

***Oregon Eastside Forests Restoration, Old-Growth Protection and Jobs Act of 2011***  
***(S.220.IS, 112<sup>th</sup> Congress)***

## **Questions and Answers**

### **What were major changes between the revised legislation and the introduced version?**

The legislative process of two hearings (one in Washington, DC and one in Bend, Oregon) as well as rewriting by the staff of the Senate Energy and Natural Resources Committee (chaired by Senator Jeff Bingaman, D-NM) has resulted in a revised bill that has major changes from what was introduced in December 2009 (S.2895, 111<sup>th</sup> Congress). The most major changes are:

#### **• 15-Year Life Versus “Permanence”**

The revised legislation would sunset after 15 years. Senator Bingaman had concerns with permanently legislating special management provisions specific only to a portion of the National Forest System. The eastside forest bill provides for a 15-year pilot or experiment in forest and watershed restoration, protection and management.

#### **• Revised “Performance Standards”**

The acres and years for which there is a mandate for projects with “predominantly” mechanical treatment with an “emphasis” on sawlogs were renegotiated. While potentially longer in duration, the annual acreage numbers were reduced and more sideboards were added.

#### **• Administrative Review Maintained**

Senator Bingaman also strongly believed, as did the Forest Service, that administrative review be maintained throughout the life of the new law. Conservationists didn’t complain.

#### **• Best Available Science**

The 2009 version said that the Secretary would have to manage in a manner *consistent* with the advice of the Scientific and Technical Advisory Panel, which had to *use* best available science in making its recommendations. It turns out that limiting the Secretary’s discretion and authority in that way is unconstitutional. In the revised 2011 bill, the Secretary must *consider* best available science, including a report from the Science and Technical Advisory Panel that must be *based* on best available science. Numerous experienced lawyers in the conservation community were consulted on the difference between the Secretary have to *use* versus *consider* best available science. Some said that there is no significant legal difference. Others felt there was a difference, but advised that if an organization otherwise was happy with the bill that it wasn’t worth opposing it over.

- **Provisions Pertaining to Biomass Utilization Dropped**

The Senate Committee on Energy and Natural Resources could not accept specific language in this regard.

- **Collaboration Provisions Loosened**

The Forest Service didn't want to be in the business of certifying collaboration groups as legitimate or not.

- **Local Contracting Section Dropped**

These matters were more generic to National Forest System Management everywhere and may be taken up in later legislation.

- **Other Changes**

There are numerous other changes to the bill as well. Introduced provisions were dropped or rewritten. New provisions were added. If you want to fully understand the revised legislation, you need to compare the original and final bills side-by-side. Please also read companion documents to this one:

- Implementation Timeline
- How the Revised Legislation Would Work
- The Gets, the Gives, the No Changes and the Not Gets
- Administrative and Judicial Review

### **Why were these changes necessary?**

Very few bills are enacted into law without first being revised in the legislative process. Some legitimate questions were raised at the hearings or in written testimony on the legislation that were addressed. The Forest Service and the Department of Agriculture had concerns, many of which were addressed. Senator Bingaman had concerns that also had to be addressed. As these concerns were addressed, other provisions of the bill had to be revised so the entire bill still made sense.

The fundamental politics were that the bill had to be mostly acceptable to the Senate Energy and Natural Resources Committee chair and staff, the Forest Service, the Department of Agriculture, the sponsor Senator Wyden, the Oregon eastside timber industry and a critical mass of the conservation community.

### **Why does the conservation community need legislation for eastside forests?**

The Forest Service is starting to revise forest plans for Oregon's eastside forests. The eastside screens and InFish/PacFish will then be superseded by these revised forest plans. It is likely that

the agency will grant itself more discretion than they currently have under the eastside screens and InFish/PacFish. This legislation sets a floor of protection and a new direction for Forest Service management.

On the negative side, with the Republican takeover of the House of Representatives, Congressman Greg Walden (R-2<sup>nd</sup>-OR) has a greater ability to influence federal forest management, including seeking enactment of his Healthy Forests Restoration Act II. Statutory protection and direction is less subject to reversal as the political pendulum swings.

