

- ◆Wild Salmon Center◆Northwest Environmental Advocates◆Native Fish Society◆
- ◆Audubon Society of Portland◆Rogue Riverkeeper◆McKenzie Flyfishers◆
- ◆Oregon Wild◆WaterWatch of Oregon◆Cascadia Wildlands◆
- ◆Pacific Coast Federation of Fishermen’s Associations◆
- ◆Institute for Fisheries Resources ◆Pacific Rivers Council◆
- ◆Center for Biological Diversity◆Oregon Chapter Sierra Club◆
- ◆Coast Range Association◆Northwest Guides and Anglers ◆

5 March 2014 (*revised*)

Thomas Imeson, Chair
 Oregon Board of Forestry
 2600 State Street
 Salem, OR 97310

Re: Urging the Board to Stay the Course on the Current Riparian Rule Analysis

Dear Chair Imeson and Members of the Board:

On behalf of the undersigned 17 organizations and individuals concerned about the protection and restoration of freshwater ecosystems in Oregon, I write to express our strong support for continuation of the Board’s efforts to promulgate stream protection rules intended to meet the “Protecting Coldwater Criterion” (PCW) of the state’s water quality standard for temperature. This letter begins by responding to a number of points expressed or implied in the February 11 letter to you from the chairs of the Northwest and Southwest Regional Forest Practice Committees, which urged that you postpone the rulemaking process. We conclude with several recommendations pertaining to the appropriate scope of a proposed rule.

➤ **No sound reason exists for postponing the rule process**

1. *The Board’s 2012 decision to embark on this rulemaking was “well-informed.”*
 Contrary to the assertion made by the Committees, the Board does not need more information to support its determination that the current rules for small and medium streams are inadequate to meet the PCW; this was a clear finding of the portion of the “RipStream” study that has now been thoroughly peer-reviewed and published. Even if future data are released that show temperature increases attenuate with time after harvest, that would not change the results or the conclusions made on the basis of data reflecting prior post-harvest conditions. (There is no exemption, for example, for violating water quality standards for a set period of years). Furthermore, data on economic impacts, effectiveness to meet numeric temperature criteria, and fish response to temperature increases are simply not relevant to the question of whether the PCW is met by compliance with the current minimum buffers for small and medium fish-bearing streams. In particular, economic impact data will be relevant when the Board is faced with choosing the “least burdensome” from an array of adequate rule alternatives; these data do not pertain to whether the Board should have made its determination and begun developing the rule alternatives in the first place.

2. The Board's 2012 decision to embark on this rulemaking was timely and delay would be costly. The Committees' letter implies that there is no urgency about improving the stream protection rules and that more time is needed to ensure the rules' technical basis is sufficiently rigorous. This view is not borne out by: 1) the substantial and rigorous technical basis of this rule process since the results of RipStream were first shared with this Board five years ago; 2) the long history of stalled efforts to increase riparian forest retention to prevent stream warming dating back fifteen years; 3) imminent disapproval by the National Oceanic and Atmospheric Administration (NOAA) and U.S. Environmental Protection Agency (EPA) of the state's coastal nonpoint source pollution control program under the Coastal Zone Act Reauthorization Amendments (CZARA) based largely on the inadequacy of forest practice rules; and 4) the connection between the inadequacy of current regulatory measures for forestry and the "threatened" status of Oregon coast coho pursuant to the Endangered Species Act and the conservation status of other aquatic- and riparian-associated species dependent on nonfederal forestlands such as amphibians. Many of these issues were cited in November 2013 testimony to this Board by Governor Kitzhaber's natural resources aide Brett Brownscombe who urged that this rulemaking proceed without interruption. The credibility of the Board's claim that it is capable of adapting the forest practice rules to address demonstrated inadequacies to meet minimum federal and state legal requirements rides on this rulemaking's producing an outcome that fish – and Oregon's natural resource agencies -- can take to the bank.

