



**MEMORANDUM**

**TO:** Columbia River Gorge Commission

**FROM:** Krystyna Wolniakowski, Executive Director

**DATE:** February 12, 2019 (presented at March 12, 2019 Commission meeting)

**SUBJECT:** **Information Item:** Compliance in the National Scenic Area: Permitting, Monitoring, Enforcement, and Impediments

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**I. Introduction**

Commissioners have requested information about Commission and county efforts to ensure compliance with the National Scenic Area Act, Management Plan, and land use ordinances. This request followed public testimony about the Commission’s enforcement practices and processes in the past several months. To help focus this report, Commissioner Blair provided a memo to the Executive Director and Executive Committee that suggested several questions, which staff has summarized as follows:

1. How does the Commission ensure oversight of county permitting processes?
2. How do county planners ensure that conditions of approval are met?
3. Do planners review past decisions when working on active applications?
4. Do all counties have active compliance programs?

5. What are the impediments to the Commission exercising its authority to ensure compliance with the National Scenic Area standards?

These questions ask about the Commission staff's compliance work, county compliance work, and the Commission's monitoring of county actions. This report is intended to give the Commission and other interested persons a comprehensive picture of the Commission's current practices, processes, statistics, and impediments relating to compliance and monitoring in the National Scenic Area. Staff's last briefing to the Commission on its compliance work was in May 2009, before any of the current commissioners were members of the Commission.

Staff recommends the next step for the Commission to get a complete understanding of compliance and monitoring in the National Scenic Area is to request the five NSA permitting counties provide a current briefing on their practices, processes, statistics, and impediments at an upcoming Commission meeting. County staff's last briefing to the Commission on compliance was in December 2009. The Executive Director has alerted the county planning directors that the Commission might make this request.

Together, this briefing from the Commission staff and a briefing from the counties will give the commissioners the necessary background to discuss compliance and monitoring throughout the National Scenic Area. With that background, the Commission would be informed to opine on the scope, priorities, and effectiveness of compliance efforts throughout the National Scenic Area; discuss other methods that the Commission might use internally or to work with and monitor the counties' actions implementing or intersecting with the National Scenic Area; discuss what new practices and processes are possible; and discuss how to overcome impediments to compliance and monitoring.

This report does not discuss current or past compliance cases in detail. Commissioners should not discuss individual compliance cases when discussing this report. This report also does not discuss legal issues related to compliance because the Commission has two pending appeals and two pending notices of intent to sue the Executive Director that expressly or indirectly raise many legal issues related to compliance. The Commission should avoid discussion of legal issues to ensure that it does not unintentionally prejudge legal issues outside of the appeals or discuss matters that are likely to be the subject of litigation likely to be filed. When the appeals and notices of intent to sue are resolved, staff will welcome discussion of legal issues.

Staff will present this report at the February 12, 2019 Commission meeting. This is an informational presentation, not a discussion about possible changes to current practices, policies, rules. Staff's presentation is not starred for public comment, but staff welcomes questions from commissioners and other persons attending the briefing. Staff will plan time for public engagement in upcoming Commission discussions after this informational staff presentation and the counties' informational presentation.

## **II. The Act, Management Plan, Commission Rules, and Land Use Ordinance Provisions Relating to Compliance**

The National Scenic Area Act, Management Plan, Commission rules, and county ordinances each contain authorities relating to compliance in the form of requirements for permitting, monitoring, and enforcement. For this memo, staff has tried to use the terms, "compliance," "permitting," "monitoring," and "enforcement" in the following ways.

By “compliance,” staff means generally ensuring development and land uses are consistent with the National Scenic Area Act, the Management Plan, and applicable land use ordinance.

By “permitting,” staff means the requirement to obtain a permit including submitting an application, practices and processes used to review applications and issue a permit decision, and appeal to the Commission.

By “monitoring,” staff is referring to three different actions depending on the context in which it is used: (1) inspecting construction activities or new uses of land as landowners establish them and ensuring the landowners satisfy conditions of approval; (2) staff’s methods of overseeing county actions to ensure they comply with the National Scenic Area Act; and (3) tracking National Scenic Area resources, like with the Commission’s VSI project.

By “enforcement,” staff means the issuance of a summary order (the term used in the Commission rules for a stop work order), notice of alleged violation, or judicial action to enjoin compliance with the National Scenic Area Act, Management Plan, and land use ordinance.

**National Scenic Area Act:** The National Scenic Area Act contains the following principal authorities for the Commission relating to compliance, permitting, monitoring, and enforcement:

**Sections 7 and 8 of the National Scenic Area Act** contain the authorities for the counties to adopt National Scenic Area land use ordinances, the requirements for the Commission and U.S. Secretary of Agriculture to review the ordinances, and the authority for the Commission to adopt an ordinance in a county that has not adopted its own ordinance.

**Section 15(a)(1)** states, “The Commission shall monitor activities of counties pursuant to [this Act] and shall take such actions as it determines are necessary to ensure compliance.”

**Section 15(a)(2)** is the requirement that the Commission must hear appeals of final county actions relating to the implementation of the Act. The Commission has received appeals of enforcement matters in the past but has not had to complete an appeal of an enforcement action and no court had confirmed that section 15(a)(2) includes authority to hear appeals of county enforcement actions. The Commission should not discuss this authority because the scope of this authority is at issue in the pending appeals before the Commission.

**Section 15(a)(3)** is the authority for the Commission to issue civil penalties for violations of the National Scenic Area Act. The Commission must hold a public hearing before issuing a civil penalty and the Commission may consider the nature and seriousness of the violation and the efforts of the violator to remedy the violation in a timely manner.

**Section 15(b)(1)(B)** is the authority for the Commission to seek an injunction from a court to prevent and remedy violations.

**Section 15(b)(2)** is the authority for citizens to bring a judicial action against the Commission, the Secretary of Agriculture or a county to compel compliance with the Act.

