Measure 49, Forest Practices, and Moratoria, Technical Memorandum
March 30, 2017

FROM: Amanda Punton, DLCD staff

TO: Jim Rue, DLCD Director

RE: Potential conflicts with state law related to Measure 49, Forest Practices
Preemption, and moratoria

Background

On April 14, 2016, the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (“NMFS”) released a Biological Opinion (the “BiOp”) analyzing the Federal Emergency Management Agency’s (“FEMA’s”) implementation of the National Flood Insurance in Program (the “NFIP”) in Oregon. The BiOp concludes that FEMA’s proposed action will jeopardize the continued existence of 16 anadromous fish species and Southern Resident killer whales listed as threatened or endangered under the Endangered Species Act (the “ESA”). For this reason, the BiOp includes a “reasonable and prudent alternative,” (the “RPA”) that proposes, among other things, certain “interim measures” that NMFS suggests are necessary until more permanent measures to avoid jeopardy are in place.1 More information on the BiOp is available at http://www.oregon.gov/LCD/Pages/NFIP_BiOp.aspx.

In Oregon the management of floodplains occurs within the overarching structure of the state land use program and other state laws and rules. FEMA has asked the Oregon Department of Land Conservation and Development (DLCD) for information on how Oregon statutes and administrative rules will affect the ability of an NFIP participating community to adopt new floodplain habitat preservation standards. DLCD enlisted volunteers with knowledgeable of Oregon’s laws and rules to help compile this information. Workgroup members added regulatory takings to the list of legal issues that needed to be recognized and understood as FEMA pursues implementation of interim measures.

The content of this memo was produced by members of the Regulatory Issues Workgroup. This document includes review and interpretation of state law. It should not be considered a policy statement or an endorsement of policies or policy approaches by any specific participating agency or member.

INTRODUCTION

1 The BiOp provides that the interim measures “while protective of habitat and listed species as interim measures, are a subset of, and less protective of important habitat features and processes than, the full RPA and are insufficient by themselves to avoid jeopardy or adverse modification over time.” BiOp, at 280.

Memo based on discussions and input from DLCD’s NFIP BiOp Regulatory Issues Workgroup.
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The interim measures call for FEMA to require that participating communities adopt ordinances that constrain certain development activities in mapped floodplains (the “Interim Development Restrictions”). The Interim Development Restrictions include:

1. A requirement to mitigate all “development”\(^3\) in the Special Flood Hazard Area (the “SFHA”) to achieve no net loss of natural floodplain functions, including specific mitigation ratios for lost flood storage and tree removal.

2. A requirement to identify a “riparian buffer zone” (the “RBZ”) measured 170’ from the ordinary high water mark of perennial and intermittent stream, and limit the types of development allowed in the RBZ to: (1) water dependent uses, (2) habitat restoration activities, (3) activities that result in a beneficial gain for the species or habitat, and (4) activities that will have no adverse effects on listed species or habitat, i.e., activities that will not degrade or limit natural floodplain functions in any way.

In addition to the Interim Development Restrictions, RPA Element 2 calls for FEMA to condition Letters of Map Revision and Conditional Letters of Map Revision such that projects will have no adverse effect on natural floodplain functions. The interim measures also require that participating communities track all permitted development activities and associated mitigation and report to FEMA “as soon as practicable.”

This memorandum analyzes several provisions of Oregon law that may restrain or preclude participating communities from implementing the Interim Development Restrictions. Section A, below, describes the compensation obligations arising under Measure 49. Section B describes how regulation of forest practices is preempted by state law. Finally, Section C analyzes the degree to which implementation of the Interim Development Restrictions may amount to \emph{de facto} development moratoria in violation of Oregon law.

\(^2\) Though the RPA suggests that FEMA “require” local communities to observe the interim measures, FEMA lacks legal authority to directly impose affirmative land development restrictions. This memorandum presumes that the RPA is suggesting that FEMA condition NFIP coverage on local communities observing the “requirements” in the RPA.

\(^3\) The BiOp defines “development” to include “[a]ny man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations, storage of equipment or materials (44 CFR 59.1), and expanded for the purpose of this RPA to include removal of vegetation or other alteration of natural site characteristics (including any remnant natural characteristics existing in a degraded site).” BiOp, at 297-98.

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A. Ballot Measure 49

On November 2, 2004, Oregon voters adopted Ballot Measure 37 ("Measure 37"), which gave certain landowners the right to seek compensation or obtain a waiver of regulations to permit any use allowable under the regulations in effect at the time the landowner acquired the property. Measure 37 was “intended to ameliorate adverse effects of restrictive land use regulations on property owners who had acquired their property before those regulations were adopted.” Papworth v. Oregon Dept. of Land Conservation and Development, 255 Or App 258, 260, 296 P3d 632 (2013).

