



Regional Road Maintenance ESA Program Guidelines Newsletter

New Interpretation of Migratory Bird Treaty Act

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The Trump Administration's new policy states that accidental harm to migratory birds, under the 1918 Migratory Bird Treaty Act, is not a crime. The Interior Department expressed the view in a [legal opinion](#) in December and again in an April [Memorandum](#).

The Migratory Bird Treaty Act of 1918 makes it unlawful to kill, hunt, sell, or possess most native species of U.S. birds—or possess their nests, eggs or feathers—without a permit. It applies to about 1,100 bird species.

The requirements for minimizing avian deaths vary among the states and within federal permits issued. The law very rarely leads to prosecution, but environmental advocates say the change reduces federal agency leverage to prevent bird deaths. There are no regulatory guidelines on what merits prosecution, given past interpretations that held that any harm can merit it. Federal appeals courts have issued conflicting decisions on the question of whether unintentional bird deaths can be prosecuted as violations of the Migratory Bird Treaty Act. The Supreme Court has yet to try to resolve the circuit court split.

Summarized from AASHTO Environmental Technical Assistance Program (ETAP) newsletter Volume 20, Issue No. 37, May 4, 2018. *Interior Tries to Clear the Legal Air for Companies on Bird Deaths*
<https://environment.transportation.org/>

Upcoming Events and

Hot Topics:

- Fall season track 3F and 3W classes will be announced this summer.

EPA and Army — Waters of the US Rule (WOTUS)

The Trump administration estimates it needs another nine months to define the reach of the Clean Water Act. A rewrite of the Obama-era regulation isn't expected to be complete until September 2019.

The first step ([RIN:2040-AF74](#)) to simply recodify the existing regulation won't happen until November 2018 because agencies have decided to issue a supplemental rule, due in May 2018. However many EPA officials are skeptical of these timelines being met.

Summarized from AASHTO Environmental Technical Assistance Program (ETAP) Newsletter Volume 20, Issue No. 38, May 11, 2018. *Water Law Jurisdiction Rule Rewrite Pushed Back Until 2019*
<https://environment.transportation.org/>

Negotiating Team and Committee Update

Committees are the working component of the Regional Forum. The Regional Forum identifies key decision points and assigns committees to research or report on them. The Forum establishes timelines and provides guidance to committees.

Committee meetings are open to any Regional Forum member and all Regional Forum members are encouraged to participate and/or monitor these meetings. The following is a description of the negotiating team and the committee's accomplishments and functions since the last newsletter:

- Report

Reports are due April 15. Please send them to Gregor Myhr at myhrg@wsdot.wa.gov and Janine Johanson at janine.johanson@kingcounty.gov.

- Negotiating Team

No update

- Program Review and Approval

The next biennial report to NMFS is due at the end of 2018.

- Training

Regional Road Maintenance Program Quarterly Meetings will continue to provide for coordination on planning for upcoming training opportunities. Training courses will also be announced through Highway and Local Programs LTAP distribution list.

See page 7 for training information.

- Part 3 Framework

No New Part 3 Applications have been submitted for approval.

- Biological Review

See Negotiating Team.

- Stormwater

See page 3 for stormwater updates.

- Implementation

No update.

- Scientific Research

BMP research continues at training sites. BMP research of BMPs used in the training program continues as classes are developed and presented.

- Permit

No update

- Integrated Vegetation Management (IVM)

No update.

Stormwater Research

Numerous studies have shown that urban stormwater runoff can be lethal to larval fishes. However, new research suggests that even sub-lethal exposure can cause negative effects on fish sensory systems.

Read the local research report:

<http://www.nature.com/articles/s41598-018-21209-z>

Stormwater Action Monitoring

The Department of Ecology administers the Stormwater Action Monitoring (SAM) program (previously called the Regional Monitoring Program) on behalf of the Stormwater Work Group and the 90+ municipal stormwater permit collaborators. The 2017 SAM Annual Report outlines progress made for each of the strategic categories where stormwater monitoring is targeted to answer stormwater management questions.

Read the 2017 Annual Report:

<https://ecology.wa.gov/Regulations-Permits/Reporting-requirements/Stormwater-monitoring/Stormwater-Action-Monitoring/administration>

Bookmark the new SAM website:

<https://ecology.wa.gov/Regulations-Permits/Reporting-requirements/Stormwater-monitoring/Stormwater-Action-Monitoring>



Solid Waste Handling Standards WAC 173-350

The Department of Ecology is revising the Solid Waste Handling Standards in Chapter WAC 173-350. Proposed changes were filed with the Office of the Code Reviser on January 23, 2018.

The Solid Waste Handling Standards in Chapter 173-350 WAC are the state's primary rules for the regulation of non-hazardous solid waste.