There are several court decisions that interpret and apply these authorities in the National Scenic Area Act. These are complex decisions and not easily summarized in a sentence or two in this report. The Commission's counsel can answer questions about these authorities.

**Management Plan for the Columbia River Gorge National Scenic Area:** The Management Plan contains the following principal authorities relating to permitting, monitoring, and enforcement:

**Parts I and II of the Management Plan** contain the substantive standards for ensuring that new developments and land uses comply with the National Scenic Area Act, requirements for applications, and some procedural requirements for reviewing applications and issuing permit decisions.

**Page IV-1-2 Gorge Commission Role – Monitoring and Enforcement of the Management Plan.** This section of the Management Plan contains the Commission's high-level policies for monitoring and enforcement. These policies generally relate to Commission staff reviewing county permit applications and decisions and the Commission monitoring the scenic, cultural, natural, and recreations resources throughout the National Scenic Area (what we now refer to as the VSI project).

**Page IV-2-6 Forest Service Role – Monitoring and Enforcement.** This section of the Management Plan contains the Forest Service's statement of its monitoring and enforcement. This report does not discuss the Forest Service's monitoring and enforcement in the National Scenic Area.

**Commission Rules:** Commission rules govern processes and substantive provisions that staff uses for permitting, monitoring, and enforcement.

**Commission Rule 350-81** is the Commission's land use ordinance for the portion of Klickitat County in the National Scenic Area. This rule contains the same substantive standards as the Management Plan, more detailed requirements for applications, and procedures for reviewing applications.

**Commission Rule 350-30** is the Commission's procedural rule for handling enforcement actions. It authorizes the Executive Director to issue summary orders and to resolve violations that are of a de minimis nature, readily correctable, not repeated, and with cooperative parties without issuing a notice of alleged violation. This rule also specifies how the Commission handles non-de minimis violations—either through a hearing to accept a “resolution through agreement” or a full evidentiary hearing to establish whether there has been a violation, resolution of the violation, and possible civil penalty. The Commission should not discuss this rule because the notices of intent to sue the Executive Director raise many legal issues relating to the application of this rule.

**County Ordinances:** Counties review development applications in the National Scenic Area, monitor their permit decisions, and handle violations of their National Scenic Area land use

ordinances through their own internal processes, which may be specified in their National Scenic Area land use ordinance or in another provision of the county's code. The counties' permitting, monitoring and enforcement processes have many common characteristics, but each counties' practices and process also have unique elements.

Permitting, monitoring, and enforcement are all intertwined. For example, monitoring can lead to enforcement, which can require new permitting and other monitoring, and permitting can resolve enforcement actions. Long-range planning and specific planning projects also intersect with compliance. For example, an important step in the Gorge 2020 review and revision of the Management Plan includes evaluating National Scenic Area resources and the effectiveness of development standards. When reviewing plan effectiveness staff must consider whether development is unpermitted, and if permitted, whether the development standards were properly applied and whether the development complies with permit requirements.

### **III. Commission Staff's Current Practices in Klickitat County**

Staff follows the procedural rules in the Commission's land use ordinance for Klickitat County and other Commission procedural rules for the situations in which those rules apply. Where there is no procedure in the Commission's rules or other law, staff uses its discretion to handle a permitting, monitoring, or enforcement issue. Staff has also developed some guidance documents, like the *Building in the National Scenic Area Handbook* and list of *Recommended Plants for Screening* for applicants and staff to use.

**Permit Application Process:** Development review in Klickitat County starts with an applicant filling out an application form and submitting it to the Commission staff for review. Often staff will meet with an applicant to provide pre-application advising. Staff provides guidance about uses and developments allowed, known resources and known or possible issues to be resolved. During the review process, staff evaluates the proposal using the Commission's land use ordinance for the National Scenic Area portion of Klickitat County.<sup>1</sup> Some projects are approvable as proposed, but many require staff to work with applicants to modify their project as necessary to approve the application. Applicants may need to change the location, size, shape, color, or height of a building, or change the number and location of windows on the building, etc. Sometimes applicants need to eliminate buildings or structures from their applications or change the type or intensity of the land use they are applying for. Staff also catches necessary elements of a proposal that are missing from an application, such as utility trenches or poles. If the applicant is unwilling to make the necessary changes, staff gives the applicant the choice of withdrawing the application, receiving an approval that does not satisfy them, or receiving a denial. When the staff approves a proposed development or land use (we call this a Director's Decision), that decision serves as the Gorge Commission's permit for development or establishing a new land use. Applicants must then obtain any other necessary Klickitat County zoning, building, and other permits before commencing development.

Applicants or interested persons who believe the Director's Decision is wrong may appeal the decision to the Gorge Commission. The Gorge Commission would then hold a public hearing to decide the facts of the proposed development, determine whether it could be approved, and require

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<sup>1</sup> During the Commission's March 2018 meeting, staff gave a presentation on its development review process. The materials from this presentation are available on the Commission's website at <http://www.gorgecommission.org/meeting/March-2018-monthly-crgc-meeting>.

necessary conditions of approval. In the past five years, no person has appealed a Director's Decision to the Commission.

As part of reviewing an application, staff reviews past applications and decisions for the subject property and may also review adjacent or nearby decisions. Comparing the application site plan with past applications and decisions, staff sometimes finds discrepancies and follows up to find out if the discrepancy is a non-compliance issue on the ground or just a documentation error. Staff also conducts at least one, and often several site visits to the subject property and to key viewing areas to observe the property. During these site visits, staff may notice non-compliance issues on the subject property or nearby parcels. Staff's use of electronic records facilitates reviewing past applications, decisions, and other information. As well, staff uses Klickitat County's electronic Assessor and other official records, which may reveal discrepancies and non-compliance issues. Staff also uses information available on the internet. For example, Google Maps street view and short-term rental websites may contain relevant information and Google Earth allows users to scroll through its past aerial imagery (generally dating back to the early 1990s for most of the Gorge). These virtual site visits through history are helpful when questions arise such as when a building or road was constructed or whether agricultural use of a parcel has occurred in the past.

