Jeff Dillen's Comments, November 9, 2014

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NOAA/EPA FINDING THAT OREGON HAS FAILED TO SUBMIT AN APPROVABLE COASTAL NONPOINT PROGRAM

FOREWORD

This document contains the bases for the determination by the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Environmental Protection Agency (EPA) (collectively, the federal agencies) that the State of Oregon (State) has failed to submit an approvable Coastal Nonpoint Pollution Control Program (Coastal Nonpoint Program) as required by Section 6217(a) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA), 16 U.S.C. 1455b. NOAA and EPA arrive at this decision because the federal agencies find that the State has not implemented and continued to revised additional management measures applicable to forestry that are necessary to achieve and maintain applicable water quality standards under Clean Water Act section 303 and to protect designated uses. NOAA and EPA first identified and notified the State of the need to do so in 1998.

On January 13, 1998, the federal agencies approved the Oregon Coastal Nonpoint Program subject to specific conditions. (see "Oregon Conditional Approval Findings"). Since then, the State has made incremental modifications to its program and has met most of those conditions.

On December 20, 2013, the federal agencies provided notice of their intent to find that the State has not fully satisfied the conditions related to new development, onsite sewage disposal systems (OSDS), and additional management measures for forestry (see "Oregon Coastal Nonpoint Program NOAA/EPA Proposed Finding"). The federal agencies invited public comment on the proposed findings relating to these conditions, as well as the extent to which those findings support a finding that the State failed to submit an approvable program under CZARA. Based on concerns the federal agencies had been made aware of about agriculture nonpoint source management in the state, the federal agencies also invited public comment on the adequacy of the State's programs and policies for meeting the CZARA 6217(g) agriculture management measures and conditions placed on Oregon's Coastal Nonpoint Program. Because the December 20, 2013's notice of intent did not propose a specific decision on whether or not Oregon had satisfied the CZARA 6217(g) agriculture management measures and the public did not have an opportunity to comment on a specific proposed decision and rationale for that decision, the adequacy of Oregon's agriculture programs is not a basis for these findings that Oregon has failed to submit an approvable coastal nonpoint program. (See "NOAA and EPA Response to Comments Regarding the Agencies' Proposed Finding that Oregon has Failed to Submit a Fully Approvable Coastal Nonpoint Program" for a summary of the comments received and NOAA and EPA's response to them.)

In response to NOAA and EPA's proposed findings, Oregon provided an additional submission in support of its coastal nonpoint program on March 20, 2014 (see "Oregon's Response to Proposed Disapproval Findings").

NOAA and EPA have carefully reviewed the public comments received and the State's March 2014 submission and have made a determination that Oregon has failed to submit an approvable coastal nonpoint program. This decision is based on the State's failure to address the additional management measures for forestry condition. Based on information the State provided in March, the federal agencies believe that Oregon has now satisfied the conditions for new development and OSDS so these conditions are no longer a basis for the finding that Oregon has failed to submit an approvable coastal nonpoint program.

For further understanding of terms in this document and the basis of this decision, the reader is referred to the following documents:

- *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters* (EPA, January 1993);
- *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance* (NOAA and EPA, January 1993);
- *Flexibility for State Coastal Nonpoint Programs* (NOAA and EPA, March 1995);
- *Final Administrative Changes to the Coastal Nonpoint Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990* (CZARA) (NOAA and EPA, October 1998);
- *Policy Clarification on Overlap of 6217 Coastal Nonpoint Programs with Phase I and II Stormwater Regulations* (NOAA and EPA, December 2002); and
- *Enforceable Policies and Mechanisms for State Coastal Nonpoint Source Programs* (NOAA and EPA January 2001).

Electronic copies of the documents cited above as well as any other references cited in this document and the Federal Register Notice announcing this action will be available at the following website: http://coast.noaa.gov/czm/pollutioncontrol.

SCOPE OF DECISION

This document explains the federal agencies' finding regarding the additional management measures for forestry condition. This finding forms the basis for the federal agencies' proposed determination that the State has failed to submit an approvable program. The document also notes that the new development and OSDS management measures are no longer a basis for this decision. In addition, the document acknowledges the comments received regarding the adequacy of Oregon's agriculture programs and policies for meeting the 6217(g) agriculture management measures and conditions placed on Oregon's Coastal Nonpoint Program.

NOAA and EPA's findings in this document are based on information the State has submitted in support of each condition, the federal agencies' knowledge of coastal nonpoint source pollution management in Oregon, and the public comments received. Oregon may–and is encouraged to–continue to work on and improve its program to satisfy all coastal nonpoint program requirements. Should the state submit subsequent information upon which NOAA and EPA determine that the State has submitted a fully approvable program, the federal agencies will provide another opportunity for public comment. At this time, the public will be asked to provide

comment on whether the State has satisfied all conditions placed on its program in 1998 and met all CZARA requirements.

FINDING OF FAILURE TO SUBMIT AN APPROVABLE PROGRAM

The federal agencies determine that the State of Oregon has failed to submit an approvable program pursuant to Section 6217(a) of CZARA.

I. UNMET CONDITION
A. ADDITIONAL MANAGEMENT MEASURES– FORESTRY

PURPOSE OF MANAGEMENT MEASURE: The purpose of this management measure is to identify additional management measures necessary to achieve and maintain applicable water quality standards and protect designated uses for land uses where the 6217(g) management measures are already being implemented under existing nonpoint source programs but water quality is still impaired due to identified nonpoint sources.

CONDITION FROM JANUARY 1998 FINDINGS: Within two years, Oregon will identify and begin applying additional management measures where water quality impairments and degradation of beneficial uses attributable to forestry exist despite implementation of the 6217(g) measures. (1998 Findings, Section X).

FINDING: Oregon has not satisfied this condition. By not implementing and not continuing to revise additional management measures applicable to forestry and forested lands that are necessary to achieve and maintain water quality standards and to protect designated uses, Oregon has failed to submit an approvable program under CZARA.

RATIONALE: Oregon proposed to address the additional management measures for forestry condition through a combination of regulatory and voluntary programs. Those measures include best management practices or other control measures by rule established by the Board of Forestry (Board). In addition, the Environmental Quality Commission (EQC), the rulemaking body for the Oregon Department of Environmental Quality (ODEQ), can petition the Board if it believes the Forest Practices Act (FPA) rules are not adequate for achieving water quality standards. While Oregon has made some progress towards meeting this condition, the State has not identified or applied additional management measures that fully address the water quality impairments attributable to forestry and forested lands the federal agencies noted in the January 13, 1998, Findings for Oregon's Coastal Nonpoint Program. Specifically, the State has not implemented or revised management measures, backed by enforceable authorities, to: (1) protect riparian areas for medium and small fish bearing streams, and non-fish bearing (type "N") streams; (2) protect high-risk landslide areas; (3) address the impacts of forest roads, particularly on so-called "legacy" roads; and (4) ensure adequate stream buffers for the application of herbicides, particularly on non-fish bearing streams.

Protection of Riparian Areas: Oregon relies on both regulatory and voluntary measures to provide riparian protections for medium and small fish bearing streams (type "F" streams) and non-fish bearing streams (type "N" streams). Generally, under the State's current Forest Practices Act (FPA) rules, no tree harvesting is allowed on private lands within 20 feet of fish bearing streams, or medium and large non-fish bearing streams. Also, all snags and downed wood that do not represent a safety or fire hazard must be retained within riparian management areas around small and medium fish bearing streams (from the stream edge out to 50 and 70 feet, respectively). In addition, the FPA rules establish conifer basal area and density targets for some riparian management areas. For example, along medium fish bearing streams, there is a requirement to leave 30 trees (at least 8 inches DBH) per 1000 feet. Oregon has no vegetation retention requirements for small non-fish bearing streams in the Coast Range and Western Cascades.

In addition to regulatory requirements, the forestry industry in the State of Oregon has adopted voluntary measures to protect riparian areas for high aquatic potential streams (i.e., streams with low gradients and wide valleys where large woody debris recruitment is most likely to be effective at enhancing salmon habitat). These voluntary measures include large wood placement, retaining additional basal area within stream buffers, large tree retention, and treating large and medium sized non-fish streams the same as fish streams for buffer retentions.[1]

Based on the results of a number of studies including those summarized below, NOAA and EPA previously determined and continue to find that additional management measures (beyond those in FPA rules and the voluntary program), for forestry riparian protection around medium and small fish bearing streams and non-fish bearing streams are necessary to attain and maintain water quality standards and to protect designated uses. Therefore, Oregon must still implement and revise management measures applicable to the forestry land use and forested areas in order to protect small and medium fish bearing streams and non-fish bearing streams from water quality impairments attributable to forestry practices in riparian areas.

A significant body of science, including: 1) the Oregon Department of Forestry's (ODF) Riparian and Stream Temperature Effectiveness Monitoring Project (RipStream)[2]; 2) "The Statewide Evaluation of Forest Practices Act Effectiveness in Protecting Water Quality" (i.e., the "Sufficiency Analysis")[3]; and 3) the Governor's Independent Multidisciplinary Science Team (IMST) Report on the adequacy of the Oregon forest practices in recovering salmon and trout[4],

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[1] According to Oregon's March 2014 coastal nonpoint program submittal, information on voluntary efforts was reported in(?) the Oregon Watershed Restoration Inventory. http://coastalmanagement.noaa.gov/nonpoint/oregonDocket/StateofOregonCZARAsubmittal3-20-14.pdf

[2] Three peer-reviewed articles present the results of the RipStream analysis:

Dent, L., D. Vick, K. Abraham, S. Shoenholtz, and S. Johnson. 2008. Summer temperature patterns in headwater streams of the Oregon Coast Range. Journal of the American Water Resources Association 44: 803-813.

Groom, J.D., L. Dent, and L.J. Madsen. 2011. Stream temperature change detection for state and private forests in the Oregon Coast Range. Water Resources Research 47: W01501, doi:10.1029/2009WR009061.

Groom, J.D., L. Dent, and L.J. Madsen. 2011. Response of western Oregon stream temperatures to contemporary forest management. Forest Ecology and Management, doi:10.1016/j.foreco.2011.07.012

[3] Oregon Department of Forestry and Oregon Department of Environmental Quality. 2002. Sufficiency Analysis: A Statewide Evaluation of Forest Practices Act Effectiveness in Protecting Water Quality, Oregon Department of Forestry and Oregon Department of Environmental Quality. October 2002.

[4] 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.

indicates that riparian protection around small and medium fish bearing streams and non-fish bearing streams in Oregon is not sufficient to achieve and maintain water quality and protect designated uses. The 2011 RipStream reports found that FPA riparian protections on private forest lands did not ensure achievement of the Protection of Cold Water criterion (PCW) under the Oregon water quality standard for temperature.[5,6] The PCW criterion prohibits human activities, such as timber harvest, from increasing stream temperatures by more than 0.3°C at locations critical to salmon, steelhead or bull trout. The RipStream analysis demonstrated that the chance of a site managed using FPA rules exceeding the PCW criterion between a pre-harvest year and a post-harvest year was 40 percent.[7,8]

The RipStream study also demonstrated that stream temperature fluctuations increased, in part, with a reduction in shade, and that shade was best predicted by riparian basal area and tree height. The findings suggest that riparian protection measures that maintain higher shade (such as measures implemented on State forest land) are more likely to maintain stream temperatures similar to control conditions. [9]

The 2002 Sufficiency Analysis found that the Oregon FPA's prescribed riparian buffer widths for small and medium fish bearing streams may be inadequate to prevent temperature impacts. That analysis concluded: 1) FPA Standards for some medium and small Type F streams in western Oregon may result in short- term temperature increases at the site level; and 2) 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. [10] In waterbodies colder than the numeric criteria, temperature increases of 0.3 °C measured for all sources combined at the point of maximum impact where salmon, steelhead or bull trout are present, is a violation of the State's Protecting Cold Water (PCW) criterion.

As early as 1999, the IMST study found that the FPA rule requirements related to riparian buffers and large woody debris needed to be improved. Based on its scientific analysis, the IMST team concluded, "…the current site-specific approach of regulation and voluntary action is not sufficient to accomplish the recovery of wild salmonids."[11] The IMST team made the following recommendations: 1) because non-game fish and other aquatic organisms play a role in a functioning stream system, and the distribution of salmonids will change over time, non-fish bearing streams should be treated no differently from fish-bearing streams when determining the buffer width protections;[12] 2) there should be an increase in the basal area and requirements for riparian management areas for both small and medium streams, regardless of the presence of

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[5] Groom, J.D., Dent, L., Madsen, L.J. 2011. "Stream temperature change detection for state and private forests in the Oregon Coast Range". Water Resources Research, vol. 47, W01501, 12 pp., 2011.
[6] Groom, J.D., 2011. "Update on Private Forests Riparian Function and Stream Temperature (RipStream) Project". Staff Report; November 3, 2011.
[7] Ibid. 2.
[8] Groom, J.D., Dent, L., Madsen, L.J., 2011. "Stream temperature change detection for state and private forests in the Oregon Coast Range". Water Resources Research, vol. 47, W01501, 2 pp., 2011.
[9] Ibid.2. 3.
[10] Oregon Department of Forestry and Oregon Department of Environmental Quality. 44-45.
[11] Independent Multidisciplinary Science Team. 2.
[12] Ibid. 21 and 43.

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 streams.[13]

In 2013, the EPA, together with the U.S. Geological Survey and the Bureau of Land Management, re-evaluated and summarized pertinent scientific theory and empirical studies to address the effects of riparian management strategies on stream function, with a focus on temperature.[20] With regard to no-cut buffers adjacent to clearcut harvest units, that paper noted that substantial adverse effects on reducing available shade have been observed with "no-cut" buffers ranging from 20 to 30 meters,[21] and small adverse effects on stream shading and temperature have been observed in studies that examined "no-cut" buffer widths of 46 meters wide.[22] For "no-cut" buffer widths of 46-69 meters, the effects of tree removal on shade and temperature were either not detected or were minimal.[23] The paper also documented that at "no-cut" buffer widths of less than 20 meters, there were pronounced reductions in shade and increases in temperature, as compared to wider buffer widths. The most dramatic effects were observed at the narrowest buffer widths (less than or equal to 10 meters).[24] As noted above, existing FPA buffers for small and medium fish bearing streams require only 20 foot (approximately 7 meter) "no-cut" buffers within a riparian management zone of approximately 17 to 23 meters, and no vegetation retention is required on small non-fish streams in the Coast Range and Western Cascades.

Oregon also has been investing in three paired watershed studies.[25] These studies are designed to analyze the effects of timber harvesting on a watershed and reach scale. Several commenters have cited the paired watershed study as evidence that the current FPA practices for riparian protection are effective at achieving and maintaining water quality standards and protecting designated uses. Unpublished preliminary data from the Hinkle Creek study indicate that changes in stream temperature after timber harvesting along non-fish bearing streams were variable. In addition, there was no measureable downstream effect on temperatures.[26] However, the variation in stream temperature and overall net observed temperature decrease may be attributable to increased slash debris along the stream after harvest, as well as a likely increase in stream flow post-harvest that could reduce any increase in temperatures and contribute to lower mean stream temperatures.[27] Therefore, NOAA and EPA do not rely on this analysis because a variety of factors confound the draft conclusions from the Hinkle Creek study. In its evaluation of the study results, DEQ concluded that temperature data from the Hinkle Creek and Alsea River studies show that for fish-bearing streams, temperature increases downstream from the

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[13] Ibid. 44-45.

[20] Leinenbach, P., McFadden, G., and C. Torgersen. 2013. Effects of Riparian Management Strategies on Stream Temperature. Prepared for the Interagency Coordinating Subgroup (ICS). 22 pages. Available upon request.

[21] Brosofske et al. 1997, Kiffney et al. 2003, Groom et al. 2011b as cited in Leinenbach et al. 2013.

[22] Science Team Review 2008, Groom et al. 2011a as cited in Leinenbach et al. 2013.

[23] Anderson et al. 2007, Science Team Review 2008, Groom et al. 2011a, Groom et al. 2011b as cited in Leinenbach et al. 2013

[24] Jackson et al. 2001, Curry et al. 2002, Kiffney et al. 2003, Gomi et al. 2006, Anderson et al. 2007 as cited in Leinenbach et al. 2013.

[25] http://watershedsresearch.org/watershed-studies/

[26] Watersheds Research Cooperative 2008. Hinkle Creek Paired Watershed Study. http://oregonforests.org/sites/default/files/publications/pdf/WRC_Hinkle.pdf

[27] Kibler, K.M. 2007. The Influence of Contemporary Forest Harvesting on Summer Stream Temperatures in Headwater Streams of Hinkle Creek, Oregon. Thesis for the degree of Master of Science in Forest Engineering presented on June 28, 2007. Oregon State University. http://watershedsresearch.org/assets/reports/WRC_Kibler,Kelly_2007_Thesis.pdf

harvest sites were very similar to the increases found in the RipStream study.[28] The 2011 RipStream reports found that FPA riparian protections on private forest lands did not ensure achievement of the Protection of Cold Water criterion (PCW) under the Oregon water quality standard for temperature.[29,30]

NOAA and EPA acknowledge that Oregon is working to address some of the inadequate riparian protection measures in the FPA. The Oregon Board of Forestry (Board) has the authority to regulate forest practices through administrative rule making and could require changes to the FPA rules to protect small and medium fish bearing streams. The Board, recognizing the need to better protect small and medium fish bearing streams, directed ODF to undertake a rule analysis process that could lead to revised riparian protection rules. At its September 2014 meeting, the Board voted unanimously in favor of continuing to analyze what changes might be needed in the Oregon Forest Practice Rules to provide greater buffer protection for medium and small fish bearing streams on private forest lands. NOAA and EPA encourage the State to move forward with this rule making process expeditiously.

The Forestry Board and ODF have not proposed increased protection for riparian areas around small non-fish bearing streams. As previously discussed in the IMST study, non-fish bearing streams should be treated no differently from fish-bearing streams when determining the appropriate need for buffer [buffer-width] protection to protect designated uses.[31] Oregon should revise and implement additional management measures for riparian areas adjacent to small non-fish bearing streams necessary to achieve and maintain water quality standards and protect designated uses.

Forestry Road: In the 1998 approval conditions, NOAA and EPA identified specific concerns with the ability of Oregon's then existing FPA rules applicable to road density and maintenance, particularly on so-called "legacy" roads, and the necessity to revise and implement additional management measures to achieve and maintain water quality standards and to protect designated uses. NOAA and EPA noted that "legacy' roads, roads constructed and used prior to adoption of the FPA in 1971 and not used or maintained since, were not required to be treated and stabilized before closure. In some locations, this has resulted in significantly altered surface drainage, diversion of water from natural channels, and serious erosion or landslides." Such conditions threaten to impair coastal waters and protect designated uses.

Oregon has established both regulatory and voluntary measures to address adverse water quality impacts attributable to roads, and commented that revision or implementation of additional

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[28] Seeds, J., Mitchie, R., Foster, E., ODEQ, Jepsen, D. 2014. "Responses to Questions/Concerns Raised by Oregon Forestry Industries Council Regarding the Protecting Cold Water Criterion of Oregon's Temperature Water Quality Standard," Oregon Department of Environmental Quality and Oregon Department of Fish and Wildlife Memo. 06/19/2014

[29] Groom, J.D., Dent, L., Madsen, L.J. 2011. "Stream temperature change detection for state and private forests in the Oregon Coast Range". Water Resources Research, vol. 47, W01501, 12 pp., 2011.

[30] Groom, J.D., 2011. "Update on Private Forests Riparian Function and Stream Temperature (RipStream) Project". Staff Report; November 3, 2011.

[31] Independent Multidisciplinary Science Team. 1999.

management measures for roads are not necessary at this time. As discussed below, additional work is needed to ensure the State has adequate additional management measures in place for abandoned forestry roads that were not adequately retired.

Since 1998, the Board of Forestry has made several improvements to general road maintenance measures to improve water quality. Changes made in 2002 and 2003, included: (1) establishment of a "Critical Locations" Policy for avoiding the building of roads in critical locations such as high hazards landslide areas, steep slopes, or within 50 feet of waterbodies; (2) creation of additional rules to address wet-weather hauling (OAR 629-625-0700), and (3) revision of an existing road drainage rule to reduce sediment delivery (OAR 629-625-0330). These improvements should reduce sedimentation from roadways in forested areas in order to achieve water quality standards and to protect designated uses. However, the new drainage requirements become operative only when new road construction or re-construction of existing roads occurs. The rule changes and new policies do not address "legacy roads", i.e., roads that do not meet current State requirements with respect to siting, construction, maintenance, and road drainage, or impairments associated with a large portion of the existing road network where construction or reconstruction is not proposed .

Oregon proposed to address these legacy road issues and gaps in its FPA rules through voluntary efforts, including restoration and monitoring activities carried out through the voluntary Oregon Plan. For example, in its March 2014 submittal in response to NOAA and EPA's proposed determination , the State described ODF's voluntary Road Hazard and Identification and Risk Reduction Project where private and State forestland owners survey their road networks to identify roads that pose risks to salmonid habitat and prioritize roads for remediation. While Oregon reports that thousands of road miles have been inspected and repaired across the State since the inception of this program in 1997, the State does not represent that the program has resulted in improved water quality in the coastal nonpoint program management area nor does the State distinguish among how many of these projects addressed active forest roads and roads retired according to current FPA practices versus problems associated with older, legacy roads. As noted in the Oregon Coastal Coho Assessment,[32] old roads make up the majority of forest roads, and road inventory data on private land is often not made available. As such, it is not possible to determine the extent to which voluntary efforts have addressed the sedimentation problems and landslide risk posed by the legacy road network.

The federal agencies are also concerned about the long-term implementation of this voluntary program. As noted in the State's March 2014 submission "voluntary reporting of OPSW [Oregon Plan for Salmon and Watersheds] voluntary measures has diminished in the past years, however it is reasonable to assume that voluntary measure implementation has not." The State does not provide the basis for this assumption. Without methods for tracking and evaluating the effectiveness of its voluntary programs, the federal agencies can not approve the voluntary approach for addressing this forestry management measures as it pertains to old or legacy roads.