The rule does not regulate the design or operation of municipal solid waste landfills (see Chapter 173-351 WAC – Criteria for Municipal Solid Waste Landfills). While the rule does not regulate hazardous waste, it does regulate moderate risk waste that has characteristics of hazardous waste.

Experience implementing the rule and input from stakeholders identified many areas in need of improvement. Issues previously identified as priorities (preproposal statement of inquiry – CR-101) included updating definitions, clarifying criteria for inert waste classification and when earthen material/soil is a solid waste, as well as streamlining recordkeeping and reporting requirements.

In the CR-101 for this rulemaking, Ecology announced it would also address other issues that might result in substantive changes, as well as clarifications and corrections to language in the chapter not expected to change the overall effect of the rule.

Update: Ecology held public hearings and received public comments from over 50 individuals and organizations. Comments are being analyzed and Ecology has until August 6, 2018 to adopt the proposed rule without revisiting the public process.

Links to related documents can be found:

<https://ecology.wa.gov/Regulations-Permits/Laws-rules-rulemaking/Rulemaking/WAC-173-350-Nov13>

BMP Feature: Dustless Sandblaster

King County crews purchased a DB225 dustless sandblaster to remove graffiti on structures. This can be used on concrete, brick, wood, and more surfaces. Equipment and labor included 2-3 people, a flatbed truck with water tank, compressor and the DB225 along with a pickup with BMPs and sand.

Removing graffiti took about 4 hours with a ½ hour to set up and tear down. This application allows for dust suppression, easy containment, and is highly efficient.

Crews installed plastic and straw wattles along the bridge footing to catch debris and vacuumed sludge on the wall. Crews used 1 ½ bags of sand and about 30 gallons of water in total to remove the graffiti.

The daily average cost of sandblasting graffiti was minimal compared to covering with paint, which would have taken at least two full days.



Before dustless sandblasting

BMP Feature: Dustless Sandblaster



Straw wattles and plastic used to contain debris





After dustless sandblasting






ESA Species Updates

This section highlights ESA species updates:

1. On April 12, 2018 USFWS proposed listing the **Island marble butterfly** (*Euchloe ausonides insularis*) as endangered under the Endangered Species Act (ESA) (50 CFR Part 17 p 15900-15936). They also proposed to designate critical habitat. USFWS will receive comments until June 11, 2018 and make a final decision in April 2019 (approximate date). Occupied butterfly habitat is only found on San Juan Island, and does not intersect with state or federal highways. 
2. The USFWS completed a five-year review of the **Canada lynx** (*Lynx canadensis*), a feline carnivore listed as threatened under the ESA. The review concluded that the lynx may no longer need protection under the ESA and can be considered for delisting. The delisting process would include the USFWS proposing to delist the species in the Federal Register. That process would take a minimum of a year from first publication in the Federal Register. Canada lynx are found in small populations in the Northern Cascades in Washington, with critical habitat designated in north central Washington. Lynx are also found in other states. 
3. On January 23, 2017 the NMFS issued a final rule to delist the Puget Sound/Georgia Basin distinct population segment (DPS) of **canary rockfish** (*Sebastes pinniger*) under the ESA (CFR Vol 82 NO 13 77-11-7731).
4. On October 17, 2016 the USFWS published a final rule downlisting the Columbia River distinct population segment (DPS) of **Columbia white-tailed deer** (*Odocoileus virginianus leucurus*) from endangered to threatened (50 CFR Part 17 V 81, 71386-71410).
5. On September 21, 2016 the USFWS made listing findings under the ESA for four species that may occur in WA, but the species are not warranted for listing (50 CFR Part 17 64843-64857). Guadalupe Murrelet (*Synthliboramphus hypoleucus*) formerly known as the Xantus's murrelet is now recognized as two species, the **Guadalupe Murrelet** and the **Scripps's murrelet** (*S. scrippsi*). **Northern Wormwood** (*Artemisia campestris* var. *wormskioldii*) known populations are stable. **Washington Ground Squirrel** (*Urocitellus Washington*) populations are not as isolated as previously thought.
6. Critical habitat designated for the **Oregon Spotted frog** (*Rana pretiosa*) in Whatcom, Skagit, Thurston, Skamania, and Klickitat Counties in Washington. Final Rule effective May 11, 2016 (50 CFR 17).
7. Critical habitat designated for Lower Columbia River

Coho Salmon and Puget Sound Steelhead. Final Rule effective March 25, 2016. (81 FR 9251)