When staff discovers a non-compliance issue and there is no serious or immediate adverse impact on resources, and the matter can be resolved through development review, staff requires an applicant to submit a new application or amend a pending application to address the compliance issue "after the fact." Amending applications usually requires the Commission to re-notice the application for public comment and may also require the applicant or landowner<sup>2</sup> to conduct unanticipated resource studies. A development reviewed after-the-fact is reviewed as if it had never been built. This means that if the development cannot be approved as built, the landowner must alter the development to bring it into compliance, or the landowner must remove the non-compliant development and remediate the site back to its pre-development condition. Since the beginning of 2013, 12 of the approximately 80 applications that Commission staff has reviewed have involved some after-the-fact element and as of the end of January 2019, three additional landowners are completing applications for after-the-fact development reviews. This is an average of two to three after-the-fact applications per year, which is a generally consistent number over time.

Klickitat County's practices for permitting in the National Scenic Area have evolved over time. In the past, the county handled its permitting completely independent of the National Scenic Area. This changed in the mid-2000. At that time, Klickitat County amended its code to include a prefatory provision stating that National Scenic Area approval may be necessary even when a county planning permit is not required; the Klickitat County Planning Department began advising applicants to contact the Gorge Commission; and the Klickitat County Building Department began sending to the Commission office monthly lists of building permits that it issued, which Commission staff reviews for developments that do not have a Director's Decision. In the early 2010s, the Klickitat County Planning Department began requiring landowners receive a Director's Decision before issuing a county planning approval. This ensures that developments that require a county planning approval have also received a National Scenic Area approval. Overall, this partial integration works most of the time, but over the years, staff has found a few situations where

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<sup>2</sup> Sometimes applicants are different from landowners; for example, the landowner may use a professional to represent them or a potential purchaser may apply for a desired development or land use prior to closing on a sale.

developments have occurred without National Scenic Area review, mostly because a development did not require a county planning approval. When that happened, staff contacted the landowners to apply for a Director's Decision. The impediments section of this report discusses a few issues that prevent better integration and compliance.

**Post-Permit Compliance Monitoring:** After staff issues a Director's Decision, staff conducts one or more site visits prior to or during construction to ensure permit conditions are being met. For a project with strict siting restrictions, staff requires a staking inspection before ground-disturbing development begins. Staff may also require some developments use an onsite monitor during specific phases of development, such as initial in-ground work to ensure avoidance of cultural resources or sensitive plant species. As staff works on other applications in the vicinity, staff observes new developments as they are being constructed and if necessary requests site visits to confirm compliance.

After a project is completed, landowners are supposed to notify the Commission office so staff can do another site visit to confirm the development complies with the Director's Decision. If the project is finished and in full compliance, staff provides the landowner a letter to document that there is nothing more to do. If there are issues that require follow up, staff will continue to work with the applicant until the development complies with the Director's Decision.

In 2018, after catching up on the backlog of permit applications and immediate inspections, staff prioritized following up on the backlog of past National Scenic Area approvals in Klickitat County that did not have a final inspection. Currently, staff has reviewed and inspected decisions dating back to 2015. Staff is conducting site visits for a batch of Director's Decisions dating between 2015 and 2012. Staff is also reviewing Director's Decisions between 2012 and 2009 and will begin inspections of these next older decisions after finishing with the 2015–2012 batch.

In the Commission staff's experience, most landowners that receive a Director's Decision comply with the decision without staff having to engage with them multiple times. When staff finds non-compliance issues, it handles them through the processes described above. During the past five years, staff has had to remind landowners of the requirements in Director's Decisions but has not had to start a formal enforcement action to get compliance.

**Enforcement:** Staff uses the Commission's enforcement process as a last resort. Staff's primary goal is bringing non-compliant development and land uses into compliance. Staff maintains flexibility in how it gets compliance. One approach does not fit all situations, but staff's experience over the years is that working with landowners on voluntary compliance best achieves compliance most of the time. A secondary goal of enforcement is deterring future non-compliance.

Commission staff learns of compliance issues through the permitting process explained above; by observing the landscape and developments on the landscape; during visits to project sites and other planning work; from landowners and other individuals; and from observing the Gorge outside of work time, such as while hiking or driving. If a landowner does not voluntarily allow staff to investigate, staff would need to obtain an administrative warrant. The warrant needs to identify with specificity the alleged violation and staff would be limited in what other compliance issues it could observe. Staff has never needed to seek an administrative warrant; nevertheless, this remains a possible complexity for a compliance issue in the future.

If there are compliance issues that cannot be resolved voluntarily, or the non-compliant development poses an immediate harm to resources, staff would issue a notice of alleged violation or a Summary Order (the equivalent of a stop-work order) or seek a judicial remedy to enjoin compliance.

In the past, the Executive Director used to resolve most compliance issues as de minimis violations. As noted above, a de minimis violation is defined in the Commission's enforcement rule as a violation that is de minimis in nature, readily correctable, not repeated, and with a cooperative party. Past examples of violations handled through de minimis reports include installing an outdoor light without a permit, placing a shipping container on a parcel, and allowing temporary parking for events. The Executive Director would work with the landowner to agree on a course of action; the landowner would follow through with that course of action; and the Executive Director would then issue a report on the violation for the Commission's files and send the report to commissioners for their information.<sup>3</sup> Typically, the violation would be resolved by an after-the-fact review or agreement to remove a development or stop a particular land use, but staff would spend a lot of time working out the text of the report with the landowner. Since about 2011, the Commission staff has focused on outcomes—the need for a National Scenic Area review, compliance with conditions of approval, removal of development, or stopping a land use—rather than issuing a de minimis report and has used a Director's Decision as the means of documenting that there had been a violation.