3. The Committees' request for a substantive collaborative review and possible future amendment of the PCW by the Oregon Environmental Quality Commission (EQC) is not a valid reason to suspend the Board's continued effort to comply with current law. We understand that the Committees do not agree with the legal and ecological basis of the PCW. Clearly, there is a need for a better understanding of the rationale behind the criterion which we hope will be advanced by better communication with DEQ. Nonetheless, this criterion remains a duly promulgated part of Oregon's water quality standards approved by EPA. The PCW is in no way affected by the vacatur, by a federal court and EPA, of Oregon's Natural Conditions Criterion.¹ We also note that the 0.3 degrees C limitation on management-caused impacts to streams supporting coldwater salmonids is in keeping with the antidegradation component of other states' temperature standards. Washington State – whose Forest Practices Act objectives explicitly include a viable timber industry – is currently meeting this same standard under rules that prohibit riparian harvest within about 80 feet of fish-bearing streams.

Furthermore, based on Oregon's experience to date, *similar or more stringent management practices as those needed to meet the PCW will be necessary to meet the near-zero load allocations for stream temperature increases from nonpoint sources* under the temperature

¹ *Northwest Environmental Advocates v. U.S. Environmental Protection Agency*, No. 3:05-cv-01876-AC (D. Or. Feb. 28, 2012)

TMDLs that have been and will continue to be developed for Oregon's temperature-impaired watersheds.²

In short, the need to prevent harvest-related stream warming on forest streams is likely to endure unless and until the Clean Water Act and the laws of physics are repealed.

Should the Board decide not to act on the basis that it challenges the validity of the PCW criterion, the default legal "shield" against claims of forestry-related Clean Water Act violations that the Board and forest landowners enjoy under the Forest Practices Act will be put at risk. Without this shield, it would be incumbent upon the Environmental Quality Commission to exercise its enforcement authority.

3. The implication that "all the Forest Practices goals" would be properly part of a revision to a water quality standard under the federal Clean Water Act is wrong. Water quality standards promulgated by states under the Clean Water Act must meet the resource protection goals of this federal law: to protect the state's designated uses. The objectives of the Oregon Forest Practices Act are simply not part of the equation in the Clean Water Act's standard-setting process and EPA won't approve Oregon's revised standards if they are considered. Underscoring this point, a federal court held in 2012 that EPA is required to review exemptions for nonpoint sources that EQC includes in Oregon's water quality standards, a requirement that led to EQC's removal of these exemptions in 2013. It is appropriate to address the multiple and competing goals of the Oregon Forest Practices Act in selecting the specific management prescription that will be required by ODF to meet a water quality standard (see 5 below). This is the point at which burden to the regulated community is considered, but this point has not yet been reached in the rulemaking process at issue. The Board should allow the process to play out as it was intended.

4. The Regional Forest Practice Committees represent the regulated community, not the broader public interest. We appreciate the important advisory role that the standing regional forest practice committees serve and the point of contact they provide for the Board with the regulated community when it seeks public engagement during policy development. However, these committees do not represent the broader public interest in public natural resource protection and its associated economic and non-economic benefits. In fact, these committees are legally mandated to be at least two-thirds composed of citizens with a vested economic interest in the regulatory status quo for timber harvest.

The primary purpose of the Regional Committees is to assist the Board of Forestry in developing appropriate forest practice rules under the Forest Practice Act. Given that the Board has already decided to seek new stream protection rules capable of meeting the PCW, in our view the recommendations forwarded by the Northwest and Southwest Regional Committees exceed the Committees' charges. At this juncture in the Board's

² For example, of the .3 degrees C "human use allowance," on impaired streamas the allowable temperature increase for all nonpoint sources (i.e. the "load allocation") is .04 degrees in the Rogue River Basin, 0 degrees in the North Coast basin, and .1 in the Umpqua River basin the number is 0.1. In short, the temperature increase associated with forestry must be essentially 0 in temperature-impaired basins.

process, it is our understanding that these Committees should essentially be poised to comment on the proposed rule language expected out soon -- not to provide unsolicited advice to the Board about their opinions of a particular water quality standard promulgated by the EQC under that agency's statutory scheme.

5. *The regulated community is well-protected from arbitrary, overly-burdensome rulemaking by the ORS 527.714 and the state's administrative procedures act.* All Oregonians, including forest landowners, are protected from arbitrary, technically unsupported administrative action by the body of law surrounding the state's Administrative Procedures Act, ORS Chapter 183. In addition, the interests of forest landowners are specially protected by the provisions of ORS 527.714 requiring a series of unique findings and considerations, including section (5)(e) requiring new regulations to be accompanied by a Board finding that the required management practice is the "least burdensome" alternative available to meet the rule objective. An economic impact analysis also is required under ORS 527.714(7).

