

Response to DNR/Timber Comments on LO Working Draft

We have read the comments on the draft sockeye recovery plan from Norm Schaaf of Merrill & Ring, Harry Bell of Green Crow and Jim Springer and Seth Barnes of WADNR. They elaborate a single argument; asserting that the current Working Draft is basically flawed because it goes beyond the rules and regulations imposed by the Forests and Fish HCP. The spokespeople for the timber industry make their continued participation in the Steering Committee contingent on forcing major changes in the recovery plan and the Limiting Factors Analysis which informs it.

All these comments criticize specific positions and arguments we have advanced. In fact, Harry Bell blames “*special interest individuals*” for creating, in his opinion, the problems of the draft plan. We assume this reference is to us and to our views. In any case, we will respond as if it is.

Let us dispose of one point right up front. We know that this recovery plan will not be “law” and will not replace existing administrative “rules.” DNR states: “*My (?) suggestion is that prior to stating any action items a paragraph be written which clearly explains that any actions listed that are not currently found within state or federal law or statute are suggestions and are therefore voluntary in nature.*”

Unlike both the DNR comments and those of Norm Schaaf, we don’t assume that this is the end of the discussion. This statement and other timber industry criticisms of the Working Draft present the Forests and Fish system as a completed set of fixed regulations and procedures, accepted by NOAA in the FFHCP, and ready for the chisel and the granite. This position is in striking contrast to their arguments when it’s more useful to show some concern with environmental issues. Then their emphasis is on the system’s alleged flexibility and its claim to be a mechanism for “adaptive management”.

We can all read and we can all think. Tedious as it might be, let’s look at the actual law to evaluate some of these tendentious self-serving legal interpretations by very interested parties.

“The legislature further finds that the changes in laws and rules contemplated by Chapter 4, Laws of 1999, taken as a whole, constitute a comprehensive and coordinated program to provide substantial and sufficient contributions to salmon recovery and water quality enhancement in areas impacted by forest practices and are intended to fully satisfy the requirements of the endangered species act (16 U.S.C. Sec. 1531 et. seq.) with respect to the incidental take of salmon and other aquatic resources and the clean water act (33 U.S.C. Sec. 1251 et. seq.) with respect to non point source pollution attributable to forest practices.” (RCW 77.85.180 (2))

For our purposes as well, the Forests and Fish rules system should be “*taken as a whole*”. The legislature “*finds*” that this system will provide “*sufficient contributions to salmon recovery,*” and that it is “*intended to fully satisfy*” the federal endangered species and clean water acts. However, the statute doesn’t demonstrate that it will do either, and a substantial body of opinion holds that it will do neither. Practical on-going demonstrations of the system’s ability to actually achieve specific environmental goals should be crucial to NOAA’s continuing acceptance of the 2005 FFHCP, an acceptance based on very little evidence of such achievements.

Taken as a whole, the FFHCP includes an adaptive management section to provide “*...assurances that rules and guidance not meeting aquatic resource objective will be modified in a streamlined and timely manner.*” (WAC 222-08 (2)). The Ozette Sockeye Recovery Plan is being developed to recover an endangered salmon stock. Its recommended actions embody the best available judgments about what is required to achieve and maintain adequate sockeye habitat. The action plan will clarify the “*sufficient contributions*” needed to protect this state resource and meet the requirements of the federal statutes.

A serious recovery plan for an endangered salmon stock must consider habitat protections beyond those dictated by current forest practice rules. If it does not - or if it cannot - there is either little need for a recovery plan or, more likely, no possibility that it will achieve success. Where the action proposals in the Ozette Recovery Plan go beyond current Forest and Fish Rules, the adaptive management mechanism should be triggered, allowing the system to “*adjust rules and guidance...in a streamlined and timely manner*” (WAC 222-12-045 (1), and ensuring that the FFHCP actually does “*fully satisfy*” the endangered species act. Proposed habitat protection measures that go beyond existing rules would be integrated into the system through the “independent” “adaptive management program administrator” designated in WAC 222-12-045 (2) (b) (iii). We will watch to see if things work this way.

