



Nez Perce

TRIBAL EXECUTIVE COMMITTEE
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June 26, 2013

By Electronic Mail (aandrea@idl.idaho.gov)

Ara Andrea
Service and Regulatory Program Manager, Forest Practices Act
Idaho Department of Lands
3284 W. Industrial Loop
Coeur d'Alene, Idaho 83815

Re: Nez Perce Tribe's comments on the Idaho Forest Practice Act changes related to the Streamside Protection Rule (Section 20.02.01.030.07.e.ii), Docket No. 20-0201-1301

Dear Ms. Andrea:

The Nez Perce Tribe appreciates the opportunity to comment on the Idaho Forest Practices Act proposed rule changes related to the Streamside Protection Rule (Section 20.020.01.030.07.e.ii), Docket No. 20-0201-1301.

Proposal

As a result of quadrennial water-quality audits conducted by the Idaho Department of Environmental Quality (IDEQ) in 2000 and 2004, the Idaho Forest Practices Act Advisory Committee has been working over the last 10 years to develop a science-based streamside tree-retention rule (shade rule) that is based on Idaho forest riparian data. The proposed shade rule will allow forest landowners to select from two options which are meant to address both shade and large wood recruitment in streams. Under Option 1, live conifers and hardwoods will be retained to maintain a minimum relative stocking per acre of sixty (60). A relative stocking per acre of thirty (30) must be retained in the stream protection zone between twenty-five (25) feet and seventy-five (75) feet from the ordinary high water mark on both sides of the stream.

Under Option 2, within fifty (50) feet from the ordinary high water mark on each side of a stream, live conifers and hardwoods will be retained to maintain a minimum relative stocking per acre of sixty (60). A relative stocking per acre of ten (10) must be retained in the stream

protection zone between fifty (50) feet and seventy-five (75) feet from the ordinary high water mark on both sides of the stream.

Background

Since time immemorial the Tribe has used and occupied the lands and waters of north-central Idaho, southeastern Washington, northeastern Oregon and areas of Montana for subsistence, ceremonial, commercial, and religious purposes. In 1855 the United States negotiated a treaty with the Tribe. Treaty of June 9, 1855, with the Nez Perces, 12 Stat. 957 (1859). In Article 3 of this treaty, the Tribe explicitly reserved to itself certain rights, including “the exclusive right to take fish in streams running through or bordering the Reservation,” “the right to take fish at all usual and accustomed places in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed lands.” These reserved rights include the right to access and fish at all of the Tribe’s usual and accustomed places in Idaho.

Salmon, steelhead, sturgeon and lamprey are integral to the spiritual, physical and economic health of the Tribe. The Tribe reveres the fishery and the waters that support the life and sustenance these resources have given, and continue to provide Tribal members. The Snake River corridor is an important migratory route for threatened spring, summer, and fall Chinook salmon and steelhead, as well lamprey and sturgeon. Any activities that potentially threaten these important resources are of great concern to the Tribe.

Shade Rule Analysis

The Tribe recognizes and appreciates that the IFPAAC acknowledges the findings of the 2000 Forest Practices Audit and as a result has committed to revising the Shade Rule. The Tribe is concerned, however, that neither option under the proposed rule will adequately protect aquatic resources by safeguarding riparian areas.

Timber harvesting can negatively affect streams and water quality in several ways. Erosion and sedimentation in streams is one of the biggest problems associated with logging. Much of the sediment comes from roads built and utilized during logging operations (Beschta 1978; Burroughs and Kings 1989), but sediment also originates from removal of slash or vegetation with heavy equipment (Beschta 1979). Runoff and erosion increases after logging as a result of compaction of soils by heavy machinery, decreased water infiltration, and reduced evapotranspiration (Niemuth et al. 2004). Excessive sedimentation is a problem, because it increases turbidity, reduces dissolved oxygen, and can bury eggs and suffocate fish (Moring 1982; Newcombe and McDonald 1991).

Other problems caused by logging in the riparian area include an increase in stream temperature (e.g., Lynch et al. 1984), increase in algal blooms, bank destabilization, loss of large woody debris contributing to channel complexity, and a decrease in organic matter input. These changes can be detrimental to aquatic species both directly and indirectly by causing a change in macroinvertebrate populations that are an important source of food for aquatic species. Logging can also destroy habitat favored by other species of plants and animals (e.g., Brosofske et al. 1997).

