

BEFORE THE OREGON BOARD OF FORESTRY

Statement of Mary Scurlock on behalf of
Oregon Wild, McKenzie Flyfishers, Native Fish Society,
Northwest Environmental Advocates, Oregon Chapter Sierra Club,
Rogue Riverkeeper, WaterWatch, & Wild Salmon Center,

*Re: Agenda Item 4: Systematic Review Findings &
Riparian Rule Analysis Alternatives for Rule Development*

November 14, 2013

My name is Mary Scurlock. I am presenting testimony today on behalf of 8 conservation organizations. Thank you for the opportunity to share our views.

Strong Support Continues in the Environmental Community for Strengthening Stream Protection

This rulemaking is a welcome response to the longstanding need to strengthen stream protection rules on private lands in Oregon. The Board has a clear duty to act in response to the RipStream study, which constitutes a sound basis to find that the current rules pose an unacceptable risk of management-related stream warming of greater than .3 degrees C on small and medium fishbearing streams, contrary to the antidegradation component of Oregon's temperature standards (the Protecting Coldwater Criterion, or "PCW")

But the need for change has been recognized for much longer and extends beyond the rule change being contemplated here. It has been 14 years since the Independent Multidisciplinary Science team recommended a series of changes to the OFPA rules to ensure salmonid recovery, including large tree and increased basal area retention in riparian management areas – neither of which has occurred. (IMST, 1999). In 2000, the Forest Practices Advisory Committee recommended increasing the no-cut buffers on fish-bearing streams to half the Riparian Management Area and increasing basal area retention standards on all stream sizes to address temperature and wood source concerns, neither of which occurred. (FPAC, 2000).

In 2001, NOAA, EPA and USFWS found, "with a high degree of confidence, that practices under the FPA adversely affect temperature-related factors such as shade levels, surface erosion, landslide rates, stream morphology and substrate, and landscape-scale conditions," concurring with ODF and DEQs own stream temperature sufficiency analysis findings of "water quality impairments due to forest management activities even with FPA rules and BMPs." Concerns were raised for all stream sizes. (NMFS, FWS, EPA, 2001).

The shortcomings of the stream protection rules have also been the focus of NOAA and EPA concerns about the adequacy of Oregon's nonpoint source pollution control measures for which full federal approval under the federal Coastal Zone Act Reauthorization Amendments (CZARA) has been withheld for over a decade. Failure to make these changes through new enforceable management measures seems likely to lead to a categorical disapproval in the near future and the loss of federal funding to Oregon under Section 319 of the Clean Water Act.

Given the long timeframe throughout which rule improvements have been called for, we have been disappointed that this rulemaking is limited only to addressing the PCW criterion, but we recognize and welcome the Board's renewed focus on ensuring that Oregon's Forest Practices rules meet their stated objective of meeting water quality standards and protecting the aquatic life for which they are designed.

Support for Staff Recommendation to Accept SRR as providing sufficient basis to select alternatives for further development

We are generally supportive of Department staff's recommendation that the Board accept the Systematic Review Report (SRR) as meeting the requirement that the proposed rule alternatives reflect available scientific information. Specifically, the SRR indicates that there is sufficient information available to provide a reasonable empirical basis for evaluating the adequacy of no-cut buffers and variable retention buffers to meet the Protecting Coldwater Criterion.

Specific alternatives must reflect available scientific information

At this juncture, the specific analytical basis the Department will use to design the specifics of each alternative has not yet been revealed, so we cannot speak to whether it, too, will reflect best available scientific information. Ultimately, ORS 527.714 requires that the proposed alternative must reflect available scientific information, but since this alternative is not yet specified and the rationale for its sufficiency presented, this determination cannot yet be made.

The limitation of the available science revealed in the Scientific Review do have clear implications for the policy call that the Board will ultimately have to make about the specific rule prescriptions it will adopt. That implication is that the Board should take a "limits of response" approach in order to fully protect all streams statewide or within a specific region. This approach would tier to the most sensitive streams, assuming that all streams could behave like the most sensitive streams in the record. (*See* comments submitted on the Draft SRR by C. Frissell for further details).

Alternate Practice Alternative seems Speculative

We are not categorically opposed to the concept of an "alternate practice" to provide the flexibility to comply with regulatory objectives with prescriptions that are tailored to a specific site. We recognize that this option already exists in rule for compliance with the intent of in-unit leave tree and downed log requirements to provide wildlife benefits. We further note that alternate practices are allowed only where they provide "better overall benefits for wildlife" in the estimation of the Forest Practices Forester. But this same concept of a better ecological benefit is not included in the staff recommendation for an alternate plan rule alternative in this case. The alternate practice should provide equal or better assurance that the PCW will be met.