Once the Executive Director issues a notice of alleged violation, the Gorge Commission must hold a public hearing to resolve the violation. If the landowner reaches an agreement with the Executive Director on how to remedy the violation, the Gorge Commission must hold a hearing to approve that agreement. If there is no agreement, the Commission must hold a hearing to decide the facts of the situation, determine if there is a violation, and require a remedy, which could include a civil penalty. The landowner may appeal the Commission's decision to court.

In staff's experience, landowners prefer to resolve compliance issues without a notice of alleged violation. For each compliance issue during the past five years, once staff explains the different ways to resolve the compliance issue, landowners have agreed to resolve the issue without the Executive Director taking an enforcement action. Anecdotally, staff has heard landowners specifically say that they do not want to appear before the Commission in a public hearing to explain a violation.

The Executive Director has not issued a notice of alleged violation in the past five years. The Executive Director issued one summary order in the past five years. That summary order required the landowner to close a road while resolving a violation that Washington State took the lead on. Because the landowner fully resolved the matter with the state, the Executive Director decided not to also issue a notice of alleged violation.

The Commission has heard public testimony that Commission staff should be actively looking for compliance issues. The Commission has no records about it doing so in the past. Instead, the Commission staff has relied on the processes explained above to discover compliance

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<sup>3</sup> An older version of the Commission's rule allowed three commissioners to request a hearing after receiving the report before the Executive Director could close the case. The Commission amended its enforcement rule in March 2011 to eliminate this provision authorizing commissioners to request a hearing.

issues. Persons who want to report a possible compliance issue can contact the Commission office and speak to a planner. A complaint form is not required; however, a complaint form is available at the Commission office and on the Commission's website for people who prefer to use a form.

#### **IV. County Processes and Practices and the Commission's Monitoring of County Actions Pursuant to the NSA**

In fall 2018, staff met with county planning directors in the Gorge to talk with them about their procedures for compliance in the National Scenic Area as part of developing this report. Each county planning director provided information on their permit review practices, number of permits issued each year, post-permit building inspections, and how they handle enforcement actions. This report does not include that detailed information.

**County Permit Application and Monitoring Processes:** County planning staff in the five permitting counties review all development applications in the National Scenic Area portions of those counties. The counties have reviewed National Scenic Area applications since the 1990s in an integrated manner with the counties' other permitting processes. So, for example, a person applying for a county building permit is notified when the project requires the county to do a National Scenic Area review as well.<sup>4</sup> The counties roughly follow the same process for reviewing their applications and use similar opportunities for getting compliance as the Commission staff uses for handling applications in Klickitat County.

After approving an application, county staff is responsible for ensuring that the landowner constructs the projects consistent with the county's decision. In some instances, building inspectors verify building site locations and county planning staff ensures compliance with the other conditions of approval, such as paint colors or required plantings.

Persons who have participated in a county application process can appeal a county decision. The counties have different internal decision makers that a decision may be appealed through before a county decision becomes final. Once the decision is final, it is appealable to the Gorge Commission.

**County Enforcement Processes:** All counties currently practice complaint-driven enforcement countywide, including in the National Scenic Area. If a county planner in the NSA notices unpermitted development or development out of compliance with the NSA ordinance, that planner can also initiate an action. Some counties use additional means for getting compliance. For example, Multnomah County also requires landowners to bring violations on a parcel into compliance before approving new development and land uses on that parcel.

Generally, when a person submits a complaint, county staff evaluates it to determine whether it describes a violation. Most counties have a code compliance officer who deals with complaints (Skamania County does not have a compliance officer and Hood River County has a half-time compliance officer). If the code compliance officer (or other staff person) determines that there is a violation, that person will determine the best tool or course of action to remedy it, ranging from voluntary compliance and after-the-fact review to more forceful actions like issuing a notice of

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<sup>4</sup> This differs from the late 1980s and early 1990s when the Commission staff did all National Scenic Area reviews, and county staff would not always know when to refer applicants to the Gorge Commission.

violation and assessing civil fines. Like the Commission's toolbox, county staff can respond with an appropriate action depending on the context and severity of the compliance issue. The counties differ in preferred approaches and practices. For example, Clark County often decides not to issue a notice of violation if a landowner voluntarily complies and Multnomah County created a decision tree flowchart with specific steps.

As with the counties' permitting processes, the counties have different internal decision makers to decide whether there is a violation and how to resolve it. As noted above, the Commission has received appeals of county enforcement decisions in the past but has not had to complete such an appeal and no court has decided whether the Commission's authority to hear appeals includes appeals of county enforcement actions. This is a legal issue in the pending appeals, so the Commission should not discuss it.

**Commission Staff Monitoring of County Activities Pursuant to the Act:** Commission staff monitors the activities of the counties pursuant to the National Scenic Area Act in many ways.

1. Commission staff participates in county development reviews when county staff contact Commission planners with questions or concerns, such as to ask whether the Commission has past applications for a parcel;<sup>5</sup> whether the Commission staff has handled a particular type of development or land use; or how Commission staff has implemented the National Scenic Area standards in a particular situation. Commission and county planning staff have good relationships, and this type of communication is frequent. This participation help Commission staff know what counties are currently working on and identify and discuss recurring issues.

2. Commission staff also participates in county development reviews by commenting on applications. Some counties, such as Skamania, send application materials to the Commission staff before sending public notice, so staff may provide informal comments, ask for more detail, or explain specific concerns at this early time. All counties send the Commission staff copies of all public notices of development review applications and some counties also send a copy of the application. Commission staff enters the information from the notices and applications into the Commission's development review database. Staff reviews each application and decides whether a comment letter would be helpful. Often, staff contacts county planners for more information, which leads to discussion about potential issues. Staff does not usually write comment letters. Staff tends to write a comment letter when a proposed land use needs additional clarification to determine whether it is allowed, when an application could raise a significant concern about a protected resource, or when staff wants to preserve standing to appeal a county's decision.

