

OREGON STREAM PROTECTION COALITION - ISSUE BRIEF #1

August 2014

Will Oregon's Board of Forestry propose new logging rules to meet coldwater protection standards on private timberlands? (Or will it defer to the timber lobby?)

BACKGROUND

- Many of Oregon's streams and rivers are too warm and exceed temperature standards required by the Clean Water Act because of land use impacts. Warm streams can stress or kill native fish and other aquatic species, help spread invasive species, and promote extinctions.
- The conservation of cold water is a fundamental goal of Oregon's water quality standards that is critical to species conservation and recovery in the face of climate change.
- Oregon's logging rules governing timber harvest on private lands provide significantly less stream protection than those in Washington and California.¹
- The need to increase stream protection from logging on private lands has long been acknowledged by the state's own science team² and by a host of federal agencies in connection with Endangered Species Act salmon listings,³ water quality standards compliance under the Clean Water Act,⁴ and coastal water pollution control under the Coastal Zone Management Act.⁵
- Even so, since 1994 no changes have been made to the size of the riparian (streamside) buffer that must be protected from logging, or to the protection required within these buffers.
- Conservation and fishing groups are alarmed that the most significant change to Oregon's forest practices rules in over 20 years could stall out if the Board of Forestry doesn't vote on September 3 to stay the course on its riparian protection rulemaking.

WHY IS THE BOARD CONTEMPLATING NEW RULES NOW?

- In January 2012, the Board of Forestry determined, on the basis of a study called "RipStream,"⁶ that current rules allow removal of too many trees in the riparian buffer area. This finding applies to small and medium salmon-bearing streams that are warmed in violation of a water quality standard called the "Protecting Coldwater Criterion" (PCW).⁷ The PCW is a Department of Environmental Quality (DEQ) standard that is intended to protect cold streams from heating up and violating DEQ's temperature standards. The finding triggered the Board's process to develop new rules to prevent violations of the PCW.⁸
- The Board has made several public decisions in support of a rule change,⁹ and the Department of Forestry (ODF) staff scientists have developed an analytical model to identify how many trees are needed to meet the PCW standard. Early results indicate that substantially more trees must be left standing to meet the PCW. Whereas current requirements often are limited to just leaving 20 feet of trees in the riparian buffer, ODF is showing that meeting the PCW may require the equivalent of about an 85 foot no-cut buffer.
- As the scope of needed improvements has become more clear, the timber industry has responded by agitating for the Board to: (1) rescind its 2012 finding, and (2) question the

need for the PCW standard itself – a matter well outside the Board’s authority because it is under the jurisdiction of the DEQ’s governing body, the Environmental Quality Commission .

- The result? A process originally projected to last one year still has not reached the point of considering rule alternatives after almost three years.

WHAT HAPPENS IF THE BOARD FAILS TO ACT?

- This rule change is important:
 - *Ecologically* because there are over 10 million acres of private timberland regulated by Oregon’s Forest Practice Rules, including many streams that are habitat for temperature-sensitive salmon, steelhead and bull trout;
 - *Fiscally* because over \$2 million annually in federal funding to Oregon relies on logging rule improvements and Oregon’s multi-million dollar fishing industry relies on clean water for fish;
 - *Socio-politically* because the Board’s ability to respond to scientific evidence and meet its obligations to protect Oregon’s natural resources, in spite of opposition from the regulated community, has not been demonstrated; and
 - *Legally*, because failure to revise logging practices likely will motivate litigation and legislative changes to the Board’s authority.
- The National Marine Fisheries Service (NMFS, the agency responsible for threatened and endangered salmon and steelhead) and the Environmental Protection Agency (EPA, administrator of the Clean Water Act) have stated their intent to “disapprove” Oregon’s coastal water quality program largely due to inadequate stream protection on private lands. The two agencies want less logging and more protection of stream temperatures, as well as more protection from road- and landslide-related sediment. Failure to correct these problems will lead to the loss of over \$2 million in federal funds annually to DEQ and the Department of Land Conservation and Development.¹⁰
- Oregon’s Forest Practices Act requires that the Board’s logging rules meet water quality standards developed by DEQ.¹¹ The presumed adequacy of the rules to protect water quality is why landowners can’t be prosecuted by DEQ for water quality standards violations if they comply with the rules. Inadequate rules could leave landowners vulnerable to water quality enforcement.
- The ability of the Board’s logging practices to prevent logging-related stream warming in violation of DEQ water quality standards has been in question since the 1990s, but the Board didn’t believe it had enough information to warrant a rule change. Between 2002 and 2010, ODF conducted the “RipStream” research study¹² which found that, on average, logging on under current rules caused stream temperatures to increase by 0.7° C -- even though this average included sites that left more trees than required by current rules. On sites that were harvested down to the minimum required, temperatures increased by an average of 1.9° C.

¹ Washington’s rules are two to three times more protective of streams than Oregon’s rules. *See for example* http://www.deq.state.or.us/wq/dwp/docs/TurbidityReports/Effect_of_logging_incident_Falls_City.pdf (quoting EPA senior staff David Powers comparing the two states’ logging rules). *See also* Olsen *et al.* 2007 at page 92 for a comparison of forest practices policies in the Pacific Northwest (article entitled *Biodiversity management approaches for stream-riparian areas: Perspectives for Pacific Northwest headwater forests, microclimates, and amphibians*), and analysis done by Pacific Rivers Council and Washington Forest Law Center available on their websites.

² Independent Multidisciplinary Science Team. 1999. Recovery of Wild Salmonids in Western Oregon Forests: Oregon Forest Practices Act Rules and the Measures in the Oregon Plan for Salmon and Watersheds. Technical Report 1999-1 to

the Oregon Plan for Salmon and Watersheds, Governor's Natural Resources Office, Salem, Oregon.