[32] Nicholas J., McIntosh, B. and E. Bowles. 2005. Oregon Coastal Coho Assessment. Coho Assessment Part 3B. Oregon Watershed Enhancement Board and Oregon Department of Fish and Wildlife, Salem, Oregon. 49 pp.

Oregon also noted it has entered into a cooperative agreement with the U.S. Forest Service to update the State's geographic information system (GIS) data layer for forest roads. The data layer will help the State conduct a rapid road survey to evaluate and prioritize road risks to soil and water resources. Oregon noted it hoped to begin the survey in 2014. NOAA and EPA encourage the State to move forward with the road survey. However, the federal agencies are not aware if the survey and GIS layer will consider (or even identify) legacy roads or how the State will use the data to direct future management actions.

In addition, the State also discussed it was undertaking a third-party audit in 2014 to assess compliance with the FPA rules governing forest road construction and maintenance among other things. While NOAA and EPA encourage the State to continue to conduct this and other audits to assess compliance with FPA rules, as noted earlier, legacy roads are not subject to FPA rules. Since the audit will assess compliance with the FPA rules, therefore, NOAA and EPA conclude that issues resulting from legacy roads as well as issues resulting from general road maintenance where construction or reconstruction is not occurring would not be observed during this audit since the FPA rules do not apply in these situations .

NOAA and EPA recognize that legacy roads are being addressed through voluntary measures, and that legacy roads have been the target of significant landowner investment. However, as noted in the Oregon Coastal Coho Assessment,[33] old roads make up the majority of forest roads, and road inventory data on private land is not widely available. As such, NOAA and EPA cannot determine, and the State has not made information-based representations, to determine the extent to which voluntary efforts have addressed the sedimentation problems and landslide risk posed by the legacy road network.

In addition, as the federal agencies' *1998 Final Administration Changes Memo* states, in order for states to rely on voluntary programs to meet coastal nonpoint program requirements, a state must, among other things: (1) describe the voluntary program, including the methods for tracking and evaluating those programs, the State will use to encourage implementation of the management measures; and (2) provide a legal opinion from its Attorney General asserting the State has adequate back-up enforcement authority for the voluntary measures and commit to exercising the back-up authority when necessary. While the State has provided the federal agencies with a legal opinion detailing the suitability of its back-up authorities, the State has not provided (either in writing or through past practice) a commitment to exercise its back-up authority to require implementation of the additional management measures for forestry roads, as needed, nor identified a prior instance when it may have exercised that authority.

Additionally, the State has not described specifically how these voluntary efforts have and will continue to address legacy road issues within the coastal nonpoint management area, nor has the State described how it will continue to monitor and track the implementation of these measures to address forestry road issues, including legacy roads

[33] Nicholas J., McIntosh, B. and E. Bowles. 2005. Oregon Coastal Coho Assessment. Coho Assessment Part 3B. Oregon Watershed Enhancement Board and Oregon Department of Fish and Wildlife, Salem, Oregon. 49 pp.

Legacy roads threaten water quality standards and designated uses due to their location and construction. Historic settlement patterns and relative ease-of-construction led early developers to preferentially locate roads in valley bottoms near streams. These roads would often parallel low gradient streams (historically the most productive coho habitat) and cross many tributaries.[34] Prior to modern best management practices, mid-slope roads would often be connected to these valley bottom roads to access harvest units.[35] These poorly designed forest roads increase sediment supplied to streams by altering hillslope hydrology, surface runoff, and sediment flux.[36,37,38,39,40] These roads represent a chronic source of low level sediment over time.[41] The ecological consequences of sediment continuously supplied from roads may be equally or even more detrimental over time than periodic sediment pulses.[42] Furthermore, legacy roads sometimes serve as initiation points for landslides many years (or even decades) after construction.[43] For example, one study found that forestry roads in Oregon built before 1984 have higher landslide rates than those built later.[44]

The ODF's 2002 Sufficiency Analysis found that, except for wet-weather road use which the Board has since addressed (see above), compliance with the current FPA road best management practices is likely to meet water quality standards. However the analysis did not examine the impacts of legacy roads that do not conform to current forest practices. Oregon's Independent Multidisciplinary Science Team (IMST) did find that:

> "'Old roads and railroad grades' on forestlands, sometimes called legacy roads, are not covered by the OFPA rules unless they are reactivated for a current forestry operation or purposes. IMST believes the lack of a mechanism to address the risks presented by such roads is a serious impediment to achieving the goals of the Oregon Plan. A process that will result in the stabilization of such roads is needed, with highest priority attention to roads in

[34] Nicholas J., McIntosh, B. and E. Bowles. 2005. Oregon Coastal Coho Assessment. Coho Assessment Part 1: Synthesis. Oregon Watershed Enhancement Board and Oregon Department of Fish and Wildlife, Salem, Oregon. 69 pp.
[35] Wemple, B.C., Swanson, F.J., Jones, J.A., 2001. Forest roads and geomorphic process interactions, Cascade range, Oregon. Earth Surface Processes and Landforms 26, 191-204
[36] Reid, L. M., Dunne, T., 1984. Sediment production from forest road surfaces. Water Resources Research 20(11), 1753-1761.
[37] Luce, C.H., Black, T.A., 1999. Sediment production from forest roads in western Oregon. Water Resources Research 35(8), 2561-2570
[38] Wemple, B.C., Jones, J.A., 2003. Runoff production on forest roads in a steep, mountain catchment. Water Resources Research 39, doi:10.1029/2002WR001744
[39] Skauget, A. and M. M. Allen. 1998. Forestry Road Sedimentation Drainage Monitoring Project for Private and State Lands in Western Oregon. Prepared for the Oregon Department of Forestry by the Forestry Engineering Department, Oregon State University, February 20, 1998.
[40] Robison, E.G.,Mills K., Paul, J. Dent, L. and A Skaugset. 1999. Storm Impacts and Landslides of 1996: Final Report, Forest Practices Technical Report, vol. 4Oregon Department of Forestry, Corvallis. 145 pp.
[41] MacDonald, L.H. and D.B.R. Coe. 2008. Road sediment production and delivery: processes and management. Proceedings of the First World Landslide Forum, International Programme on Landslides and International Strategy for Disaster Reduction, United Nations University, Tokyo, Japan. pp. 381–384.
[42] Detenbeck, N.E. , P.W. Devore, G.J. Niemi, and A. Lima. 1992. Recovery of temperate stream fish communities from disturbance: a review of case studies and synthesis of theory. Environ. Manage. 16:33-53.
[43] Oregon Department of Forestry and Oregon Department of Environmental Quality. 2002. Sufficiency Analysis: A Statewide Evaluation of Forest Practices Act Effectiveness in Protecting Water Quality, Oregon Department of Forestry and Oregon Department of Environmental Quality. October 2002.
[44] Oregon Department of Forestry and Oregon Department of Environmental Quality. 2002. Sufficiency Analysis: A Statewide Evaluation of Forest Practices Act Effectiveness in Protecting Water Quality, Oregon Department of Forestry and Oregon Department of Environmental Quality, p. 33, Sessions, 1987.

core areas, but with attention to such roads and railroad grades at all locations on forestlands over time."[45]

In 1996 the National Marine Fisheries Service (NMFS) provided a scientific analysis of the draft Coastal Salmon Restoration Initiative (CSRI) report (which later evolved into the Oregon Plan for Salmon and Watershed). NMFS indicated that the forest practice rules have no well-defined process to identify problems with older logging roads and railroad grades constructed prior to 1994.[46]

In addition to water quality impacts, sedimentation and erosion from forestry roads have adverse impacts on salmon. Salmonid spawning is one of Oregon's designated uses. Logging roads are a source of fine sediments which enter spawning gravel and can lower the success of spawning and recruitment for coho salmon.[47] NOAA National Marine Fisheries Services' scientific analysis for their Endangered Species Act Section 7 listing for Oregon Coast Coho Salmon, also continues to recognize forestry roads, including legacy roads, as a source of sediment and a threat to Oregon coastal coho salmon. NMFS explained that "existing and legacy [forestry] roads can contribute to continued stream degradation over time through restriction of debris flows, sedimentation, restriction of fish passage, and loss of riparian function."[48]

Despite the improvements the State has made in addressing forestry roads, legacy forest road networks in Oregon continue to deliver sediment into streams, threatening attainment of water quality standards and designated uses. Oregon notes that some legacy roads may have filled in with trees and other vegetation since being retired from active use and that accessing some of these roads to repair them properly may create more disturbance and potential water quality impacts. While this statement may be accurate in some cases, it is not for all cases, as noted above, in the description of NMFS' ESA Section 7 listing for coastal coho salmon.

The suite of voluntary programs Oregon has described may enable the State to satisfy the forestry roads element of this condition. However, as discussed above, additional information is needed at this time. The federal agencies encourage the State to provide a commitment to use its back-up authority to ensure implementation of the forestry road additional management measures . The agencies also encourage the State to move forward with establishing a road survey or inventory program that considers both active, inactive, and legacy roads, including a mechanism for tracking and monitoring implementation of these voluntary measures to carry out identified priority forest road improvements. To support an approvable coastal nonpoint program, the program could establish, among other things, a timeline for addressing priority road issues including retiring or restoring forest roads that impair water quality, and a reporting and

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[45] 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. pp. 47

[46] NOAA National Marine Fisheries Service. 1996. "Analysis of the Oregon Department of Forestry's (ODF) Most Recent Submission for the State of Oregon's Coastal Salmon Restoration Initiative". September 10, 1996 memo from Rowan Baker to Steve Morris and Elizabeth Garr.

[47] Cederholm, C.J., Reid, L.M., Salo, E.O. 1980. "Cumulative Effects of Logging Road Sediment on Salmonid Populations in the Clearwater River, Jefferson County, Washington," Contribution No. 543, College of Fisheries, University of Washington, Seattle, Washington 98195.

[48] NOAA National Marine Fisheries Service. 2012. *Scientific Conclusions of the Status Review for Oregon Coast Coho Salmon* (*Oncorhynchus kisutch*). NOAA Technical Memorandum NMFS-NWFSC-118, June 2012. Pg. 78 http://www.nwfsc.noaa.gov/assets/25/1916_08132012_121939_SROregonCohoTM118WebFinal.pdf

tracking component to assess progress for remediating identified forest road problems. Establishing a roads inventory with appropriate reporting metrics would provide valuable information on State and private landowner accomplishments to improve and repair roads and identify where further efforts are needed. Such an approach could help verify whether the combination of current rules and the Oregon Plan's voluntary measures are effective in managing forest roads to protect streams on a reasonable timeframe.

Landslide Prone Areas: In the 1998findings federal agencies identified areas where existing practices under the FPA and FPA rules should be strengthened to to achieve and maintain water quality standards and protect designated uses; among them was the need to provide better protection of areas at high-risk to landslides.

Oregon proposed to address the landslide element of the additional management measures for forestry condition through a mix of regulatory and voluntary approaches. While the State has adopted more protective forestry rules to reduce landslide risks to life and property and promotes some voluntary practices to reduce landslide risks through the Oregon Plan for Salmon and Watersheds (The Oregon Plan), Oregon has not revised or implemented additional management measures for forestry in high-risk landslide areas to achieve and maintain water quality standards and protect designated uses.

Since January 13, 1998, Oregon amended the Oregon FPA rules to require the identification of landslide hazard areas in timber harvesting plans and road construction and placed certain restrictions on harvest and road activities within these designated high-risk landslide areas for public safety (OAR 629-623-0000 through 629-623-0800). However, under these amendments, shallow, rapidly moving landslide hazards directly related to forest practices are addressed only as they relate to risks for losses of life and property, not for potential adverse impacts on water quality standards or designated uses. Timber harvest and the construction of forest roads, where alternatives are not available, continues without controls on high-risk landslide hazard areas as long as such harvest and road construction are not deemed a public safety risk.

In addition to these regulatory programs, Oregon stated that it employs a voluntary measure under the Oregon Plan that gives landowners credit for leaving standing live trees along landslide-prone areas as a source of large wood. The large wood, which may eventually be deposited into fish-bearing stream channels, contributes to stream complexity, a key limiting factor for coastal coho salmon recovery. While this is a good management practice, the measure is not designed to protect high-risk erosion areas but rather to ensure large wood is available to provide additional stream complexity when a landslide occurs. NOAA and EPA do not consider this voluntary action as a sufficient management measure to reduce high-risk landslides that threatened maintenance of water quality standards or designated uses.
Also, Oregon's voluntary program is incomplete. To rely on voluntary approaches to meet CZARA requirements, a state not only needs to describe the voluntary approach but also needs to describe how it will monitor and track implementation of that approach, provide a legal opinion asserting the state has adequate back-up authority to ensure implementation of the management measure, and provide a commitment to use that back-up authority, when needed.

As noted in the January 13, 1998, findings, logging on unstable steep terrain can increase landslide rates, which contributes to water quality impairments. A number of studies continue to show significant increases in landslide rates after clear cutting compared to unmanaged forests in the Pacific Northwest. For example, one study found that in three out of four areas studied in very steep terrain, landslide densities and erosion volumes were greater in stands that were clear-cut during the previous nine years.[50] The study observed that landslide rates on Mettman Ridge, within the Oregon Coast Range, increased three to nine times the background rate after clear cut harvest. Another study performed a regional analysis from the Mettman Ridge study and found that forest clearing dramatically accelerates shallow landslides in steep terrain typical of the Pacific Northwest.[51] In another study in southwestern Washington, landslide densities in recently harvested sites were roughly to two to three times the landslide densities in old stands when exposed to rainfall intensities greater than the 100-year event.[52] This research found that very few landslides occurred when rainfall was less than or equal to a 100-year rainfall event.

Other research has examined the role of root cohesion on landslide susceptibility in forested landscapes. Root cohesion is a measure of the lateral reinforcing strength the root system provides. The higher the root cohesion, the better the root system can stabilize the soil, reducing the risk of landslides.[55] One study noted that median lateral root cohesion is less for industrial forests with significant understory and deciduous vegetation (6.8–23.2 kiloPascal (kPa), a unit of pressure) compared to natural forests dominated by conifers (25.6–94.3 kPa). Additionally, in clearcuts, the researchers found also that lateral root cohesion is uniformly less than or equal to 10 kPa, making these areas much more susceptible to landslides.

Sakals and Sidle modeled the effect of different harvest methodologies on root cohesion over time.[56] They found that, of the methodologies examined (clear cutting, single tree selection cutting and strip cutting), clear cutting produces the greatest decline in root cohesion. Further, they found that root cohesion may continue to decline for 30 years post-harvest. That decline is attributed to the decay of the root systems of the harvested trees, and the fact that young root systems have smaller root volumes and less radial rooting extent. They concluded that clear cutting on hazard slopes could increase the number of landslides as well as the probability of larger landslides. They also stated that a management approach requiring the retention of conifers on high-risk slopes would increase root cohesion and reduce the risk of landslide.

The peer-reviewed science demonstrates that timber harvesting in landslide-prone areas, degrades water quality and impairs designated uses in Pacific Northwest streams. Whittaker and

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[50] Robison, G.R., Mills, K.A., Paul, J. Dent, L. and A. Skaugset. 1999. Oregon Department of Forestry Storm Impacts and Landslides of 1996: Final Report. Oregon Department of Forestry Forest Practices Monitoring Program. Forest Practices Technical Report Number 4.157 pages.
[51] Montgomery, D. R., K. M. Schmidt, H. M. Greenberg & W. E. Dietrich. 2000. Forest clearing and regional landsliding. Geology 28: 311-314.
[52] Turner, T.R., Duke, S.D., Fransen, B.R., Reiter, M.L., Kroll, A.J., Ward, J.W., Bach, J.L., Justice, T. E., and R.E. Bilby. 2010. Landslide densities associated with rainfall, stand age, and topography on forested landscapes, southwestern Washington, USA. Forest Ecology and Management 259:2233–2247.
[55] Schmidt, K.M., Roering, J.J., Stock, J.D., Dietrich, W.E., Montgomery, D.R., and Schaub,T. 2001. The variability of root cohesion as an influence on shallow landslide susceptibility in the Oregon Coast Range, Canada Geotech. J. Vol. 38; 997-1024
[56] Sakals, M.E. and R.C. Sidle. 2004. A spatial and temporal model of root cohesion in forest soils. Canadian Journal of Forest Research 34(4): 950-958.

McShane explained:

> "In the Pacific Northwest, … [l]andslides alter aquatic habitats by elevating sediment delivery, creating log jams, and causing debris flows that scour streams and stream valleys down to bedrock (Rood, 1984; Cederholm and Reid, 1987; Hogan et. al., 1998). The short-term and long-term impacts of higher rates of landslides on fish include habitat loss, reduced access to spawning and rearing sites, loss of food resources, and direct mortality (Cederholm and Lestelle, 1974; Cederholm and Salo, 1979; Reeves et. al., 1995). The restoration of geomorphic processes to natural disturbance regimes is crucial to the recovery of endangered salmonids (*Oncorhynchus* spp.) and other aquatic species in the Pacific Northwest as these species evolved under conditions with much lower sediment delivery and landslide frequency (Reeves et. al., 1995; Montogomery, 2004)."[57]

In 2013, the Cooperative Monitoring Evaluation and Research committee (CMER) of the Washington State Department of Natural Resources published a study that explored landslide response to a large 2007 storm in Southwestern Washington.[58] Within the 91 square mile study area, a total of 1147 landslides were found within harvest units that delivered to public resources (mostly streams). The majority (82%) occurred on hillslopes and the rest initiated from roads. In examining these landslides, the study found that unstable hillslopes logged with no buffer had a significantly higher (65%) landslide density than did mature stands. Unstable slopes logged with no buffer also delivered 347% more sediment than slopes with unlogged, mature stands. The authors conclude that buffers on unstable slopes likely reduce landslide density and sediment volume. This has important implications for water quality and designated beneficial uses. Sediments at levels associated with landslides clog and damage fish gills, suffocate fish eggs, smother aquatic insect larvae, and fill in spaces in streambed gravel where fish lay eggs. Sediment can also carry other pollutants into waterbodies, creating issues for domestic water supply and public water providers.[59,60,61,62,63,64]

Given the evidence that clear-cutting increases the rate of landslides and that landslides adversely affects water quality and designated beneficial uses. revision and implementation of additional management measures applicable to forestry in landslide prone areas are necessary to achieve and maintain water quality standards and to protect designated uses. To develop the

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[57] Whittaker, K.A., McShane, D., 2012. Comparison of slope instability screening tools following a large storm event and application to forest management policy. Geomorphology 145-146 (2012); 115-122.

[58] Stewart, G., Dieu, J., Phillips, J., O'Connor, M., Veldhuisen C., 2013. The Mass Wasting Effectiveness Monitoring Project: An examination of the landslide response to the December 2007 storm in Southwestern Washington; Cooperative Monitoring, Evaluation and Research Report CMER 08- 802; Washington Department of Natural Resources, Olympia, WA.

[59] Whittaker, K.A., McShane, D., 2012. Comparison of slope instability screening tools following a large storm event and application to forest management policy. Geomorphology 145-146 (2012); 115-122.

[60] Cederholm, C.J., Reid, L.M., Salo, E.O. 1980. Cumulative Effects of Logging Road Sediment on Salmonid Populations In The Clearwater River, Jefferson County, Washington. Contribution No. 543, College of Fisheries, University of Washington, Seattle, Washington 98195

[61] Jensen, D.W., Steel, E.A., Fullerton, A.H., Pess, G.R., 2009. Impact of Fine Sediment on Egg-To-Fry Survival of Pacific Salmon: A Meta-Analysis of Published Studies, Reviews in Fisheries Science: 17(3):348-359, Northwest Fisheries Science Center, NOAA Fisheries, Seattle Washington, USA

[62] EPA. 2003. "Developing Water Quality Criteria for Suspended and Bedded Sediments (SABS): Potential Approaches (Draft). U.S. Environmental Protection Agency, August 2003.

[63] EPA and Idaho Water Resources Research Institute. 1999. Aquatic Habitat Indicators and their Application to Water Quality Objectives within the Clean Water Act, Section 3. U.S. Environmental Protection Agency, Region 10, July 1999. p. 20. EPA 910-R-99-014.

[64] Oregon Department of Environmental Quality, Turbidity Standards, Background Information. http://www.deq.state.or.us/wq/standards/turbidity.htm

needed additional management measures, potential actions the State could peruse several actions that would collectively address this issue, such as some of the following: :

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- Adopt harvest and road construction restrictions similar to those applicable in areas where landslides pose risks to life and property, but for all high-risk landslide prone areas with moderate to high potential to impact water quality and designated uses.

- Develop a scientifically rigorous process for identifying high-risk areas and unstable slopes based on field review by trained staff. Such a process could include the use of slope instability screening tools to identify high-risk landslide areas that take into account site-specific factors such as slope, geology and geography, and planned land management activities such as roads development.

- Develop more robust voluntary programs to encourage and incentivize the use of forestry best management practices to protect high-risk landslide areas that have the potential to impact water quality and designated uses, such as employing no-harvest restrictions around high-risk areas and ensuring that roads are designed, constructed, and maintained in such a manner that the risk of triggering slope failures is minimized. Widely available maps of high-risk landslide areas could improve water quality by informing foresters during harvest planning.

- Institute a monitoring program to track compliance with the FPA rules and voluntary guidance for high-risk landslide prone areas and the effectiveness of these practices in reducing slope failures.

- Establish an ongoing monitoring program that assesses the underlying causes and water quality impacts of landslides shortly after they occur and generates specific recommendations for future management. Integrate processes to identify high-risk landslide prone areas and specific best management practices to protect these areas into the TMDL development process. For example, in the Mid-Coast Basin DEQ is currently developing a sediment TMDL to address water quality limited waters for biocriteria, turbidity, and sediment. To support the development of the TMDL, the Oregon Department of Geology and Mineral Resources completed landslide inventory maps for two watersheds in the Mid-Coast Basin finding hundreds of previously unidentified landslides.[65] As part of the TMDL DEQ would be completing a source assessment of the landslides in relationship to the water quality impairments. NOAA and EPA encourage the state to complete this TMDL and include specific practices that landowners will need to follow in order to reduce pollutants causing impairments addressed in the TMDL.