In response to concerns over the sweeping impact of Measure 37, the Oregon legislature drafted legislation to narrow Measure 37, which was referred to the voters in 2007 as Measure 49. On November 6, 2007, Oregon voters adopted Measure 49. Although Measure 49 generally acted to limit the scope and extent of development authorized under Measure 37, Measure 49 did allow Measure 37 claimants with approved waivers to proceed with development authorized under Measure 37 to the extent that the claimants’ use of their properties complied with the waivers and the claimants had a “common law vested right” on December 6, 2007 to complete and continue the use. Or Laws 2007, ch 424, § 5(3).

Measure 49 also allowed landowners to seek compensation for certain new (after January 1, 2007) land use regulations enacted at the state or local level that restrict certain uses or practices. ORS 195.310(1). Specifically, if a public entity “enacts one or more land use regulations that restrict the residential use of private real property or a farming or forest practice and that reduce the fair market value of the property, then the owner of the property shall be entitled to just compensation from the public entity that enacted the land use regulation or regulations as provided in ORS 195.310 to 195.314.” ORS 195.305(1). The reduction in fair market value is calculated using a “before and after” method whereby the fair market value of the property one year before the land use regulation is contrasted against the fair market value one year after the land use regulation and the entire delta is attributed to impact of the new regulation. ORS 195.310(2).

Presuming for the sake of argument a reduction in fair market value, the question for purposes of this memorandum is whether the Interim Development Restrictions would qualify for compensation or waiver under Measure 49. This question hinges, in turn, on whether the Interim Development Restrictions would be considered “land use regulations,” and whether any exception applies.

1. Land Use Regulations

The statute defines “land use regulations,” in relevant part to include the following:

“(c) A provision of a city comprehensive plan, zoning

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ordinance or land division ordinance that restricts the residential use of private real property zoned for residential use;

“(d) A provision of a county comprehensive plan, zoning ordinance or land division ordinance that restricts the residential use of private real property;

“(e) A provision, enacted or adopted on or after [the effective date of 2009 Or Laws, ch 464, § 1], 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 * * * .”

ORS 195.300(14). Thus, any ordinance adopted by a city or county implementing the Interim Development Restrictions would be a “land use regulation” under Measure 49 to the extent it “restricts the residential use of private real property” or regulates a “forest practice.”

To date, no Oregon cases have interpreted the term “residential use” in the context of a post-2007 Measure 49 claim. To interpret such a provision, courts normally examine the text of the statute in context, along with any relevant legislative history and canons of statutory construction. State v. Gaines, 346 Or 160, 171-72, 206 P3d 1042 (2009); see also State v. Guzek, 322 Or 245, 265, 906 P2d 272 (1995) (applying same method of statutory analysis to statute enacted by voters). Although Measure 49 defines “zoned for residential use” as “zoning that has as its primary purpose single-family residential use,” ORS 195.300(25), it does not define the term “residential use.” Likewise, the legislative history of Measure 49 does not provide any insights into the meaning of “residential use.” But, to the extent that the Interim Development Restrictions would further restrict a landowner’s ability to build a residence in the floodplain, it would be difficult to argue that the ordinance does not restrict the residential use of real property.

Chapter 105 defines “forest practice” by reference to the definition in Chapter 527:

“(5) ‘Forest practice’ means any operation conducted on or pertaining to forestland, including but not limited to:

(a) Reforestation of forestland;

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(b) Road construction and maintenance;
(c) Harvesting of forest tree species;
(d) Application of chemicals;
(e) Disposal of slash; and
(f) Removal of woody biomass.

ORS 527.620(5). “Forestland” means “land that is used for the growing and harvesting of forest tree species, regardless of how the land is zoned or taxed or how any state or local statutes, ordinances, rules or regulations are applied.” Thus, to the extent that the Interim Development Restrictions restrict the circumstances under which one can harvest trees on land that is used for the growing and harvesting of trees, then it would be a “forest practice” under Measure 49. However, Measure 49 provides that if the forest practice is adopted by a body other than the Oregon legislature or Board of Forestry, then it is a “land use regulation” only to the extent the law is enacted “solely for the purpose of regulating a forest practice.” ORS 195.300(14)(e)(C). This language is not defined in statute, and no Oregon case has considered it. To the extent that a participating community enacts an ordinance restricting tree harvest on forestland to qualify for the NFIP, one could argue that the ordinance was not “solely for the purpose of regulating a forest practice.” However, read this way, one could argue that no regulation or law is adopted “solely for the purpose of regulating a forest practice”; there is always some attendant public benefit justifying imposition of a law. It remains unclear what local laws regulating forest practices would qualify for compensation under Ballot Measure 49, and if the Interim Development Restrictions are implemented through local ordinances, we expect this language to be litigated.

