



BEFORE THE BOARD OF FORESTRY

Statement of Mary Scurlock, Oregon Stream Protection Coalition

Agenda Item 2: Developing Riparian Rule Prescriptions

23 July 2015

My name is Mary Scurlock, representing the Oregon Stream Protection Coalition's 24 fishing industry and conservation member groups united in support of stronger, science-based riparian protection on Oregon's 10.6 million acres of private forestland.

Summary Points

- 1) The Board's legal duty is to "insure to the maximum extent practicable" that the Protecting Coldwater Criterion (PCW) is met. This means the Board must adopt measures that provide a high likelihood (i.e. "insure to the maximum extent") that the PCW will be attained unless attainment is demonstrably infeasible for the regulated community as a whole.
- 2) The Board's discretion with regard to how effective management practices must be to meet its duty is more constrained when dealing with a numeric criterion like the PCW that is specifically designed to limit impacts at the site level than it would be with a more generally applicable ambient standard -- as has often been the case when interpreting "maximum extent practicable" in other Clean Water Act contexts.
- 3) The Board is not empowered to decide that the standard does not need to be fully complied with for reasons other than demonstrated impracticability, nor may it decide that some other, less stringent standard is adequate, or that only "least cost" options should be considered.
- 4) For buffer sizes, there is a strong scientific basis to guide you: a regional literature review narrowing your choice to either no-harvest buffers or variable retention buffers, and a multimillion dollar study that demonstrates the standard is not currently being met and whose data supports a state-of-the-art analysis of the likely effectiveness of riparian prescriptions. That science tells us that 120 feet buffers are necessary to insure achievement of the PCW to the maximum extent -- or virtually 100% of the time. A 100 foot buffer gets us there about 80-85% of the time, and 90 feet limits stream warming to the low levels directed by the PCW only about 50% of the time.
- 5) None of the most effective buffer size alternatives has been demonstrated to be incapable of being implemented, i.e. impracticable.
- 6) Given the known and substantial risk to public natural resources posed by continued implementation of current rules, there is no rational basis not to apply buffers meeting the PCW to all of western Oregon.
- 7) Because there is no non-arbitrary way to ensure that Salmon, Steelhead and Bull Trout (SSBT) reaches are protected from prohibited stream warming caused by logging of



upstream, “non SSBT” reaches, and because stream warming limitations are also required in many of these reaches by temperature restoration targets (“TMDLs”), enhanced buffers of at least 100 feet should be extended to all fish-bearing streams in western Oregon.

OSPC RECOMMENDATIONS

- **Buffer size:** ODF modeling illustrates that at least a 100 foot no cut is needed to provide what could be considered a high certainty that the PCW will be met (“insure to the maximum”) with sufficient frequency to be considered compliant with the criterion: a 100 foot buffer translates into a predicted average warming of .18 degrees, which translates into meeting the PCW about 80 to 85% of the time. (Pers. Comm. J. Groom, ODF, 2 June 2015). Alternatively -- in order to get compliance to the “maximum extent” as directed by the OFPA and federal law – the Board could select 120 feet for close to 100% certainty of attaining the PCW.
- **Geographic and Stream extent:** Substantially more than 1000 feet above SSBT reaches would be needed to reliably protect downstream reaches from prohibited warming, and at least some tributaries would need protection although tributaries are excluded from all of the Department’s proffered policy packages. We recommend that PCW-sufficient buffers be applied in all of western Oregon for the full extent of the upstream fish-bearing network as well as nonfish tributaries that contribute 20% or more of the streamflow of the receiving fishbearing water.

Application of the new rule to SSBT reaches only means the new protections would apply to just slightly more than 11% of the perennial stream network, and 25% of perennial streams governed by the FPA in western Oregon. (EPA analysis, A. Henning and P. Leinenbach, June 3, 2015). Public policy dictates in favor of “all fish” coverage because it will substantially reduce the risk of failing to meet the PCW due to insufficient upstream and tributary protection and will get us furthest down the road toward CZARA and TMDL compliance.

- **Eastern Oregon:** The expanded buffer should include all small and medium fishbearing streams in all ecoregions of Western Oregon with a commitment to implement appropriate commensurate protection from harvest-related stream warming for small and medium fish streams in Eastern Oregon within 12 months.
- **Nonfish Streams:** The Board should initiate a rule change to address water quality needs on non-fish streams statewide within 12 months.

DISCUSSION

- **Board Duty and Decision Standard.** We are extremely concerned that some members of the Board may fundamentally misunderstand their legal duty and overestimate their



discretion to choose alternatives that make minor improvements over the status quo, creating the real possibility that a majority of the Board will not see fit to support the best conservation alternative now on the table, much less the stronger one OSPC believes is needed to meet the Protection Coldwater Criterion (PCW). This perception seems to relate to confusion over the Board's duty to comply with the standard as well as the apparent belief that the Board is empowered to decide that there is no or limited public benefit to meeting the PCW.