[65] Burns, W. J., Duplantis, S., Jones, C., English, J., 2012. LIDAR Data and Landslide Inventory Maps of the North Fork Siuslaw River and Big Elk Creek Watersheds, Lane, Lincoln and Benton Counties, Oregon. Open-File Report O-12-07, Oregon Department of Geology and Mineral Industries.

If Oregon plans to rely on voluntary efforts, State would need to: (1) describe the full suite of voluntary practices it plans to use address this management measure; (2) describe how it would ensure the use of these voluntary practices, and track their implementation; and (3) provide a legal opinion that the State has back-up authority to ensure implementation of the management measure and a commitment to use the back-up authority when needed.

Buffers for Pesticide Application on Non-Fish Bearing (Type N) Streams: Buffers for Pesticide Application on Non-Fish Bearing (Type N) Streams: In the January 1998 findings, the federal agencies noted that Oregon had adopted forest practices rules that require aerial spray buffers for most pesticide applications (OAR 629-620-0400(7)(b)). However, these rule changes did not include spray buffers for the aerial application of herbicides along non-fish bearing streams commonly found in headwaters. NOAA and EPA determined that additional management measures to protect non-fish bearing streams during the aerial application of herbicides on forestlands were necessary to achieve and maintain water quality standards and to protect designated uses.

Since 1998, Oregon has provided to the federal agencies several documents describing the programs the State uses to manage pesticides, most recently in March 2014. In addition to the FPA rule buffers noted above, the State also addresses pesticide issues through the Chemical and Other Petroleum Product Rules (OAR 629-620-0000 through 800); Pesticide Control Law (ORS 634); best management practices set by the ODA and federal pesticide label requirements under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); as well as the State's Water Quality Pesticide Management Plan[66] and Pesticide Stewardship Partnership (PSP) program[67]. In its March 2014 submittal, Oregon noted that it specifically relies on best management practices set by ODA and EPA under FIFRA for the protection of small non-fish bearing streams.

The aerial application of herbicides, such as glyphosate, 2,4-D, atrazine and others, is a common practice[68,69] in the forestry industry in Oregon. Herbicides are sprayed to control weeds on recently harvested parcels to prevent competition with newly planted tree saplings. In 2008, more than 800,000 pounds of pesticides, the majority of which were herbicides (at least 700,000 pounds) were used for forestry purposes in Oregon.[70] Research has shown that herbicides may adversely impact water quality and designated uses to protect aquatic life.[71,72,73,74, 75] Herbicides

[66] ODA, ODEQ, ODF, and OHA. 2011. *Pesticide Management Plan for Water Quality Protection.*
[67] ODEQ, 2012. *Fact Sheet: Pesticide Stewardship Partnerships in Oregon.* DEQ 12-WQ-021. Updated March, 2012

[68] Robert G. Wagner, Michael Newton, Elizabeth C. Cole, James H. Miller, and Barry D. Shiver. 2009. *The role of herbicides for enhancing forest productivity and conserving land for biodiversity in North America.* doi:10.2193/0091-7648(2004)032[1028:TROHFE]2.0.CO;2

[69] Norris, L.A., H.W. Lorz, and S.V. Gregory. 1991. Forest Chemicals. Influences of Forest and Rangeland Management on Salmonid Fishes and Their Habitats. American Fisheries Society Special Publication 19:2-7-296, 1991.

[70] ODA. Pesticide Use Reporting System. 2008 Annual Report. June 2009.

[71] Rick A. Relyea 2005. "The Impact of Insecticides and Herbicides on the biodiversity and productivity of aquatic communities." Ecological Applications 15:618–627. http://dx.doi.org/10.1890/03-5342; http://www.esajournals.org/doi/full/10.1890/03-5342

[72] Relyea, R. and Hoverman, J. (2006), Assessing the ecology in ecotoxicology: a review and synthesis in freshwater systems. Ecology Letters, 9: 1157–1171. doi: 10.1111/j.1461-0248.2006.00966.x. http://onlinelibrary.wiley.com/doi/10.1111/j.1461-0248.2006.00966.x/full

applied through the air commonly reach nearby streams through aerial drift[76,77,78] and runoff from the land.[79,80]

Oregon does not require spray buffers for aerial application of herbicides on small, non-fish bearing streams; applicators can spray directly up to and over non-fish bearing streams. In addition, there are no requirements for riparian harvest buffers along small, non-fish bearing streams. For example, in the Triangle Lake area in the Oregon coastal nonpoint management area, there are areas where aerial application of herbicides occurred in areas where timber was harvested to the stream edge.[81] Riparian harvest buffers could serve as defacto spray buffers since they would prevent timber harvesting up to the stream and therefore, would not require herbicide spraying over the non-harvested area to control weeds. Riparian buffers can also help filter any herbicide pollutants from runoff before it reaches the streams.[82] [83]

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[73] Hayes, T.B. et al. National Institute of Environmental Health Sciences. 2006. Pesticide mixtures, Endocrine disruption, and amphibian declines: Are we underestimating the impact?. Environmental Health Perspectives, doi:10.1289/ehp.8051 (available at http://dx.doi.org/) http://nctc.fws.gov/resources/course-resources/pesticides/Limitations%20and%20Uncertainty/Hayes%20et%20al%20in%20press%20EHP%20mixtures%20January%202006.pdf

[74] Battaglin,W.A. et al. 2009. The occurrence of glyphosate, atrazine, and other pesticides in vernal pools and adjacent streams in Washington DC, Maryland, Iowa, and Wyoming, 2005-2006. Environmental Monitoring and Assessment, vol. 155, 281-307. DOI 10.1007/s10661-008-0435-y. http://download.springer.com/static/pdf/861/art%253A10.1007%252Fs10661-008-0435-y.pdf?auth66=1420487219_acd0a22105b623694ff637e687270c5c&ext=.pdf

[75] Graymore, Stagnitti, and Allinson 2001. Impacts of **atrazine** in aquatic ecosystems. http://fn4qj3vk6a.scholar.serialssolutions.com/?sid=google&auinit=M&aulast=Graymore&atitle=Impacts+of+atrazine+in+aquatic+ecosystems&id=doi:10.1016/S0160-4120(01)00031-9&title=Environment+international&volume=26&issue=7&date=2001&spage=483&issn=0160-4120

[76] Majewski, M.S., and P.D. Capel. 1996. Pesticides in the Atmosphere: Distribution, Trends, and Governing Factors. Volume 3 of Pesticides in the Hydrologic System Series. Ann Arbor Press, Inc., Chelsea, Michigan 28118, 1997.

[77] F. Van Den Berg, R. Kubiak, W.G. Benjey, M.S. Majewski, S.R. Yates, G.L. Reeves, J.H. Smelt, A.M.A. Van Der Linden. Fate of Pesticides in the Atmosphere: Implications for Environmental Risk Assessment, Emissions of Pesticides into the Air. 1999, pp. 195-218.

[78] D. Pimentel and L. Levitan. Pesticides: amounts applied and amounts reaching pests. Bioscience, Vol. 36, no. 2, 1986.

[79] Gilliom et al. USGS, 2006. The Quality in Our Nation's Water: Pesticides in the Nation's Streams and Groundwater, 1992-2001. Circular 1291. http://pubs.usgs.gov/circ/2005/1291/pdf/circ1291.pdf

[80] Larson, S.J., P.D. Capel, and M. Majewski. Pesticides in Surface Waters: Distribution, Trends and Governing Factors. Volume 2 of Pesticides in the Hydroogic System Series. Ann Arbor Press, Inc., Chelsea, Michigan 28118, 1995.

[81] Memo from P. Leinenbach, P to Alan Henning, EPA re:"Images of forest harvest areas where herbicides were applied using aerial broadcast application methods with helicopters in the Triangle Lake region of the central coast range of Oregon." January 12, 2015.

[82] Welsch, D.J. USDA Forest Service. 1991. Riparian Forest Buffers: Function and Design for Protection and Enhancement of Water Resources. NA-PR-07-91. https://books.google.com/books?hl=en&lr=&id=rpSNdMJz4XQC&oi=fnd&pg=PP3&dq=buffer+pesticide+forestry&ots=77TENrS6TQ&sig=BH__zajspVcRveXtEcGq17vZeFE#v=onepage&q=buffer%20pesticide%20forestry&f=false

[83] Kiffney. P.M., J.S. Richardson, J.P. Bull. 2003. Responses of periphyton and insects to experimental manipulation of riparian buffer width along forest streams. Journal of Applied Ecology, 2003. Volume 40, 1060-1076. http://onlinelibrary.wiley.com/doi/10.1111/j.1365-2664.2003.00855.x/pdf

Given that non-fish bearing streams comprise about 70 percent of the total stream length and feed fish-bearing streams, the wide use of herbicides by the forestry industry in coastal Oregon and the lack of any spray or riparian buffers that would help protect non-fish bearing streams from adverse impacts due to the aerial application of herbicides threaten designated uses in Oregon coastal waters. Small, headwater non-fish bearing streams play an important role in delivering cold, clean water to downstream fish-bearing steams.[84] Therefore, it is reasonably foreseeable that Oregon coastal waters are threatened by herbicide pollutants and that additional management measures that will provide greater protection of non-fish bearing streams during the aerial application of herbicides are warranted to achieve water quality standards and protect designated uses (CZARA Sec. 6127(b)(1)(B), 16 U.S.C. 1455b).

Other recent studies and reports also support NOAA and EPA's determination that additional management measures for forestry are needed to address aerial herbicide application due to a reasonable, foreseeable threat to coastal waters and designated uses. One of the common indirect adverse effects on water quality and designated uses, particularly cold water fisheries uses, occurs because herbicides can reduce the growth and biomass of primary producers (algae and phytoplankton) that form the base of the aquatic food chain. A decrease in primary production (e.g, plants, algae) can have significant effects on consumers (e.g., salmonids or other animals that eat food to get energy) that depend on the primary producers for food.[85] These effects are often reported at herbicide concentrations well below concentrations that would have a direct effect on consumers. In addition, there are concerns about the increased toxicity of mixtures of herbicides and other pesticides to aquatic organisms.[86, 87,88] Although the NOAA National Marine Fisheries Services' (NMFS) biological opinion (BiOp) for several EPA herbicide labels, including 2,4-D,[89] discusses that it is difficult to predict the magnitude and duration these impacts would have on juvenile salmon because the extent of salmonid effects often depend on the interaction with many different parameters, such as availability of alternative food sources, water temperature, and other abiotic factors, NMFS concluded that products containing 2,4-D are likely to jeopardize the existence of all listed salmonids and adversely modify or destroy critical habitat.

A few studies have indicated that the aerial application of herbicides may not result in herbicides exceeding toxic thresholds for humans or aquatic life in fish-bearing and drinking water

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[84] Gomi, T., RC. Sidle,. And JS Richardson. 2002. Understanding Processes and Downstream Linkages of Headwater Systems. Bioscience, October 2002, Vol. 52, No. 10. http://bioscience.oxfordjournals.org/content/52/10/905.short

[85] Laurie B. Marczak, Takashi Sakamaki, Shannon L. Turvey, Isabelle Deguise, Sylvia L. R. Wood, and John S. Richardson 2010. Are forested buffers an effective conservation strategy for riparian fauna? An assessment using meta-analysis. *Ecological Applications* 20:126–134.

[86] Relyea, R.A. A Cocktail of Contaminants: How mixtures of pesticides at low concentrations affect aquatic communities. Oecologia, March 2009, Volume 159, Issue 2, pp 363-376.

[87] Gilliom et al, 2006. Ibid.

[88] Carpenter, K.D., S. Sobeszczyk, A. Arnsberg, and F.A. Rinella. USGS. 2008. Pesticide Occurrence and Distribution in the Lower Clackamas River Basin, Oregon, 2000-2005. Scientific Investigations Report 2008-5027.

[89] NMFS. 2011. *National Marine Fisheries Service Endangered Species Act Section 7 Consultation Biological Opinion Environmental Protection Agency Registration of Pesticides 2,4-D, Triclopyr BEE, Diuron, Linuron, Captan, and Chlorothalonil.* NOAA National Marine Fisheries Service, June 30, 2011.

streams,[90] [91]at the interface of fish and non-fish bearing streams, or drinking water facilities in Oregon. However, none of these studies were focused on impacts to non-fish bearing streams and do not provide sufficient evidence, based on other information, that coastal waters and designated uses are not reasonably or foreseeably threatened by the aerial application of herbicides over non-fish bearing streams. For example, an ODF study which looked at the effectiveness of forest practices act aerial spray buffers for herbicides and fungicides on fish bearing streams stated that they could not draw any conclusions about the FPA's effectiveness at protecting water quality for non-fish bearing streams. A USGS study in the McKenzie River basin, looked broadly at urban, forestry and agriculture pesticide use and the impacts on drinking water. The study, which took place outside the coastal nonpoint management area, also notes that forestry sampling was inconsistent because of irregular and intermittent pesticide application patterns among tributaries and the difficulty of capturing runoff events in the spring after application[92]. A National Council for Air and Stream Improvement (NCASI) study in the Needle Branch in the Oregon Coast Range looked at how herbicide levels in streams varied during storm events at three sample sites in harvest units downstream of non-fish bearing areas where aerially herbicides were applied with no buffers. The sample sites themselves were collected in fish-bearing streams with 50-foot riparian buffers. The study noted clear pulses of herbicides at each storm event with declining levels downstream and over several storms.

Oregon relies on the national best management practices established through the federal FIFRA pesticide labels to protect non-fish bearing streams. Currently, EPA, the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and the U.S. Department of Agriculture are working to improve the national risk assessment process to include all ESA-listed species when registering all pesticides, including herbicides. Given the scale of this undertaking, the federal agencies are employing a phased, iterative approach over the next 15 years to make the changes, and it is expected that herbicide labels will not be updated until the end of the 15-year process. This ongoing federal process, however, should not preclude Oregon from making needed state-level improvements to how it manages herbicides in the context of its forestry landscape and sensitive species.

Oregon and other Pacific Northwest states have recognized the need to go beyond the national FIFRA label requirements to protect water quality and designated uses, including salmon, in their state.[93] Oregon has 60-foot spray buffers for non-biological insecticides and fungicides on non-fish bearing streams (OAR 629-620-400(7)) and 60-foot spray buffers for herbicides on wetlands, fish-bearing and drinking water streams (OAT 629-620-400(4)). Other Pacific Northwest states have established more stringent forestry spray buffer requirements for

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[90] Dent L. and J. Robben. 2000. *Oregon Department of Forestry: Aerial Pesticide Application Monitoring Final Report*. Oregon Department of Forestry, Pesticides Monitoring Program. Technical Report 7. March 2000.

[91] National Council for Air and Stream Improvement. 2013. *Measurement of Glyphosate, Imazapyr, Sulfometuron methyl, and Mmetfulfuron methyl in Needle Branch Streamwater*. Special Report No. 130-1.

[92] Kelly, V.J., C.W. Anderson, and K. Morgenstern. 2012. USGS and Eugene Water and Electric Board. Reconnaissance of Land-Use Sources of Pesticides in Drinking water, McKenzie River Basin, Oregon. Scientific Investigations Report 2012-5091.

[93] Peterson, E. EPA. 2011. Memo to Scott Downey, EPA and David Powers, EPA RE: *Comparative Characterization of Pacific Northwest Forestry Requirements for Aerial Application of Pesticides.* August 30, 2011.

herbicides along non-fish bearing streams. For example, for smaller non-fish bearing streams, Washington maintains a 50-foot riparian and spray buffer (WAC-222-38-040). Idaho has riparian and spray buffers for non-fish bearing streams of 100 feet (IAR 20-02-01). California sets riparian buffers for non-fish bearing streams after consulting with the local forester, which implicitly restrict the aerial application of herbicides near the stream (14 CCR 4).

Though Oregon has neither spray nor riparian harvest buffers for herbicides that are aerially applied on non-fish bearing streams, the ODA Pesticide Division requires applicators to attend trainings and obtain licenses prior to spraying pesticides. ODF requires pesticide applicators to complete a Notification of Operation at least 15 days before applying on forestlands[94] and to maintain a daily chemical application form.[95] On the form, the applicators must list which pesticides *may* be applied, the stream segments on which these pesticides *may* be applied, and when application *may* occur within a 2-3 month period. However, the notification form does not specify when application will occur within a 1-2 week period, and post-application which pesticides were applied and how much. The form also reminds the applicator of the required spray buffers for fish-bearing and drinking water streams, but does not specify protections for non-fish bearing streams or voluntary best practices included in the [insert proper name of state guidance discussed below] that should be followed.

Oregon's broader strategy for cross program coordination on pesticides includes its Water Quality Pesticide Management Plan, Pesticide Stewardship Program (PSP), and Pesticide Analytical and Response Center (PARC). The Water Quality Pesticide Management Plan guides statewide actions to protect waters from pesticide contamination using water quality to drive adaptive management. Oregon's Pesticide Stewardship Program is an ODEQ initiative that works with State and local partners to collect and analyze water samples in areas with the greatest potential for impacts to aquatic life and human health. PARC is a multi-state agency group that coordinates investigations to collect and analyze information about reported incidents.

NOAA and EPA acknowledge the progress Oregon has made in its establishment of a multi-agency management teams and programs to assess and manage pesticide water quality issues. However, as these efforts apply to the aerial application of herbicides in the coastal nonpoint management area, the federal agencies note that water quality monitoring data on pesticides is still limited in the State, and that Oregon has established eight PSP monitoring areas in seven watersheds, none of which are within the coastal nonpoint management area. While NOAA and EPA recognize that the PSP program targets the most problematic or potentially problematic watersheds, and Oregon received recent funding to expand into two new watersheds, the agencies believe that if monitoring data are to drive adaptive management, the State should develop and maintain more robust and targeted studies of the effectiveness of its pesticide monitoring and best management practices within the coastal nonpoint management area. The

[94] https://ferns.odf.state.or.us/E-Notification

[95] Oregon Department of Forestry. "Daily Chemical Application Record Form." Revised September 2013. http://www.oregon.gov/odf/privateforests/docs/ChemicalApplicationForm_Final.pdf

federal agencies encourage the State to design its monitoring program in consultation with EPA and NMFS.

NOAA and EPA believe that Oregon could develop additional management measures for forestry that will protect non-fish bearing streams during the aerial application of herbicides to achieve and maintain water quality standards and protect designated uses through a variety of mechanisms. Some potential approaches could include one or more of the following elements:

- Adopt rules that would require spray buffers for the aerial application of herbicides along non-fish bearing streams. Oregon may wish to look toward spray buffer requirements neighboring states have established for ideas.
- Adopt riparian buffer protections for timber harvest along non-fish bearing streams, which, by default, would also provide a buffer during aerial spraying.
- Expand existing guidelines for voluntary buffers for the aerial application of herbicides on non-fish bearing streams.
- Educate and train aerial applicators of herbicides on the new guidance;
- Revise the ODF Notification of Operation form required prior to chemical applications on forestlands to include a check box for aerial applicators to indicate they must adhere to FIFRA labels for all stream types, including non-fish bearing streams;
- Track and evaluate the implementation of voluntary measures for the aerial application of herbicides along non-fish bearing streams to assess the effectiveness of these practices, and if adjustments are needed, to achieve water quality standards and protect designated uses;
- Provide better maps of non-fish bearing streams and other sensitive sites and structures to increase awareness of these sensitive areas that need protection among the aerial applicator community; and
- Encourage the use of GPS technology, linked to maps of non-fish bearing streams, to automatically shut off nozzles before crossing non-fish bearing streams.

If Oregon chooses a voluntary approach, the State would also need to meet the other CZARA requirements for using voluntary, incentive-based programs as part of the State's coastal nonpoint program. This includes a description of the methods the state will use to track and evaluate those voluntary programs, a legal opinion stating it has the necessary back-up authority to require implementation of the voluntary measures, a description of the process that links the implementing agency with the enforcement agency, and a commitment to use the existing enforcement authorities, where necessary.

II. <u>CONDITIONS THAT ARE NO LONGER A BASIS FOR THIS DECISION</u>

A. URBAN AREAS MANAGEMENT MEASURES – NEW DEVELOPMENT

PURPOSE OF MANAGEMENT MEASURE: The purpose of this management measure is four-fold: (1) decrease the erosive potential of increased volumes and velocities of stormwater associated with development-induced changes in hydrology; (2) remove suspended solids and associated pollutants entrained in runoff that result from activities occurring during and after

development; (3) retain hydrological conditions that closely resemble those of the pre-disturbance condition; and (4) preserve natural systems including in-stream habitat.

CONDITION FROM JANUARY 1998 FINDINGS: Within two years, Oregon will include in its program: (1) management measures in conformity with the 6217(g) guidance; and (2) enforceable policies and mechanisms to ensure implementation throughout the coastal nonpoint management area. (1998 Findings, Section IV.A).

FINDING: Based on information provided in Oregon's March 2014 submission, NOAA and EPA now believe the State has satisfied this condition. The new development management measure is no longer a basis for finding that the Oregon has failed to submit an approvable program under CZARA.

RATIONALE NOT INCLUDED: NOAA and EPA will provide a rationale for public comment if/when the federal agencies are in a position to propose full approval of Oregon's coastal nonpoint pollution control program at a later point in time.

B. OPERATING ONSITE SEWAGE DISPOSAL SYSTEMS

PURPOSE OF MANAGEMENT MEASURE: The purpose of this management measure is to minimize pollutant loadings from operating OSDS.

CONDITION FROM JANUARY 1998 FINDINGS: Within two years, Oregon will finalize its proposal to inspect operating OSDS, as proposed on page 143 of its program submittal. (1998 Findings, Section IV.C).

FINDING: Based on information provided in Oregon's March 2014 submission, NOAA and EPA now believe the State has satisfied this condition. The OSDS management measure is no longer a basis for finding that the Oregon has failed to submit an approvable program under CZARA.

RATIONALE NOT INCLUDED: NOAA and EPA will provide a rationale for public comment if/when the federal agencies are in a position to propose full approval of Oregon's coastal nonpoint pollution control program at a later point in time.