Certainly this is the reasonable interpretation of the realities and legalities of the situation. Who could possibly take the unsupported general predictions in the statute preamble as a reason to exclude serious scientifically-based proposals to restore natural habitat process in the Ozette watershed in a NOAA- organized plan for recovering a threatened salmon stock? Norm Schaaf? Harry Bell? Jim Springer? If the Ozette sockeye recovery plan cannot be reconciled with the WACs and the RCWs of existing forest practices, it does more than suggest a need to rework the recovery plan--**it brings the FFHCP into question.**

It is true that specific actions proposed in the recovery plan will require voluntary private landowner cooperation. However, the timber interests’ generally non-cooperative stance cannot be reconciled with their professed commitment to Ozette sockeye recovery. It conflicts with the “*legislative findings*” cited above and with the assurances made to federal agencies in the lobbying for the FFHCP. Such non-cooperation should not be without consequences. We will try to make them significant.

The extent of cooperation and the areas of contention on these habitat issues must be clarified before the Ozette sockeye recovery plan can proceed. A systematic plan of work is impossible if every action proposal must be dealt with individually and ad hoc, searching for some illusory “consensus” through a piecemeal reconciliation process.

We would like to make some additional comments on points raised by the timber companies and the DNR. Harry Bell states: “*We are particularly concerned with the shift from a Sockeye Recovery Plan to “Ecosystem Management Plan”. They are not the same. By implementing FFR and the HCP we are doing the former. We do not support the latter.*”

The best we can make of this is that Green Crow opposes the Roni recovery model, which prioritizes the restoration of natural watershed processes. We thought this approach had been adopted without a lot of debate and dissent. If Bell is raising some different issue, he needs to clarify it. If he is challenging this approach, we’d like to understand what alternative he is suggesting...beyond business as usual.

Norm Schaaf’s three bullet points on the draft section 2.2.4 raise similar questions. Each of his three points are arguments against the position that sockeye recovery depends on the restoration of natural watershed processes in critical sections of their habitat – the lynchpin of this and other NOAA salmon recovery plans. When Schaaf repeatedly maintains that there is “*no evidence*” ...; “*no evidence whatsoever...*”; “*no evidence...*” - the “evidence” that he mistakenly claims is lacking is that which supports the relevance and importance of restoring natural processes.

Schaaf’s first bullet point on draft section 2.3.2 challenges the following: “*Eliminate or strictly limit road and logging related sediment inputs...*” Schaaf argues that the FFHCP only requires that sediment be “*minimized*” and that its impact on fish and on water quality be “*reduced.*” He’s quite right on this point, and the difference between the FFHCP and the draft recovery plan is

significant. The existing forest practice rules on sediment input are vague and do not establish clear limits or require systematic monitoring and measurements. This is an area where the forest practice rules and DNR's interpretation and enforcement of them must be strengthened in order to adequately protect the necessary habitat for recovery of Ozette sockeye.

On this point also, Schaaf asks for evidence... this time it is evidence that "...*enforcement is currently inadequate or that rules and laws are being violated...*". On the particular point the problem is the inadequate rule more than poor enforcement. However, since Schaaf asks for examples of inadequate enforcement and rules violations, we'll provide a few later. Be careful what you ask for

The last 6 of Schaaf's bullet points on section 6.8, the "miscellaneous" section, criticize positions that we recognize as ours. Schaaf would delete all of them. He argues that most of them contradict Forest Practice Rules but provides no evidence that this is the case. The rest he just doesn't like – quite understandably we would say.

We know that Schaaf is on the Forest Practices Board and we definitely are not. Nevertheless, we don't accept his unsupported assertions that various particular proposals are "*in complete contradiction to the Forest Practice Rules and HCP*". Our proposals are specific approaches to restoring natural processes in crucial segments of Ozette sockeye habitat. Some definitely do go beyond existing rules and we state as much. Some question the way existing rules are interpreted. And some charge that certain useful rules are not implemented and should be. These all point to possible ways to restore natural processes. We recognize these are not the only possible approaches to this goal and are open to hearing and discussing alternatives. The Schaaf response is not such an alternative because he challenges the centrality of the strategic goal to the recovery of Ozette sockeye habitat.