Staff records in the Commission's development review database whether it has submitted a formal comment on a county development review application because this is part of a metric for the Commission's performance measures tracked by the states. In 2017, staff also started tracking less-formal comments and clarifications needed during the development review process. This data field is only a check box; it does not include other information, such as the date, form or substance of the comment, and staff does not always check the box when making informal comments.

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<sup>5</sup> Forest Service and Commission staff reviewed all development and land use application in the National Scenic Area from the date of the National Scenic Area Act in 1986 until the mid-1990s when counties adopted their first National Scenic Area ordinances.

3. Occasionally, county planners or Friends of the Columbia Gorge have requested Commission staff write a comment letter or testify at a public hearing on a county application. In the past, staff participated in a few hearings (once or twice by subpoena), but more recently, staff has declined. Reasons that staff has discussed when deciding whether to participate have included: staff has already discussed the issue with the county and is comfortable with the county's approach; staff believes the issue allows the county to use its judgment; and staff is concerned with its ability to be involved in an appeal of the county's decision to the Commission, which it could not do if it was involved in the county's process.

4. Commission staff may attend site visits for county development review applications when a county requests, or when staff wants to gather more information before giving advice to a county or deciding whether to comment on an application.

5. Commission staff can appeal a county decision when it has submitted a comment that gives it standing to file an appeal. Staff last appealed a county decision in the mid-2000s.

6. If Commission staff discovers or receives a complaint of a compliance issue in a county, staff notifies a county planner. These tend to be informal communications, but occasionally, staff fills out county-required violation forms.<sup>6</sup>

7. National Scenic Area planners meet quarterly to discuss implementation of the National Scenic Area standards and other issues of common interest that arise. These meetings also build relationships between planners, which facilitate individual contacts when there are specific questions. The Executive Director also hosts county planning director meetings as needed (typically several times each year) to discuss issues that the National Scenic Area planners can't directly address.

8. County planners and other staff are also in constant communication with Commission staff about non-permitting actions that intersect with the National Scenic Area. For example, county staff routinely ask Commission staff about whether the Commission needs to review minor revisions to their National Scenic Area land use ordinances (grammar, typos, etc.) and revisions to other county codes that are effective in the National Scenic Area. Commission staff also monitors and works with counties as they navigate state law requirements that intersect with the National Scenic Area. For example, in the past year, staff has worked with county planners to ensure updates to the Klickitat County's Shorelines Master Plan and Skamania County's Critical Areas Ordinance (both required by Washington law) do not impose conflicting land use requirements within the National Scenic Area.

9. In the past, county compliance officers and planning directors have made direct presentations to the Commission about their enforcement practices, processes, and statistics. The last such presentation was in December 2009 and included the five permitting counties. Staff recommends the Commission request the counties provide a current briefing on their practices, processes, statistics, and impediments relating to their compliance work in the National Scenic Area. That county briefing is a necessary precursor to the Commission opining on the scope, priorities, or effectiveness of county compliance efforts and any Commission discussion of other methods that the Commission might use to work with the counties or monitor the counties' actions implementing or intersecting with the National Scenic Area.

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<sup>6</sup> For example, Klickitat County requires complainants complete a violation reporting form.

Staff is aware of situations in which the counties have issued decisions or taken other actions contrary to Commission advice or comments, but overall, staff believes this toolbox of opportunities to monitor and interact with the counties is generally effective in helping counties ensure development and land uses comply with the National Scenic Area standards.

## **V. Opportunities for Ensuring Compliance Outside Permitting and Monitoring Director's Decisions and County Processes**

Compliance is embedded in all aspects of the Commission staff's work, including staff's planning work outside of permitting and monitoring its Directors' Decisions and other counties' permitting. As staff does long range planning and other planning work, it addresses non-compliance issues that it discovers.

Currently, staff's planning work outside development review is mostly focused on the Gorge2020 review of the Management Plan. As staff reviews existing policies and standards and information created for the Gorge2020 review, it is necessarily considering compliance issues. For example, the Commission has visual monitoring photos taken from the same 27 Oregon and Washington viewpoints, first in 1988, and then subsequently in 2003, 2009, and 2016. Those photos are intended to be used to evaluate landscape change over time for evaluating whether the Management Plan standards for protection of scenic resources are effective. As staff studies and evaluates the information in the visual monitoring photos, it must consider whether visible developments were approved, whether the approvals used the standards appropriately, and whether the visible developments comply with their approvals.

Similarly, the Recreation Development Plan in the Management Plan requires the Commission to maintain and periodically update an Inventory of Potential Recreation Sites, Inventory of Potential Trails and Travelways and Recreation Development Proposals List. As staff evaluates the recreation policies and recreation development plan, it must evaluate whether the sites on the inventories and proposals are still suitable for recreation. This requires an evaluation of whether the impacts are caused by unpermitted development, decisions that did not correctly apply the standards, or developments that do not comply with their approval decisions, which can be remedied.

## **VI. Compliance Over Time**

The 2014 *Columbia River Gorge Commission Administrative Assessment* notes that there is anecdotal evidence from several sources on a growing "culture of noncompliance" in the NSA. That may have been the sense at the time, but staff does not believe there are more compliance issues now than in the past. This section of the report describes some of the many facets to comparing current and past compliance efforts and accomplishments.

