

OREGONIANS IN ACTION

July 22, 2015

Oregon Board of Forestry
2600 State Street
Salem, OR 97310

Re: Riparian Rule Proscriptions

Board Members:

Thank you for the opportunity to testify on the Board's proposed riparian rules, which could add significant additional restrictions on harvest activities on Oregon's private lands. On behalf of the nearly 10,000 Oregon property owners who contribute to our organization, including many industrial and non-industrial forestland owners, we write to encourage the Board to bear in mind its obligations under Ballot Measure 49 when considering a increased streamside harvest setbacks.

As you may be aware, in 2004, Oregon voters approved Ballot Measure 37, a measure designed to provide protection to property owners from future land use regulations that resulted in further limitations on property uses. Oregonians In Action led the campaign for passage of the measure, which received significant financial support from industrial and non-industrial forestland owners, precisely out of concern for the financial impact to their forestland from laws and rules similar to those you are presently considering.

The goal of Measure 37 was to provide Oregon property owners with the assurance that the rights to use the land would be subject to the limitations that were in place when the land was acquired, but that new regulations which further restricted the use of land would require the payment of compensation by the governing body imposing the regulation. In essence, Measure 37 could be viewed as a "grandfather clause" law.

To no one's surprise, Measure 37 proved to be controversial. Significant claims were filed across the state, and the potential impact to state government was substantial. Consequently, the 2007 Oregon legislature referred Measure 49 to the ballot, where it was adopted by voters. Measure 49 altered and limited Measure 37, but retained significant protection for Oregon private property owners from new land use regulations. Measure 49 was further amended by the Oregon legislature in 2009 to add additional protections for Oregon forestland owners, and is codified in Chapter 195 of the Oregon Revised Statutes.

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The riparian rules that you are presently contemplating are precisely the type of rule that would trigger Measure 49 claims. Depending upon what you ultimately enact, new streamside setbacks on timber harvests could generate a few Measure 49 claims, or thousands of them. A review of the language of Measure 49, however, shows that proposed riparian setbacks would fall within the ambit of Measure 49.

As indicated above, Measure 49 applies to new "land use regulations". The definition of "land use regulation" for purposes of Measure 49 is found in ORS 195.300(14), and includes:

- "(e) A provision, enacted or adopted on or after January 1, 2010, of:
 - (A) The Oregon Forest Practices Act;
 - (B) An administrative rule of the State Board of Forestry; or
 - (C) Any other law enacted, or rule adopted, solely for the purpose of regulating a forest practice.

Given this definition, should you choose to enact new administrative rules, those rules will constitute "land use regulations" for purposes of Measure 49 analysis.

When a "land use regulation" is enacted by a public entity, and the result of the land use regulation 1) restricts the use of private property for a forest practice, and 2) reduces the fair market value of the property, then the property owner impacted by the regulation is entitled to bring a Measure 49 claim against the public entity that enacted the new law/regulation. ORS 195.305(1). In this case, that would be the Oregon Department of Forestry ("ODF").

Measure 49 claims are made by filing a claim with the public entity responsible for enacting the "land use regulation". ORS 195.312(3). The property owner filing the claim is entitled to "just compensation," which would include either 1) payment by the agency responsible for the new land use regulation of the difference in fair market value between the property with the new restrictions and the property without, or 2) a waiver of the new land use regulation to enable the property owner to use the land in the manner authorized prior to the enactment of the land use regulation. ORS 195.310(6).

There are exceptions to coverage under Measure 49. Those exceptions are found in ORS 195.305(3), and include "land use regulations" that are enacted to protect the public health and safety (ORS 195.305(3)(b)) and "land use regulations" that are enacted as a requirement to comply with federal law (ORS 195.305(3)(c)). In the case of "land use regulations" that limit forest practices, these exceptions are construed very narrowly. A new "land use regulation" limiting forest practices will be exempt from Measure 49 claims under the "public health" exemption only if the primary purpose of the new regulation is the protection of *human* health and safety. ORS 195.305(4)(b). Likewise, the "federal requirement" exception under ORS 195.305(3)(c) is only triggered when the public entity enacting the regulation "has no discretion under federal law to decline to enact the regulation." ORS 195.305(4)(c). Neither of these exceptions would apply to the Board rulemaking under consideration.