Furthermore, it seems premature to include an "alternate plan" as a separate alternative at this juncture, given that staff cannot yet describe what such an alternative would entail. The staff report states: "[t]he further analysis of the No-cut buffers and Variable retention buffers may provide the necessary information to develop criteria for a shade-based alternate plan as a third alternative." Essentially, the Board is being asked to approve development of something for

which a basis has not yet materialized.

We recommend that if and when it is determined that there is adequate information upon which to formulate a “shade-based alternate plan” that Staff return to the Board and request approval to develop this alternative. This may require a check-in prior to the March meeting at which the preferred alternative will be chosen.

Our primary concern about alternate practices is the lack of clarity as to how, i.e. by what metrics or criteria, FPFs will evaluate the adequacy of alternate practices to meet resource protection objectives – in this case prevention of stream warming in violation of the PCW. To the extent that the alternate practice uses some kind of “shade rule” (e.g. a shade removal cap) that will be applied to ensure shade reduction is appropriately limited, we are supportive of the concept. However, the information required for the landowner to meet the burden of demonstrating the adequacy of the alternate practice must also be explicitly described as part of such forest practices applications.

It is important that any alternate plan rule, like a regular default rule, be consistent, repeatable, and enforceable. In order for these qualities to exist the rule must be clear. However, at this point the alternate plan category is just a “catch all” for a mishmash of rule concepts, and we cannot support it as an alternative as proposed. (*See* page 16 of SRR: “plan for alternate practices, acts as a catch-all for riparian management prescriptions that did not fit into other rule alternatives”).

Geographic Applicability

As you are aware, we were disappointed that the Board chose not to extend this rulemaking to eastern Oregon, largely on the basis that the Rip Stream study did not include Eastern Oregon sites. In our opinion, there is adequate evidence available to infer that current prescriptions should be revisited in Eastern Oregon.

We were further disappointed that the Board did not use the Scientific Review process to collate all available studies that might shed light on the adequacy of current riparian rules to prevent harvest-related stream temperature increases in Eastern Oregon. We strongly encourage the Board to prioritize evaluation of the sufficiency of these rules in future efforts.¹

Given the Board’s decision to exclude the Eastern Cascades and Blue Mountains regions, we strongly encourage you to ensure that all five of the ODF regions west of the Cascade Crest are included in this rulemaking effort -- including the Siskiyou. Please consider the extent of stream temperature impairment in this region when making your final decision. (*See e.g.* DEQ Map of

¹ Preliminary information emerging from the state of Washington’s adaptive management studies on forest practices that indicates substantial similarity of many Eastern Washington streams with those in Western Washington streams. Data from the Forest Hydrology Study suggests that there is a “significant population” of nonfishbearing perennial streams in Northwest Washington that conform to the hydrologic profile of westside streams (i.e. are characterized by continuous surface flow). This finding is strong enough that researchers have proposed the use of study designs developed for westside streams on eastside streams, with minor modification. (CMER Eastside Type N Riparian Effectiveness Research Alternatives, October 2013).

Temperature Impaired Streams in the Rogue Basin, attached).

Nonfishbearing Streams

Headwater streams comprise a large portion of total stream length (over 80% in the Coast Range) and are important sources of sediment, water, nutrients, and organic matter to downstream fish bearing streams (Gomi et al., 2002). We remain concerned that the Board is not devoting enough energy to reducing risks to temperature, sediment and large wood regimes under current rules for non fish-bearing streams. Not only does failure to address protection of these streams compromise salmon recovery and the watershed restoration goals of the Oregon Plan, but new management measures to address these risks are needed for DEQ to meet its Coastal Zone obligations generally, as well as those specific to the Settlement Agreement with Northwest Environmental Advocates. To the extent that ODF does not lead its own effort to improve stream protection on the non-fish streams to which water quality standards apply, it will be left for DEQ to propose management measures.

Our overall concern is that the focus on reach-level impacts to stream temperature on fish bearing streams in studies such as RipSteam has deflected scrutiny of watershed-wide cumulative impacts and from a growing body of literature indicating that aquatic life is not being protected on the non fish-bearing network. There is evidence that harvest and stream temperature changes in small streams can be correlated with certain site characteristics to ascertain those streams most vulnerable to warming from canopy removal. These characteristics include stream surface area, the presence of associated wetlands, and substrate texture. (Janisch et. al., 2012 at 312). Ideally, the Board would use this and other available information to design an effective approach to headwater stream protection.

Respectfully submitted,

Mary Scurlock, M. Scurlock & Associates
On behalf of

Mike Brinkely
President
McKenzie Flyfishers

Forrest English
Program Director
Rogue Riverkeeper

Paul Engelmeyer
Mid Oregon Coast River Steward
Native Fish Society

Rhett Lawrence
Conservation Director
Oregon Chapter, Sierra Club

Nina Bell
Executive Director
Northwest Environmental Advocates

Lisa Brown
Staff Attorney
WaterWatch of Oregon

Steve Pedery
Conservation Director
Oregon Wild

Bob Van Dyk
Forest Policy Manager
Wild Salmon Center