The Board's duty is **not met** by measures that simply "reduce" exceedances or increase the likelihood that the PCW will be met over the status quo. "Substantial advancement" of the purpose of the rule is a necessary finding under -714, but is not itself a sufficient standard for the Board's decision. (At least two proposals we know of have claimed that they will reduce violations/improve attainment of the PCW from the status quo as if that is the standard).

Nor is the Board authorized to second-guess the legal or biological need for PCW attainment because that has already been decided by EQC. Specifically, the Board cannot legally substitute judgment for that of the EQC (the sole promulgator of water quality standards in the state of Oregon) and the US Congress (the anti-degradation policy of the Clean Water Act as memorialized in statute and federal rule). Full compliance with the PCW as already been determined to be necessary for protection of the public's waters in the appropriate forum (EQC, ratified by EPA). See also ORS 527.714 (enforcement savings clause referring to goal of full compliance with water quality goals).

- **The primary information the Board should use in making its decision is the Department's assessment of the prescriptions' effectiveness to meet the target standard.** The reason we spent millions and waited over a decade to get here is because the RipStream study tested BMP effectiveness to meet the PC, so the public has a clear and reasonable expectation that the Board will make its policy decisions consistent with the study results. The most probative information on the table, and that which should be given the greatest weight, is the ODF predictive model based on RipStream.

The Board should not even be CONSIDERING rule changes that the ODF effectiveness analysis does not demonstrate are adequate to prevent the prohibited stream warming. This means only the 90, 100 and 120 foot no cut, the state FMP should even be on the table at this point UNLESS one of these is really not feasible, which has not been shown. In our considered view, the scope of the Board's discretion does not include alternatives for which there is no rational basis to find the target water quality criterion actually is met with a reasonably high likelihood.

There is a great deal of information on the table now of highly variable quality that is not directly related to maximizing the effectiveness of management measures to "insure" the standard is met as the law requires. Information that the Board should NOT be distracted by includes: the likelihood of active wood placement, the unquantified putative benefits of active management to control stocking" to meet DFC, ODF's opinion of the "marginal return"



of additional riparian protection, the “fish response” information, the statistical “risk of extrapolation” of RipStream results to ecoregions outside the Coast Range – none of which relate to the effectiveness of measures to meet the PCW. Even the landowner economic impact information is only relevant to exclude an alternative as impracticable if it shows jeopardy to the industry or sector as a whole and to identify the least burdensome alternatives.

Information that has been given relatively less attention than it should have been in the Department’s policy framework most notably includes: 1) the risk of not meeting the PCW posed by a failure to protect both an inadequate portion of upstream reaches but also *upstream contributing tributaries*; and; 2) the complexities of the implementation burden created by tiering protection to SSBT reaches which could lead to incomplete and/or inefficient application of the new rule.

- **All the ODF rule packages fall short on buffer size and stream extent.** None of the ODF rule packages outlined in the staff report is sufficient on its face to fulfill the Board’s legal duty to meet the PCW to the maximum extent practicable. Only the no cut in Package 1 — referred to as the “Minimize Temperature Concerns” (90 foot buffers) should even be considered to be in the ballpark, but this package doesn’t really “minimize” temperature concerns or “maximize” attainment of the standard. According to ODF analysis these buffers would still allow violation of the PCW at approximately 50% of sites. Further, the covered stream extent is Salmon, Steelhead and Bull Trout reaches plus an admittedly arbitrary and insufficient 1000 feet the Department’s review of the best available science clearly illustrates that this distance is not adequate to prevent downstream warming in violation of the standard. The literature reviewed by ODF and DEQ illustrates that 1000 is median distances that does not cover more than half the sites and observations at some sites show that recovery may not happen for as much as two miles. Further, ODF does not adequately address risks posed by failure to include adequate upstream extent of SSBT, and does not propose in any of its 3 packages to protect tributaries. *In our view, the most logical way for ODF’s riparian rules to account for the wide variability in stream dynamics is to provide additional riparian protection to the full extent of the fish-bearing network.*
- **The staff report gives almost no attention to the practical implementation difficulties associated with tiering riparian protection to Salmon, Steelhead and Bull Trout (SSBT) reaches.** Detailed rules and agency guidance will be needed to ensure credible and consistent implementation. We have previously provided an analysis of implementation concerns, including: 1) the need to create, publish and maintain a new stream classification database; 2) inadequacy of current rules and guidance for determining natural barriers to accurately determine the extent of SSBT distribution; 3) inadequacy of ODF’s current fish survey protocol; 4) inadequacy of ODFW fish distribution maps as the foundation for a new regulatory scheme and the source of consistently reliable basis for determining SSBT distribution; 5) questions about the adequacy of stream classification information sources and whether ODF or ODFW is the appropriate custodian of the SSBT database given concerns about expertise, capacity to conduct rapid updates and funding.