In general, describing our package of proposals as "*in complete contradiction*" with the FFHCP stretches the meaning of the language. However, there is one point on which it is accurate. The recovery plan should emphasize the actions that are the most protective of sockeye stocks and sockeye habitat, whether or not logging is curtailed. Those, such as Schaaf, who advocate options less restrictive to logging, have the responsibility to provide the "evidence" that their approach will be equally or more protective of the endangered Ozette sockeye stocks. We do want the Ozette recovery plan to "*prioritize salmon recovery over the economics of the market for wood*". We do agree that this is in "*complete contradiction*" with the underlying rationale of the Forest & Fish Rules.

Our final point concerns DNR enforcement of the FFHCP and DNR's role in the "adaptive management" component of the FFHCP. This point is also raised in the Schaaf criticisms, but we think DNR response presents the issue more clearly:

"The DNR has the authority to enforce existing state laws and rules on forest land; this authority is limited to the rules adopted by the Forest Practices Boards (WACs) and the codes enacted by the State Legislature (RCWs)"

This part of DNR's response to the Working Draft is evasive nonsense. We are not fans of the Forests & Fish structure, however it is not nearly as toothless as this statement suggests. DNR has primary jurisdiction over state resources on upland and riparian timber lands. Beyond its management of state-owned forest lands and its regulatory authority over private timberlands, DNR also plays the leading role on the rule-making Forest Practices Board and in the Cooperative Monitoring, and Evaluation and Research structure. The jurisdiction and authority of DOE, WDFW, and the Tribes are strictly circumscribed and there are regular efforts to reduce them further. Like most bureaucracies, DNR attempts to maximize its jurisdiction and authority while minimizing its responsibilities and accountability. DNR has clear authority to do whatever is necessary to protect

state resources; however it routinely makes the institutional choice to dilute or evade this responsibility. While there are some limits on DNR authority, our concern is the limits it places on itself.

Here are a few areas where DNR authority need not be limited to the “rules” and “codes” in the manner suggested by their response:

- The Forest Practice Rules give DNR authority to trigger a SEPA review (WAC 222-10-010 (4) (5)). FPAs and management practices that conflict with a recovery plan for an endangered stock can be reviewed under this authority.
- The Forest Practice Rules give DNR the responsibility to “*determine the rate of timber harvest*”. (WAC 222-30-120) The DNR thinks we interpret this point to mean that DNR can set the cutting rotation for timber harvest. In fact, the rule means what it says: DNR is to collect the information necessary to determine if shorter cutting rotations are “*compatible with protection of public resources*”. The Ozette recovery draft suggests they are not compatible. We agree. Where does DNR stand, and where are the appropriate determinations of the rate of harvest in the Ozette basin?
- The Forest Practice Rules give DNR authority to approve “Alternate Plan” FPAs, if they provide “*...protection to public resources at least equal in overall effectiveness...*” (WAC 222-12-040 (1)). DNR should not approve alternate plan FPAs that conflict with a recovery plan for an endangered species. By definition these are unlikely to provide “*...protection to public resources at least equal...*”
- The Forest Practice Rules place primary responsibility for “adaptive management” on the Forest Practices Board and in CMER (WAC 222-12-045 (1), (2-b-i)), and gives DNR the leading role in both. If a recovery plan contains resource goals incompatible with current rules, or with the way they are being implemented, DNR can initiate or support the adjustment of “rules and guidance” through the adaptive management procedures. In fact, it should be obligated to do this to justify the FFHCP.
- The Forest Practice Rules raise the issue of “*combined and cumulative effects*” in the Watershed Analysis section (WAC 222- 22-010 (1)). While this section doesn’t direct DNR to consider these issues when approving FPAs, we know that it can do this and at times it has. We think that it certainly should take this approach to FPAs in critical Ozette watersheds where the Ozette recovery plan has documented negative combined and cumulative impacts.
- The Forest Practice Rules and the Forests & Fish statutes give DNR authority to determine “*representatives on inspections*” (WAC 222-46-012) (RCW 76.09-150 (4)). This provides DNR with the tools for the cooperative monitoring of forest practices and watershed conditions needed in the recovery program...if it chooses to use them.