III. ADDITIONAL COMMENTS

A. AGRICULTURAL MANAGEMENT MEASURES--EROSION AND SEDIMENT CONTROL, NUTRIENT, PESTICIDE, GRAZING, AND IRRIGATION WATER MANAGEMENT

As noted in the Foreword, the federal agencies invited public comment on the adequacy of the State's programs and policies for meeting the 6217(g) agriculture management measures and conditions placed on Oregon's Coastal Nonpoint Program.

PURPOSE OF MANAGEMENT MEASURES: The purposes of these management measures are to: (1) reduce the mass load of sediment reaching a waterbody and improve water quality and the use of the water resource; (2) minimize edge-of-field delivery of nutrients and minimize leaching of nutrients from the root zone; (3) reduce contamination of surface water and ground water from pesticides; (4) reduce the physical disturbance to sensitive areas and reduce the discharge of sediment, animal waste, nutrients, and chemicals to surface waters; and (5) reduce nonpoint source pollution of surface waters caused by irrigation.

CONDITIONS FROM JANUARY 1998 FINDINGS: Within one year, Oregon will (1) designate agricultural water quality management areas (AWQMAs) that encompass agricultural lands within the coastal nonpoint management area, and (2) complete the wording of the alternative management measure for grazing, consistent with the 6217(g) guidance. Agricultural water quality management area plans (AWQMAPs) will include management measures in conformity with the 6217(g) guidance, including written plans and equipment calibration as required practices for the nutrient management measure, and a process for identifying practices that will be used to achieve the pesticide management measure. The State will develop a process to incorporate the irrigation water management measure into the overall AWQMAPs. Within five years, AWQMAPs will be in place. (1998 Findings, Section II.B).

DISCUSSION: In 2004, the federal agencies provided Oregon with an informal interim approval of its agriculture conditions, believing that the State had satisfied those conditions, largely though its Agriculture Water Quality Management Act (ORS 568.900-933, also known as SB 1010) and nutrient management plans (ORS-468B, OAR-60374). At that time, the federal agencies found that these programs demonstrated that the State has processes in place to implement the 6217(g) management measures for agriculture as CZARA requires.

Although the federal agencies initially found that these programs enabled the State to satisfy the agriculture condition, prior to announcing the proposed decision some specific concerns with the State's agriculture program were brought to the federal agencies' attention such as:

- Enforcement is limited and largely complaint-driven; it is unclear what enforcement actions have been taken in the coastal nonpoint management area and what improvements resulted from those actions.
- The AWQMA plan rules are general and do not include specific requirements for implementing the plan recommendations, such as specific buffer requirements to adequately protect water quality and fish habitat.
- AWQMA planning has focused primarily on impaired areas when the focus should be on both protection and restoration.
- The State does not administer a formalized process to track implementation and effectiveness of AWQMA plans.
- AWQMA planning and enforcement does not address "legacy" issues created by agriculture activities that are no longer occurring.

Given these concerns, NOAA and EPA chose to solicit additional public comment on whether the State had satisfied the 6217(g) agriculture management measure requirements and the conditions related to agriculture placed on its program. The federal agencies appreciate the

comments provided and are considering them closely. NOAA and EPA will work with the State, as necessary, to ensure it has programs and policies in place to satisfy all CZARA 6217(g) requirements for agriculture before proposing and making a final decision that the State has a fully approved coastal nonpoint program. For a summary of the comments received related to agriculture, see http://coast.noaa.gov/czm/pollutioncontrol/.

January 30, 2015

Jeff Dillen's Comments, November 9, 2014

DELIBERATIVE - DO NOT SHARE

~~OREGON COASTAL NONPOINT PROGRAM~~

NOAA/EPA ~~FINAL~~ FINDING THAT OREGON HAS FAILED TO SUBMIT AN APPROVABLE COASTAL NONPOINT PROGRAM

FOREWORD

This document contains the bases for the ~~final~~ determination by the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Environmental Protection Agency (EPA) (collectively, the federal agencies) that the State of Oregon (State) has failed to submit an approvable Coastal Nonpoint Pollution Control Program (Coastal Nonpoint Program) as required by Section 6217(a) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA), 16 U.S.C. 1455b. NOAA and EPA arrive at this decision because the federal agencies find that the State has not implemented and continued to revised additional management measures applicable to forestry ~~and forested~~ that are necessary to achieve and maintain applicable water quality standards under Clean Water Act section 303 and to protect designated uses. NOAA and EPA first identified and notified the State of the need to do so in 1998. ~~fully satisfied all conditions placed on the State's Coastal Nonpoint Program.~~

Comment [HA1]: I suggest we delete "and forested".

On January 13, 1998, the federal agencies approved the Oregon Coastal Nonpoint Program subject to specific conditions. ~~that the State still needed to address~~ (see "Oregon Conditional Approval Findings"). Since then, the State has made incremental modifications to its program and has met most of those conditions.

On December 20, 2013, the federal agencies provided notice of their intent to find that the State has not fully satisfied the conditions related to new development, onsite sewage disposal systems (OSDS), and additional management measures for forestry (see "Oregon Coastal Nonpoint Program NOAA/EPA Proposed Finding"). The federal agencies invited public comment on the proposed findings relating to these conditions, as well as the extent to which those findings support a finding that the State failed to submit an approvable program under CZARA. Based on concerns the federal agencies had been made aware of~~heard~~ about agriculture nonpoint source management in the state, the federal agencies also invited public comment on the adequacy of the State's programs and policies for meeting the CZARA 6217(g) agriculture management measures and conditions placed on Oregon's Coastal Nonpoint Program. Because the December 20, 2013's notice of intent did not propose a specific decision on whether or not Oregon had satisfied the CZARA 6217(g) agriculture management measures and the public did not have an opportunity to comment on a specific proposed decision and rationale for that decision, the adequacy of Oregon's agriculture programs is not a basis for ~~the~~these ~~final~~ findings that Oregon has failed to submit an approvable coastal nonpoint program. ~~The public will have an opportunity to comment on NOAA and EPA's proposed decision regarding the agriculture management measures at a later date.~~ (See "NOAA and EPA Response to Comments Regarding the Agencies' Proposed Finding that Oregon has Failed to Submit a Fully Approvable Coastal

Ex. 5 - Attorney Client

Comment [JG3]: This may sound confusing to the reader – suggest deleting this sentence.

Nonpoint Program" for a summary of the comments received and NOAA and EPA's response to them.)

In response to NOAA and EPA's proposed findings, Oregon provided an additional submission in support of its coastal nonpoint program on March 20, 2014 (see "Oregon's Response to Proposed Disapproval Findings").

NOAA and EPA have carefully reviewed the public comments received and the State's March 2014 submission and have made a ~~final~~ determination that Oregon has failed to submit an approvable coastal nonpoint program. This decision is based on the State's failure to address the additional management measures for forestry condition. Based on information the State provided in March, the federal agencies believe that Oregon has now satisfied the conditions for new development and OSDS so these conditions are no longer a basis for the finding that Oregon has failed to submit an approvable coastal nonpoint program.

For further understanding of terms in this document and the basis of this decision, the reader is referred to the following documents ~~which are available at~~:

- *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters* (EPA, January 1993);
- *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance* (NOAA and EPA, January 1993);
- *Flexibility for State Coastal Nonpoint Programs* (NOAA and EPA, March 1995);
- *Final Administrative Changes to the Coastal Nonpoint Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990* (CZARA) (NOAA and EPA, October 1998);
- *Policy Clarification on Overlap of 6217 Coastal Nonpoint Programs with Phase I and II Stormwater Regulations* (NOAA and EPA, December 2002); and
- *Enforceable Policies and Mechanisms for State Coastal Nonpoint Source Programs* (NOAA and EPA January 2001).

Comment [L4]: Location of docs is given below the list so better to remove this reference to availability here, or add url up here

Electronic copies of the documents cited above as well as any other references cited in this document and the Federal Register Notice announcing this action will be available at the following website: http://coast.noaa.gov/czm/pollutioncontrol.

SCOPE OF DECISION

This document explains the federal agencies' ~~final~~ finding regarding the additional management measures for forestry condition. This finding forms the basis for the federal agencies' proposed determination that the State has failed to submit an approvable program. The document also notes that the new development and OSDS management measures are no longer a basis for this decision. In addition, the document acknowledges the comments received regarding the adequacy of Oregon's agriculture programs and policies for meeting the 6217(g) agriculture management measures and conditions placed on Oregon's Coastal Nonpoint Program.

NOAA and EPA's ~~final~~ findings in this document are based on information the State has submitted in support of each condition, the federal agencies' knowledge of coastal nonpoint

source pollution management in Oregon, and the public comments received. Oregon may–and is encouraged to–continue to work on and improve its program to satisfy all coastal nonpoint program requirements. ~~If, based on a later review of information received from the State subsequent to what the federal agencies considered for this document~~Should the state submit subsequent information upon which ~~,~~ NOAA and EPA determine that the State has submitted a fully approvable program, the federal agencies will provide another opportunity for public comment. At this time, the public will be asked to provide comment on whether ~~or not~~ the State has satisfied all conditions placed on its program in 1998 and met all CZARA requirements.

~~PROPOSED~~ FINDING OF FAILURE TO SUBMIT AN APPROVABLE PROGRAM

The federal agencies ~~find~~ determine that the State of Oregon has failed to submit an approvable program pursuant to Section 6217(a) of CZARA.

I. UNMET CONDITION
A. ADDITIONAL MANAGEMENT MEASURES– FORESTRY

PURPOSE OF MANAGEMENT MEASURE: The purpose of this management measure is to identify additional management measures necessary to achieve and maintain applicable water quality standards and protect designated uses for land uses where the 6217(g) management measures are already being implemented under existing nonpoint source programs but water quality is still impaired due to identified nonpoint sources.

CONDITION FROM JANUARY 1998 FINDINGS: Within two years, Oregon will identify and begin applying additional management measures where water quality impairments and degradation of beneficial uses attributable to forestry exist despite implementation of the 6217(g) measures. (1998 Findings, Section X).

FINDING: Oregon has not satisfied this condition. By not implementing and not continuing to revise additional management measures applicable to ~~satisfying the additional management measures for~~ forestry and forested lands that are necessary to achieve and maintain water quality standards and to protect designated uses, Oregon has failed to submit an approvable program under CZARA.

RATIONALE: Oregon proposed~~s~~ to address the additional management measures for forestry condition through a combination of regulatory and voluntary programs~~.~~. Those measures include best management practices or other control measures by rule established by the Board of Forestry (Board). In addition, the Environmental Quality Commission (EQC), the rulemaking body for the Oregon Department of Environmental Quality (ODEQ)~~EQ~~, can petition the Board if it believes the Forest Practices Act (FPA) rules are not adequate for achieving water quality standards. ~~W~~While Oregon has made some progress towards meeting this condition, the State has not identified or applied ~~begun to apply~~ additional management measures that fully ~~in a systematic way to fully~~ address the water quality impairments attributable to forestry and forested lands~~program weaknesses~~ the federal agencies noted in the January 13, 1998, Findings

Comment [JG5]: Is there a way to simply this sentence? Something like….Should the state submit subsequent information upon which NOAA and EPA determine the state has a fully approvable program, the federal agencies will provide another opportunity…

Comment [HA6]: Suggest changing this sentence to "The public will then be asked to provide comment…."

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Ex. 5 - Attorney Client

Comment [HA8]: I think "in a systematic way" should be deleted. "In a systematic way" could mean may things and we have never used this phrase before.

Ex. 5 - Attorney Client

Comment [HA10]: I agree with Allison's comments. We should be consistent with the 98 language which is consistent with the 2013 proposed decision document and other interim decision documents. The strength of our positions on the forestry issues has been with the scientific studies that been developed over the years. We should be consistent with what we have said in the past.

for Oregon's Coastal Nonpoint Program. Specifically, the State has not implemented or revised~~demonstrated it has~~ management measures, backed by enforceable authorities, ~~in place~~ to: (1) protect riparian areas for medium and small fish bearing streams, and non-fish bearing (type "N") streams; (2) protect high-risk landslide areas; (3) address the impacts of forest roads, particularly on so-called "legacy" roads; and (4) ensure adequate stream buffers for the application of herbicides, particularly on non-fish ~~bea~~~~Wring~~bearing streams.

Protection of Riparian Areas: ~~*Protection of Riparian Areas:*~~ Oregon relies on both regulatory and voluntary measures to provide riparian protections for medium and small fish bearing streams (type "F" streams) and non-fish bearing streams (type "N" streams). Generally, under the Sstate's current Forest Practices Act (FPA) rules, no tree harvesting is allowed on private lands within 20 feet of fish bearing streams, or medium and large non-fish bearing streams~~,~~. Also, all snags and downed wood that do not represent a safety or fire hazard~~,~~ must be retained within riparian management areas around small and medium fish bearing streams (from the stream edge out to 50~~to50~~ ~~or~~ and 70 feet, respectively). In addition, the FPA rules establish conifer basal area and density targets for some riparian management areas. For example, along medium fish bearing streams, there is a requirement to leave 30 trees (at least 8 inches DBH) per 1000 feet. Oregon has no vegetation retention requirements for small non-fish bearing streams in the Coast Range and Western Cascades.

In addition to regulatory requirements, the forestry ~~and paper products~~~~Forestry~~ industry in the State of Oregon has adopted voluntary measures to protect riparian areas for high aquatic potential streams (i.e., streams with low gradients and wide valleys where large woody debris recruitment is most likely to be effective at enhancing salmon habitat). These voluntary measures include large wood placement, retaining additional basal area within stream buffers, large tree retention, and treating large and medium sized non-fish streams the same as fish streams for buffer retentions.[1] ~~For a state to rely these voluntary measures to meet coastal nonpoint program requirements, a state must 1) describe the voluntary programs including the methods for tracking and evaluating those programs and 2) provide a legal opinion from its Attorney General asserting the State has adequate back-up enforcement authority for the voluntary measures and commit to exercising the back-up authority when necessary. The State has not provided the federal agencies with a commitment to exercise its back-up authority to require implementation of additional management measures for forestry roads nor has the State provided the federal agencies with specific data to document the effectiveness of voluntary effort to determine the extent of forestry road miles not meeting current road standards within the coastal nonpoint management area.~~

~~However, b~~Based on the results of a number of studies including those summarized below, NOAA and EPA previously determined and continue to find that additional management measures (beyond those in FPA rules and the voluntary program), for forestry riparian protection around medium and small fish bearing streams and non-fish bearing streams are necessary to

[1] According to Oregon's March 2014 coastal nonpoint program submittal, information on voluntary efforts was reported ~~to~~ in(?) the Oregon Watershed Restoration Inventory. http://coastalmanagement.noaa.gov/nonpoint/oregonDocket/StateofOregonCZARAsubmittal3-20-14.pdf

Comment [HA11]: "to 50" needs to remain in the sentence. The total riparian management buffer for small streams is 50'; for medium streams it is 70'. I would not want the reader to think the riparian management buffer for small streams is 70'.

Comment [AC12]: PE: I'm not sure that trees per 1,000 feet is an example of a basal area target. Unless we've done the calculations?

Comment [HA13]: It is a density target or more specifically a vegetation retention requirement.

Comment [AC14]: HA: ODF rules identify conifer basal area and density targets for the riparian areas. I added to this language to help clarify the statement. This lang. is taken from the ODF rules.

Comment [HA15]: Good.

Comment [AC16]: Forestry is the commonly used term

Comment [HA17]: I agree with including the word "forest".

Comment [L18]: Adequacy of tracking and enforcement for voluntary efforts not spoken to, but that's probably because there are so many other issues to be resolved wrt buffers. – if so, OK

Comment [HA19]: This is an attempt to fill in the language gap to better articulate what's needed for voluntary measures. I think it would be better to leave it out.

Comment [AC20]: I think this is pretty full as it is and not sure we need to explain this since we go on to show that the science says the voluntary stuff isn't working but I suppose we could add something in.

attain and maintain water quality standards and to protect designated uses. Therefore, ~~per the condition on the federal agencies earlier1998earlier conditional approval of Oregon's coastal nonpoint program under CZARA,~~ Oregon must still implement and revise~~adopt additional~~ management measures applicable to the forestry land use and forested areas in order to protect small and medium fish bearing streams and non-fish bearing streams from water quality impairments~~pollution~~ attributable to forestry practices in riparian areas.

A significant body of science, including: 1) the Oregon Department of Forestry's (ODF) Riparian and Stream Temperature Effectiveness Monitoring Project (RipStream)[2]; 2) "The Statewide Evaluation of Forest Practices Act Effectiveness in Protecting Water Quality" (i.e., the "Sufficiency Analysis")[3]; and 3) the Governor's Independent Multidisciplinary Science Team (IMST) Report on the adequacy of the Oregon forest practices in recovering salmon and trout[4], indicates that riparian protection around small and medium fish bearing streams and non-fish bearing streams in Oregon is not sufficient to ~~protect~~ achieve and maintain water quality and ~~beneficial~~ protect designated uses. ~~[Can we say something about the POLLUTANTS of concern or STREAM CONDITIONS that would be addressed for riparian areas? Does Oregon still list receiving waters as impaired for those pollutants?]~~

The 2011 RipStream reports found that FPA riparian protections on private forest lands did not ensure achievement of the Protection of Cold Water criterion (PCW) under the Oregon water quality standard for temperature.[5,6] The PCW criterion prohibits human activities, such as timber harvest, from increasing stream temperatures by more than 0.3°C at locations critical to salmon, steelhead or bull trout. The RipStream analysis demonstrated that the chance of a site managed using FPA rules exceeding the PCW criterion between a pre-harvest year and a post-harvest year was 40 percent.[7,8]

The RipStream study also demonstrated that stream temperature fluctuations increased, in part, with a reduction in shade, and that shade was best predicted by riparian basal area and tree height. The findings suggest that riparian protection measures that maintain higher shade (such

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

Comment [AC23]: Rearranged order to address Steve's comment

Ex. 5 - Attorney Client

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[2] Three peer-reviewed articles present the results of the RipStream analysis:
Dent, L., D. Vick, K. Abraham, S. Shoenholtz, and S. Johnson. 2008. Summer temperature patterns in headwater streams of the Oregon Coast Range. Journal of the American Water Resources Association 44: 803-813.
Groom, J.D., L. Dent, and L.J. Madsen. 2011. Stream temperature change detection for state and private forests in the Oregon Coast Range. Water Resources Research 47: W01501, doi:10.1029/2009WR009061.
Groom, J.D., L. Dent, and L.J. Madsen. 2011. Response of western Oregon stream temperatures to contemporary forest management. Forest Ecology and Management, doi:10.1016/j.foreco.2011.07.012

[3] Oregon Department of Forestry and Oregon Department of Environmental Quality. 2002. Sufficiency Analysis: A Statewide Evaluation of Forest Practices Act Effectiveness in Protecting Water Quality, Oregon Department of Forestry and Oregon Department of Environmental Quality. October 2002.

[4] 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.

[5] Groom, J.D., Dent, L., Madsen, L.J. 2011. "Stream temperature change detection for state and private forests in the Oregon Coast Range". Water Resources Research, vol. 47, W01501, 12 pp., 2011.

[6] Groom, J.D., 2011. "Update on Private Forests Riparian Function and Stream Temperature (RipStream) Project". Staff Report; November 3, 2011.

[7] Ibid. 2.

[8] Groom, J.D., Dent, L., Madsen, L.J., 2011. "Stream temperature change detection for state and private forests in the Oregon Coast Range". Water Resources Research, vol. 47, W01501, 2 pp., 2011.

as measures implemented on State forest land) are more likely to maintain stream temperatures similar to control conditions. [9]

The 2002 Sufficiency Analysis found that the Oregon FPA's prescribed riparian buffer widths for small and medium fish bearing streams may be inadequate to prevent temperature impacts. That analysis concluded: 1) FPA Standards for some medium and small Type F streams in western Oregon may result in short- term temperature increases at the site level; and 2) 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. [10] In waterbodies colder than the numeric criteria, temperature increases of 0.3 °~~degrees C.~~ measured for all sources combined at the point of maximum impact where salmon, steelhead or bull trout are present, is a violation of the State's Protecting Cold Water (PCW) criterion.

As early as 1999, the IMST study found that the FPA rule requirements related to riparian buffers and large woody debris needed to be improved. Based on its scientific analysis, the IMST team concluded, "…the current site-specific approach of regulation and voluntary action is not sufficient to accomplish the recovery of wild salmonids."[11] The IMST team made the following recommendations: 1) because non-game fish and other aquatic organisms play a role in a functioning stream system, and the distribution of salmonids will change over time, non-fish bearing streams should be treated no differently from fish-bearing streams when determining the buffer width protections;[12] 2) there should be an increase in the basal area and requirements for riparian management areas for both small and medium 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 streams.[13]

~~The 2002 Sufficiency Analysis found that the Oregon FPA's prescribed riparian buffer widths for small and medium fish bearing streams may be inadequate to prevent temperature impacts. That analysis concluded: 1) FPA Standards for some medium and small Type F streams in western Oregon may result in short_term temperature increases at the site level; and 2) 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.~~ [14]

~~The 2011 RipStream reports found that FPA riparian protections on private forest lands did not ensure achievement of the Protection of Cold Water criterion (PCW) under the Oregon water quality standard for temperature.~~ [15] [16] ~~The PCW criterion prohibits human activities, such as timber harvest, from increasing stream temperatures by more than 0.3°C at locations critical to~~

[9] Ibid.2. 3.
[10] Oregon Department of Forestry and Oregon Department of Environmental Quality. 44-45.
[11] Independent Multidisciplinary Science Team. 2.
[12] Ibid. 21 and 43.
[13] Ibid. 44-45.
[14] ~~Oregon Department of Forestry and Oregon Department of Environmental Quality. 44-45.~~
[15] ~~Groom, J.D., Dent, L., Madsen, L.J. 2011. "Stream temperature change detection for state and private forests in the Oregon Coast Range". Water Resources Research, vol. 47, W01501, 12 pp., 2011.~~
[16] ~~Groom, J.D., 2011. "Update on Private Forests Riparian Function and Stream Temperature (RipStream) Project". Staff Report, November 3, 2011.~~

Ex. 5 - Attorney Client

Comment [L26]: As written these results sound more speculative than the others – e.g.,"may" be inadequate - move to last/later in the paragraph series?

