

NORTHWEST ENVIRONMENTAL ADVOCATES



Statement of Nina Bell, Executive Director, Northwest Environmental Advocates Re: Riparian Rule Analysis – July 23, 2015 Board of Forestry Meeting

My name is Nina Bell and I am the Executive Director of Northwest Environmental Advocates. NWEA has worked to improve regulatory programs that protect and restore water quality in Northwest states, including state water quality standards that are the foundation of pollution control programs.

Over 20 years ago, along with other stakeholders we began working with the Oregon Department of Environmental Quality to craft water quality standards for temperature to protect Oregon's streams and the species that depend upon cold water. In all of the intervening years since that process began, nothing meaningful has changed in the way that Oregon treats the riparian areas that are essential to ensure cold water. Nothing.

Now fish are dying in streams and rivers all over the state. While the direct cause is identified as this year's drought, the sad fact is that with climate change we know the future will look more like this than any of us want. Oregon's streams are too hot and it will only get worse. That's not environmental groups talking; that's the State of Oregon.

And while this year's fish kills are glaring evidence of a widespread failure to protect riparian vegetation that protects stream temperatures, the less dramatic effects of high water temperatures on cold water species are seen every year.

Thinking like a home owner, it only makes sense to insulate our streams the best that we can. To literally insulate them from the sun's rays that heat the water. And to figuratively insulate them from the politics that drive the backwards forest practices in this state. Instead, the Oregon Department of Forestry wants to continue the status quo, just as it has for all the years we have had a state Forest Practices Act. It hasn't even bothered to put forth a recommendation to the Board or to explain why none of its proposals go beyond a 90-foot riparian buffer.

It's taken over six years to get to this point because ODF refused to act until it gathered its own data. Now that ODF data shows what all the other scientists and agencies said it would—namely that Oregon's forest practices cause stream warming—ODF does not want to meet Oregon's water quality standards. Yet that is the goal of state law and the Board's job.

ODF will continue to inform you, the Board, that meeting water quality standards means meeting the Protecting Cold Water (PCW) criterion, a limit of 0.3°C on stream warming. ODF is wrong. ODF will continue to tell you that the EPA-approved Total Maximum Daily Loads (TMDL) developed by the ODEQ are irrelevant to this process, "a different problem for a different day." ODF is wrong.

These TMDLs may often be perceived as irrelevant artifacts of the federal Clean Water Act that can be ignored. But, *in Oregon, for temperature*, that is distinctly not the case.

First, the water quality standards for temperature *prohibit any stream warming* over numeric criteria for nonpoint sources such as forestry until a TMDL is in place.¹ That means that for those basins and subbasins *without* TMDLs, to meet Oregon’s temperature standards means knowing whether a stream is listed on Oregon’s Clean Water Act Section 303(d) list of impaired waters and having no warming at all on those streams. **Second**, meeting water quality standards means that once a TMDL is in place, the increment of allowable warming known as a “load allocation” is *incorporated into the temperature standards* as the allowable increase in temperature for a nonpoint source such as forestry.² A TMDL is not irrelevant because it is built in to the standards. **Third**, the TMDL establishes the geographic scope of the waters to which its load allocations apply, superseding the limitations of the PCW criterion and the debate over salmon/steelhead/bull trout ranges.³ **Fourth**, the load allocations of allowable warming in the TMDLs range from zero to a 0.1°C increase—*not* the 0.3°C increase of the PCW criterion.⁴

¹ Oregon’s temperature standards specify that “[i]n no case may a source cause more warming than that allowed by the human use allowance provided in subsection (b) of this rule.” OAR 340-041-0028(12)(a). Subsection (b)(A) of this rule, pertaining to a Human Use Allowance *prior to completion of a TMDL*, creates an temperature increase allowance for NPDES permitted sources but no allowance for nonpoint sources such as forestry.

² Subsection (b)(B), pertains to the Human Use Allowance *following completion of a TMDL*, creating a temperature increase allowance for nonpoint sources as established in the TMDL:

Following a temperature TMDL or other cumulative effects analysis, waste load and *load allocations* will restrict all NPDES point sources *and nonpoint sources* to a cumulative increase of no greater than 0.3 degrees Celsius (0.5 Fahrenheit) above the applicable criteria after complete mixing in the water body, and at the point of maximum impact.

OAR 340-041-0028(12)(b)(B) (emphasis added).

