

NORTHWEST ENVIRONMENTAL ADVOCATES



February 11, 2015

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Re: Oregon Coastal Nonpoint Pollution Control Program; Efforts Under Way to Control Logging's Effects on Water Quality are Inadequate to Meet Water Quality Standards

Dear Mr. Opalski and Dr. Payne:

Over the last few years, Northwest Environmental Advocates (NWEA) has repeatedly written to your agencies concerning your final approval of Oregon's Coastal Nonpoint Pollution Control Program (CNPCP). In light of the federal agencies' disapproval decision issued on January 30, 2015, we are writing to inform you of some significant limitations in Oregon's over-three-year process to develop riparian logging rules needed to meet water quality standards on private lands in coastal watersheds, the so-called "Ripstream Study." Specifically, the state's current plan is that the new rules will not apply to any non-fish-bearing streams or to any impaired streams.

The good news is that—six years after the results of Ripstream were presented to the Board of Forestry—progress continues. The bad news is that the new logging prescriptions being considered by the Oregon Department of Forestry (ODF) are currently intended to apply to a very limited geographic scope of streams. In addition and relatedly, ODF misconstrues the water quality standards that apply to the streams under consideration.

ODF has summarized the Ripstream findings for private lands as standing for the following propositions: (1) current logging practices are sufficient to meet water quality standards and protect designated uses for all large streams and for all small and medium impaired streams; (2) no data exist to demonstrate that current logging practices have a negative impact on temperature in so-called non-fish-bearing streams; (3) current logging practices result in a mean increase of 0.7°C on small and medium fish-bearing streams that are not impaired for temperature. As a result of these propositions, ODF is prepared, at most, to adopt new prescriptions for small and medium streams that are "fish-bearing"—meaning only salmon, steelhead, and bull trout ("SSBT"), to the exclusion of other salmonids, such as cutthroat, and other fish—and that are

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not impaired. The corollary is that ODF is not planning on adopting new logging practices for any non-SSBT fish-bearing streams or for any impaired streams.

ODF arrives at this position in part because of its incorrect reading of Oregon's water quality standards for temperature. A full explanation of this is set out in the memorandum attached to this letter. *See* Memorandum from Nina Bell, NWEA, to Peter Daugherty, ODF *et al.* Re: Why the ODF Ripstream rulemaking must apply the TMDL load allocations in lieu of the Protecting Cold Water criterion (Feb. 10, 2015). In summary, ODF's insistence that only the Protecting Cold Water (PCW) criterion applies is incorrect because upon EPA's approval of Total Maximum Daily Loads (TMDLs), the allowable human increment of warming changes under the Oregon water quality standards. While the PCW criterion *appears* to apply because the streams are not impaired¹—thereby allowing logging to add a human increment of 0.3°C—in fact, applicable TMDLs establish quite clearly that it is the human increment established by the TMDLs that apply to the streams covered by the TMDLs (at the very least, all perennial streams). Oregon's water quality standards are clear that once a TMDL has been completed, its provisions supersede the other human use limitations on temperature impacts that are set out in the water quality standards, such as the PCW criterion and its human use increment.

Therefore, after a TMDL is completed, the TMDL load allocations restrict the nonpoint sources to their allocation fraction of the 0.3°C human use allowance which, depending on the individual TMDL, ranges from 0.0°C to 0.1°C. While ODF and the Governor's Office take the position that TMDLs are “a different discussion” than meeting the water quality standards, they are mistaken because TMDLs alter the allowable increment of temperature change in the water quality standards. Put another way, the existence of a TMDL changes which criteria apply. The Oregon Department of Environmental Quality (DEQ) agrees, stating in its guidance that “[i]n 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.

As a result of this mistaken reading of the Oregon water quality standards by ODF and the Governor's Office, the Ripstream data are being compared to the wrong criteria, with two key results. First, the mean increase of 0.7°C should be compared to the increment of warming that applies under the applicable water quality standards, namely the TMDL load allocation increment, not the PCW increment. When ODF concludes that current logging practices are adequate for impaired streams because a 0.7°C mean increase does not cause a violation of numeric criteria, they are making an incorrect comparison. The change in temperature that is relevant, and allowed, is the increment of human-source warming allowed in the TMDL load allocation to forestry, not whether the change in temperature pushed ambient water temperatures over the numeric criteria. (It is also worth recalling that one premise of EPA's approval of the numeric criteria is that actual water temperatures upstream of the lowest point to which these criteria applied would be cooler.) Thus, the Ripstream Study in no way demonstrates that current forest practices are adequate for impaired streams.

Second, in determining the correct prescriptions, the mean increase of 0.7°C should be reduced to the applicable human use allowance as established in the TMDLs, not the 0.3°C allowed

¹ That is, the streams are not listed on Oregon's 303(d) list for waters violating water quality standards, which the state interprets to be limited to violating the numeric criteria.

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under the no-longer-applicable PCW. This is, for example, how Oregon DEQ evaluated the alternatives set out by the Bureau of Land Management in the Western Oregon Plan Revision (WOPR), comparing the predicted temperature increases to the 0.1°C load allocation set out in the Umpqua River Basin TMDL. *See* Oregon DEQ, Comments for the Science Team Review Western Oregon Plan Revision (WOPR) Draft Environmental Impact Statement (DEIS) Alternatives, Submitted to The Bureau of Land Management (Dec. 7, 2007) at A-13.

In addition, as explained above, the TMDLs apply to all perennial streams at a minimum and to additional streams in some instances. The TMDLs do not distinguish between SSBT streams that are explicitly protected by the PCW criterion and other fish and non-fish streams to which the PCW may or may not apply, depending on whether an analysis demonstrates they are not related to cooling of downstream SSBT waters. The Ripstream Study may not have included any non-SSBT streams but there is no rationale for not applying the results of that study to non-SSBT streams because the physics of stream warming are not altered by the presence of salmonids, the PCW rule covers non-SSBT streams in the absence of evidence that such streams are not necessary for downstream cooling, and there are currently no such findings that the cold water from these non-SSBT streams is not necessary to meet the PCW in the SSBT streams. This point, and others pertaining to the importance of addressing non-fish-bearing streams, is further elucidated in the second memorandum attached to this letter. *See* Memorandum from Nina Bell, NWEA, to Peter Daugherty, ODF *et al.*, Re: Rationale for including so-called non-fish-bearing streams in the Ripstream rulemaking (Feb. 10, 2015).

We urge EPA, NOAA, and NMFS to encourage ODF and the Governor's Office to engage in a more complete reading of the water quality standards that apply to the current rulemaking on riparian prescriptions needed to protect Oregon's waters.

Sincerely,



Nina Bell
Executive Director

Attachments: Memorandum, Why the ODF Ripstream rulemaking must apply the TMDL load allocations in lieu of the Protecting Cold Water criterion (Feb. 10, 2015).

Memorandum, Rationale for including so-called non-fish-bearing streams in the Ripstream rulemaking (Feb. 10, 2015).

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