Comment [AC27]: Rearranged to talk about RipStreams first.

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

Comment [HA32]: I don't believe there is a lot of uncertainty here. All three studies show that the riparian buffers may not be adequate in protecting water quality. This means that data show that when you apply the established buffers, wq standards will be violated sometime. Because site specific conditions, such as ground water recharge, aspect and slope, vary considerable, it would be rare to find a study that provides absolute certainty that the buffers are inadequate. Even the RipStream study, which is probably the most compelling of the studies and the one driving the State's current riparian rule change, shows that exceedance of the PCW would occur only 40% of the time. What is important is th ... [1]

Ex. 5 - Attorney Client

~~salmon, steelhead or bull trout. The RipStream analysis demonstratedfound that the chance of a site managed using FPA rules exceeding the PCW criterion between a pre-harvest year and a post-harvest year was 40%.[17] .[18]~~

~~The RipStream study also demonstratedfound that stream temperature fluctuations increased, in part, with a reduction in shade, and that shade was best predicted by riparian basal area and tree height. The findings suggest that riparian protection measures that maintain higher shade (such measures implementedfound on Sstate forest land) are more likely to maintain stream temperatures similar to control conditions.[19]~~

In 2013, the EPA, together with the U.S. Geological Seurvey~~ice~~ and the Bureau of Land Management, re-evaluated and ~~sought to~~ summarized pertinent scientific theory and empirical studies to address the effects of riparian management strategies on stream function, with a focus on temperature.[20] With regard to no-cut buffers adjacent to clearcut harvest units, that paper noted that substantial adverse? effects on reducing available? shade have been observed with "no-cut" buffers ranging from 20 to 30 meters,[21] and small adverse? effects on stream shading and temperature have been observed in studies that examined "no-cut" buffer widths of 46 meters wide.[22] For "no-cut" buffer widths of 46-69 meters, the effects of tree removal on shade and temperature were either not detected or were minimal.[23] The paper also documentedfound that at "no-cut" buffer widths of less than 20 meters, there were pronounced reductions in shade and increases in temperature, as compared to wider buffer widths. The most dramatic effects were observed at the narrowest buffer widths (less than or equal to 10 meters).[24] As noted above, existing FPA buffers for small and medium fish bearing streams require only 20 foot (~approximately 7 meter) "no-cut" buffers within a riparian management zone of ~approximately 17 to ~23 meters, and no vegetation retention is required on small non-fish streams in the Coast Range and Western Cascades.

Oregon also has been investing in three paired watershed studies.[25] These studies are designed to analyze the effects of timber harvesting on a watershed and reach scale. Several commenters have cited the paired watershed study as evidence that the current FPA practices for riparian protection are effective at ~~achieving~~ achieving and maintaining water quality standards and protecting designated uses. Unpublished preliminary data from the Hinkle Creek study indicate that changes in stream temperature after timber harvesting along non-fish bearing streams were variable. In addition, there was no measureable downstream effect on temperatures.[26] However, the variation in stream temperature and overall net observed temperature decrease may be attributable to increased slash debris along the stream after harvest, as well as a likely increase in

Ex. 5 - Attorney Client

Comment [N36]: These acronyms should be defined if they are not already defined elsewhere.

Comment [L37]: This citation is listed as 'available on request' and a few subsequent cites reference this one. All the data we cite, especially in support of key findings, should be publicly available. Can it be arranged to post this study on NOAA's website or elsewhere.

Response: Yes, we can make available.

Ex. 5 - Attorney Client

Comment [L39]: If my edits are not right, please make other edits to clarify the buffer findings. I found it ambiguous in the first few sentences what "effect" was the primary indicator being discussed. The subsequent sentences are clear.

Comment [AC40]: AH: Linda, I think your edits are fine but I will check with Peter L, the author of the document to ensure we are consistent with the article's findings.

Comment [SS41]: We will still need to include whatever version of this document that we have (that we reviewed) in the administrative record.

Response: It's listed in the footnotes so will be included in the online record.

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[17] ~~Ibid. 2.~~

[18] ~~Groom, J.D., Dent, L., Madsen, L.J., 2011. "Stream temperature change detection for state and private forests in the Oregon Coast Range". Water Resources Research, vol. 47, W01501, 2 pp., 2011.~~

[19] ~~Ibid.2. 3.~~

[20] Leinenbach, P., McFadden, G., and C. Torgersen. 2013. Effects of Riparian Management Strategies on Stream Temperature. Prepared for the Interagency Coordinating Subgroup (ICS). 22 pages. Available upon request.

[21] Brosofske et al. 1997, Kiffney et al. 2003, Groom et al. 2011b as cited in Leinenbach et al. 2013.

[22] Science Team Review 2008, Groom et al. 2011a as cited in Leinenbach et al. 2013.

[23] Anderson et al. 2007, Science Team Review 2008, Groom et al. 2011a, Groom et al. 2011b as cited in Leinenbach et al. 2013

[24] Jackson et al. 2001, Curry et al. 2002, Kiffney et al. 2003, Gomi et al. 2006, Anderson et al. 2007 as cited in Leinenbach et al. 2013.

[25] http://watershedsresearch.org/watershed-studies/

[26] Watersheds Research Cooperative 2008. Hinkle Creek Paired Watershed Study. http://oregonforests.org/sites/default/files/publications/pdf/WRC_Hinkle.pdf

stream flow post-harvest that could ~~countervail?~~~~prevent~~ reduce? any increase in temperatures and contribute to lower mean stream temperatures.[27] Therefore, NOAA and EPA do not rely on this analysis because a variety of factors confound the draft conclusions from the Hinkle Creek study. ~~there may be other factors at play that make it difficult to draw any definitive conclusions about the adequacy of the FPA practices from the Hinkle Creek results.~~ In its evaluation of the study results, DEQ concluded that temperature data from the Hinkle Creek and Alsea River studies show that for fish-bearing streams, temperature increases downstream from the harvest sites were very similar to the increases found in the RipStream study.[28] The 2011 RipStream reports found that FPA riparian protections on private forest lands did not ensure achievement of the Protection of Cold Water criterion (PCW) under the Oregon water quality standard for temperature.[29,30]

NOAA and EPA acknowledge that Oregon is working to address some of the inadequate riparian protection measures in the FPA. The Oregon Board of Forestry (Board) has the authority to regulate forest practices through administrative rule making and could require changes to the FPA rules to protect small and medium fish bearing streams. The Board, recognizing the need to better protect small and medium fish bearing streams, directed ODF to undertake a rule analysis process that could lead to revised riparian protection rules. At its September 2014 meeting, the Board voted unanimously in favor of continuing to analyze what changes might be needed in the Oregon Forest Practice Rules to provide greater buffer protection for medium and small fish bearing streams on private forest lands. NOAA and EPA encourage the State to move forward with this rule making process expeditiously. ~~Implementation and revision of such management measures are necessary to achieve and maintain water quality standards (for XYZ) and to protect designated uses, particularly [insert].~~

~~Until more protective FPA rule changes are adopted, the federal agencies would not consider them as part of the State's coastal nonpoint program.~~

The Forestry ~~NOAA and EPA also remain concerned that the~~ Board and ODF have~~are~~ not propose~~ding~~ increased protection for riparian areas around small non-fish bearing streams. As previously discussed in the IMST study, -non-fish bearing streams should be treated no differently from fish-bearing streams when determining the appropriate need for buffer [buffer-width] protection to protect designated uses.[31] Oregon should ~~identify and adopt~~revise and

[27] Kibler, K.M. 2007. The Influence of Contemporary Forest Harvesting on Summer Stream Temperatures in Headwater Streams of Hinkle Creek, Oregon. Thesis for the degree of Master of Science in Forest Engineering presented on June 28, 2007. Oregon State University. http://watershedsresearch.org/assets/reports/WRC_Kibler,Kelly_2007_Thesis.pdf

[28] Seeds, J., Mitchie, R., Foster, E., ODEQ, Jepsen, D. 2014. "Responses to Questions/Concerns Raised by Oregon Forestry Industries Council Regarding the Protecting Cold Water Criterion of Oregon's Temperature Water Quality Standard."~~",~~ Oregon Department of Environmental Quality and Oregon Department of Fish and Wildlife Memo. 06/19/2014

[29] Groom, J.D., Dent, L., Madsen, L.J. 2011. "Stream temperature change detection for state and private forests in the Oregon Coast Range". Water Resources Research, vol. 47, W01501, 12 pp., 2011.

[30] Groom, J.D., 2011. "Update on Private Forests Riparian Function and Stream Temperature (RipStream) Project". Staff Report; November 3, 2011.

[31] Independent Multidisciplinary Science Team. 1999.

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Comment [L42]: I recommend we have a more direct response to the conclusion from these results that logging may be helpful due to the secondary factors of woody debris and increased flow. Can we add a statement that the ambiguous results of this one watershed study don't offset the larger body of analysis that shows a strong effect on shade and T from inadequate buffers. The final sentence says DEQ concluded this – if we agree with that assessment let's say so explicitly.

Comment [AC43]: HA: Several commenters (predominately industry) raised the paired watershed studies' preliminary results in defense of the ODF rules, possibly the only defense against the findings from the RipStream study, the IMST Report and the Sufficiency Analysis. As such, we felt we needed to mention this study in our rationale. However, these studies really represent a laboratory for a variety of studies that are being conducted, many of which are not are not relevant to our decision. The results of many of the relevant studies have yet to be published. DEQ has done a very good job at communicating the deficiencies of these ... [3]

Ex. 5 - Attorney Client

Comment [AC45]: L: This sentence could be interpreted that Ripstream showed no-effect also, not that Hinkle and Alsea actually had an effect (which is what I think you are sayi ... [5]

Comment [AC46]: HA: Changes were made to the narrative. References were added.

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Ex. 5 - Attorney Client

Comment [HA48]: I don't have a problem with this statement, but I don't have a good feel for how it conflicts with the legislative history. However, if we do use the stater ... [7]

Comment [L49]: Statement as written makes it sound like the buffers need to be the same width regardless of the size of the stream. Is that what's intended and if so is there an ... [8]

Comment [AC50]: HA: I modified the language to help clarify the statement. The IMST study essentially says that appropriate buffers (based on size of the stream) shou ... [9]

implement additional management measures ~~necessary to protect~~for riparian areas adjacent to small non-fish bearing streams necessary to ~~ensure attainment of~~achieve and maintain water quality standards and protect designated uses.

Forestry Road ~~Additional Management Measures~~: -In the 1998 approval conditions~~al approval findings~~, NOAA and EPA ~~called out~~identified specific concerns with the ability of Oregon's then existing FPA rules applicable to ~~adequately address~~ road density and maintenance, particularly on so-called "legacy" roads, and the necessity to revise and implement additional management measures to ~~attain~~ achieve and maintain water quality standards and to protect designated uses. ~~In the rationale,~~ NOAA and EPA noted that "~~-~~legacy' roads, roads constructed and used prior to adoption of the FPA in 1971 and not used or maintained since, were not required to be treated and stabilized before closure. In some locations, this has resulted in significantly altered surface drainage, diversion of water from natural channels, and serious erosion or landslides." -Such conditions ~~could~~ threaten to impair ~~or threatened to impair attainment of water quality standards~~ coastal waters ~~for [insert] [and/or fail to~~ and -protect designated uses~~, for [insert]]~~.

Oregon has established both regulatory and voluntary measures to address adverse water quality impacts attributable to roads, ~~associated pollutant impacts to water quality,~~ and commented~~has suggested~~ that revision or implementation of~~further~~ additional management measures for roads are not necessary at this time. As ~~While NOAA and EPA acknowledge the progress the State has made, as~~ discussed ~~further~~ below, ~~the federal agencies maintain that~~ additional work is needed to ensure the State has adequate additional management measures in place for abandoned forestry roads that were not adequately ~~or properly~~ retired~~, including legacy roads~~.

Since 1998, the Board of Forestry has made several improvements to general road maintenance measures to improve water quality. Changes made in 2002 and 2003, included: (1) establishment of a "Critical Locations" Policy for avoiding the building of roads in critical locations such as high hazards landslide areas, steep slopes, or within 50 feet of waterbodies; (2) creation of additional rules to address wet-weather hauling (OAR 629-625-0700), and (3) revision of an existing road drainage rule to reduce sediment delivery (OAR 629-625-0330). These improvements should ~~will help~~ reduce sedimentation from roadways in forested areas in order to achieve water quality standards and to protect designated uses. However, the new drainage requirements become operative ~~are triggered~~ only when new road construction or re-construction of existing roads occurs. The rule changes and new policies do not address ~~therefore apply to sufficiently address water quality problems associated with~~ "legacy roads" ~~(e.g.~~, i.e., ~~existing historic~~ roads that do not meet current ~~S~~state requirements with respect to siting, construction, maintenance, and road drainage, or impairments associated with a large portion of the existing road network where construction or reconstruction is not proposed . ~~The rules do not address achievement and maintenance of water quality standards for [insert] nor do they protect designated uses for [insert]) or problems associated with a large portion of the existing road network where construction or reconstruction is not proposed.~~

Oregon proposed to address these legacy road issues and gaps in its FPA rules through voluntary efforts, including restoration and monitoring activities carried out through the voluntary Oregon Plan. For example, in its March 2014 submittal in response to NOAA and EPA's proposed

Ex. 5 - Attorney Client

Comment [L52]: FWIW none of the other categories have the AMM descriptor in the title

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Comment [AC53]: Revised this language to be consistent with 6217(b)(1)(B)

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Ex. 5 - Attorney Client

determination ~~comments on the proposed determination~~~~March 2014 submittal~~, the State described ODF's voluntary Road Hazard and Identification and Risk Reduction Project where private and S~~s~~tate forestland owners survey their road networks to identify roads that pose risks to salmonid habitat and prioritize roads for remediation. ~~Although~~ While Oregon reports that thousands of road miles have been inspected and repaired across the S~~s~~tate since the inception of this program in 1997, the State does not represent that the program has resulted in improved water quality in ~~did not indicate the impact the program has had within~~ the coastal nonpoint program management area nor does the State distinguish among how many of these projects addressed active forest roads and roads retired according to current FPA practices versus problems associated with older, legacy roads. As noted in the Oregon Coastal Coho Assessment,[32] old roads make up the majority of forest roads, and road inventory data on private land is often not made available. As such, it is not possible to determine the extent to which voluntary efforts have addressed the sedimentation problems and landslide risk posed by the legacy road network.

The federal agencies are also concerned about the long-term implementation of this voluntary program. As noted in the State's March 2014 submission "voluntary reporting of OPSW [Oregon Plan for Salmon and Watersheds] voluntary measures has diminished in the past years, however it is reasonable to assume that voluntary measure implementation has not." The State does not provide the basis for this assumption. Without methods for tracking and evaluating the effectiveness of its voluntary programs, the federal agencies can not approve the voluntary approach for addressing this forestry management measures as it pertains to old or legacy roads.

Oregon also noted it has entered into a cooperative agreement with the U.S.~~DA~~ Forest Service to update the State's geographic information system (GIS) data layer for forest roads. The data layer will help the State conduct a rapid road survey to evaluate and prioritize road risks to soil and water resources. Oregon noted it hoped to begin the survey in 2014. NOAA and EPA encourage the State to move forward with the road survey. However, the federal agencies are not aware if the survey and GIS layer will consider (or even identify) legacy roads or how the S~~s~~tate will use the~~to~~ data to direct future management actions.

In addition, the State also discussed it was undertaking a third-party audit in 2014 to assess compliance with the FPA rules governing forest road construction and maintenance among other things. While NOAA and EPA encourage the State to continue to conduct this and other audits to assess compliance with FPA rules, as noted earlier, legacy roads are not subject to FPA rules. ~~The State's comments do not indicated whether the audit would distinguish or identify water quality impairments attributable to~~ Since the audit will assess compliance with the FPA rules, therefore, NOAA and EPA conclude that issues resulting from ~~Issues resulting from~~ legacy roads as well as issues resulting from ~~nd~~ general road maintenance ~~issues~~ where construction or reconstruction is not occurring would not be observed during this audit since the FPA rules do not apply in these situationsg ~~that would trigger compliance would the FPA would not be observed during this audit~~.

[32] Nicholas J., McIntosh, B. and E. Bowles. 2005. Oregon Coastal Coho Assessment. Coho Assessment Part 3B. Oregon Watershed Enhancement Board and Oregon Department of Fish and Wildlife, Salem, Oregon. 49 pp.

Comment [PC55]: To say that it's not widely available implies that an inventory does exist but is not available. I was under the impression that an inventory did not exist. If that is true, then delete "not widely available" and replace with "does not exist" or something like that.

Comment [HA56]: Private landowners often have roads inventories but many do not share them with the State or others. I modified the language a little.

Comment [PC57]: This paragraph is somewhat repetitive (see previous page). I think the point about DEQ not having an roads inventory should be made once.

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Comment [AC58]:

Comment [AC59]: See revised text. The issue is that audits that only look at the compliance with FPA rules leave big holes and would not shed light on the issues we're most concerned with given the limited scope of the FPA rules.

Ex. 5 - Deliberative

NOAA and EPA recognize that legacy roads are being addressed through voluntary measures, and that legacy roads have been the target of significant landowner investment. However, as noted in the Oregon Coastal Coho Assessment,[33] old roads make up the majority of forest roads, and road inventory data on private land is not widely available. As such, NOAA and EPA cannot determine, and the State has not made information-based representations, to determine~~it is not possible to determine~~ the extent to which voluntary efforts have addressed the sedimentation problems and landslide risk posed by the legacy road network.

In addition, as the federal agencies' *1998 Final Administration Changes Memo* states, in order for states to rely on voluntary programs to meet coastal nonpoint program requirements, a state must, among other things: (1) describe the voluntary program, including the methods for tracking and evaluating those programs, the State will use to encourage implementation of the management measures; and (2) provide a legal opinion from its Attorney General asserting the State has adequate back-up enforcement authority for the voluntary measures and commit to exercising the back-up authority when necessary. While the State has provided the federal agencies with a legal opinion detailing the suitability of its back-up authorities, the State has not provided (either in writing or through past practice) a commitment to exercise its back-up authority to require implementation of the additional management measures for forestry roads, as needed, nor identified a prior instance when it may have exercised that authority.

Additionally,~~lso,~~ the State has not described specifically how these voluntary efforts have and will continue to address legacy road issues within the coastal nonpoint management area,~~.~~ nor has ~~T~~~~Nor has t~~the State ~~has not~~~~fully~~ described how it will continues to monitor and track the implementation of these measures to address forestry road issues, including legacy roads ~~(not just through one-time compliance audits but through more routine monitoring practices).~~

Legacy roads threaten water quality standards and designated uses ~~remain an issue~~ due to their location and construction. Historic settlement patterns and relative ease-of-construction led early developers to preferentially locate roads in valley bottoms near streams. These roads would often parallel low gradient streams (historically the most productive coho habitat) and cross many tributaries.[34] Prior to modern best management practices, mid-slope roads would often be connected to these valley bottom roads to access harvest units.[35] T~~It is widely recognized that t~~hese poorly designed forest roads increase sediment supplied to streams by altering hillslope hydrology, surface runoff, and sediment flux.[36,37,38,39,40] These roads represent~~can also become~~ a

[33] Nicholas J., McIntosh, B. and E. Bowles. 2005. Oregon Coastal Coho Assessment. Coho Assessment Part 3B. Oregon Watershed Enhancement Board and Oregon Department of Fish and Wildlife, Salem, Oregon. 49 pp.
[34] Nicholas J., McIntosh, B. and E. Bowles. 2005. Oregon Coastal Coho Assessment. Coho Assessment Part 1: Synthesis. Oregon Watershed Enhancement Board and Oregon Department of Fish and Wildlife, Salem, Oregon. 69 pp.
[35] Wemple, B.C., Swanson, F.J., Jones, J.A., 2001. Forest roads and geomorphic process interactions, Cascade range, Oregon. Earth Surface Processes and Landforms 26, 191-204
[36] Reid, L. M., Dunne, T., 1984. Sediment production from forest road surfaces. Water Resources Research 20(11), 1753-1761.
[37] Luce, C.H., Black, T.A., 1999. Sediment production from forest roads in western Oregon. Water Resources Research 35(8), 2561-2570
[38] Wemple, B.C., Jones, J.A., 2003. Runoff production on forest roads in a steep, mountain catchment. Water Resources Research 39, doi:10.1029/2002WR001744

chronic source of low level sediment over time.[41] The ecological consequences of sediment continuously~~chronically~~ supplied from roads may be equally or even more detrimental over time than periodic sediment pulses.[42] Furthermore, legacy roads sometimes~~can~~ serve as initiation points for landslides many years (or even decades) after construction.[43] For example, one study found that forestry roads in Oregon built before 1984, have higher landslide rates than those built later.[44]

~~While~~ The ODF's 2002 Sufficiency Analysis found that, except for wet- weather road use which the Board has since addressed (see above), compliance~~ying~~ with the current FPA road best management practices- is likely to meet water quality standards. However~~,~~ the analysis did not examine the impacts of legacy roads that do not conform to ~~which do not adhere to~~ current forest practices. Oregon's Independent Multidisciplinary Science Team (IMST) did find that:

> "'Old roads and railroad grades' on forestlands, sometimes called legacy roads, are not covered by the OFPA rules unless they are reactivated for a current forestry operation or purposes. IMST believes the lack of a mechanism to address the risks presented by such roads is a serious impediment to achieving the goals of the Oregon Plan. A process that will result in the stabilization of such roads is needed, with highest priority attention to roads in core areas, but with attention to such roads and railroad grades at all locations on forestlands over time."[45]

In 1996 the National Marine Fisheries Service (NMFS) provided a scientific analysis of the draft Coastal Salmon Restoration Initiative (CSRI) report (which later evolved into the Oregon Plan for Salmon and Watershed). ~~As part of the development process for the Coastal Salmon Restoration Initiative (CSRI) report, which later evolved in to the Oregon Plan for Salmon and Watershed (Oregon Plan), a 1996 National Marine Fisheries Service (NMFS) memo providing the service's scientific analysis of the draft CSRI report identifies the report's omission of forestry road-related problems as a serious inadequacy.~~ NMFS indicated that the forest practice rules have no well-defined process to identify problems with older logging roads and railroad grades constructed prior to 1994.[46]

Ex. 5 - Attorney Client

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[39] Skauget, A. and M. M. Allen. 1998. Forestry Road Sedimentation Drainage Monitoring Project for Private and State Lands in Western Oregon. Prepared for the Oregon Department of Forestry by the Forestry Engineering Department, Oregon State University, February 20, 1998.