**Compliance in the Commission's Workplan:** The Commission's workplan has allocated staff resources to enforcement at different levels over the years. In the 2009–11 and 2011–13 workplans, enforcement and compliance was listed as part of the "Planning" and "Legal" categories. None of the specific tasks in those categories were line items with individually allocated time. In the 2013–15 workplan, enforcement appeared as a line item, but did not specifically allocate staff time. In the Commission's current workplan, enforcement appears as a line item with 0.02 FTE allocated and a note stating that it needs more time and resources. Over time, the Commission's

workplan has not shown significant resources for compliance work; however, as shown in the table below, this does not mean the staff is not doing compliance work.<sup>7</sup>

**Staff Methods of Compliance:** The manner in which staff handles enforcement has varied over the years. For example, in 2006, one Director developed a violation intake form that prioritized violations considering impacts to resources and difficulty of enforcement. In 2009, a different Director changed that approach to emphasize impacts to resources and classify violations as class I, II, or III, with class I cases being high priority to be resolved as soon as possible. The last records showing staff's use of this classification system seem to be in 2010. At that time, staff was using de minimis reports to resolve and document violations. Staff last used de minimis reports in 2011.

As described above, currently, staff has been able to resolve nearly all compliance issues with monitoring and inspections and after-the-fact development reviews. The continual changes in enforcement priorities and practices reflect different Executive Directors' styles, priorities, and experiences with compliance issues. As discussed in the impediments section below, additional study would be necessary to determine whether some methods are more effective at deterring future compliance issues, correspond to differences in the number of compliance issues discovered and resolved, and affect other aspects of the Commission's work.

**Number of Compliance Issues Discovered and Resolved Over Time:** Staff reviewed its records to give sample counts of compliance issues discovered and resolved in the table below. The table shows just counts from calendar years and only actual compliance issues; it does not show compliance issues reported when staff determined there was no violation or no action was needed to address the compliance issue.<sup>8</sup> The counts in the table are only roughly comparative over the years because of differences in how staff has considered issues resolved over the years. Staff chose ten years ago, five years, and last year as its sample years; however, staff believes the numbers would generally be within the same ranges if it had chosen different years. The numbers in the table do not add for a few reasons:

- Each year does not start and end with zero compliance issues. Each year begins with some pending matters from the prior year and ends with pending matters to begin the next year.
- Some compliance issues marked as discovered in one year were resolved in a subsequent year.
- Some compliance issues marked as resolved in one year were discovered in an earlier year.
- Compliance issues are marked as resolved in more than one way when staff issued a de minimis report that also required an after-the-fact review or additional monitoring.

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<sup>7</sup> The Commission's 2017-19 Oregon Legislatively Adopted Budget contains a table showing more than \$250,000 for a broad "program unit/activity description" entitled "Monitoring, Including: Compliance Monitoring and Enforcement, Management Plan Monitoring, Reviewing and Updating of the Plan, County Assistance and Resource Monitoring" (page A-58). This category includes many different tasks and is not comparable to the Commission's workplan. Oregon requires agencies to allocate its funding to broad program units, not to specific tasks, and the allocation is not binding. There are only four such program units that the Commission uses to show how it is allocating its funding. The Washington approved budget does not require the Commission show an allocation in similar program units.

<sup>8</sup> An example of when no action was needed to resolve a compliance issue involved a road, but the road had grown over with grasses and further restoration was infeasible.

## National Scenic Area Compliance in Klickitat County

	2008*	2013**	2018***
<b>Compliance Issues Discovered</b>	7	5	9
<b>Compliance Issues Resolved****</b>	7	2	4
<b>Resolved By:</b>			
<b>Monitoring (typically inspections)</b>	3	0	2
<b>After-the-fact Director's Decision</b>	4	2	1
<b>De Minimis Report</b>	4	0	0
<b>Notice of Alleged Viol. or Summary Order</b>	0	1	0
<b>Discovered But No Resolution Documented</b>	1	1	0
<b>Compliance Issues Pending</b>	4	5	10

\* Numbers from 2008-09 Annual Enforcement Report, development review database, enforcement database, and paper and electronic files

\*\* Numbers from development review database, and enforcement database and electronic files

\*\*\* Numbers from development review database, enforcement database, electronic files, and site inspection records

\*\*\*\* In 2018, staff considered a matter resolved after a final inspection and when no compliance issues remained. In 2008 and 2013, matters were considered resolved upon issuing an after-the-fact approval or de minimis report, not after a final inspection.

The number of compliance issues discovered was low in 2013 because staff was reviewing fewer development review applications and doing less development review compliance work overall. The number of compliance issues discovered in 2018 was higher because the Klickitat County-funded staff planner was able to focus on inspections and other compliance monitoring work that staff was unable to do in the past (this is discussed in Section III above), and the number of pending issues is also higher because of increased monitoring of past decisions, which, for reasons discussed in the impediments section below, can take a long time to resolve. Again, staff believes the numbers for the intervening years are generally within the range shown in the table.

Commissioners have expressed interest in knowing the scope of non-compliance throughout the National Scenic Area. As discussed above, neither the Commission nor counties have compliance programs where staff purposefully look for violations. Without such programs, this information is not available.

**New Compliance Tools:** There are many new tools and safeguards that planners and code enforcement officers did not have (or were not as useful) in the past to prevent and catch compliance issues.

1. When counties first adopted their National Scenic Area land use ordinances in the 1990s, they integrated National Scenic Area permitting with their other permitting requirements and processes. This integration enables the counties to better ensure that applicants have applied for and received necessary permits, that regular inspections include review for compliance with National Scenic Area decisions, and that county staff are intimately familiar with National Scenic Area development to better identify possible compliance issues.

2. In the mid-2000s, Klickitat County planners began requiring that applicants have received a National Scenic Area development review decision from the Gorge Commission before the county

issues its planning permits and began advising landowners to contact the Commission office when landowners would inquire at the county about needed permits. Also, Klickitat County building officials began providing building permit information to the Commission staff for review and to check for unpermitted National Scenic Area buildings and structures. This better coordination has helped, but as discussed above, there are still impediments to better coordination and integration like within the counties that have adopted their own National Scenic Area land use ordinance.

