

ENVIRONMENTAL POLICY
2018 WASHINGTON SOCIETY OF AMERICAN
FORESTERS
ANNUAL MEETING



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MAY 3, 2018

OVERVIEW

- Endangered Species Act: Changes in Critical Habitat
- Biomass: Direction of Carbon Market
- Landslides: What happens after Oso?

CRITICAL HABITAT: ESA FRAMEWORK

ESA enacted to conserve “ecosystems upon which endangered species...depend.”

- 16 USC 1531(b)

ESA allows the Service to designate critical habitat that is either “occupied” or “unoccupied” by listed species.

- 16 USC 1532(5)(A): “Critical habitat” may include areas “occupied by the species” as well as “areas outside the geographic area occupied by the species” that are determined to be “essential for the conservation of the species.”

Does the ESA apply different standards to the designation of critical habitat based on whether it is “occupied” or “unoccupied” by listed species?

- Occupied: “physical or biological features essential to the conservation of the species”
 - 16 U.S.C. 1531
- Unoccupied: “a determination that such areas are essential for the conservation of the species”

CRITICAL HABITAT: DUSKY GOPHER FROG

77 FED. REG. 35, 118 (JUNE 12, 2012)

Fish and Wildlife Service designated Unit 1 as unoccupied critical habitat.

Dusky Gopher Frog needs three things for habitat:

- Small, isolated ephemeral ponds in open canopy forest for breeding
- Upland, open canopy forest for non-breeding habitat
- Upland habitat connecting breeding and non-breeding habitat

Service designated 1544 acres of private land in Louisiana that is unoccupied. Has, at most, one feature (ephemeral ponds) of habitat.

Service: “Uplands associated with these ponds do not currently contain the essential physical or biological features of critical habitat.”

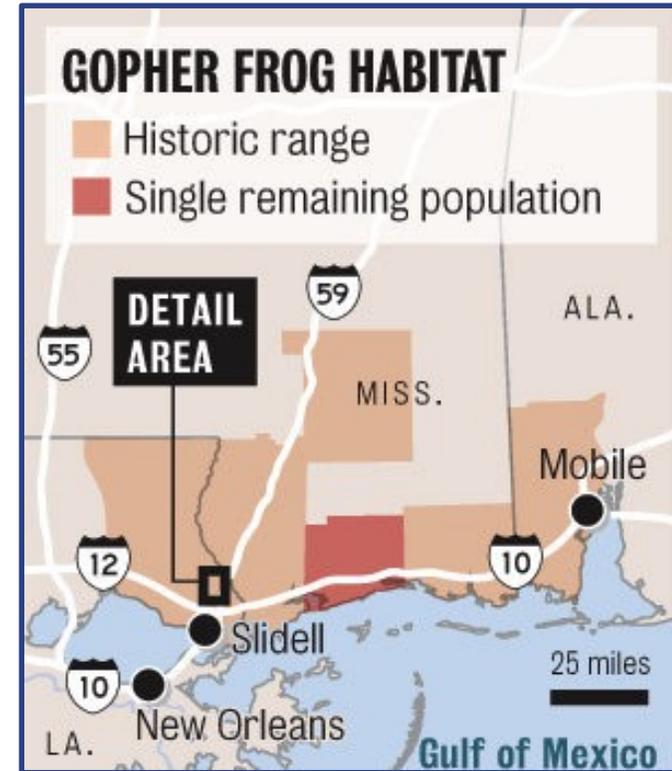
Service: “hope” that landowners will plan for frog



CRITICAL HABITAT: PROCEDURAL HISTORY

Markle Interests, LLC v. U.S. Fish & Wildlife Serv., 827 F.3d 452
(5th Cir. 2016)

- Trial court: Service’s designation “remarkably intrusive” but “reluctantly” upheld
- Appellate court: “extremely limited and highly deferential review”
 - No habitability requirement in the text of the ESA; only occupied critical habitat need to contain all essential habitat elements
 - So long as Service fulfills its duty to consider economic impacts of designation, the determination of impacts is unreviewable. Accordingly, \$34M in impacts to the private landowners went effectively unreviewed.