[40] Robison, E.G.,Mills K., Paul, J. Dent, L. and A Skaugset. 1999. Storm Impacts and Landslides of 1996: Final Report, Forest Practices Technical Report, vol. 4Oregon Department of Forestry, Corvallis. 145 pp.

[41] MacDonald, L.H. and D.B.R. Coe. 2008. Road sediment production and delivery: processes and management. Proceedings of the First World Landslide Forum, International Programme on Landslides and International Strategy for Disaster Reduction, United Nations University, Tokyo, Japan. pp. 381–384.

[42] Detenbeck, N.E. , P.W. Devore, G.J. Niemi, and A. Lima. 1992. Recovery of temperate stream fish communities from disturbance: a review of case studies and synthesis of theory. Environ. Manage. 16:33-53.

[43] Oregon Department of Forestry and Oregon Department of Environmental Quality. 2002. Sufficiency Analysis: A Statewide Evaluation of Forest Practices Act Effectiveness in Protecting Water Quality, Oregon Department of Forestry and Oregon Department of Environmental Quality. October 2002.

[44] Oregon Department of Forestry and Oregon Department of Environmental Quality. 2002. Sufficiency Analysis: A Statewide Evaluation of Forest Practices Act Effectiveness in Protecting Water Quality, Oregon Department of Forestry and Oregon Department of Environmental Quality, p. 33, Sessions, 1987.

[45] 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. pp. 47

[46] NOAA National Marine Fisheries Service. 1996. "Analysis of the Oregon Department of Forestry's (ODF) Most Recent Submission for the State of Oregon's Coastal Salmon Restoration Initiative". September 10, 1996 memo from Rowan Baker to Steve Morris and Elizabeth Garr.

In addition to water quality impacts, sedimentation and erosion from forestry roads have adverse impacts on salmon. Salmonid spawning is one of~~and use are among~~ Oregon's designated uses~~.~~ ~~For example, l~~Logging roads are a source of fine sediments which enter spawning gravel and can lower the success of spawning and recruitment for coho salmon.[47] NOAA National Marine Fisheries Services' scientific analysis for their Endangered Species Act Section 7 listing for Oregon Coast Coho Salmon, also continues to recognize forestry roads, including legacy roads, as a source of sediment and a threat to Oregon coastal coho salmon. NMFS explained that "existing and legacy [forestry] roads can contribute to continued stream degradation over time through restriction of debris flows, sedimentation, restriction of fish passage, and loss of riparian function."[48]

Despite the improvements the State has made in addressing forestry roads, legacy ~~NOAA and EPA remain concerned that many~~ forest road networks in Oregon continue to deliver sediment into streams, threatening attainment of water quality standards and designated uses. Oregon notes that some legacy roads may have filled in with trees and other vegetation since being retired from active use and that accessing some of these roads to repair them properly may create more disturbance and potential water quality impacts. While this statement may be accurate in some cases, it is not for all cases, as noted above, in the description of NMFS' ESA Section 7 listing for coastal coho salmon.~~the State did not provide legacy roads inventory data of the coastal area to support its position. An inventory of all legacy roads and old roads (roads built prior to the 1983 rule changes[49]) would identify the location of the legacy roads, identify where impairments are needed and provide information on effectiveness of any improvements made via its voluntary roads improvement program.~~

The suite of voluntary programs Oregon has described may enable the State to satisfy the forestry roads element of this condition. However, as discussed above, additional information is needed at this time. The federal agencies encourage the State to provide a commitment to use its back-up authority to ensure implementation of the forestry road additional management measures. ~~for waters that do not meet water quality standards for [insert] or achieve designated uses for [insert]when needed~~. ~~-~~The agencies also encourage the State ~~and~~ to move forward with establishing a road survey or inventory program that considers both active, inactive, and legacy roads, including a mechanism for tracking and monitoring implementation of these voluntary measures to carry out identified priority forest road improvements. To support an approvable coastal nonpoint program, the program ~~c~~should establish, among other things, a timeline for addressing priority road issues~~,~~ including retiring or restoring forest roads that impair water quality, and a reporting and tracking component to assess progress for remediating identified forest road problems. Establishing a roads inventory with appropriate reporting metrics would provide valuable information on State and private landowner accomplishments to improve and

[47] Cederholm, C.J., Reid, L.M., Salo, E.O. 1980. "Cumulative Effects of Logging Road Sediment on Salmonid Populations in the Clearwater River, Jefferson County, Washington," Contribution No. 543, College of Fisheries, University of Washington, Seattle, Washington 98195.

[48] NOAA National Marine Fisheries Service. 2012. *Scientific Conclusions of the Status Review for Oregon Coast Coho Salmon* (*Oncorhynchus kisutch*). NOAA Technical Memorandum NMFS-NWFSC-118, June 2012. Pg. 78 ~~[Why all this underlining in this citation?]~~ ~~78~~ http://www.nwfsc.noaa.gov/assets/25/1916_08132012_121939_SROregonCohoTM118WebFinal.pdf

~~[49] AD HOC Forest Practices Advisory Committee on Salmon and Watersheds. 2000. Report of the AD HOC Forest Practices Advisory Committee on Salmon and Watersheds to the Oregon Board of Forestry, August 2000. Section B-Forestry Roads, p. B-17.~~

Comment [AC64]: Is this stated using the correct terms? I had difficulty finding anything definitive online.

Comment [HA65]: I revised the language a little. We could say salmon spawing, rearing and migration, or we could go with my suggested revision which aligns with the NMFS analysis.

Ex. 5 - Attorney Client

Comment [AC67]: See added lang.

Comment [HA68]: See my comment to your next comment.

Ex. 5 - Attorney Client

Comment [AC70]: See added lang.

Comment [HA71]: Allison, I like the language you added. It strengthens our position on this issue.

Ex. 5 - Attorney Client

Comment [AC74]: This info does not exist so I don't think we can say this.

Ex. 5 - Attorney Client

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repair roads and identify where further efforts are needed. Such an approach could help verify whether the combination of current rules and the Oregon Plan's voluntary measures are effective in managing forest roads to protect streams on a reasonable timeframe.

Landslide Prone Areas: In the 1998 ~~approval,~~findings ~~findings, NOAA and EPA placed a condition on Oregon's program requiring the state to identify and begin applying additional management measures where water quality impairments and degradation of beneficial designated uses attributable to forestry exist despite implementation of the CZARA 6217(g) measures. The~~ federal agencies ~~identified~~ identified areas where existing practices under the FPA and FPA rules should be strengthened to ~~as a condition, the need for revision and implementation of additional management measures applicable to forestry and forested areas at high risk for landslides in order areas where existing practices under the FPA and FPA rules should be strengthened to attain~~ to achieve and maintain water quality standards and ~~fully support beneficial~~ protect designated uses; among them was the need to provide better protection of areas at high-risk to landslides.;~~, among them was the need to provide better protection of areas at high risk for landslides.~~

Oregon proposed~~s~~ to address the landslide element of the additional management measures for forestry condition through a mix of regulatory and voluntary approaches. While the S~~s~~tate has adopted more protective forestry rules to reduce landslide risks to life and property and promotes some voluntary practices to reduce landslide risks through the Oregon Plan for Salmon and Watersheds (The Oregon Plan), Oregon has not revised or implemented ~~still does not have~~ additional management measures for forestry in~~in place to protect~~ high-risk landslide areas to ~~ensure that~~achieve and maintain water quality standards and protect designated uses ~~are achieved~~.

Since ~~receiving conditional approval on~~ January 13, 1998, Oregon amended the Oregon FPA rules to require the identification of landslide hazard areas in timber harvesting plans and road construction and placed certain restrictions on harvest and road activities within these designated high-risk landslide areas for public safety (OAR 629-623-0000 through 629-623-0800). However, under these amendments, shallow, rapidly moving landslide hazards directly related to forest practices are addressed only as they relate to risks for losses of life and property, not for potential adverse impacts on water quality standards or designated uses~~impacts~~. T~~ Oregon still allows t~~imber harvest and the construction of forest roads, where alternatives are not available, continues without controls on high-risk landslide hazard areas as long as ~~i~~such harvest and road construction are~~t is~~ not deemed a public safety risk.

In addition to these regulatory programs, Oregon stated that it employs a voluntary measure under the Oregon Plan that gives landowners credit for leaving standing live trees along landslide-prone areas as a source of large wood. The large wood, which may eventually be deposited into fish-bearing stream channels, contributes to stream complexity, a key limiting factor for coastal coho salmon recovery. While this is a good management practice, the measure is not designed to protect high-risk erosion areas but rather to ensure large wood is available to provide additional stream complexity when a landslide occurs. NOAA and EPA do not consider this voluntary action as a sufficient~~suitable~~ management measure to reduce high-risk landslides

Comment [AC77]: We call it "findings" online. Just calling it an "approval" since we are "disapproving" them now. Prefer to either say 1998 conditioanl approval findings or 1998 approval findings, with conditions, or shorthand 1998 findings.

Ex. 5 - Attorney Client

Comment [AC79]: This revised lang. is incorrect. The actual condition said nothing about landslides…only the rationale called out a concern about high-risk landslide areas so we cannot state that "as a condition they needed to develop add MM for high-risk landslides areas"

Ex. 5 - Attorney Client

Comment [AC81]: PC: What does this mean?

Comment [AC82]: AH: The language is carry over from our 2013 proposed decision document. While I did not locate this specific language in the FPA rules, however I believe it suggests that if a high landslide hazard location is identified (that is not a public exposure risk) in a proposed harvest plan, the operator and ODF would look for ways to avoid these sites. (HLH locations do have some restrictions on them that may represent a greater cost to the operator – a disincentive). However, if there are not alternatives to avoiding these sites, the operator can still harvest them.

Comment [AC83]: PE: Here we imply/state that our concern relates to "timber harvest" on high-risk landslide hazard areas. Below, we use the phrase "clear-cut" several times. Just bringing up the question, do we want to use the phrase "clear-cut"? What is the relevant OR FPA allowed activity that we are concerned about, does the FPA use "clear-cut"? It may, I'm not sure. If it doesn't though, we may want to try and use a less loaded phrase.

Comment [AC84]: HA: Eric, I am not sure I understand your concern. The specific phrase used in the FPA is "timber harvest" however, the referenced studies were of clear-cuts. Clear cutting, as a method for timber harvesting, is a common practice in the Coast Range, and probably represents the most land-disturbing harvesting practice being implemented. I think we have appropriately used the phrase clear-cuts.

that threatened maintenance of water ~~have the potential to impact water~~ quality standards or designated uses. ~~After a landslide occurs, increases in stream complexity associated with large wood would be insufficient to offset the immediate impairment of water quality standards and designated uses.~~

Also, Oregon's voluntary program is incomplete. ~~Oregon has not yet to provided the all information that NOAA and EPA have considered when determining whetherneeded to use voluntary programs to address this aspect of itssatisfy CZARA requirements coastal nonpoint program.~~ To rely~~use~~ on voluntary approaches to ~~demonstrate satisfaction of meet~~meet CZARA requirements, a state not only needs to describe the voluntary approach but also needs to describe how it will monitor and track implementation of that approach, provide a legal opinion asserting the state has adequate back-up authority to ensure implementation of the management measure, and provide a commitment to use that back-up authority, when needed.

As noted in the January 13, 1998, findings, logging on unstable~~,~~ steep terrain can increase landslide rates, which contributes to water quality impairments. A number of studies continue to show significant increases in landslide rates after clear cutting compared to unmanaged forests in the Pacific Northwest. For example, ~~Robinson et al.~~ one study ~~,~~ found that in three out of four areas studied in very steep terrain, landslide densities and erosion volumes were greater in stands that were clear-cut during the previous nine years.[50] The study observed that landslide rates on Mettman Ridge, within the Oregon Coast Range, increased three to nine times the background rate after clear cut harvest. Another study performed a regional analysis from the Mettman Ridge study and found that forest clearing dramatically accelerates shallow landslides in steep terrain typical of the Pacific Northwest.[51] In another study in southwestern Washington, landslide densities in recently harvested sites were roughly to two to three times the landslide densities in old stands when exposed to rainfall intensities greater than the 100-year event.[52] This research found that very few landslides occurred when rainfall was less than or equal to a 100-year rainfall event.

~~Landslide rates in Mettman Ridge in the Oregon Coast Range increased after clear cutting at a rate of three to nine times the background rate for the region. The regional analysis from the Mettman Ridge study found that forest clearing dramatically accelerates shallow landsliding in steep terrain typical of the Pacific Northwest.[53] In southwestern Washington, rain fall intensity, slope steepness, and stand age affected landslide rates.[54] Very few landslides occurred when rainfall was less than or equal to a 100-year rainfall event; and at higher rainfall intensities, steep slopes had significantly higher landslide densities compared to lower gradient slopes. In addition, they found that at higher rainfall intensities, the density of landslides in recently harvested sites~~

[50] Robison, G.R., Mills, K.A., Paul, J. Dent, L. and A. Skaugset. 1999. Oregon Department of Forestry Storm Impacts and Landslides of 1996: Final Report. Oregon Department of Forestry Forest Practices Monitoring Program. Forest Practices Technical Report Number 4.157 pages.
[51] Montgomery, D. R., K. M. Schmidt, H. M. Greenberg & W. E. Dietrich. 2000. Forest clearing and regional landsliding. Geology 28: 311-314.
[52] Turner, T.R., Duke, S.D., Fransen, B.R., Reiter, M.L., Kroll, A.J., Ward, J.W., Bach, J.L., Justice, T. E., and R.E. Bilby. 2010. Landslide densities associated with rainfall, stand age, and topography on forested landscapes, southwestern Washington, USA. Forest Ecology and Management 259:2233–2247.
[53] ~~Montgomery, D. R., K. M. Schmidt, H. M. Greenberg & W. E. Dietrich. 2000. Forest clearing and regional landsliding. Geology 28: 311-314.~~
[54] ~~Turner, T.R., Duke, S.D., Fransen, B.R., Reiter, M.L., Kroll, A.J., Ward, J.W., Bach, J.L., Justice, T. E., and R.E. Bilby. 2010. Landslide densities associated with rainfall, stand age, and topography on forested landscapes, southwestern Washington, USA. Forest Ecology and Management 259:2233–2247.~~

Comment [AC85]: The main point we are making with the above para. is that CZARA is about protection/prevention. Placement of LWD does not prevent a landslide from occurring. This sentence does not add to the argument.

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

Comment [JG89]: Should this reference be handled as footnote?

Comment [AC90]: HA: Joelle, I believe Allison raised this very issue. After discussions with some of her office colleagues, it was agreed that this was an acceptable approach for presenting this information.

Comment [AC91]: Another option would just say generically "one study" in the text.

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Comment [L92]: Not clear if these references are to 100-year events or events of higher intensity than that. If the latter, these would be very infrequent events, posing a legitimate question as to the environmental significance of this

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~~was roughly two to three times the landslide density in older stands.~~

Other research has examined the role of root cohesion on landslide susceptibility in forested landscapes. Root cohesion is a measure of the lateral reinforcing strength the root system provides. The higher the root cohesion, the better the root system can stabilize the soil, reducing the risk of landslides.[55] ~~Schmidt et al.~~ One study noted that median lateral root cohesion is less for industrial forests with significant understory and deciduous vegetation (6.8–23.2 kiloPascal (kPa), a unit of pressure) compared to natural forests dominated by conifers (25.6–94.3 kPa). Additionally, in clearcuts, ~~Schmidt et al~~ the researchers~~.~~ found also that lateral root cohesion is uniformly less than or equal to 10 kPa, making these areas much more susceptible to landslides.

Sakals and Sidle modeled the effect of different harvest methodologies on root cohesion over time.[56] They found that, of the methodologies examined (clear cutting, single tree selection cutting and strip cutting), clear cutting produces the greatest decline in root cohesion. Further, they found that root cohesion may continue to decline for 30 years post-harvest. That decline is attributed to the decay of the root systems of the harvested trees, and the fact that young root systems have smaller root volumes and less radial rooting extent. They concluded that clear cutting on hazard slopes could increase the number of landslides as well as the probability of larger landslides. They also stated that a management approach requiring the retention of conifers on high-risk slopes would increase root cohesion and reduce the risk of landslide.

T~~Not only has t~~he peer-reviewed science demonstrates~~d~~ that timber harvesting ~~can contribute to~~in landslide-prone areas~~, it has also concluded but that these landslides also~~ degrades water quality and impairs designated uses in Pacific Northwest streams. Whittaker and McShane ~~cited~~ ~~that~~explained ~~that~~:

> "In the Pacific Northwest, … [l]andslides alter aquatic habitats by elevating sediment delivery, creating log jams, and causing debris flows that scour streams and stream valleys down to bedrock (Rood, 1984; Cederholm and Reid, 1987; Hogan et. al., 1998). The short-term and long-term impacts of higher rates of landslides on fish include habitat loss, reduced access to spawning and rearing sites, loss of food resources, and direct mortality (Cederholm and Lestelle, 1974; Cederholm and Salo, 1979; Reeves et. al., 1995). The restoration of geomorphic processes to natural disturbance regimes is crucial to the recovery of endangered salmonids (*Oncorhynchus* spp.) and other aquatic species in the Pacific Northwest as these species evolved under conditions with much lower sediment delivery and landslide frequency (Reeves et. al., 1995; Montogomery, 2004)."[57]

In 2013, the Cooperative Monitoring Evaluation and Research committee (CMER) of the Washington State Department of Natural Resources published a study that explored landslide

Comment [AC93]: L: L: These two sentences are "so-what?" information. I would suggest to not including it unless you can tie it in to the effects of harvest in the last sentence in the paragraph. If you do not include these two sentences, then I would suggest changing the last sentence to -

"In another study in southwestern Washington, landslide densities in recently harvest sites were roughly to two to three times the landslide densities in old stands when exposed rainfall intensities greater than the 100-year event.[43]"

Ex. 5 - Attorney Client

Comment [AC95]: See next sentence---it indicates landslide risk.

Comment [L96]: Units in acronym glossary?

Ex. 5 - Attorney Client

Comment [AC98]: Can we say something about how common the practice is in OR, for example. Add a sentence along the lines of "Clear cutting is a common logging practice in the coastal management area. An estimated X% of harvests or acres harvested acres are by clear cuts (and then cite a source).

Comment [HA99]: I will see if I can find information on the # of acres clear cut annually in the coastal area

Ex. 5 - Attorney Client

[55] Schmidt, K.M., Roering, J.J., Stock, J.D., Dietrich, W.E., Montgomery, D.R., and Schaub,T. 2001. The variability of root cohesion as an influence on shallow landslide susceptibility in the Oregon Coast Range, Canada Geotech. J. Vol. 38; 997-1024

[56] Sakals, M.E. and R.C. Sidle. 2004. A spatial and temporal model of root cohesion in forest soils. Canadian Journal of Forest Research 34(4): 950-958.

[57] Whittaker, K.A., McShane, D., 2012. Comparison of slope instability screening tools following a large storm event and application to forest management policy. Geomorphology 145-146 (2012); 115-122.

response to a large 2007 storm in Southwestern Washington.[58] Within the 91 square mile study area, a total of 1147 landslides were found within harvest units that delivered to public resources (mostly streams). The majority (82%) occurred on hillslopes and the rest initiated from roads. In examining these landslides, the study found that unstable hillslopes logged with no buffer had a significantly ~~(65%)~~ higher (65%) landslide density than did mature stands. Unstable slopes logged with no buffer also delivered 347% more sediment than slopes with unlogged, mature stands. The authors conclude that buffers on unstable slopes likely reduce landslide density and sediment volume. This has important implications for water quality and ~~beneficial~~ designated beneficial uses. ~~It is well documented that sediment can~~Sediments at levels associated with landslides clog and damage fish gills, suffocate fish eggs, smother aquatic insect larvae, and fill in spaces in streambed gravel where fish lay eggs. Sediment can also carry other pollutants into waterbodies, creating issues for domestic water supply and public water providers.[59,60,61,62,63,64]

Given the evidence that~~The science shows~~ clear-cutting increases the rate of landslides and that landslides ~~can~~ adversely affects water quality and ~~beneficial~~ designated beneficial uses. ~~,~~ revision and implementation of a ~~A~~dditional management measures applicable to forestry in ~~are needed to provide greater protection of~~ landslide prone areas are necessary to achieve and maintain water quality standards and to protect designated uses. ~~, particularly for [insert relevant pollutant(s)] standards and [insert relevant use] uses. for water qualitythe protection of water quality in Oregon.~~ To develop the needed additional management measures, potential actions ~~T~~the State could peruse several actions that would collectively address this issue, such as some of the following: ~~satisfy this condition with revision and implementation of additional measures, for example~~~~To meet this additional management measure requirement, the state needs to establish a suite of measures that collectively address this issue. Examples of potential measures include but are not limited to the following~~:

- ~~Dot Identify parcel-specific management measures applicable to forestry in landslide-prone areas in a TMDL developed to address impairments attributable to [insert pollutant(s)]~~
-
- Adopt harvest and road construction restrictions similar to those applicable in areas where landslides pose risks to life and property, but for all high-risk landslide prone areas

[58] Stewart, G., Dieu, J., Phillips, J., O'Connor, M., Veldhuisen C., 2013. The Mass Wasting Effectiveness Monitoring Project: An examination of the landslide response to the December 2007 storm in Southwestern Washington; Cooperative Monitoring, Evaluation and Research Report CMER 08- 802; Washington Department of Natural Resources, Olympia, WA.
[59] Whittaker, K.A., McShane, D., 2012. Comparison of slope instability screening tools following a large storm event and application to forest management policy. Geomorphology 145-146 (2012); 115-122.
[60] Cederholm, C.J., Reid, L.M., Salo, E.O. 1980. Cumulative Effects of Logging Road Sediment on Salmonid Populations In The Clearwater River, Jefferson County, Washington. Contribution No. 543, College of Fisheries, University of Washington, Seattle, Washington 98195
[61] Jensen, D.W., Steel, E.A., Fullerton, A.H., Pess, G.R., 2009. Impact of Fine Sediment on Egg-To-Fry Survival of Pacific Salmon: A Meta-Analysis of Published Studies, Reviews in Fisheries Science: 17(3):348-359, Northwest Fisheries Science Center, NOAA Fisheries, Seattle Washington, USA
[62] EPA. 2003. "Developing Water Quality Criteria for Suspended and Bedded Sediments (SABS): Potential Approaches (Draft). U.S. Environmental Protection Agency, August 2003.
[63] EPA and Idaho Water Resources Research Institute. 1999. Aquatic Habitat Indicators and their Application to Water Quality Objectives within the Clean Water Act, Section 3. U.S. Environmental Protection Agency, Region 10, July 1999. p. 20. EPA 910-R-99-014.
[64] Oregon Department of Environmental Quality, Turbidity Standards, Background Information. http://www.deq.state.or.us/wq/standards/turbidity.htm

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

Comment [L105]: This is a good list – it shows that the state has a lot of options.