With regard to the “public health” exception, the water quality standard driving the Board’s deliberations protects salmon, steelhead, and bull trout, OAR 340-041-0028(11). Because the primary purpose of the rulemaking is not the protection of *human* health and safety, the “public health” exemption to Measure 49 would not apply.

With regard to the “federal requirement” exception, you would have to demonstrate that you are required by federal law to enact the proposed rules in order to be protected from Measure 49 claims. Although we have not seen an analysis of the impact of Measure 49 on the Board’s proposed rules, we have been informed that the DOJ may take the position that the “federal requirement” provisions of ORS 195.305(3)(c) insulate the proposed rules from Measure 49 claims. With due respect to DOJ, this is wrong as a matter of law.

As stated by the Ninth Circuit, “the federal Clean Water Act uses a carrot-and-stick approach to attaining acceptable water quality *without direct federal regulation of nonpoint sources of pollution.*” *Pronsolino v. Nastri*, 291 F3d 1123, 1127 (9th Cir 2002) (emphasis added). States must designate uses for all water bodies in the state, set water quality standards for all such uses, identify those water bodies not meeting water quality standards, and prepare “total maximum daily loads” or “TMDLs” for all such impaired water bodies. Point sources may discharge pollutants only in accordance with a §402 point source permit, and states may only issue such permits if they would otherwise meet the waste load allocations under an EPA-approved TMDL. However, no such permitting scheme is required for nonpoint source dischargers. While states must prepare §303 implementation *plans* for TMDLs, “[s]tates must implement TMDLs only to the extent that they seek to avoid losing federal grant money; there is no pertinent statutory provision otherwise requiring implementation of §303 plans or providing for their enforcement.” *Id.* at 1140. That is, the Clean Water Act does not “require” states to control nonpoint source pollution.¹ Rather, the penalty for failure to implement TMDLs is a loss of grant funding. Because the decision of whether to implement §303 plans is discretionary with the state, the “federal requirement” exception to Measure 49 does not apply.²

Because none of the relevant Measure 49 exceptions apply, if the Board were to enact a new regulation that increased riparian setbacks, with limitations (or prohibitions) on harvest activities within those setbacks, the new rules would constitute “land use regulations” for purposes of Measure 49, would trigger Measure 49 claims by industrial and non-industrial forestland owners, and would require the

¹ While one could argue that nonpoint source regulations is “required” to obtain §319 grant funding, Measure 49 is clear that the “federal requirement” exemption only applies if the regulating entity “has no discretion under federal law to decline to enact the regulation.” As stated in *Pronsolino*, the state is under no obligation to implement TMDLs, and there is no federal authority to enforce §303(e) implementation plans. The state has clear authority to decline to enact the regulation.

² While the Board of Forestry may be obligated by ORS 527.765 to “insure . . . to the maximum extent practicable nonpoint source discharges of pollutants resulting from forest operations on forestlands do not impair the achievement and maintenance of water quality standards,” this is a requirement of *state* law. That is, while Oregon law may require the Board to act, no such requirement exists under *federal* law, and for that reason, the “federal requirement” exception to Measure 49 would not apply to the proposed rulemaking. Measure 49 is a shield against uncompensated state regulations, and forest practices act regulations are specifically included.

payment of just compensation by ODF, which would include either payment of the financial impact created by the new rules or a waiver of those new rules to allow the property owner to continue forest practices as they were prior to the enactment of the rule.

In summary, please bear in mind your obligations under Measure 49 when promulgating new stream protection rules. To the extent that the Board requires large setbacks, the agency will almost certainly be flooded with Measure 49 claims that will, if nothing else, consume a large amount of staff time. In the end, the rule will either be enormously expensive for the state given the obligation to compensate landowners, or the rule will not be effective because ODF is forced to waive its enforcement. In this light, we would encourage you to pursue voluntary measures that have proven to be effective historically, and avoid onerous new land use regulations that will trigger Measure 49.

Very Truly Yours,



David J. Hunnicutt

President