### **Why does the timber industry need legislation for eastside forests?**

The “timber industry” is no longer a monolith. The first notable distinction is westside versus the eastside Oregon timber industry. A few mills on the westside still cut mature and old-growth trees and need to close. Those that remain need to concentrate on ecological restoration thinnings of both monoculture plantations in moist forest types and fire-suppressed dry forest types. On the eastside, there are few mills left and those mills are surviving without large old trees.

Because the 21” rule has generally prevented the logging of large trees on the eastside since 1995, the eastside timber industry has effectively moved beyond the biggest trees. The milling operations still operating on the eastside of Oregon realize that their only future on the National Forest System is in scientifically sound ecological restoration thinning that can yield a byproduct of logs of adequate quality and quantity for their purposes. (Of course, the industry will still partially rely on private timberlands.) The remaining industry is even willing to invest in state-of-the-art small-diameter logging, milling, yarding, hauling and logging equipment—if they think supplies will be adequate. Such equipment can make the removal of ecologically problematic small trees more profitable. Such equipment is more efficient, uses less energy and has lower environmental impacts to soils, water and other resources.

A Democratic Congress, Democratic Administration and severely depressed housing market is a perfect storm for the timber industry. The few eastside mills that are left need federal timber to survive (forests on the eastside are mostly public and the private lands have, for the most part, been overcut). In the isn’t-life-ironic department, to achieve our goals of conserving and restoring dry forests of the region, conservationists need a right-sized industry to do scientifically sound (and coincidentally capitalistically profitable) ecological restoration thinning that is part of comprehensive forest and watershed restoration.

### **Why is size (21+” DBH) specified for explicit statutory protection rather than age (say 150+ years old)?**

It was a concession by conservationists and Senator Wyden to the timber industry, which prefers the “devil they know” in the form of the current eastside screens. Senator Wyden, most conservationists (and scientists) prefer age-based rather than sized-based protection. Senator Wyden’s earlier draft bill—which was drafted with the advice of Dr. Jerry Franklin of the University of Washington and Professor Norm Johnson of Oregon State University—did specify age-based protection. The revised legislation provides for experimental projects in which age-based protection will be tested, with the results reported to Congress.

**Does the revised legislation similarly specify stand-level protection (no logging) for old-growth forests as it speaks to specific tree-level protection (no logging) of larger and older trees that will not be logged?**

Conservationists and the timber industry could not agree to stand-level protection, so the question will be addressed by the Scientific and Technical Advisory Panel as they provide Plant Association Group-specific guidance to the Forest Service on how to meet the goals of the revised legislation.

**Why does the bill mandate mechanical treatment with an emphasis on sawlogs?**

The Act mandates that the Forest Service produce projects of 39,000 acres in year 1, 58,000 acres in year 2 and 80,000 acres in year 3. For each fiscal year thereafter, the 80,000-acre figure is in effect until one ecological restoration project (authorized by the revised legislation) is initiated for each national forest. After that, the Forest Service may, if it wishes, set annual restoration acreage targets consistent with the revised legislation. These acreage targets must “predominantly” (i.e. “mainly; for the most part”) include “mechanical treatments” (also includes non-commercial activities such as mastication) that “emphasize” (i.e. “gives special importance or prominence to”) sawlogs (for making lumber and plywood and a minimum of 7-9” in diameter at breast height) as a “byproduct” (i.e. “a secondary result”).

The best available science concludes that mechanical treatment to reduce stand densities is desirable as part of comprehensive restoration of forest health.<sup>1</sup> The timber industry is interested in sawlogs and this is the main reason they were interested in legislation. The conservation community supporting the legislation is supportive of such mechanical treatments, especially when constrained by the protections and guided by the directions in the revised legislation.

The mandate is “to the maximum extent practicable” (subject to funding and need) and must comply with all other statutes and regulations.

We can only forecast the amount of mechanical treatment acres. We know it would be “predominant” (somewhere between just over half to just short of all, so let's estimate three-quarters) and there would be an “emphasis” on sawtimber (let's estimate two-thirds on the high side).  $80,000 \text{ acres/year} * 75\% * 66.7\% = 40,200 \text{ acres per year}$  of mechanical treatment with a sawtimber emphasis. The Forest Service says that it is currently averaging 28,000 acres per year of such projects.