³ The following TMDLs in the boundary area to which the Ripstream rulemaking may apply *include all perennial streams unless indicated to the contrary*: North Coast (all perennial or fish bearing); South Coast; Upper South Fork Coquille watershed; Umpqua (all perennial and fish bearing); Rogue except Bear Creek watershed; Bear Creek watershed (all perennial and intermittent fish bearing); Applegate, Lobster Creek and Lower Sucker Creek watersheds; Willamette (perennial and/or fish bearing); Sandy; Mid Columbia Miles Creek watershed (all perennial and intermittent).

⁴ In the TMDLs that pertain to the geographic boundaries being considered for the rule, the load allocations are as follows:

North Coast	0.0°C
South Coast	0.0°C Upper South Fork Coquille watershed
Umpqua	0.1°C (for landscapes not likely to achieve a natural condition)
Rogue	0.04°C <i>entire basin except</i> 0.05° in the Bear Creek watershed (applicable to altered landscapes and existing structures)
	0.0°C in the Applegate, Lobster Creek and Lower Sucker Creek watersheds
Willamette	0.05°C <i>except</i> 0.035°C at the Willamette River point of maximum impact (Marys

And, **last**, the existence of a TMDL supersedes the Protecting Cold Water criterion if it is more protective.⁵

As a result, the existence and content of temperature TMDLs and identification of 303(d) listed streams are absolutely key to knowing whether revised forest practices for riparian buffers will be sufficient to “meet water quality standards.”

Unfortunately, you are being told otherwise. In the short term, it will make the politicians and agencies captured by the timber industry, to say nothing of the industry itself, pleased. But there will be many longer term ramifications of ignoring the facts of Oregon law as the Board moves forward with this rulemaking.

First, whatever action the Board takes to ostensibly address water quality standards, ODF and the Board will still have TMDLs to address in the future. Second, the Board’s new forest practices will still fail to meet Oregon water quality standards, as they do today. Third, Oregon will not be

	River-Santiam River);
	0.025°C on the lower Coast Fork Willamette and lower McKenzie Rivers;
	0.025°C on the Clackamas River below PGE Clackamas Project;
	0.025° on the lower Willamette River below Willamette Falls
Sandy	0.05°C of HUA (but not incorporated into load allocations so essentially 0.0)
Mid Columbia	0.05°C Miles Creek watershed (for landscapes not likely to achieve a natural condition)

⁵ DEQ agrees, explaining in its guidance that:

Total Maximum Daily Loads (TMDLs) include a human use allowance. . . . This heat load is allocated among all sources in the TMDL. An individual source or type of source (such as forestry) will typically get a load allocation that is a portion of the human use allowance (e.g. 0.1°C). If modeling or temperature monitoring shows that an activity or activities would fail to comply with the PCW criterion, then the activity would necessarily not comply with the TMDL human use allowance or load allocation. Appropriate action should be taken by DEQ and Designated Management Agencies to bring activities into compliance with the TMDL.

Upper watershed streams (headwaters streams), particularly small, non-fish-bearing, or intermittent streams, may or may not be subject to TMDL load allocations and surrogate measures. This can vary by TMDL. If TMDL load allocations apply to headwater streams and are more stringent than the PCW criterion, then the load allocations and their surrogate measures should be used. If the TMDL does not apply to all streams, then the PCW criterion applies to any streams not covered by the TMDL and an evaluation is necessary to determine if cold water from those streams is needed to meet the downstream TMDL load allocation (i.e. evaluate whether Exception C of the PCW criterion is met; see Section 2.1). *In any case, the more stringent of PCW criterion or TMDL load allocations applies.*

Oregon DEQ, Internal Management Directive: Nonpoint Source Compliance With the Protecting Cold Water Criterion of the Temperature Standard (Nov. 2011) at 11 (emphasis added).

able to claim, nor federal agencies to find, that Oregon's forest practices are sufficient to meet the requirements of the Coastal Zone Act Reauthorization Amendments (CZARA), which depends upon the practices' meeting water quality standards. Fourth, eventually Oregon's Clean Water Act permitted dischargers will have to pay the price of Oregon's failure to control nonpoint source pollution. Fifth, not only will Oregon have failed to protect its waters from temperature increases but, as the scientists are telling you, the proposed revisions will fail to protect against excess sedimentation and to ensure sufficient large woody debris. Sixth, Oregon's failure to protect streams against warming will result in new Endangered Species Act listings for amphibians whose populations are plummeting due to, among other factors, inadequately protective logging practices. Seventh, for all of these reasons, Oregon will fail in any effort to delist the Oregon coast coho as a threatened species or to make any meaningful progress in protecting the other cold water species listed under the Endangered Species Act. And, last, Oregon will continue to give lip service to the effects of climate change on stream habitats without making any meaningful progress thus, once again, failing to be the national leaders we claim to be.