

NORTHWEST ENVIRONMENTAL ADVOCATES



MEMORANDUM

February 10, 2015

To: Peter Daugherty, ODF
From: Nina Bell, NWEA
CC: Richard Whitman, GNRO

Re: **Why the ODF Ripstream rulemaking must apply the TMDL load allocations in lieu of the Protecting Cold Water criterion**

Dating to the first meetings in January 2012 on the Ripstream rulemaking, NWEA has raised the concern that ODF was disregarding the role of the Total Maximum Daily Loads (TMDLs) in its interpretation of the applicable water quality standards. If I may summarize your position, combining what was said then and most recently the other day, it is that: (1) the Ripstream study demonstrated there are no problems with current logging practices' attaining the numeric criteria; (2) there is an existing plan for addressing TMDLs (presumably a reference to the plan to not address TMDLs); (3) that if ODF were to address TMDLs it would want to reopen them to change the allocations; (4) the current rulemaking is based on the Protecting Cold Water (PCW) criterion; and (5) the load allocations must be in heat, not temperature, to be useable by ODF (notwithstanding that the load allocations are a fraction of the 0.3°C that ODF seems to have no trouble in using in its analysis).

The intent of this memo is to demonstrate that ODF is reading the water quality standards incorrectly when it insists that it can rely solely on the PCW criterion because the completion of the TMDLs, and EPA's approval of them, fundamentally changes the water quality standards that apply to the streams ODF is charged with protecting. Put another way, you are simply incorrect in believing that the TMDLs are a "different discussion." They are not a different discussion because they affect the applicable water quality standards the prescriptions must meet.

As we know, the mean increase of the (larger-than-FPA) buffers in the Ripstream study was 0.7°C. Because these streams were not impaired,¹ the PCW criterion appears to apply. The PCW criterion includes a human use allowance (HUA) of 0.3°C,² and it is this HUA that the

¹ I am assuming that all the Ripstream sites were located in non-impaired streams.

² "Except as described in subsection (c) of this rule, waters of the State that have summer seven-day-average maximum ambient temperatures that are colder than the biologically based criteria in section (4) of this rule, *may not be warmed by more than 0.3 degrees Celsius (0.5 degrees Fahrenheit) above the colder water ambient temperature.* This provision applies to all sources taken together at the point of maximum impact where salmon, steelhead or bull trout are present." OAR 340-041-0028(11)(a).

Ripstream models and the current rulemaking are set to meet, to reduce the impact from 0.7°C to 0.3°C.

ODF has considered this the end of the discussion about what water quality standards apply, ignoring the TMDL load allocations that *divide* the post-TMDL HUA of 0.3°C established by OAR 340-041-0028(12)(b)(B). The rationale for using the PCW and ignoring the TMDL load allocations is, presumably, that the Ripstream sites were in non-impaired streams and so the TMDLs do not apply. This, however, is false. The TMDLs establish quite clearly that they apply to all the perennial streams in the basins and, in addition, some include all fish-bearing streams or intermittent streams in the basin or watershed.³

Oregon's water quality standards contemplate 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. Specifically, the 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) of this rule, pertaining to use of the HUA following completion of a TMDL, provides that:

Insignificant additions of heat are authorized in waters that exceed the applicable temperature criteria as follows:

* * *

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). In other words, the point of developing a TMDL is to divide the HUA amongst the sources of temperature pollution, both point and nonpoint, in all the streams to which the TMDL applies.

Therefore, after a TMDL is completed, the wasteload allocations in the TMDL supersede the HUA of 0.3°C that previously applied to individual point sources, pursuant to OAR 340-041-0028(12)(b)(A), and the TMDL's load allocations restrict the nonpoint sources to their allocation of the HUA.

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>

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).

	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 River-Santiam River);
	0.025°C on 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 LAs so essentially 0.0)
Mid Columbia	0.05°C Miles Creek watershed (for landscapes not likely to achieve a natural condition)

It is these load allocations that the ODF rules must meet where there are TMDLs in place, not the 0.3°C PCW criterion.

It is worth pointing out that DEQ concurs with NWEA's interpretation of the Oregon water quality standards, 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).