3. Throughout the National Scenic Area, there is much more information, and that information is more complete and searchable than even just a few years ago. Relevant information that planners use include electronic planning, building, assessor, and other officials records; resource data from federal, state, local agencies and special districts; and information on the internet (e.g., Google Earth with historical aerial views, Google Maps with street view, Gorge-specific information websites, trail route websites, and short-term rental websites). These are important tools that planners use to compare current applications with actual development on the ground and past approvals, which helps planners identify compliance issues.

4. County planners and Commission staff believe landowners and applicants are more familiar with and more used to getting National Scenic Area approvals than in the early years of the National Scenic Area. This is likely because the National Scenic Area has been around for more than 30 years, and knowledge of the need for land use review is more ubiquitous now than in the past.

## **VII. Impediments to the Commission Exercising its Monitoring and Enforcement Authority**

In preparing this report, staff discussed the following impediments to its ability to be more effective in ensuring compliance with the National Scenic Area standards. This list includes specific impediments, many of which cannot be resolved without additional staff times and financial resources. This list does not discuss the general issue that the Commission staff is 40% smaller than in the early and mid-2000s and that increasing compliance activities at this time would require reducing other work on the Commission's workplan. Staff has tried to organize these impediments, but there is overlap in the categories.

**Impediments to Better Compliance in Klickitat County:** These impediments are mostly unique to Commission staff's experiences with compliance in Klickitat County.

1. The Commission and counties do not have on-going programs to affirmatively search for compliance issues. Staff's methods for discovering compliance issues is generally consistent with the counties' methods, but it is imperfect. The methods can miss compliance issues that occur outside of the times that staff would normally observe the property and compliance issues can occur for a long time before staff discovers them. Even in the past, when staff issued development review decisions in all the counties, had a larger number of staff planners, and was driving and observing more of the Gorge more frequently, staff did not affirmatively search for compliance issues. Currently, staff is in the office more than in the past, but it uses electronic and historical information not available in the past, so it discovers more compliance issues using those resources than in the past. Creating an affirmative compliance program—whether using electronic data or in-person visual inspections—will take some mix of additional staff time and financial resources, reprioritizing work, sharing resources with partners, and redesigning processes and long-range planning projects to include new compliance tasks.

2. The Management Plan requires applicants to record Director's Decisions and county decisions in county deeds and records, and staff and county decisions specifically mention this requirement as a condition of approval. However, staff is aware that often Director's Decisions are not being recorded in Klickitat County deeds and records, and as a result, staff has spoken with new landowners that were unaware of the scope of past approvals and conditions of approval. This complicates enforcement because landowners feel a sense of unfairness and staff may be unable to prove who is responsible for the original action. Some counties ensure recording before issuing a building permit. Because the Commission's National Scenic Area review process is not integrated with Klickitat County's process, that safeguard is not currently available in Klickitat County.

3. In Klickitat County, some developments and land uses require National Scenic Area review but do not require Klickitat County permits. For example, the National Scenic Area standards require review and approval of all land divisions, but the Klickitat County Subdivision and Short Plat Ordinance (§ 3.00) does not require review for certain types of land divisions. In these situations, landowners may not know to ask the Gorge Commission about the need for a National Scenic Area permit. Although county planners tell landowners in the National Scenic Area that they should contact the Commission office, other county staff may not know to do so or may be legally prohibited from doing so. For example, if a landowner wants to record a plat that does not require county approval, the Klickitat County Auditor cannot, by law, refuse to accept a document in proper form for recording, question whether the Gorge Commission approved the plan, or advise that landowner to contact the Commission.

4. Resolving the backlog of inspections of Director's Decisions will take many months or longer. Current staff must familiarize itself with applications and Director's Decisions that former Commission planners handled and contact landowners who thought they were done with their National Scenic Area permitting or subsequent landowners who purchased a property from an original applicant. Resolving compliance issues years after a landowner completed construction requires forming or reforming relationships between staff and landowners, working out resolutions that could have been more quickly addressed if staff had been able to do periodic and final inspections at the time of construction, and a need for current subsequent inspections.

5. In the past few years, Klickitat County has been grant-funding a permitting position for the Commission. That funded planner has been developing a culture where landowners work closely with the Commission staff, but because the grant is for a land use planner to process the backlog of permits and inspections, the County does not permit its funding to be used for enforcement. If staff needs to start an enforcement action, it will need to use a planner, who would have to shift time away from other work in the office.

6. Staff is comfortable that its current approach of using after-the-fact development reviews adequately records and resolves compliance issues, but staff does not know whether its increased use of after-the-fact reviews without an accompanying notice of alleged violation or de minimis report has led to or could lead to landowners choosing to undertake development without first talking to the Commission staff. Formal enforcement actions have, in theory, some deterrence effect. If the Commission would like to study what compliance methods are most effective in the National Scenic Area, staff recommends using an outside expert to help design and conduct the study, interpret its results, and make policy recommendations.

**Impediments Relating to Information Management:** The impediments described in this section relate to information in the Commission’s office, which includes information about staff and counties’ permitting, monitoring, and enforcement.

7. The Commission office has many records that are still in paper form or that have been scanned into electronic form but are not tagged, indexed, or georeferenced to facilitate searching, finding, and linking to them. Converting the Commission’s records into electronic form, tagging, indexing, georeferencing, and linking, and creating and maintaining new records in those more useable forms requires time, expertise, and resources that the Commission needs to plan for.

8. The Commission’s development review database has missing information, so staff often needs to verify searches for accurate information. This missing information seems to be the result of a few problems that are common to all databases. First, the database has 211 data fields, so planners can easily miss some fields for entry. Second, staff has added new fields over time, and information from older files was not added. Third, there is a wide range in the level of detail given in Commission staff reports and Director’s Decisions and the staff reports and decisions of the other counties, so some information was not available at the time Commission staff initially entered the information. Commission staff update the database as it discovers specific missing data, but a comprehensive update will take staff time that the Commission needs to plan for.

**Impediments Affecting the Commission and Counties:** Staff has identified some impediments that are also impediments in the counties.