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Comment [AC106]: We believe this is covered by the other bullets. Given the change in direction for IR-TMDL, we're unsure if that mechanism would enable the state to address CZARA concerns now.

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with ~~the~~ moderate to high potential to impact water quality and designated uses.

- Develop a scientifically rigorous process for identifying high-risk areas and unstable slopes based on field review by trained staff. Such a process could include the use of slope instability screening tools to identify high-risk landslide areas that take into account site-specific factors such as slope, geology and geography, and planned land management activities~~,~~ such as roads development.

- Develop more robust voluntary programs to encourage and incentivize the use of forestry best management practices to protect high-risk landslide areas that have the potential to impact water quality and designated uses, such as employing no-harvest restrictions around high-risk areas and ensuring that roads are designed, constructed, and maintained in such a manner that the risk of triggering slope failures is minimized. Widely available maps of high-risk landslide areas could improve water quality by informing foresters during harvest planning.

- Institute a monitoring program to track compliance with the FPA rules and voluntary guidance for high-risk landslide prone areas and the effectiveness of these practices in reducing slope failures.

- Establish an ongoing monitoring program that assesses the underlying causes and water quality impacts of landslides shortly after they occur and generates specific recommendations for future management. ~~In particular, look for ways to reduce the occurrence of channelized landslides.~~

- Integrate processes to identify high-risk landslide prone areas and specific best management practices to protect these areas into the TMDL development process. For example, in the Mid-Coast Basin~~,~~ DEQ is currently developing a sediment TMDL to address water quality limited waters for biocriteria, turbidity, and sediment. To support the development of the TMDL, the Oregon Department of Geology and Mineral Resources completed landslide inventory maps for two watersheds in the Mid-Coast Basin finding hundreds of previously unidentified landslides.[65] As part of the TMDL DEQ would be completing a source assessment of the landslides in relationship to the water quality impairments. NOAA and EPA encourage the state to complete this TMDL and include specific practices that landowners will need to follow in order to reduce pollutants causing impairments addressed in the TMDL.

If ~~the~~ Oregon plans to rely on voluntary efforts, ~~, NOAA and EPA would consider the adequacy of such efforts as acceptable additional management measures based on their long-standing and consistent approach whereby a the~~ State would need to: ~~(1) would need to~~(1) describes the full suite of voluntary practices it plans to use address this management measure; ~~,~~ (2) describes how

Comment [AC107]: PE: Okay, they develop this; is that enough? Is there another today that goes with this or is this a stand alone piece?

Comment [AC108]: HA: This is not stand-alone piece. It represents one of many pieces of a program that needs to be established to address this issue. I modified the language in the introductory sentence to clarify this point.

Ex. 5 - Attorney Client

Comment [AC110]: This doesn't make sense to me. If I'm understanding correctly, it implies that we look at implementation history for approval which is incorrect. Is there a legal basis for this proposed change?

Comment [L111]: Para was hard to read

[65] Burns, W. J., Duplantis, S., Jones, C., English, J., 2012. LIDAR Data and Landslide Inventory Maps of the North Fork Siuslaw River and Big Elk Creek Watersheds, Lane, Lincoln and Benton Counties, Oregon. Open-File Report O-12-07, Oregon Department of Geology and Mineral Industries.

~~the Sstate~~ it would ~~promote~~ensure the use of these voluntary practices, and track their implementation;~~,~~ and (3) provide ~~meet the other requirements when using voluntary programs to meet 6217(g) management measure requirements (i.e.,~~ a legal opinion that~~asserting~~ the ~~S~~state has back-up authority to ensure implementation of the management measure and, a commitment to use the back-up authority when needed.
~~, and a description of the monitoring and tracking program the state will use to assess how it will monitor and track implementation of the voluntary approach).~~

Buffers for Pesticide Application on Non-Fish Bearing (Type N) Streams: *Buffers for Pesticide Application on Non-Fish Bearing (Type N) Streams*: In the January 1998 findings, the federal agencies noted that Oregon had adopted forest practices rules that require aerial spray buffers for most pesticide applications (OAR 629-620-0400(7)(b)). However, these rule changes did not include spray buffers for the aerial application of herbicides along non-fish bearing streams commonly found in headwaters. NOAA and EPA determined that additional management measures to protect non-fish bearing streams during the aerial application of herbicides on forestlands were necessary to achieve and maintain water quality standards and to protect designated uses.

Since 1998, Oregon has provided to the federal agencies several documents describing the programs the State uses to manage pesticides, most recently in March 2014. In addition to the FPA rule buffers noted above, the State also addresses pesticide issues through the Chemical and Other Petroleum Product Rules (OAR 629-620-0000 through 800); Pesticide Control Law (ORS 634); best management practices set by the ODA ~~;~~ and federal pesticide label requirements under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); as well as the State's Water Quality Pesticide Management Plan[66] and Pesticide Stewardship Partnership (PSP) program[67]. In its March 2014 submittal, Oregon noted that it specifically relies on best management practices set by ODA and EPA under FIFRA for the protection of small non-fish bearing streams.

The aerial application of herbicides, such as glyphosate, 2,4-D, atrazine and others, is a common practice[68,69] in the forestry industry in Oregon. Herbicides are sprayed to control weeds on recently harvested parcels to prevent competition with newly planted tree saplings. In 2008, more than 800,000 pounds of pesticides, the majority of which were herbicides (at least 700,000 pounds) were used for forestry purposes in Oregon.[70] Research has shown that herbicides may adversely impact water quality and designated uses to protect aquatic life.[71,72,73,74, 75] Herbicides

[66] ODA, ODEQ, ODF, and OHA. 2011. *Pesticide Management Plan for Water Quality Protection*.
[67] ODEQ. 2012. *Fact Sheet: Pesticide Stewardship Partnerships in Oregon*. DEQ 12-WQ-021. Updated March, 2012

[68] Robert G. Wagner, Michael Newton, Elizabeth C. Cole, James H. Miller, and Barry D. Shiver. 2009. *The role of herbicides for enhancing forest productivity and conserving land for biodiversity in North America*. doi:10.2193/0091-7648(2004)032[1028:TROHFE]2.0.CO;2

[69] Norris, L.A., H.W. Lorz, and S.V. Gregory. 1991. Forest Chemicals. Influences of Forest and Rangeland Management on Salmonid Fishes and Their Habitats. American Fisheries Society Special Publication 19:2-7-296, 1991.

[70] ODA. Pesticide Use Reporting System. 2008 Annual Report. June 2009.

[71] Rick A. Relyea 2005. "The Impact of Insecticides and Herbicides on the biodiversity and productivity of aquatic communities." Ecological Applications 15:618–627. http://dx.doi.org/10.1890/03-5342; http://www.esajournals.org/doi/full/10.1890/03-5342

Ex. 5 - Attorney Client

Comment [AC113]: Note: Change changes were lost on this section when pasted it in to document.

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

Comment [AC117]: The 1998 findings state that: "The rules do not contain restrictions for aerial application of herbicides, which would appear to leave type N streams still at risk" and call out our concern about the "ad ... [12]

Comment [AC118]: Is this in a document or series of policy statements? I believe it is, in which case it would be good to cite for consistency with the other items listed h ... [13]

Comment [AC119]: I don't believe this is a complete citation. Needs to be fleshed out. *JW – Allison, here's a link to the document. I don't see any publication numbers. We* ... [14]

Comment [AC120]: Does this have something to cite? Even a website explaining the program would be helpful. *JW – I added a citation below for the P* ... [15]

Comment [AC121]: Can we cite anything to support this statement *JW – I could only get the abstract for this, so need to read the entire article. But ever* ... [16]

Comment [AC122]: Add a fee citations to support this statement---more recent studies that NMFS cited in BiOp? would be better than stuff from the 70s from the (g) guidance ... [17]

applied through the air commonly reach nearby streams through aerial drift[76,77,78] and runoff from the land.[79,80]

Oregon does not require spray buffers for aerial application of herbicides on small, non-fish bearing streams; applicators can spray directly up to and over non-fish bearing streams. In addition, there are no requirements for riparian harvest buffers along small, non-fish bearing streams. For example, in the Triangle Lake area in the Oregon coastal nonpoint management area, there are areas where aerial application of herbicides occurred in areas where timber was harvested to the stream edge.[81] Riparian harvest buffers could serve as defacto spray buffers since they would prevent timber harvesting up to the stream and therefore, would not require herbicide spraying over the non-harvested area to control weeds. Riparian buffers can also help filter any herbicide pollutants from runoff before it reaches the streams.[82,83]

Comment [WJ123]: Need to add Peter's citation once he finalizes memo.

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[72] Relyea, R. and Hoverman, J. (2006). Assessing the ecology in ecotoxicology: a review and synthesis in freshwater systems. Ecology Letters, 9: 1157–1171. doi: 10.1111/j.1461-0248.2006.00966.x. http://onlinelibrary.wiley.com/doi/10.1111/j.1461-0248.2006.00966.x/full

[73] Hayes, T.B. et al. National Institute of Environmental Health Sciences. 2006. Pesticide mixtures, Endocrine disruption, and amphibian declines: Are we underestimating the impact?. Environmental Health Perspectives, doi:10.1289/ehp.8051 (available at http://dx.doi.org/) http://nctc.fws.gov/resources/course-resources/pesticides/Limitations%20and%20Uncertainty/Hayes%20et%20al%20in%20press%20EHP%20mixtures%20January%202006.pdf

[74] Battaglin,W.A. et al. 2009. The occurrence of glyphosate, atrazine, and other pesticides in vernal pools and adjacent streams in Washington DC, Maryland, Iowa, and Wyoming, 2005-2006. Environmental Monitoring and Assessment, vol. 155, 281-307. DOI 10.1007/s10661-008-0435-y. http://download.springer.com/static/pdf/861/art%253A10.1007%252Fs10661-008-0435-y.pdf?auth66=1420487219_acd0a22105b623694ff637e687270c5c&ext=.pdf

[75] Graymore, Stagnitti, and Allinson 2001. Impacts of **atrazine** in aquatic ecosystems. http://fti4qj3vk6a.scholar.serialssolutions.com/?sid=google&auinit=M&aulast=Graymore&atitle=Impacts+of+atrazine+in+aquatic+ecosystems&id=doi:10.1016/S0160-4120(01)00031-9&title=Environment+international&volume=26&issue=7&date=2001&spage=483&issn=0160-4120

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[76] Majewski, M.S., and P.D. Capel. 1996. Pesticides in the Atmosphere: Distribution, Trends, and Governing Factors. Volume 3 of Pesticides in the Hydrologic System Series. Ann Arbor Press, Inc., Chelsea, Michigan 28118, 1997.

[77] F. Van Den Berg, R. Kubiak, W.G. Benjey, M.S. Majewski, S.R. Yates, G.L. Reeves, J.H. Smelt, A.M.A. Van Der Linden. Fate of Pesticides in the Atmosphere: Implications for Environmental Risk Assessment, Emissions of Pesticides into the Air. 1999, pp. 195-218.

[78] D. Pimentel and L. Levitan. Pesticides: amounts applied and amounts reaching pests. Bioscience, Vol. 36, no. 2, 1986.

[79] Gilliom et al. USGS, 2006. The Quality in Our Nation's Water: Pesticides in the Nation's Streams and Groundwater, 1992-2001. Circular 1291. http://pubs.usgs.gov/circ/2005/1291/pdf/circ1291.pdf

[80] Larson, S.J., P.D. Capel, and M. Majewski. Pesticides in Surface Waters: Distribution, Trends and Governing Factors. Volume 2 of Pesticides in the Hydroogic System Series. Ann Arbor Press, Inc., Chelsea, Michigan 28118, 1995.

[81] Memo from P. Leinenbach, P to Alan Henning, EPA re:"Images of forest harvest areas where herbicides were applied using aerial broadcast application methods with helicopters in the Triangle Lake region of the central coast range of Oregon." January 12, 2015.; ~~(insert appropriate memo citation when back in office.) USEPA Draft Memo, August 29, 2014. (Update when Peter is back in office.)~~

[82] Welsch, D.J. USDA Forest Service. 1991. Riparian Forest Buffers: Function and Design for Protection and Enhancement of Water Resources. NA-PR-07-91. https://books.google.com/books?hl=en&lr=&id=rpSNdMJz4XQC&oi=fnd&pg=PP3&dq=buffer+pesticide+forestry&ots=77TENrS6TQ&sig=BH__zajspVcRveXtEcGq17vZeFE#v=onepage&q=buffer%20pesticide%20forestry&f=false

[83] Kiffney, P.M., J.S. Richardson, J.P. Bull. 2003. Responses of periphyton and insects to experimental manipulation of riparian buffer width along forest streams. Journal of Applied Ecology, 2003, Volume 40, 1060-1076. http://onlinelibrary.wiley.com/doi/10.1111/j.1365-2664.2003.00855.x/pdf

Given that non-fish bearing streams comprise about 70 percent of the total stream length and feed fish-bearing streams, the wide use of herbicides by the forestry industry in coastal Oregon and the lack of any spray or riparian buffers that would help protect non-fish bearing streams from adverse impacts due to the aerial application of herbicides threaten designated uses in Oregon coastal waters. Small, headwater non-fish bearing streams play an important role in delivering cold, clean water to downstream fish-bearing steams.[84] Therefore, it is reasonably foreseeable that Oregon coastal waters are threatened by herbicide pollutants and that additional management measures that will provide greater protection of non-fish bearing streams during the aerial application of herbicides are warranted to achieve water quality standards and protect designated uses (CZARA Sec. 6127(b)(1)(B), 16 U.S.C. 1455b).

Other recent studies and reports also support NOAA and EPA's determination that additional management measures for forestry are needed to address aerial herbicide application due to a reasonable, foreseeable threat to coastal waters and designated uses. One of the common indirect adverse effects on water quality and designated uses, particularly cold water fisheries uses, occurs because herbicides can reduce the growth and biomass of primary producers (algae and phytoplankton) that form the base of the aquatic food chain. A decrease in primary production (e.g, plants, algae) can have significant effects on consumers (e.g., salmonids or other animals that eat food to get energy) that depend on the primary producers for food.[85] These effects are often reported at herbicide concentrations well below concentrations that would have a direct effect on consumers. In addition, there are concerns about the increased toxicity of mixtures of herbicides and other pesticides to aquatic organisms.[86, 87,88] Although the NOAA National Marine Fisheries Services' (NMFS) biological opinion (BiOp) for several EPA herbicide labels, including 2,4-D,[89] discusses that it is difficult to predict the magnitude and duration these impacts would have on juvenile salmon because the extent of salmonid effects often depend on the interaction with many different parameters, such as availability of alternative food sources, water temperature, and other abiotic factors, NMFS concluded that products containing 2,4-D are likely to jeopardize the existence of all listed salmonids and adversely modify or destroy critical habitat.

Ex. 5 - Attorney Client

Comment [AC125]: Per citation format, we do not reference authors in text. - *jw - okay*

Comment [AC126]: Delete web address from article in footnote. Inconsistent with other citations.
JW – added a couple of examples. Thx for making refs consistent.)

Ex. 5 - Attorney Client

Comment [WJ128]: Edited most of this paragraph to cite directly to sources discussed in BiOp. Left this reference of BiOp in rationale, since it's an important reference for agency determination on impact of herbicides on salmon.

Ex. 5 - Attorney Client

Comment [AC131]: The decision is based on NOAA/EPA's assessment that there is a reasonably foreseeable threat to coastal waters. The jeopardy conclusion that NMFS arrived at helps support our assessment and I believe is important to retain. Revised this para. to hopefully make that connection clearer.
JW – I think it's important to keep in the effects on species and critical habitat given the reasonably foreseeable threat. We have worked to rely more on literature cited in BiOp for the effects.

[84] Gomi, T., RC. Sidle,. And JS Richardson. 2002. Understanding Processes and Downstream Linkages of Headwater Systems. Bioscience. October 2002, Vol. 52, No. 10. http://bioscience.oxfordjournals.org/content/52/10/905.short

[85] Laurie B. Marczak, Takashi Sakamaki, Shannon L. Turvey, Isabelle Deguise, Sylvia L. R. Wood, and John S. Richardson 2010. Are forested buffers an effective conservation strategy for riparian fauna? An assessment using meta-analysis. *Ecological Applications* 20:126–134.

[86] Relyea, R.A. A Cocktail of Contaminants: How mixtures of pesticides at low concentrations affect aquatic communities. Oecologia, March 2009, Volume 159, Issue 2, pp 363-376.

[87] Gilliom et al, 2006. Ibid.

[88] Carpenter, K.D., S. Sobeszczyk, A. Arnsberg, and F.A. Rinella. USGS. 2008. Pesticide Occurrence and Distribution in the Lower Clackamas River Basin, Oregon, 2000-2005. Scientific Investigations Report 2008-5027.

[89] NMFS. 2011. *National Marine Fisheries Service Endangered Species Act Section 7 Consultation Biological Opinion Environmental Protection Agency Registration of Pesticides 2,4-D, Triclopyr BEE, Diuron, Linuron, Captan, and Chlorothalonil.* NOAA National Marine Fisheries Service, June 30, 2011.

A few studies have indicated that the aerial application of herbicides may not result in herbicides exceeding toxic thresholds for humans or aquatic life in fish-bearing and drinking water streams,[90] [91]at the interface of fish and non-fish bearing streams, or drinking water facilities in Oregon. However, none of these studies were focused on impacts to non-fish bearing streams and do not provide sufficient evidence, based on other information, that coastal waters and designated uses are not reasonably or foreseeably threatened by the aerial application of herbicides over non-fish bearing streams. For example, an ODF study which looked at the effectiveness of forest practices act aerial spray buffers for herbicides and fungicides on fish bearing streams ***, stated that they could not draw any conclusions about the FPA's effectiveness at protecting water quality for non-fish bearing streams. A USGS study in the McKenzie River basin, looked broadly at urban, forestry and agriculture pesticide use and the impacts on drinking water. The study, which took place outside the coastal nonpoint management area, also notes that forestry sampling was inconsistent because of irregular and intermittent pesticide application patterns among tributaries and the difficulty of capturing runoff events in the spring after application[92]. A National Council for Air and Stream Improvement (NCASI) study in the Needle Branch in the Oregon Coast Range looked at how herbicide levels in streams varied during storm events at three sample sites in harvest units downstream of non-fish bearing areas where aerially herbicides were applied with no buffers. The sample sites themselves were collected in fish-bearing streams with 50-foot riparian buffers. The study noted clear pulses of herbicides at each storm event with declining levels downstream and over several storms.

Oregon relies on the national best management practices established through the federal FIFRA pesticide labels to protect non-fish bearing streams. Currently, EPA, the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and the U.S. Department of Agriculture are working to improve the national risk assessment process to include all ESA-listed species when registering all pesticides, including herbicides. Given the scale of this undertaking, the federal agencies are employing a phased, iterative approach over the next 15 years to make the changes, and it is expected that herbicide labels will not be updated until the end of the 15-year process. This ongoing federal process, however, should not preclude Oregon from making needed state-level improvements to how it manages herbicides in the context of its forestry landscape and sensitive species.

Oregon and other Pacific Northwest states have recognized the need to go beyond the national FIFRA label requirements to protect water quality and designated uses, including salmon, in their state.[93] Oregon has 60-foot spray buffers for non-biological insecticides and fungicides on

[90] Dent L. and J. Robben. 2000. *Oregon Department of Forestry: Aerial Pesticide Application Monitoring Final Report*. Oregon Department of Forestry. Pesticides Monitoring Program. Technical Report 7. March 2000.

[91] National Council for Air and Stream Improvement. 2013. *Measurement of Glyphosate, Imazapyr, Sulfometuron methyl, and Mmetfulfuron methyl in Needle Branch Streamwater*. Special Report No. 130-1.

[92] Kelly, V.J., C.W. Anderson, and K. Morgenstern. 2012. USGS and Eugene Water and Electric Board. Reconnaissance of Land-Use Sources of Pesticides in Drinking water, McKenzie River Basin, Oregon. Scientific Investigations Report 2012-5091.

[93] Peterson, E. EPA. 2011. Memo to Scott Downey, EPA and David Powers, EPA RE: *Comparative Characterization of Pacific Northwest Forestry Requirements for Aerial Application of Pesticides*. August 30, 2011.

Ex. 5 - Attorney Client

Comment [AC134]: Dent et al.

Comment [AC135]: PCW

Comment [JW136]: Note that the study talks about 3 type N streams that were sampled, but that all of these had riparian harvest buffers which the study acknowledges is not required. ""These Type N streams had overstory vegetative buffers, a practice not required for Type N streams." page 2. It gets complicated to go into detail about each othere studies, so I recommend we keep as is, so this is FYI.

Comment [AC137]: This conclusory statement from Dent can't be applied to all the studies discussed in this para. It's placement here is very misleading and not a statement we would want to be making since Dent only made that conclusion based on their work. *JW – I didn't look carefully at what you del* ... [18]

Comment [WJ138]: Agreed and corrected. I also added a statement on the NCASI study to be consistent with the RTC.