2. Exceptions
There are exceptions to Measure 49’s compensation obligation. The statute specifically exempts certain laws or regulations that would otherwise be considered compensable “land use regulations,” including in relevant part those:

“(b) That restrict or prohibit activities for the protection of public health and safety;

“(c) To the extent the land use regulations are required to

4 State law preempts local regulation of forest practices outside the urban growth boundary. See discussion, infra, Section B.

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comply with federal law * * *."

ORS 195.305(3).

Taking these in reverse order, because participation in the NFIP is not “required by federal law,” it would be difficult to argue that the ordinances FEMA demands under the RPA as a prerequisite to participation in the NFIP are, themselves, “required by federal law.” As highlighted above, FEMA has no independent authority to regulate land use activities. A local community is not “required” to participate in the NFIP. Because a local community may choose to not participate in the NFIP (as some already have), the criteria for participation in the NFIP are decidedly elective.

However, a local community could also attempt to fashion the Interim Development Restrictions as regulations “for the protection of public health and safety.” Again, this language is not further defined, and no case has considered it. Insofar as the Interim Development Restrictions not only require mitigation ratios, but also preclude all impacts on floodplain functions in the Riparian Buffer Zone, the question becomes whether regulations that arguably benefit species without concomitant flood protection are regulations “for the protection of public health and safety.” Members of the workgroup expressed concern that if local jurisdictions amend their development code to incorporate mitigation requirements and use restrictions that mirror the Interim Development Restrictions, the amendments will be litigated.

To the extent that the local ordinances restrict a landowner’s ability to harvest trees on forestlands, and insofar as the harvest restrictions were adopted “solely for the purpose of regulating a forest practice,” then the statute clarifies that the “public health and safety” exception “does not apply to any * * * forest practice regulation * * * unless the primary purpose of the regulation is the protection of human health and safety.” ORS 195.305(4)(b) (emphasis added). In this context, regulations restricting forest practices that are adopted primarily for species protection are compensable, even if they have secondary benefits to human health and safety. That this language applies only to forest practice regulations creates further uncertainty regarding the scope of the “public health and safety” exception in the context of other land use regulations.

B. Forest Practices Preemption

With few exceptions, Oregon law strictly prohibits local jurisdictions from regulating forest practices outside the urban growth boundary:

5 The Oregon Legislature amended the Ballot Measure 49 language in 2007 to include specific reference to farming and forest practices. HB 3540, 2007 Or. Laws Ch. 424, §4.
“(1) Notwithstanding any provisions of ORS chapters 195, 196, 197, 215 and 227, and except as provided in subsections (2), (3) and (4) of this section, no unit of local government shall adopt any rules, regulations or ordinances or take any other actions that prohibit, limit, regulate, subject to approval or in any other way affect forest practices on forestlands located outside of an acknowledged urban growth boundary.”

ORS 527.722(1). As explained above, a “forest practice” means any operation conducted on or pertaining to forestland (including, for instance, harvesting trees and road construction and maintenance). ORS 527.620(5). “Forestland” means land that is used for the growing and harvesting of forest tree species, regardless of how the land is zoned or taxed or how any state or local statutes, ordinances, rules or regulations are applied. ORS 527.620(7). Any local ordinance that restricts such forest practices on forestlands outside of the urban growth boundary (whether or not such lands are zoned as forestlands) is specifically preempted by state law. None of the exceptions in ORS 527.722 would capture the Interim Development Restrictions.

C. Prohibition on Development Moratoria

The BiOp suggests that one way of avoiding jeopardy would be to “prohibit all NFIP-related actions in FEMA mapped Special Flood Hazard Areas during the implementation phase” of the RPA. However, Oregon law specifically prohibits development moratoria unless the local jurisdiction can evidence (1) a “shortage of public facilities,” (2) the development moratorium is “reasonably limited” to those areas where the shortage would occur, and (3) that “the housing and economic development needs of the area affected have been accommodated as much as possible in any program for allocating any remaining public facility capacity.” ORS 197.520(2)(a)-(c). A statutory change would likely be necessary for a jurisdiction to use this path for the declaration of a moratorium. The only other way a local jurisdiction can impose a short-term development moratorium (no longer than six months) is if it can show a “compelling need” and that existing law is inadequate to prevent “irrevocable public harm from development.” id. at .520(3). A development moratorium imposed to qualify for the NFIP would not likely meet any of these criteria. Even absent an explicit moratorium, there is some risk that implementation of mitigation standards, for which there are no established or feasible pathways to achieve, may amount to a de facto moratorium in conflict with state law.