<http://www.fsl.orst.edu/imst/reports/1999-1.pdf> (including recommendations to increase tree retention in riparian buffers, and to apply buffers to medium and small non-fishbearing streams).

³ See for example NOAA-NMFS, 2010. 75 Federal Register 29489-29506 *Listing Endangered and Threatened Species: Completion of a Review of the Status of the Oregon Coast Evolutionarily Significant Unit of Coho Salmon; Proposal to Promulgate Rule Classifying Species as Threatened* (May 26, 2010). <http://www.gpo.gov/fdsys/pkg/FR-2010-05-26/html/2010-12635.htm> (based on science team's review of the status of Oregon Coast coho salmon, NOAA made findings in this proposed rule (final as of June 20, 2011) regarding the adequacy of the Oregon Forest Practices Act's administrative framework to protect coho salmon, specifically identifying uncertainty over (1) whether the widths of riparian management areas are sufficient to fully protect riparian functions and stream habitats; (2) whether operations allowed within riparian management areas degrade stream habitats; (3) what operations are appropriate on high-risk landslide sites; and (4) whether watershed-scale effects, including those from roads, are adequately controlled. NMFS concluded that: "Based on the available information, we are unable to conclude that the Oregon Forest Practices Act adequately protects OC coho habitat in all circumstances. On some streams, forestry operations conducted in compliance with this act are likely to reduce stream shade, slow the recruitment of large woody debris, and add fine sediments. Since there are no limitations on cumulative watershed effects, road density on private forest lands, which is high throughout the range of this ESU, is unlikely to decrease." (FR at 29499-500). See also Stout *et al.* 2011. Scientific conclusions of the status review for Oregon Coast coho salmon (*Oncorhynchus kisutch*) (Draft revised report of the Oregon Coast Coho Salmon Biological Review Team. NOAA/NMFS/NWFSC, Seattle, WA)

⁴ EPA and NOAA-NMFS. June 12, 2008. *NOAA and EPA Preliminary Decisions on Information Submitted by Oregon to Meet Coastal Nonpoint Program Conditions of Approval* (12 pp) ("Oregon lacks adequate management measures under the Oregon Forest Practices Act (FPA) rules for protecting water quality;" "Oregon still lacks adequate measures for protecting riparian areas of medium, small and non-fish bearing streams, high risk landslide areas, and for addressing the impacts of legacy roads. A broad body of science continues to demonstrate that the FPA rules do not adequately protect water quality[.];" "While we acknowledge Oregon's extensive voluntary efforts, and its incremental progress on the regulatory front, NOAA and EPA do not believe the progress made is adequate. . . . additional revisions to Oregon's FPA rules are needed to fully protect water quality and beneficial uses." (pp. 10-12).

⁵ See for example [2010 Oregonian Article on Coastal Zone Lawsuit](#); See e.g. [Frissell Declaration supporting CZARA disapproval - OR Logging Rules-3-14-14.pdf](#)

⁶ Groom *et al.* 2011, *Response of Western Oregon (USA) stream temperatures to contemporary forest management*, *Forest Ecology and Management*, 262: 1618-1629.

⁷ The PCW prohibits a 0.3° C or greater increase in stream temperature from logging on certain fish-bearing streams. See Subsections (a) and (c) of OAR 340-041-0028 (11) which read: "(a) Except as described in subsection (c) of this rule, waters of the State that have summer seven-day-average maximum ambient temperatures 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...(c) The cold water protection narrative criteria in subsection (a) does not apply if: (A) There are no threatened or endangered salmonids currently inhabiting the water body; (B) The water body has not been designated as critical habitat; and (C) The colder water is not necessary to ensure that downstream temperatures achieve and maintain compliance with the applicable temperature criteria." See also ODEQ, 2011. [Internal Management Directive: Nonpoint Source Compliance with the Protecting Coldwater Criterion of the Temperature Standard](#)

⁸ The Forest Practices Act makes it very difficult to change the water protection rules that govern logging near streams on private land: there must be an affirmative finding of resource degradation for the Board to increase logging restrictions to protect environmental values. A finding that a water quality standard is not met by the rules is legally adequate to serve as a resource degradation finding. (6/23/14 statement of counsel at Board Riparian Rules Workshop).

⁹ Board decisions to date include: 1) Current rules on small and medium fish streams don't meet the PCW ("the degradation finding") (January 2012); 2) acceptance of a "Scientific Evidence Review" Report that reviews and synthesizes available scientific information relevant to the riparian rulemaking and the relationship between riparian harvest/protection and stream temperature (final report approved November 2013); 3) Conceptual agreement on how "maximum extent practicable" will be defined for this rulemaking (November 2012).

¹⁰ [2010 Oregonian Article on Coastal Zone Lawsuit](#)

¹¹ The Forest Practices Act requires the Board to: "establish best management practices and other rules applying to forest practices as necessary to insure that to the maximum extent practicable nonpoint source discharges of pollutants resulting from forest operations on forestlands do not impair the achievement and maintenance of water quality standards established by the Environmental Quality Commission for the waters of the state." ORS 527.765. It is the purported sufficiency of the rules that justifies exemption of logging operations from direct enforcement by DEQ against landowners and operators for standards violations. ORS 468B.110(2).

¹² RipStream resulted in two peer-reviewed publications: Groom *et al.* 2011, *Response of Western Oregon (USA) stream temperatures to contemporary forest management*, *Forest Ecology and Management*, 262: 1618-1629; Groom *et al.* 2011, *Stream Temperature Change detection for state and private lands in the Oregon Coast Range*. *Water Resources Research* 47.