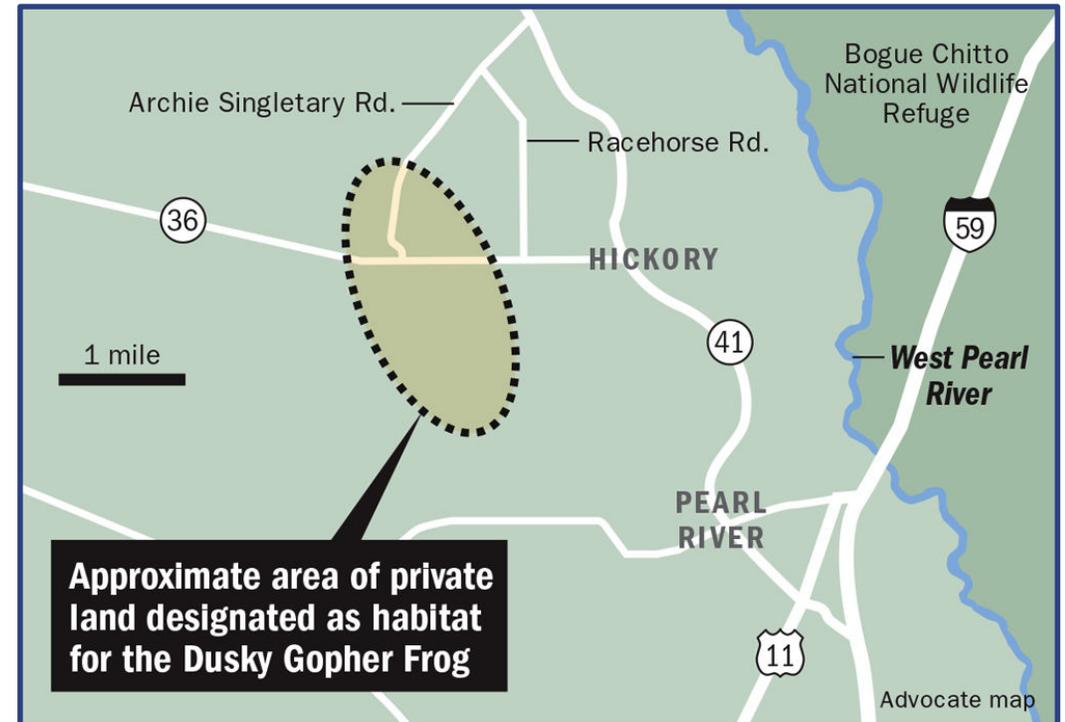
CRITICAL HABITAT: SUPREME COURT REVIEW

Review granted January 22, 2018; case heard in October term

Can only “habitat of such species” be designated critical habitat?

Should the test for unoccupied habitat be more demanding than the test for occupied habitat?

Is the Service’s economic analysis judicially reviewable?



CRITICAL HABITAT: POTENTIAL IMPACT

Potentially sweeping change to and expansion of national land use regulation

- E.g., Issuance of 404 permits by the U.S. Army Corps of Engineers
 - Increasingly more challenging given the Corps' obligation to consult under Section 7
 - Used as leverage to encourage landowner to "develop a strategy" that will lead to reintroduction of listed species

Judicial review of agency action limited

Expansion of critical habitat designations for other species.

- E.g., Northern Spotted Owl: critical habitat designation of over 9.5 million acres contains unoccupied habitat



BIOMASS UPDATE

Recent Biomass Power Association presentation predicts strong international demand, with some policy constraints, particularly in Japan.

Domestically

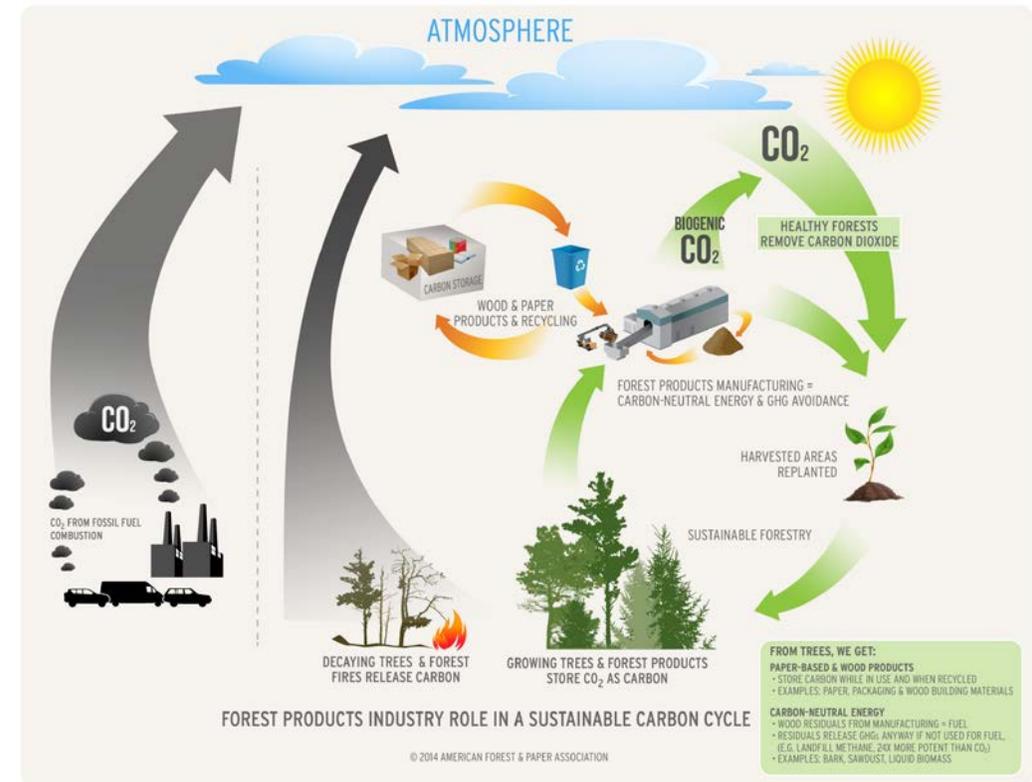
Significant growth recently, but still dependent on tax policy