First, the Tribe's preliminary review of the proposed Shade Rule indicates that the revisions are significantly less protective than the U.S. Fish and Wildlife Service's PACFISH/INFISH buffers. PACFISH was produced by the United States Forest Service and the Bureau of Land Management to establish habitat conservation areas on Forest Service and BLM lands for Pacific salmon species in and along rivers and streams, and to set goals and standards to protect salmon species within that habitat. Specifically, the PACFISH identifies and addresses riparian goals, objectives, standards and guidelines; riparian habitat conservation areas (RHCA's); key watersheds; watershed analysis; watershed restoration and watershed monitoring. PACFISH standards for Class I, fish-streams is a 300-foot buffer; Class II perennial stream without fish is 150-feet; and a Class III intermittent stream is 100 feet.

Second, the Tribe's review indicates that the proposed rule would appear to allow vegetative densities to fall below levels necessary for provision of adequate shade, sediment filtration, LWD recruitment, bank stabilization and macroinvertebrate production. Stream habitat recovery for ESA listed species is dependent in some areas on large woody debris input. This would diminish the potential for fish recovery by removing a needed element for stream habitat complexity and function. As a result, the Tribe is concerned that the existing proposal will not be sufficient to ensure protection and adherence of State Water Quality Standards. For waterbodies that do not currently meet water quality criteria, for example, the Tribe is concerned that the proposal may result in further degradation of those waterbodies in violation of IDAPA direction. Our understanding is that EPA shares many of the Tribe's concerns with respect to protecting water quality standards and riparian habitat, and has communicated those concerns directly to IDL.

Third, the Tribe was unable to identify in the proposed rule that monitoring will be performed to support the proposed changes. Effectiveness monitoring is vital to ensure that the proposed changes are complying with applicable water quality standards as well as the intent of the proposed rule.

Finally, the Tribe observes that the proposed rule appears to be inconsistent with terms in Section II.B.2 of the Snake River Basin Adjudication Mediator's Term Sheet, adopted on April 20, 2004, wherein the State of Idaho and the United States agreed to negotiate an Idaho Forestry Program

under Section 6 of the ESA that would not vary materially from the terms specified in the Mediator's Term Sheet.

According to the executive summary available on IDL's website, the Idaho Forestry Program (IFP) is an integral part of an application to the U.S. Department of Interior Fish and Wildlife Service (FWS) and U.S. Department of Commerce National Oceanic and Atmospheric Administration National Marine Fisheries Service (NMFS) for incidental take coverage for four native fish species listed as threatened or endangered under the Federal Endangered Species Act (ESA). The intent of the IFP is to 1) provide conservation benefits for listed species under section 6(c)(1) of the ESA that are in addition to those provided under existing laws and regulations, 2) provide for a stable, long-term IFP for the management of forest resources on enrolled state and private lands in the Salmon and Clearwater River basins in Idaho consistent with the conservation of listed fish species under section 6 of the ESA, 3) actively manage the IFP to assist in the survival and recovery of listed fish species and the protection of their habitat, and 4) provide a mechanism for enrollees implementing IFP measures to receive incidental take coverage for those actions that may affect listed fish species or their habitat in the project area.

The Executive Summary explicitly affirms the State of Idaho's commitment to ensuring consistency between the IFP and the SRBA terms. The Tribe's review of the proposed rule suggests that there are inconsistencies between the proposed rule and the IFP, and the SRBA terms on which the IFP is based.

Conclusion

Thank you again for the opportunity to comment on the proposed rule. The Tribe values its relationship with the State of Idaho and recognizes our common goal of protecting the natural resources on which our citizens and future generations depend. The Tribe looks forward to working with IDL to address the Tribe's comments and extends an open invitation to the agency to discuss them at a staff-to-staff or more formal level.

If you have any questions or wish to arrange a meeting, please contact Michael Lopez, Staff Attorney, Nez Perce Tribe Office of Legal Counsel, at (208) 843-7355, or by email at mikel@nezperce.org.

Sincerely,



for Silas C. Whitman
Chairman