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

non-fish bearing streams (OAR 629-620-400(7)) and 60-foot spray buffers for herbicides on wetlands, fish-bearing and drinking water streams (OAT 629-620-400(4)). Other Pacific Northwest states have established more stringent forestry spray buffer requirements for herbicides along non-fish bearing streams. For example, for smaller non-fish bearing streams, Washington maintains a 50-foot riparian and spray buffer (WAC-222-38-040). Idaho has riparian and spray buffers for non-fish bearing streams of 100 feet (IAR 20-02-01). California sets riparian buffers for non-fish bearing streams after consulting with the local forester, which implicitly restrict the aerial application of herbicides near the stream (14 CCR 4).

Though Oregon has neither spray nor riparian harvest buffers for herbicides that are aerially applied on non-fish bearing streams, the ODA Pesticide Division requires applicators to attend trainings and obtain licenses prior to spraying pesticides. ODF requires pesticide applicators to complete a Notification of Operation at least 15 days before applying on forestlands[94] and to maintain a daily chemical application form.[95] On the form, the applicators must list which pesticides *may* be applied, the stream segments on which these pesticides *may* be applied, and when application *may* occur within a 2-3 month period. However, the notification form does not specify when application will occur within a 1-2 week period, and post-application which pesticides were applied and how much. The form also reminds the applicator of the required spray buffers for fish-bearing and drinking water streams, but does not specify protections for non-fish bearing streams or voluntary best practices included in the [insert proper name of state guidance discussed below] that should be followed.

Oregon's broader strategy for cross program coordination on pesticides includes its Water Quality Pesticide Management Plan, Pesticide Stewardship P ~~pro~~gram (PSP), and Pesticide Analytical and Response Center (PARC). The Water Quality Pesticide Management Plan guides statewide actions to protect waters from pesticide contamination using water quality to drive adaptive management. Oregon's Pesticide Stewardship Program is an ODEQ initiative that works with State and local partners to collect and analyze water samples in areas with the greatest potential for impacts to aquatic life and human health. PARC is a multi-state agency group that coordinates investigations to collect and analyze information about reported incidents.

NOAA and EPA acknowledge the progress Oregon has made in its establishment of a multi-agency management teams and programs to assess and manage pesticide water quality issues. However, as these efforts apply to the aerial application of herbicides in the coastal nonpoint management area, the federal agencies note that water quality monitoring data on pesticides is still limited in the State, and that Oregon has ~~only~~ established eight PSP monitoring areas in seven watersheds, none of which are within the coastal nonpoint management area. While NOAA and EPA recognize that the PSP program targets the most problematic or potentially problematic watersheds, and Oregon received recent funding to expand into two new watersheds, the agencies believe that if monitoring data are to drive adaptive management, the State should

Comment [L145]: So the states does have buffer requirements on non-fish streams for other insecticides and fungicides?? But not herbicides..?

Comment [AC146]: Correct.

Comment [AC147]: I'm wondering if we should avoid making this explicit statement but just say that other states have these buffers. Anyone that's worth their salt can draw the conclusion that OR's are much weaker/non-existent. But this way, we avoid rubbing OR's nose in it in a public forum. We can make this direct connections in our follow up convos with the state.

Comment [WJ148]: I think this is helpful and think it's better to keep in. But I'm open. Maybe Alan has an opinion on what's more constructive for working with the State while still keeping this as defensible as possible. This was compelling for managers in knowing that we're not holding Oregon to a higher standard.

Comment [AC149]: We need a citation for this.
JW – got this from Erik Peterson, so will look for his citation.

Comment [WJ150]: Added citation

Comment [AC151]: If I recall, the blank form does't provide this reminder but the ODF State Foresterse response to teh form? If so, may be good to clarify.

Comment [L152]: Above para says nonfish as well

Comment [AC153]: I assume this is true but confirm. Does it reference the guidance anywhere on BMPs to follow? *- JW - I can dig deeper, but maybe this is a simpler edit. Let me know what you think.*

Comment [AC154]: This is out of place here. Last sentence is incomplete.

Comment [AC155]: May be helpful to retain short description of what these programs do.

Comment [AC156]: Retain short description and spell out PSP

[94] https://ferns.odf.state.or.us/E-Notification

[95] Oregon Department of Forestry. "Daily Chemical Application Record Form." Revised September 2013. http://www.oregon.gov/odf/privateforests/docs/ChemicalApplicationForm_Final.pdf

develop and maintain more robust and targeted studies of the effectiveness of its pesticide monitoring and best management practices within the coastal nonpoint management area. The federal agencies encourage the State to design its monitoring program in consultation with EPA and NMFS.

NOAA and EPA believe that Oregon could develop additional management measures for forestry that will protect non-fish bearing streams during the aerial application of herbicides to achieve and maintain water quality standards and protect designated uses through a variety of mechanisms. Some potential approaches could include one or more of the following elements:

- Adopt rules that would require spray buffers for the aerial application of herbicides along non-fish bearing streams. Oregon may wish to look toward spray buffer requirements neighboring states have established for ideas.
- Adopt r~~ no-cut r~~iparian buffer protectionss for timber harvest along non-fish bearing streams, which, by default, would also provide a buffer during aerial spraying.
- Expand existing guidelines for voluntary buffers ~~or buffer protections~~ for the aerial application of herbicides on non-fish bearing streams.
- Educate and train aerial applicators of herbicides on the new guidance ~~and how to minimize aerial drift to waterways, including non-fish bearing streams~~;
- Revise the ODF Notification of Operation form required prior to chemical applications on forestlands to include a check box for aerial applicators to indicate they must adhere to FIFRA labels for all stream types, including non-fish bearing streams;
- ~~Revise the ODF Notification of Operation form to refer applicators to the XXX guidelines for additional recommended best practices they should follow during application. JW need to look into this, but good suggestion.~~
- Track and evaluate the implementation of voluntary measures for the aerial application of herbicides along non-fish bearing streams to assess the effectiveness of these practices, and if adjustments are needed, to achieve water quality standards and protect designated uses;
- Provide better maps of non-fish bearing streams and other sensitive sites and structures to increase awareness of these sensitive areas that need protection among the aerial applicator community; and
- Encourage the use of GPS technology, linked to maps of non-fish bearing streams, to automatically shut off nozzles before crossing non-fish bearing streams.

If Oregon chooses a voluntary approach, the State would also need to meet the other CZARA requirements for using voluntary, incentive-based programs as part of the State's coastal nonpoint program. This includes a description of the methods the state will use to track and evaluate those voluntary programs, a legal opinion stating it has the necessary back-up authority to require implementation of the voluntary measures, a description of the process that links the implementing agency with the enforcement agency, and a commitment to use the existing enforcement authorities, where necessary.

II. CONDITIONS THAT ARE NO LONGER A BASIS FOR THIS DECISION

Ex. 5 - Attorney Client

Comment [AC159]: Would it have to be no-cut or could some sort of managed area also be acceptable? I don't know if they also spray over managed areas to keep weeds down.

Comment [AC160]: Would be good to include specific name of guidelines (same ones we talked about in earlier para.) - removed reference to specific BMPs; I don't have the guidelines.

Comment [WJ161]: We would rather not be specific on the guidelines and leave them general.

Comment [AC162]: What do you mean by this? Beyond what BMPs are already in the guidance to minimize drift, etc? If so, may be helpful to provide an e.g.,

Comment [AC163]: Based on what we say in the previous para, they already provide training on this or am I missing something? If so, I would not include this piece.

Comment [WJ164]: Okay, edited.

Comment [AC165]: Very good and needed but alas, outside the scope of this add MM rationale.

Comment [AC166]: I don't this is done already but I could be wrong. If they ex ... [23]

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Comment [JW167]: I took this out. I think the focus for the ODF Notification of ... [24]

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Comment [AC168]: I would stay away from listing this one since FIFRA is in flux. ... [25]

Comment [AC169]: The state can't take this action but they can encourage applicato ... [26]

Comment [WJ170]: Agreed

Ex. 5 - Attorney Client

A. URBAN AREAS MANAGEMENT MEASURES – NEW DEVELOPMENT

PURPOSE OF MANAGEMENT MEASURE: The purpose of this management measure is four-fold: (1) decrease the erosive potential of increased volumes and velocities of stormwater associated with development-induced changes in hydrology; (2) remove suspended solids and associated pollutants entrained in runoff that result from activities occurring during and after development; (3) retain hydrological conditions that closely resemble those of the pre-disturbance condition; and (4) preserve natural systems including in-stream habitat.

CONDITION FROM JANUARY 1998 FINDINGS: Within two years, Oregon will include in its program: (1) management measures in conformity with the 6217(g) guidance; and (2) enforceable policies and mechanisms to ensure implementation throughout the coastal nonpoint management area. (1998 Findings, Section IV.A).

FINDING: Based on information provided in Oregon's March 2014 submission, NOAA and EPA now believe the State has satisfied this condition. The new development management measure is no longer a basis for finding that the Oregon has failed to submit an approvable program under CZARA.

RATIONALE NOT INCLUDED: NOAA and EPA will provide a rationale for public comment if/when the federal agencies are in a position to propose full approval of Oregon's coastal nonpoint pollution control program at a later point in time.

B. OPERATING ONSITE SEWAGE DISPOSAL SYSTEMS

PURPOSE OF MANAGEMENT MEASURE: The purpose of this management measure is to minimize pollutant loadings from operating OSDS.

CONDITION FROM JANUARY 1998 FINDINGS: Within two years, Oregon will finalize its proposal to inspect operating OSDS, as proposed on page 143 of its program submittal. (1998 Findings, Section IV.C).

FINDING: Based on information provided in Oregon's March 2014 submission, NOAA and EPA now believe the State has satisfied this condition. The OSDS management measure is no longer a basis for finding that the Oregon has failed to submit an approvable program under CZARA.

RATIONALE NOT INCLUDED: NOAA and EPA will provide a rationale for public comment if/when the federal agencies are in a position to propose full approval of Oregon's coastal nonpoint pollution control program at a later point in time.

III. ADDITIONAL COMMENTS

A. AGRICULTURAL MANAGEMENT MEASURES--EROSION AND SEDIMENT CONTROL, NUTRIENT, PESTICIDE, GRAZING, AND IRRIGATION WATER MANAGEMENT

As noted in the Foreword, the federal agencies invited public comment on the adequacy of the State's programs and policies for meeting the 6217(g) agriculture management measures and conditions placed on Oregon's Coastal Nonpoint Program.

PURPOSE OF MANAGEMENT MEASURES: The purposes of these management measures are to: (1) reduce the mass load of sediment reaching a waterbody and improve water quality and the use of the water resource; (2) minimize edge-of-field delivery of nutrients and minimize leaching of nutrients from the root zone; (3) reduce contamination of surface water and ground water from pesticides; (4) reduce the physical disturbance to sensitive areas and reduce the discharge of sediment, animal waste, nutrients, and chemicals to surface waters; and (5) reduce nonpoint source pollution of surface waters caused by irrigation.

CONDITIONS FROM JANUARY 1998 FINDINGS: Within one year, Oregon will (1) designate agricultural water quality management areas (AWQMAs) that encompass agricultural lands within the coastal nonpoint management area, and (2) complete the wording of the alternative management measure for grazing, consistent with the 6217(g) guidance. Agricultural water quality management area plans (AWQMAPs) will include management measures in conformity with the 6217(g) guidance, including written plans and equipment calibration as required practices for the nutrient management measure, and a process for identifying practices that will be used to achieve the pesticide management measure. The State will develop a process to incorporate the irrigation water management measure into the overall AWQMAPs. Within five years, AWQMAPs will be in place. (1998 Findings, Section II.B).

DISCUSSION: In 2004, the federal agencies provided Oregon with an informal interim approval of its agriculture conditions, believing that the State had satisfied those conditions, largely though its Agriculture Water Quality Management Act (ORS 568.900-933, also known as SB 1010) and nutrient management plans (ORS-468B, OAR-60374). At that time, the federal agencies found that these programs demonstrated that the State has processes in place to implement the 6217(g) management measures for agriculture as CZARA requires.

Although the federal agencies initially found that these programs enabled the State to satisfy the agriculture condition, prior to announcing the proposed decision, some specific concerns with the State's agriculture program were brought to the federal agencies' attention such as:

- Enforcement is limited and largely complaint-driven; it is unclear what enforcement actions have been taken in the coastal nonpoint management area and what improvements resulted from those actions.
- The AWQMA plan rules are general and do not include specific requirements for implementing the plan recommendations, such as specific buffer requirements to adequately protect water quality and fish habitat.
- AWQMA planning has focused primarily on impaired areas when the focus should be on both protection and restoration.
- The State does not administer a formalized process to track implementation and effectiveness of AWQMA plans.

- AWQMA planning and enforcement does not address "legacy" issues created by agriculture activities that are no longer occurring.

Given these concerns, NOAA and EPA chose to solicit additional public comment on whether the State had satisfied the 6217(g) agriculture management measure requirements and the conditions related to agriculture placed on its program. The federal agencies appreciate the comments provided and are considering them closely. NOAA and EPA will work with the State, as necessary, to ensure it has programs and policies in place to satisfy all CZARA 6217(g) requirements for agriculture before proposing and making a final decision that the State has a fully approved coastal nonpoint program. For a summary of the comments received related to agriculture, see http://coast.noaa.gov/czm/pollutioncontrol/.

Page 6: [1] Comment [HA32] **Henning, Alan** **12/22/2014 10:35:00 AM**

I don't believe there is a lot of uncertainty here. All three studies show that the riparian buffers may not be adequate in protecting water quality. This means that data show that when you apply the established buffers, wq standards will be violated sometime. Because site specific conditions, such as ground water recharge, aspect and slope, vary considerable, it would be rare to find a study that provides absolute certainty that the buffers are inadequate. Even the RipStream study, which is probably the most compelling of the studies and the one driving the State's current riparian rule change, shows that exceedance of the PCW would occur only 40% of the time. What is important is that the studies do not say that exceedences of the wq standard will NOT occur.

Page 6: [2] Comment [SS33] **Stephen Sweeney** **1/8/2015 3:50:00 PM**

Ex. 5 - Attorney Client

Page 8: [3] Comment [AC43] **Allison Castellan** **12/5/2014 3:55:00 PM**

HA: Several commenters (predominately industry) raised the paired watershed studies' preliminary results in defense of the ODF rules, possibly the only defense against the findings from the RipStream study, the IMST Report and the Sufficiency Analysis. As such, we felt we needed to mention this study in our rationale. However, these studies really represent a laboratory for a variety of studies that are being conducted, many of which are not are not relevant to our decision. The results of many of the relevant studies have yet to be published. DEQ has done a very good job at communicating the deficiencies of these studies (relative to inadequate riparian buffers) to ODF and the forestry industry. The strength of our position rests on the findings from RipStream, IMST and the Sufficiency Analysis, not with assessing the preliminary, unpublished results from the Paired Watershed Study. The study also seems to be a "pet project" of some of the Board of Forestry members who seem to react to negative criticism of the project. While I don't disagree with your comments, I suggest we stay with the language we have.

Page 8: [4] Comment [SS44] **Stephen Sweeney** **12/5/2014 3:55:00 PM**

Ex. 5 - Attorney Client

Page 8: [5] Comment [AC45] **Allison Castellan** **12/5/2014 3:55:00 PM**

L: This sentence could be interpreted that Ripstream showed no-effect also, not that Hinkle and Alsea actually had an effect (which is what I think you are saying with this sentence). You may want to rewrite this sentence.

Page 8: [6] Comment [AC47] **Allison Castellan** **1/8/2015 3:54:00 PM**

Ex. 5 - Attorney Client

Page 8: [7] Comment [HA48] **Henning, Alan** **12/22/2014 11:07:00 AM**

I don't have a problem with this statement, but I don't have a good feel for how it conflicts with the legislative history. However, if we do use the statement I would not include "temperature" and would not include "for salmon" in the statement. While temperature is the key pollutant of concern when dealing with "riparian buffers" the buffers also protect against sediment, turbidity, pesticide loading, etc. I also wouldn't narrow this to salmon because we also want to protect for other aquatic species especially in the type N streams. The language I suggest using is "Implementation and revision of such management measures are necessary to achieve and maintain water quality standards and to protect designated and beneficial uses."

Page 8: [8] Comment [L49] **Lynda** **12/5/2014 3:55:00 PM**

Statement as written makes it sound like the buffers need to be the same width regardless of the size of the stream. Is that what's intended and if so is there an explicit basis in the analysis for that conclusion? If yes, recommend adding to IMST paragraph a descriptor that the buffer findings applied regardless of stream size

HA: I modified the language to help clarify the statement. The IMST study essentially says that appropriate buffers (based on size of the stream) should be applied regardless of whether fish are present.

Page 13: [10] Comment [HA73] Henning, Alan 12/22/2014 3:16:00 PM

The State uses both reg. and vol. measures to address roads. Reg. measures don't address roads built before 1971 or roads built after 1971 that have not been reconstructed. Vol. measures need a tracking mechanism and need to show that fixes are working. Inventory and effectiveness monitoring data were not provide. In some cases the State's claim of passive restoration may be true, but we don't know where. We do know that legacy roads can continue to be sources of sediment especially if they were built on steep slopes and in unstable site conditions. We also know that lots of the timber harvest roads were built before the State established specific roads construction standards. An inventory of the legacy and old roads, the identification of problem areas, data on the fixes implemented and data on the effectiveness of the fixes is what we need from the state.

Page 13: [11] Comment [AC76] Allison Castellan 12/5/2014 3:55:00 PM

This is exactly what we said in the proposed decision in Dec. and the prior 2012 "Christmas Letter". Would changing "should" to "could" address?

Page 19: [12] Comment [AC117] Allison Castellan 1/8/2015 4:32:00 PM

The 1998 findings state that: "The rules do not contain restrictions for aerial application of herbicides, which would appear to leave type N streams still at risk" and call out our concern about the "adequacy of stream buffers during chemical application".

Therefore, I recommend we make a more general statement about the intent of the add MMs here…especially since not all of the actions we recommend at the end directly speak to "spray buffers" but all are aimed at achieving greater protection of non-fish bearing streams.

Jw- agreed

Page 19: [13] Comment [AC118] Allison Castellan 1/8/2015 4:32:00 PM

Is this in a document or series of policy statements? I believe it is, in which case it would be good to cite for consistency with the other items listed here.

Jw – Based on July 1, 2003 state submission, page 29, additional BMPs set by ODA and EPA are under FIFRA.

Page 19: [14] Comment [AC119] Allison Castellan 1/8/2015 4:36:00 PM

I don't believe this is a complete citation. Needs to be fleshed out.
JW – Allison, here's a link to the document. I don't see any publication numbers. We can also get Tetratech to do this for references.
http://www.oregon.gov/ODA/shared/Documents/Publications/PesticidesPARC/PesticideManagementPlanWaterQuality.pdf

Page 19: [15] Comment [AC120] Allison Castellan 1/8/2015 4:36:00 PM

Does this have something to cite? Even a website explaining the program would be helpful.
JW – I added a citation below for the Pesticide Stewardship Partnership.
http://www.deq.state.or.us/wq/pubs/factsheets/community/pesticide.pdf
They also have a website.

Page 19: [16] Comment [AC121] Allison Castellan 1/8/2015 4:32:00 PM

Can we cite anything to support this statement
JW – I could only get the abstract for this, so need to read the entire article. But even the abstract speaks to herbicides playing a big role in forestry management.
http://www.readcube.com/articles/10.2193%2F0091-7648%282004%29032%5B1028%3ATROHFE%5D2.0.CO%3B2?r3_referer=wol&show_checkout=1&tracking_ac

Page 19: [17] Comment [AC122] **Allison Castellan** **1/8/2015 4:32:00 PM**

Add a fee citations to support this statement---more recent studies that NMFS cited in BiOp? would be better than stuff from the 70s from the (g) guidance. Use footnote style that does not include researchers in the text of the doc. *jw - I'm working on getting citations for this sentence. I have general references, but I think recent ones would be better. Let's also include the 1991 Norris and S.V. Gregory which is pretty recent.*

Page 22: [18] Comment [AC137] **Allison Castellan** **1/8/2015 4:32:00 PM**

This conclusory statement from Dent can't be applied to all the studies discussed in this para. It's placement here is very misleading and not a statement we would want to be making since Dent only made that conclusion based on their work. *JW – I didn't look carefully at what you deleted, but the paragraph with no markups read smoothly.*

Page 22: [19] Comment [WJ140] **Wu, Jennifer** **1/12/2015 11:04:00 AM**

Ex. 5 - Deliberative

Page 22: [20] Comment [SS141] **Stephen Sweeney** **1/8/2015 4:32:00 PM**

Ex. 5 - Attorney Client

Page 22: [21] Comment [AC142] **Allison Castellan** **1/8/2015 4:32:00 PM**

See revisions to other sections above that make a more explicit supported finding that add MMs are needed because of the "reasonable foreseeable" threat to coastal waters, etc.

This statement is made to

Page 22: [22] Comment [AC144] **Allison Castellan** **1/8/2015 4:44:00 PM**

Need to respond to Steves' comments on NPDES. I'm not familiar.

JW – I think Alan already looked into this, but I'll ask around.

Page 24: [23] Comment [AC166] **Allison Castellan** **1/8/2015 4:32:00 PM**

I don't this is done already but I could be wrong. If they expand the guidelines to include recommended spray buffer widths as well, would be extra valuable. *JW - yes.*

Page 24: [24] Comment [JW167] **Jenny Wu** **1/8/2015 11:19:00 PM**

I took this out. I think the focus for the ODF Notification of Operation form is the check box ofor aerial applicators to adhere to FIFRA labels. I don't know if the ODF Notification of Operation form also has a place for reocommended best practices.

Page 24: [25] Comment [AC168] **Allison Castellan** **1/8/2015 4:32:00 PM**

Ex. 5 - Deliberative

Page 24: [26] Comment [AC169] **Allison Castellan** **1/8/2015 4:32:00 PM**

The state can't take this action but they can encourage applicators do so.

Page 24: [27] Comment [N171] **NOSTEMP** **1/8/2015 4:32:00 PM**

Ex. 5 - Attorney Client