Many of these actions and approaches would be appealed by the timber companies, and in some cases the appeal would be successful. However, where endangered species recovery plans are involved, adaptive management dictates implementing the course most protective of the endangered resource until the disputed issues are resolved on their merits. In this situation, DNR must function as an advocate for public interests and resources, not as public defender for the timber industry.

Our last point moves from the issue of the scope of DNR authority to the adequacy of its exercise of this authority. DNR's response states: "2.. *There is an assumption here that the rules and laws are not being 'fully' enforced and that is the message sent to the reader with this statement. The Department does not share this opinion.*"

In fact, DNR's own recently released FPA compliance review indicates its problems with "fully" enforcing the FFHCP. According to the Seattle Post-Intelligencer, Wednesday, February 14, 2007:

"The report admits that the 97 timber operations checked were not a large enough number to make the review statistically significant among the thousands of timber cuts annually authorized in the state. To be statistically significant, the review would have to include more than 500 logging sites, which is impossible 'within current budget and time constraints', the report says."

One reason for the lack of "full" enforcement is that DNR is woefully understaffed, forcing it to rely heavily on information from, and cooperation with, the regulated companies. Few FPAs, if any, are inspected systematically, prior to, during and after cutting – and certainly not with a full ID team. Many are not inspected at all. There is very little chance that any inspections will look at all the issues associated with each individual FPA. Without additional resources, there is no way that DNR can or will oversee FPAs in the Ozette watershed in a manner consistent with protecting an endangered stock. A similar argument applies to RMAPs. DNR is not adequately staffed to inspect the road systems or to critically evaluate the different priorities and practices implemented in the various logging companies' RMAPs.

We want to list some specific issues where DNR enforcement of the FFR is problematic. These are in addition to the examples cited in the Limiting Factors analysis. On our Ozette tour last fall we saw a culvert removal that left a substantial sediment wedge to flush out into type F waters and a road "improvement" that positioned a cross drain to deliver road surface water and sediment directly into type F water. The fact that DNR presented each of these as examples of good work, not as problems, is not reassuring.

Our direct experience with DNR enforcement is not in the Ozette Watershed, but we assume that it involves the same protocols and procedures. We can point to two specific areas where we believe DNR enforcement is chronically lacking.

DNR has allowed logging through virtually all privately-owned off-channel forested fish habitats in flood plains in WRIA's 19 & 20 – sometimes more than once. Without a specific permit, such logging is absolutely barred under current rules and, we understand, it was also barred under the old rules. This happens because DNR relies on inadequate habitat default procedures, and, worse, on water typing done by the landowner. These substitute for adequate habitat models or, better, actually checking for fish at the times of the year when the fish might be present.

DNR is the primary enforcement for state water quality standards on forest and fish land. Some of these standards are quite specific:

WAC 173-201A: "*Turbidity shall not exceed 5 NTU [nephelometric turbidity units] over background turbidity when turbidity is 50 NTU or less OR "Turbidity shall not exceed a 10%*

increase in turbidity when the background turbidity is more than 50 NTU. “Background” (is defined as the condition) “outside the area of influence of the discharge under consideration”.

DNR does not enforce this limit. Nor can it, since it does not routinely measure turbidity and sediment levels during rain events where the limits are most likely to be exceeded. Instead of evaluations based on clear quantitative standards, DNR relies extensively on subjective qualitative judgments about practices that supposedly will “minimize”, “reduce”, or “limit” turbidity and sedimentation. The failure to implement this straightforward water quality rule is justified with reference to the inadequate Forests and Fish rules on the same subject, e.g. “Road Construction and Maintenance” WAC 222-224-10 (2). We could make similar arguments about other water quality issues such as temperatures.

This is all we have for the moment. We would like to assure Ian McIver that we actually wrote the above – all by ourselves.

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