2 projects in WA

Congress and EPA have declared biomass carbon neutral

Others:

- Oregon (2015)
- California – with requirements
- Massachusetts – with requirements
- Connecticut – with requirements



OSO LITIGATION UPDATE

BACKGROUND

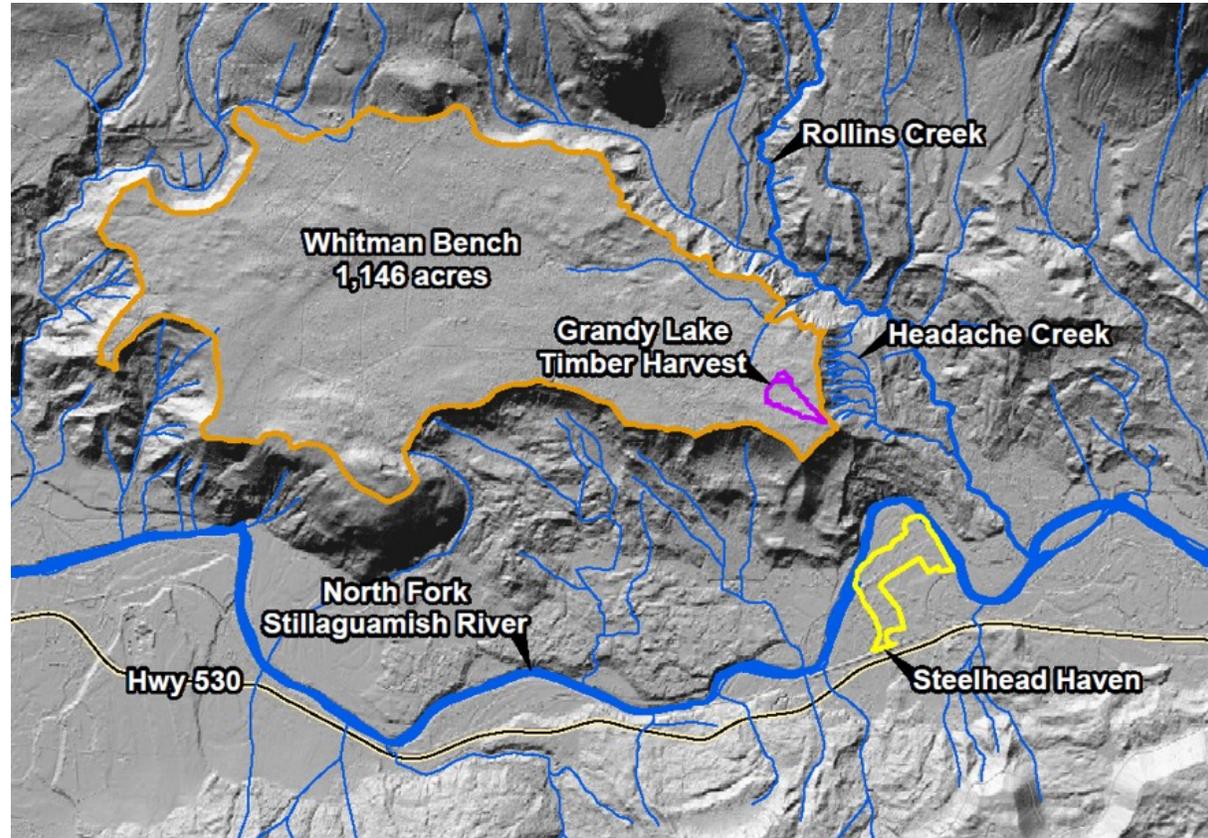
Follow the Water

Understanding of Geology

Liability for Natural Hazards

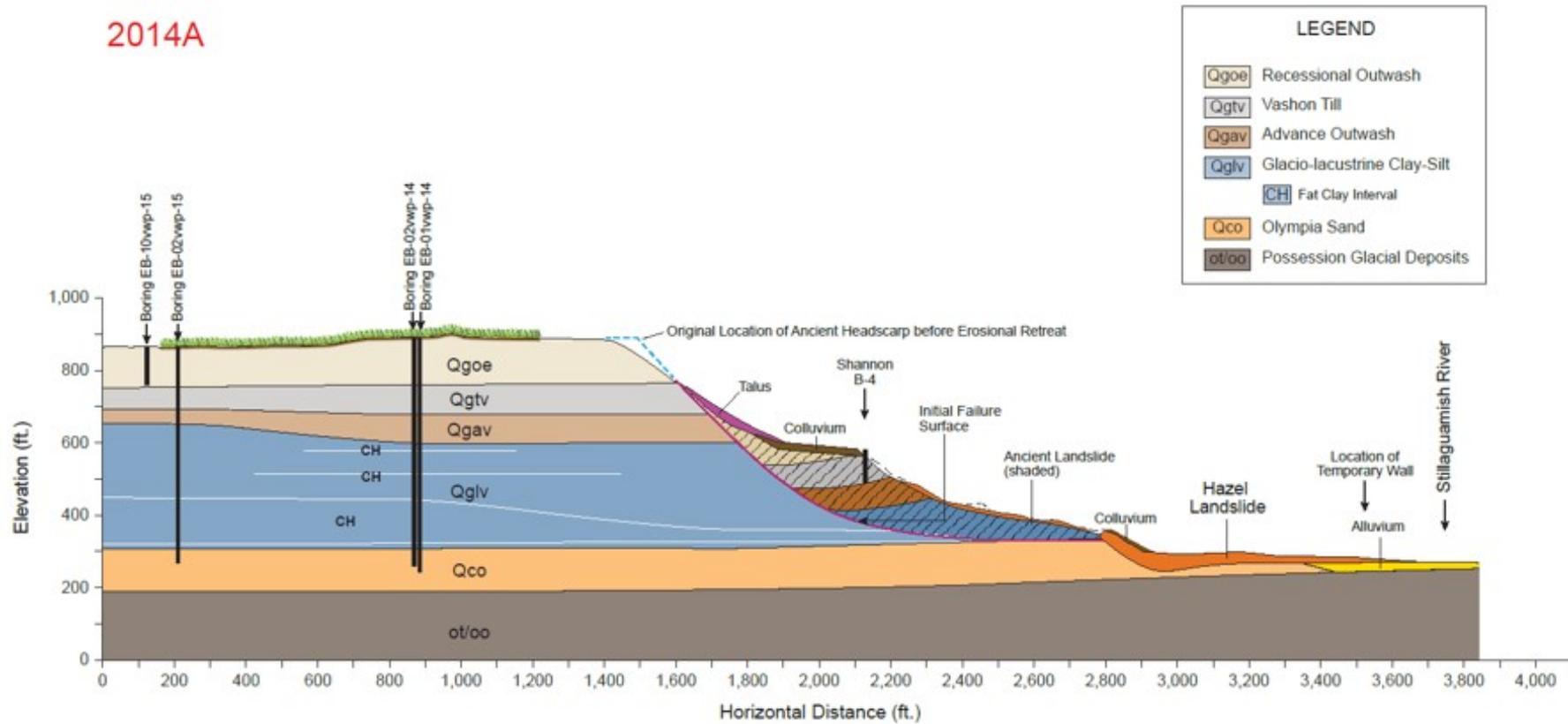


Oso: "FOLLOW THE WATER"



OSO: POST-LANDSLIDE EXPLORATION

2014A



QSO: LIABILITY FOR NATURAL HAZARDS

LANDOWNER DUTY

Albin v. National Bank of Commerce

“No duty to inspect and no liability so far as the owner was concerned (absent knowledge of a hazardous condition) so long as the forest remained in its natural conditions”

Price v. City of Seattle

Alteration must increase the natural vulnerability

Owner knows or should know that alteration increases natural vulnerability

Are landowners liable for natural hazards?



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