline measures to minimize and mitigate impacts that may harm a species. Resource managers must apply for and be granted an “**incidental take permit**” for any action that results in a taking condition, before proceeding with the management action.

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1.4. Oregon State Endangered Species Programs. The Oregon Endangered Species Act of 1987 (ORS 496.172) gave the Oregon Department of Agriculture (ODA) responsibility and jurisdiction over threatened and endangered plants, and the Oregon Department of Fish and Wildlife (ODFW) responsibility for threatened and endangered fish and wildlife. Both of these agencies have entered into cooperative agreements with the USFWS to continue research and conservation programs for animal and plant species under the federal ESA. The Oregon Natural Heritage Program has a similar agreement with the USFWS for invertebrates.

The ODFW maintains a list of threatened and endangered species; currently 35 species of fish and wildlife are on the list. The Oregon Act requires state agencies to develop programs for the management and protection of endangered species, and requires agencies to comply with the guidelines adopted by the Oregon Fish and Wildlife Commission for threatened species.

Table 6.0. Federally Listed Wildlife Populations Affecting Jackson County.

| Mammals | | | |
|--------------------|-------------|----------------|-------------|
| Scientific Name | Common Name | Federal status | ODFW status |
| <i>Canis lupus</i> | Gray wolf | LE | LE |

| | | | |
|-----------------------------------|----------------------------------|-----------|-----------|
| Lynx canadensis | Canada lynx | LT | - |
| Ursus Arctos | Grizzly bear | LT | - |
| Fish | | | |
| Onchorhynchus kisutch | Coho salmon | LT | SC |
| Onchorhynchus mykiss | Steelhead | C | SV |
| Birds | | | |
| Haliaeetus leucocephalus | Bald Eagle | LT | LT |
| Strix occidentalis Cairina | Northern Spotted Owl | LT | LT |
| Falco peregrines alatum | American Peregrine falcon | - | LE |

LE = Listed Endangered. Taxa listed by the U.S. Fish and Wildlife service or the National Marine Fisheries Service (NMFS), Endangered under the Endangered Species Act (ESA), or by the Departments of Agriculture (ODA) and Fish and Wildlife (ODFW) of the state of Oregon under the Oregon Endangered Species Act 1987 (OESA).

LT = Listed Threatened. Taxa proposed by the USFWS or NMFS to be listed as Endangered under the ESA or by ODFW or ODA under the OESA.

C = Candidate. Taxa for which NMFS or USFWS have sufficient information or support a proposal to list under the ESA, or which is a candidate for listing by the ODA under the OESA.

SV = Species vulnerable

SC = Species critical

Reptiles and amphibians were also reviewed for this table, and none are listed as threatened, endangered or candidate species at this time. (For more information on listing status of reptiles, amphibians, insects, invertebrates, and plants see the Oregon Natural Heritage Website www.heritage.tnc.org/nhp/us/or/index.html. For plant populations refer to ONHP website Oregon State Sensitive Species Listing Categories)

6.1.5. Oregon Forest Practices Act. The Oregon Forest Practices Act requires forest operators to comply with best management practices to achieve water quality objectives developed within the boundary of the Coastal Nonpoint Source Control Program by the Board of Forestry. These objectives apply to riparian setbacks, harvest practices, and vegetation management. Water quality protections in federal forest practices must meet or exceed the effectiveness of the FPA practices. The Oregon Department of Forestry has already served as the lead agency for TMDL development on state and private forest lands in several basins.

6.1.6. Oregon SB1010 Agricultural Water Quality Management Act. In 1993, the state legislature approved Senate Bill 1010, which directs the Oregon Department of Agriculture (ODA) to provide for controlling nonpoint source pollution to protect water quality. The ODA is charged with developing *agricultural water quality management plans* (AWQMP), and consults with ODEQ to establish boundaries of responsibility, identify nonpoint sources of pollution, and develop control measures to achieve 303(d) water quality objectives. SB1010 directs ODA to work with farmers and ranchers to develop overall agricultural water quality management area plans for watersheds that are required by state or federal law to have such plans in place. Plan provisions are binding upon local landowners, and nonparticipation can result in enforcement actions.

A central objective of the WQMP process is to involve local citizens and landowners in plan formulation and implementation, and a plan for the Bear Creek subbasin has been in place since 1997. The objectives of the Bear Creek Subbasin Agricultural Water Quality Management Area Plan are:

1. Create a high level of awareness of water quality issues and problems among farmers in the watershed;
2. Promote practices which limit the movement of nutrients and animal wastes from agricultural lands into Bear Creek;
3. Promote practices which stabilize streambanks;
4. Promote practices which reduce sedimentation of streams due to soil erosion;
5. Seek to control water pollution as close to its source as possible; and
6. Seek funding necessary to achieve the mission statement.

6.1.7. Jackson County and Municipal Regulatory Measures. Oregon's Statewide Planning Goal 5 (*Natural Resources, Scenic and Historic Areas, and Open Spaces*, OAR 660-23-090) requires local jurisdictions to adopt programs that will protect natural resources, including riparian corridors. The rules provide two alternative ways by which a local jurisdiction may implement Goal 5 requirements: the "standard" process that requires an inventory of riparian areas, an assessment of their significance, and adoption of a program to achieve Goal 5. Alternatively, a jurisdiction may follow a "safe harbor" process by adopting a standard definition of significant riparian areas under OAR 660-23-090(5), and implementing the "safe harbor" provisions of OAR 660-23-090(8) as a program to achieve Goal 5. The safe harbor provisions specify use restrictions in riparian corridors and provide options for hardship variances and restoration in lieu of fully meeting the standards.

Jackson County ordinances require a 50 ft. setback for Class I (fish bearing) streams, a 25 ft. setback for Class II (non-fish bearing) streams, and overstory vegetation retained to 3x average width of stream to a maximum of 100 ft. Riparian and wetland areas are currently being inventoried.

Medford has mapped riparian areas within the city limits and requires riparian protection to 50 ft. from top of stream bank for Class 1 streams, and proposed a buffer area of 50 ft. from wetland boundaries. Central Point requires 25 ft. setback for riparian areas, but has not mapped riparian or wetland areas. Jacksonville requires 50 ft. riparian protection from top of stream bank, and goals for protection of wetlands are stated in Jacksonville's Comprehensive Plan.

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