6. *There is no compelling new information that negates the basis of the Board's finding that current rules are inadequate to meet the PCW.* Quite simply, nothing has changed to justify the Board's changing course. More information, particularly from the paired watershed studies, will not obviate the need to change the rules to protect stream temperature, provide more wood sources, and mitigate impacts on sediment regimes.

What has changed is that the preliminary results of the rule analysis have been shared with stakeholders, and they indicate a need for more significant changes to the current rules than some parties may have expected or hoped. These changes are likely to be the most significant changes since 1994, and for the organizations signing this letter they are both welcome and long overdue. Numerous federal agencies would agree.

The right path for Oregon is for the Board to finish the rule process it started in January 2012. There will be ample time during the public comment period for all stakeholders to express their views. The immediate goal is to finalize a set of rule alternatives for Board consideration so that a rule proposal can be presented to the public.

➤ **The Board should be considering a broader, not a narrower, footprint for this rule**

The one point where we do agree with the Committees is that the Board would ideally have taken a more "holistic" approach to rule reform – though we clearly differ on what such an approach would have looked like.

We had hoped that this rule change effort would be statewide – it currently is not. We had hoped that it would include at least all the streams to which the PCW applies and also to those listed as temperature-impaired – but as yet it does not. We had hoped it would apply to non fish-bearing streams; it does not. Many in Oregon's conservation community have long advocated that the Oregon Plan should embrace the goal of ESA sufficiency through multi-species aquatic Habitat Conservation Plans for both state and private forestlands

which would have necessitated that rules be promulgated with all riparian functions and the needs of a broad suite of aquatic species in mind and a goal which Washington State has boldly embraced. This, too, has not yet come to pass.

Nonetheless, it is not too late for the Board to broaden the scope of its rule change consistent with the following recommendations:

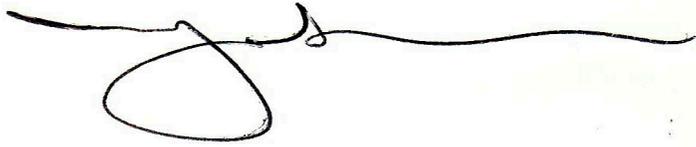
8. *The rule should apply to all streams to which the PCW applies, statewide.* The PCW applies to streams bearing salmon, steelhead and bull trout statewide. The regulatory and biological need to prevent management-caused increases in stream temperatures also applies to streams in Eastern Oregon. In fact, the susceptibility of eastside streams to increased solar radiation is even greater than on west-side streams. As we have noted before, Washington's forest practice rules require retention of all available shade within 75 feet on eastside bull trout streams to meet the same objective – a standard that research validates is effective.

9. *The new rule must also apply to streams in basins that are temperature-impaired.* As noted above (point 3, footnote 1), experience tells us that in basins and watersheds not meeting numeric temperature criteria we can expect nonpoint sources collectively to be limited to heating stream temperatures by zero to 0.1 degrees once Oregon DEQ has completed a Total Maximum Daily Load pursuant to the Clean Water Act. This conclusion is supported in every basin in Oregon where a water quality restoration planning effort has been conducted, and there is no reason to expect that this will change. As a result, the Board knows that management measures to control temperature increases are needed in streams and watersheds that are identified as currently violating temperatures standards, not just unimpaired waters to which the PCW criterion applies. Whatever rules the Board identifies to meet the PCW criterion will also need to be applied to impaired waters and it is highly unlikely that the rules could be less stringent given that they must be designed to allow a smaller increment of warming.

10. *A rule that applies to the balance of western Oregon should not leave out the Siskiyou.* There is no logical reason to exclude the Siskiyou ODF region in southwest Oregon from the scope of a rule applied to the rest of Western Oregon. The fact that the original 1994 rule required a slightly lower basal area target within riparian buffers on medium streams is not a logical basis to exclude the Siskiyou from this rule. There is no logical basis to assume that the relationship between shade and basal area removal within 100 feet of streams is different in the Siskiyou.

We urge you to provide unwavering support for the promulgation of a robust new stream protection rule that Oregon can be proud of.

Sincerely,



Mary Scurlock

On behalf of the following 16 individuals and 17 organizations:

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Northwest Environmental Advocates

Bob Van Dyk, Forest Policy Manager
Wild Salmon Center

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Joseph Vaile, Executive Director
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