

NORTHWEST ENVIRONMENTAL ADVOCATES



MEMORANDUM

February 10, 2015

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

Re: **Rationale for including so-called non-fish-bearing streams in the Ripstream rulemaking**

For the last two years, and memorialized in the Findings of the Board of Forestry, ODF has taken the position that the Ripstream data and analysis cannot be applied to so-called non-fish-bearing streams because there were no such streams included in the study. ODF has never explained why the physics of water temperature are altered by the presence of salmon, steelhead, and bull trout (SSBT). ODF has not explained why appropriate prescriptions for non-SSBT streams cannot be extrapolated from the Ripstream results. And ODF has not explained how its finding that the Protecting Cold Water (PCW) criterion has been violated does not extend to all waters covered by the PCW standard.

Now that the federal agencies have disapproved Oregon's Coastal Nonpoint Pollution Control Program— and over three years have passed since the rule process formally began—ODF may want to reconsider the scope of the Ripstream rulemaking. One element of this disapproval is the federal agencies' finding that Oregon fails to provide sufficient protection of water quality from logging of non-fish-bearing streams, the very streams excluded from the current rulemaking. Since the rationale for this is obvious, I won't belabor it here. However, there are several additional reasons why the scope of the rule should have been broader, as we requested at the outset of the process, and should now be expanded.

First, the burden is on those who would remove riparian vegetation from any stream reach that is not exceeding the numeric criteria to demonstrate that the PCW criterion does *not* apply. The literal language of the rule — “[e]xcept as described in subsection (c) of this rule,” and “[t]he cold water protection narrative criteria in subsection (a) *do not apply if*” — makes clear that the PCW applies to waters that are colder than numeric criteria *unless* it is demonstrated that there are no SSBT currently using the water, it is not designated as critical habitat, and “[t]he colder water is not necessary to ensure that downstream temperatures achieve and maintain compliance with the applicable temperature criteria.” In other words, the PCW applies to these non-SSBT streams *unless* it has been demonstrated that the cold water from these streams is not necessary. There is currently no such finding that the cold water from these streams is not necessary to meet the PCW in the SSBT streams to which the rulemaking applies.

In fact, there are several credible findings to the contrary, which could provide an adequate basis for the Board to include non-fish-bearing streams in the current rule change. For example, EPA and NOAA cite Oregon's own Independent Multidisciplinary Science Team (IMST) for the

proposition that:

Because nongame fish and other aquatic organisms play a role in a functioning stream system, and the distribution of salmonids will change over time, *non-fishbearing streams should be treated no differently than fish-bearing streams when determining the buffer width protections*; 2) there should be an increase in the basal area and requirements for riparian management areas for both small and medium-sized streams, *regardless of the presence of fish*; and 3) there should be an increase in the number of trees within the riparian management area for *both fish- and non-fish-bearing* small and medium-sized streams.

EPA/NOAA Finding that Oregon Has Not Submitted a Fully Approvable Coastal Nonpoint Program (Jan. 30, 2015) at 6 (footnotes omitted) (emphasis added). And, as EPA and NOAA also point out, Oregon’s 2002 Sufficiency Analysis concluded that “FPA standards for some small Type N streams may result in short-term temperature increases at the site level that may be transferred downstream (this may impact water temperature and cold-water refugia) to fish-bearing streams.” *Id.* at 5.

Second, the completed TMDLs’ applicability to all perennial or “perennial and/or fish-bearing” or “intermittent fish-bearing streams”¹ is a DEQ finding that the temperatures of those streams—including non-fish-bearing streams—are key to attainment of temperature standards in water bodies of the basin.² In order to fully comprehend its duties, it would behoove the Board to recognize that attainment of water quality standards requires application of the load allocations in these TMDLs to the waters to which they are assigned. The inadequacy of current stream protection rules to ensure attainment of these load allocations on non-PCW (i.e., impaired) streams and non-fish-bearing streams cannot be ignored simply because the current, inadequate rules are enshrined in TMDL implementation plans that rubber-stamped the status quo and that have no legal relevance to water quality standards or TMDLs.

Third, as set out in NWEA’s October 5, 2012 letter to the federal agencies regarding protection of amphibians in Type N streams, Oregon’s water quality standards require protection for such species as designated uses and existing uses, under Tier I of the antidegradation policy, which is a part of Oregon’s water quality standards. Some amphibians are in a state of decline and likely to be designated as threatened or endangered in the future if protections from logging are not adopted. This letter catalogued a plethora of recent studies that demonstrate the importance of riparian buffers on headwater-dependent species.

Finally, as stated at the outset, ODF has never satisfactorily explained why the physics of water temperature are altered by the presence of salmon, steelhead, and bull trout and why appropriate prescriptions for these fish-bearing streams cannot be extrapolated from the Ripstream results.

¹ 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).

² The use of the word “fish” in the context of the TMDLs includes “resident fish and aquatic life,” along with salmonids. *See, e.g.*, Willamette Basin TMDL: Middle Fork Willamette Subbasin (Sept. 2006) at 12-10.