9. Some developments and land uses have unusually complicated data, monitoring and compliance issues. For example, some state and federal laws make specific types of information confidential, and applicants may not be willing to provide complete information to maintain confidentiality. In this situation, staff has had to do the best it can with the information it is able to obtain. In another example, staff can’t easily observe and verify that completed communication tower projects, such as new antenna or dishes, satisfy the characteristics that the applicants specified in their applications and does not have the technical expertise to verify some characteristics. Following up with cell towers can also be challenging because most of the time, consultants act as applicants, and personnel with communication providers frequently change. Finding a person to contact for follow up and to help staff identify technical equipment takes a long time. Sometimes, there are new applications to replace equipment on a tower before staff has been able to verify compliance for the prior equipment, and staff has used those new applications as the opportunity to verify compliance.

10. The Commission’s relationships with partner agencies—counties, cities, state agencies, tribes—and private, utility, and other entities that the Commission commonly interacts with are based on informal understandings, which change when Commission staff and leadership and partners’ staff and leadership change or when a disagreement evolves. The Commission has not tried to solidify its relationships with partners in memoranda of understanding (MOUs) or other similar means. MOUs can establish and create lasting relationships, by defining roles and responsibilities, means of addressing common and uncommon situations, and other aspects of working together for a common goal. Other agencies use MOUs frequently. For example, the Tahoe Regional Planning Agency currently has more than 50 MOUs that establish responsibilities and tasks for specific entities to undertake exempt projects, to delegate review tasks, and other purposes.

**Legal Issues Related to Compliance:** Legal requirements, whether in the Act, Commission rules, or case law, may be an impediment to the Commission's preferred methods of getting compliance. This report does not discuss legal issues related to compliance because the Commission has two pending appeals and two pending notices of intent to sue the Executive Director that expressly or indirectly raise many legal issues related to compliance. To ensure the Commission does not unintentionally prejudge legal issues outside of the appeals or discuss matters that are likely to be the subject of litigation likely to be filed, staff will not discuss legal issues and recommends the Commission not discuss them. After the appeals and notices of intent to sue are resolved, staff will welcome the Commission's discussion on legal issues and possible ways to avoid them in the long term. The Commission should specifically avoid discussion of the following:

- whether the Gorge Commission has authority to hear appeals of county enforcement actions;
- whether the Commission has authority to take enforcement actions in counties other than Klickitat County;
- whether the Executive Director has discretion to bring enforcement actions;
- whether the Executive Director has authority to resolve enforcement actions independent of the Commission;
- whether and how the appearance of fairness doctrine applies in compliance cases;
- the extent that the Executive Director and staff can discuss compliance cases with the Commission;
- staff's ability to investigate compliance issues that a county is already handling; and
- the Commission Counsel's ability to assist the Executive Director in investigating possible violations and issuing a summary order or notice of alleged violation in Klickitat County and advise the Gorge Commission at a hearing to resolve a notice of alleged violation.

Staff will be prepared to advise the Commission whether it should avoid other legal issues that arise during its discussion of this report.

### **VIII. Other Items Related to Compliance**

While preparing this memo, staff identified two items that are related to compliance activities but did not fit elsewhere in this report.

1. In the past, Commission staff prepared enforcement reports. For many years, the Commission's counsel included enforcement cases in the annual litigation report, but in the mid-2000s, the Commission's principal planner at the time made enforcement into a stand-alone report. These reports helped the Commission and public understand the staff's compliance efforts on a regular basis. In preparing this report, staff realized that the annual enforcement report was not maintained following several staff transitions beginning in 2010. Staff revived that report for 2018 and will continue to issue annual compliance reports to show the types of cases and how the Commission resolved them. The report is a valuable tool for demonstrating Commission efforts at resolving compliance issues within the National Scenic Area.

2. Oregon and Washington's biennial performance measures for the Commission measures the frequency that counties explicitly address the Commission staff's comments in their county staff reports and administrative decisions. This mostly measures the counties' actions instead of the Commission's actions. This performance measure should be revised to measure the Commission staff's effectiveness in assisting counties.

## IX. Conclusion and Next Steps

Staff welcomes the Commission's discussion of improving a "culture of compliance" in the National Scenic Area.

This report summarizes Commission staff's experience with permitting, monitoring and enforcement for Klickitat County and monitoring the other five National Scenic Area counties compliance efforts. Commission staff and county planning and code enforcement staff use their opportunities in when doing permitting, monitoring and long-range and project planning to find and resolve compliance issues but do not purposefully go looking for compliance issues to resolve.

Throughout the past 30 years, the Commission staff has always had and worked on several compliance issues at any moment in time. The 2014 *Columbia River Gorge Commission Administrative Assessment* notes that there is anecdotal evidence from several sources on a growing "culture of noncompliance" in the NSA. That may have been the sense at that time, but Commission staff does not believe there were more compliance issues then (or now) than in the past. Despite the impediments discussed in this report, staff continues to find and resolve compliance issues, but its experience is that the number of compliance issues discovered and resolved has remained generally consistent (within a general range) over the years.

What has changed for the Commission is how staff is resolving compliance issues. Staff is doing more after-the-fact reviews without also issuing de minimis violation reports or notices of alleged violation. This accomplishes compliance with less staff time than doing the formal enforcement actions, but additional study would be necessary to determine whether this approach is as effective as taking enforcement actions for overall and long-term compliance.

**Next Steps:** The next step for the Commission to get a complete understanding of compliance in the National Scenic Area is to request the counties provide a briefing on county practices, processes, statistics and impediments. Together, the Commission staff and county briefings will give the commissioners the necessary background to discuss compliance throughout the National Scenic Area, whether compliance might be handled differently, if so, what new practices and processes are possible, and how to overcome impediments to compliance.

### Attachments:

- Section 15 of the National Scenic Area Act
- Management Plan pages relating to Commission and Forest Service Monitoring and Enforcement
- Commission Rule 350-30