If the amount of mechanical treatment emphasizing sawtimber is an average of 40,200 acres/per year for three years, it would translate to treating ~1% per year of the estimated 4.6 million acres of ponderosa pine-dominated forest outside of Wilderness and Inventoried Roadless Areas on the

---

<sup>1</sup> *Examples:* Brown, Richard T., James K. Agee and Jerry F. Franklin. 2004. Forest Restoration and Fire: Principles in Context of Place. *Conservation Biology* 18:903-912; Noss, R. F., J. F. Franklin, W. L. Baker, T. Schoennagel, P. B. Moyle. 2006. Managing fire-prone forests in the western United States. *Frontiers in Ecology and the Environment* 4(9): 481-487. (Ecological Society of America, Washington, D.C.). (The former paper is available from Rick Brown ([rick@conservationscience.org](mailto:rick@conservationscience.org)) and with the permission of the lead author, the latter paper is available for download for limited educational purposes only at [www.andykerr.net/downloads](http://www.andykerr.net/downloads).)

eastside. If—against all likelihood—every acre yielded sawlogs, it would result in the mechanical treatment of 1.7% per year for 15 years (25.5% total) of the roaded ponderosa pine-dominated forests. Most scientists are comfortable with ecological restoration thinning on one-quarter (or more) of the roaded dry forest landscape.

**The bill appears to mandate the permanent continuation of the timber industry in the future. Why is that a good idea or even acceptable?**

It's time to parse the words. The revised legislation says:

*(b) Land Management Goals.—*

*(1) In general.—In the covered area, the Secretary shall, using the best available science, seek—*

*(A) to conserve and restore forest health, watershed health, and other ecosystems;*

*(B) to reduce the risk of, and increase the resistance and resiliency of the land to, uncharacteristic disturbances;*

*(C) to allow for characteristic natural disturbances; and*

*(D) to harvest wood to maintain adequate levels of industry infrastructure to accomplish the goals in subparagraphs (A), (B) and (C).*

Notice that the goal (D) only speaks to an industry of adequate size to accomplish goals (A), (B) and (C).

**How can you support legislation that leaves quite a lot of discretion to the Forest Service, an agency that has a record of abusing such discretion?**

Forest management bills are a different matter than forest wilderness bills. With the latter, one may or may not get the Wilderness boundary one wants, but one is relatively certain what will happen inside that boundary. The Wilderness Act severely limits agency discretion, as it should. However, a law such as the National Forest Management Act, while in some ways limiting agency discretion, vests discretion in the Forest Service. One statutory command rarely fits all forest types. Though the Oregon eastside forest legislation will be applied to a limited geography, it nonetheless embraces a multitude of forest types and issues that Congress both cannot and will not specifically address. The revised legislation will both establish protections for the forest and watersheds as well as directions for the agency. If the agency ignores those directions by acting in an arbitrary and capricious manner, they can be taken to court.

**The revised legislation is quite different from what was first introduced? Why are you still supporting it?**

In determining whether or not to support legislation, is useful to ask and answer two questions:

A. *Does the enactment of this legislation into law put us in a better place than we are today?*

B. *Do we think we could do better next time?*

If A is yes and B is no, support the legislation on the table.

If A is no and B is yes, do not support the legislation on the table.

If A is yes and B is yes, do not support the legislation on the table if you are damn sure you are right about next time.

If A is no and B is no, do not support the legislation on the table and ask yourself how the hell you got into this mess.

Our biggest loss was permanence; the bill would only be the law of the land for 15 years. There are several concessions conservationists made in the original bill that were removed from the revised legislation. On balance it is still a very good new statute that advances the causes of forest and watershed conservation and restoration.

In this circumstance at this time for this place, the answer to A is yes and the answer to B is no (but not that much worse). Therefore, we support the revised legislation being enacted into law.

Those great environmentalists Mick Jagger and Keith Richards sum it up:

*You can't always get what you want  
But if you try sometimes you just might find  
You just might find  
You get what you need, ah yes...*

*Prepared by Andy Kerr (andykerr@andykerr.net), The Larch Company, January, 2011*