8. On October 7, 2014, the U.S. Fish and Wildlife Service proposed to list the West Coast distinct population segment (DPS) of the **fisher** (*Pekania pennant*) as threatened under the ESA (50 CFR 17 60419-60443). 
9. On October 3, 2014 the USFWS issued a final rule listing for the Western DPS of the **yellow-billed cuckoo** (*Coccyzus americanus*) as threatened under the ESA (50 CFR 17 59992-60038). The ruling went into effect on November 3, 2014.
10. On September 12, 2014 the USFWS published a final rule designating rule designating revised **Canada lynx** (*Lynx canadensis*) critical habitat, and adjusting the boundary of the lynx distinct population segment (DPS) (50 CFR 17 54782-54846) under the ESA. The final rule takes effect on October 14, 2014. (USFWS Vol 11, Issue 4)
11. On August 29, 2014, the USFWS published a final rule to list the **Oregon Spotted frog** (*Rana pretiosa*) as a threatened species under the ESA (50 CFR 17 51658-51710). The Service will make its final determination on critical habitat sometime in the future. (USFWS Vol 11, Issue 4)
12. On May 9, 2014 the final rule to list four subspecies of **Mazama pocket gopher** as threatened species under the ESA, along with designated critical habitat became effective. (50 CFR Part 17 19760-19796 and 19712-19757). (USFWS Volume 11, Issue 3 and Volume 10, Issue 1) 
13. The final rule to delist the Eastern DPS of the **Steller sea lion** was published on November 4, 2013 (50 CFR Parts 223 and 224 66140-66199). (Volume 11, Issue 1) 
14. On October 3, 2013 the USFWS listed the **Taylor's checkerspot butterfly** as an endangered species (50 CFR 17 61452-61503) and also designated critical habitat (50 CFR 17 61506-61589). (Volume 11, Issue 1; Volume 10, Issue 1)
15. On October 3, 2013 the USFWS published a final rule to list the **streaked horned lark** (*Eremophila alpestris strigata*) as threatened (50 CFR 17 61452-61503) and also designate critical habitat (50 CFR 17 61506-61589). A 4(d) rule will also be implemented (Volume 11, Issue 1; Volume 10, Issue 1).
16. The USFWS listed two plants as threatened under the ESA and designated critical habitat for **Umtanum Desert buckwheat** and **White Bluffs bladderpod** with an effective date of May 23, 2013.

(Continued on page 7)

Regional Road Maintenance Training

The Regional Forum will schedule fall season classes and announce dates this summer.

Additional classes can be scheduled if enough participants are on a waitlist. Typically classes are given in Spring and Fall. Contact Susan Neff and let her know the class you are interested in and how many staff you would like to send to each class—this allows the Regional Forum to determine what class to provide and where. NeffS@wsdot.wa.gov.

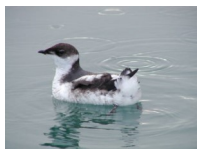
If you have any other training questions, Please contact Gregor Myhr (MyhrG@wsdot.wa.gov), Jeff Rudolph (jrudolp@co.pierce.wa.us), or Janine Johanson (Janine.johanson@kingcounty.gov).



BMP Training at Pierce County May 2018

ESA Species Update (continued)

17. On February 4, 2013, the USFWS proposed to list the North American distinct population segment (DPS) of the **wolverine** (*Gulo gulo luscus*). Wolverine critical habitat could not be determined at this time. (USFWS Volume 10, Issue 2).
18. On January 14, 2013, the NOAA proposed to designate critical habitat for **Lower Columbia River Coho Salmon and Puget Sound Steelhead**. Comments are due April 15, 2013.
19. The NOAA accepted a petition to delist **Puget Sound's killer whales** from the ESA. NOAA is seeking information on the southern resident killer whales during its review until January 28, 2013. (NOAA Fish Volume 10, Issue 1).
20. The USFWS revised critical habitat for the **northern spotted owls** across federal lands in Washington, Oregon and Northern California on November 21, 2012 (proposed March 2012). Today 9.6 million acres are designated as Critical Habitat. (USFWS Federal Register Vol 77 No 233, Dec 4, 2012; Volume 9, Issue 3—proposal to revise critical habitat)
21. On September 4, 2012, the USFWS announced that the **Mardon skipper butterfly** (*Polites mardon*) does not warrant protection under the Endangered Species Act (ESA) (50 CFR 17, 77:54332-54352). (Volume 9, Issue 4)
22. In June 2012, The USFWS announced a modification of **Marbled Murrelet** nesting season in Washington. The USFWS will use the new definition to conduct their analyses for any ac-



- tions that will be implemented in the 2013 breeding season. Biological Assessments submitted after December 1, 2012 should reflect this new nesting season information (USFWS; Volume 9, Issue 3)
23. On June 19, 2012, the USFWS published a final rule designating revised critical habitat for the Pacific Coast distinct population segment (DPS) of the **western snowy plover** (*Charadrius nivosus nivosus*) (50 CFR 77, 36728-36869). 24,527 acres were designated in the final rule in Washington, Oregon, and California. Washington critical habitat areas formerly totaled 2,526 acres, and now total 6,077 acres in the final rule.
24. On June 5, 2012, the USFWS announced a finding that a petition to list the southern (*Lagopus leucura altipetens*) and Mount Rainier (*L. l. rainierensis*) subspecies of **white-tailed ptarmigan** as threatened under the Endangered Species Act had presented substantial information to indicate that listing may be warranted (CFR 77, 108, 33143-33155).

Light Pollution and Salmon

Local governments have updated a 10-year recovery plan and one of the new priorities is to address the possible link between fish mortality and artificial light pollution. Read the article: http://knkx.org/post/light-pollution-identified-potential-issue-threatened-puget-sound-chinook-salmon?utm_source=Sightline%20Institute&utm_medium=web-email&utm_campaign=Sightline%20News%20Selections

Future Meetings - Update Your Schedule!

Forum meetings are typically held on the second Thursdays of January, April, July, and October.

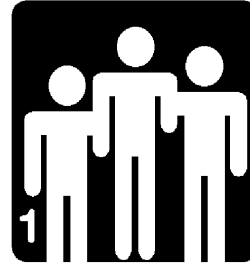
Current scheduled meetings include:

- July 12, 2018 (Thurston Co)
- October 11, 2018 (TBD)

If you are interested in hosting a Regional Forum meeting, please speak up at the next Regional Forum meeting or contact Janine Johanson.

Committee meetings are scheduled on an as-needed basis. If you would like to be part of a committee, contact Gregor Myhr (MyhrG@wsdot.wa.gov).

If you would like to be added to the e-mail list, have questions or need directions contact Janine Johanson (janine.johanson@kingcounty.gov).



**Program Element 1:
Regional Forum**

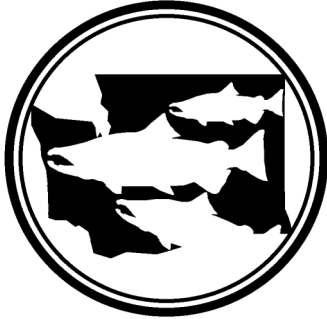
Regional Forum Members

Agencies that received a Biological Opinion from NOAA Fisheries

1. City of Bellevue
2. City of Bremerton
3. City of Burien
4. Cowlitz County
5. Clallam County
6. Clark County
7. City of Covington
8. City of Edgewood
9. City of Everett
10. City of Kenmore
11. City of Kent
12. King County
13. Kitsap County
14. City of Lake Forest Park
15. City of Lakewood
16. Lewis County
17. City of Maple Valley
18. Mason County Public Works and Utilities and Waste Management
19. City of Mill Creek
20. City of Monroe
21. City of Newcastle
22. Pierce County
23. City of Poulsbo
24. City of Renton
25. City of Sammamish
26. City of SeaTac
27. City of Shoreline
28. Skagit County
29. Skamania County
30. Snohomish County
31. City of Sumner
32. City of Tacoma
33. Thurston County
34. City of University Place
35. City of Winlock
36. Wahkiakum County
37. WSDOT



RRMP Contacts



For more information regarding the Regional Road Maintenance ESA Program please contact any of the following individuals:

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Matt Barnhart: Mbarnha@co.pierce.wa.us

Common Acronyms

ACOE	Army Corps of Engineers
BA	Biological Assessment
BMP	Best Management Practice
BO	Biological Opinion
CEU	Continuing Education Unit
CWA	Clean Water Act
DPS	Distinct Population Segment
Ecology	Washington State Department of Ecology
EPA	United States Environmental Protection Agency
ESA	Endangered Species Act
ESU	Evolutionarily Significant Unit
FEMA	Federal Emergency Management Agency
FHWA	Federal Highway Administration
HB	House Bill
NOAA Fisheries	National Marine Fisheries Service
NPDES	National Pollutant Discharge Elimination System
ORA	Office of Regulatory Assistance
RCW	Revised Code of Washington
RRMP(G)	Regional Road Maintenance ESA Program (Guidelines)
RF	Regional Forum
SB	Senate Bill
SBE	Sequential Biological Evaluation
USFWS	United States Fish and Wildlife Service
UW	University of Washington
WAC	Washington Administrative Code
WSDOT	Washington State Department of Transportation
WSU	Washington State University

THE RRMPG IS ON THE WEB!

<http://www.wsdot.wa.gov/Maintenance/roadside/esa.htm>