

Background Report



May 19, 2015

To: Air, Land, Water, Wildlife and Hazards Subcommittee

CC: Project Team

From: Rithy Khut, Assistant Land Use Planner

Re: Goal 5, Natural Resources – Standard and Safe Harbor Process Analysis

SUMMARY

The purpose of this memo is to provide background information regarding the requirements for complying with Statewide Planning Goal 5, Natural Resources. In particular, this analysis will focus on both the standard process and safe harbor provisions within Oregon Administrative Rule 660, Division 23. After discussing each methodology, the analysis will compare the current West Hill significant environmental concern (SEC) overlays to safe harbor provisions. Since the West Hills SEC overlays are similar to those applied in other rural areas of the county, this comparison will verify whether the County's protection program is compliant with safe harbor provisions.

BACKGROUND

There are two methodologies to achieve compliance with Statewide Planning Goal 5. As of 1996, local governments can choose either the "standard" approach or the "Safe Harbor" approach. Using the standard approach requires the local government to create an inventory of the resource and carefully justify its decision to protect or not protect the resource using an economic, social, environmental, and energy (ESEE) consequence analysis. This approach can be costly, time consuming and open to legal challenge. Alternatively, the local government can choose to use the safe harbor approach. The safe harbor approach is standardized and prescriptive thereby lowering the cost and time because there is less flexibility for local governments to cater their protection to local conditions.

Figure 1 – Goal 5 Significant Resource Process



Using either method can be broken into a two-step process. The first part is to create an inventory of significant resources specific to Goal 5. The second part is to adopt measures to protect the resource. Local governments have the ability to use either method, standard or safe harbor for each of the parts (Figure 1). For example, a jurisdiction could elect to use the safe harbor approach to create its inventory of significant resources and then conduct an ESEE analysis to determine its protection program.

RIPARIAN RESOURCES (OAR 660-0023-0090)

STANDARD PROCESS

To conduct the standard inventory process, the local government must meet the requirements of OAR 660-023-0030. To accomplish this task the government must collect information on all water areas, fish habitat, riparian areas and wetlands within riparian corridors. At a minimum, the following resources should be used to determine the inventory:

- (a) Oregon Department of Forestry stream classification maps;
- (b) United States Geological Service (USGS) 7.5-minute quadrangle maps;
- (c) National Wetlands Inventory maps;
- (d) Oregon Department of Fish and Wildlife (ODFW) maps indicating fish habitat;
- (e) Federal Emergency Management Agency (FEMA) flood maps; and
- (f) Aerial photographs

The local government can also elect to conduct field investigations to verify the location, quality and quantity of resources.

Once an inventory is created, a protection program can be developed. To develop this program, the local government is required to conduct an ESEE analysis as outlined in OAR 660-023-0040. The goal of the analysis is to balance the protection of the riparian resource and other local priorities.

There are four steps in the ESEE process:

- Identify conflicting uses;
- Determine the impact area;
- Analyze the ESEE consequences; and
- Develop a program to determine whether to allow, limit, or prohibit identified conflicting uses for significant resource sites

In developing the protection program, the local government must identify at least the following activities as conflicting uses in riparian corridors:

1. The permanent alteration of the riparian corridor by placement of structures or impervious surfaces, except for water-dependent or water-related uses and replacement of existing structures with structures in the same location that do not disturb additional riparian surface area; and

2. Removal of vegetation in the riparian area, except as necessary for restoration activities, the development of water-related or water-dependent uses, and on lands designated for agricultural or forest use outside UGBs.

Additionally, local governments must follow the requirements of OAR 660-023-0050 on creating its program to achieve Goal 5. For each resource site, local governments must adopt comprehensive plan provisions and land use regulations to implement the decisions made pursuant to ESEE analysis. The plan and implementing ordinances must:

- Describe the degree of protection intended for each significant resource site, and
- Clearly identify those conflicting uses that are allowed and the specific standards or limitations that apply to the allowed uses

Implementing measures must contain clear and objective standards or alternatively a performance standard that describes the outcome to be achieved by the design, siting, construction, or operation of the conflicting use, and specifies the objective criteria to be used in evaluating outcome or performance.

SAFE HARBOR

The local government may elect to use safe harbor provisions to create its inventory and protection program. For the inventory, a local government may determine the boundaries of significant riparian corridors using a standard setback distance from all fish-bearing lakes and streams. Using the same resources and maps listed above from the standard process, the inventory consists of the following:

- (a) Along all streams with average annual stream flow greater than 1,000 cubic feet per second (cfs), the riparian corridor boundary shall be 75 feet upland from the top of each bank.
- (b) Along all lakes, and fish-bearing streams with average annual stream flow less than 1,000 cfs, the riparian corridor boundary shall be 50 feet from the top of bank.

Once an inventory is determined, a protection program to meet the Goal 5 requirements will be created using safe harbor provisions. The local jurisdiction must adopt specific ordinances that:

1. Prevent permanent alteration of the riparian area by grading or by the placement of structures or impervious surfaces, except for the following uses, provided they are designed and constructed to minimize intrusion into the riparian area:
 - Streets, roads, and paths;
 - Drainage facilities, utilities, and irrigation pumps;
 - Water-related and water-dependent uses; and
 - Replacement of existing structures with structures in the same location that do not disturb additional riparian surface area
2. Control the removal of riparian vegetation, except for the removal of:
 - Non-native vegetation and replacement with native plant species; and
 - Vegetation necessary for the development of water-related or water-dependent uses

Additionally, the ordinance must include a procedure to consider hardship variances, claims of map error, and reduction or removal of the restrictions for any existing lot or parcel demonstrated to have been rendered not buildable by application of the ordinance. The ordinance may also authorize the permanent alteration of the riparian area by placement of structures or impervious surfaces within the riparian corridor boundary established upon a demonstration that equal or better protection for identified resources will be ensured through restoration of riparian areas, enhanced buffer treatment, or similar measures. In no case shall such alterations occupy more than 50 percent of the width of the riparian area measured from the upland edge of the corridor.

WETLANDS RESOURCES (OAR 660-0023-0100)

STANDARD PROCESS

The local government may elect to conduct a local wetland inventory (LWI). If a local wetland inventory is conducted for areas outside an urban growth boundary (UGB) or an urban unincorporated community (UUC), OAR 660-023-0100 requires that the local government follow the same requirements for areas inside the UGB or UUC. The procedures are outlined in OAR 141-086-0110 through 141-086-0240. Significant local wetlands to be added to the LWI are required to be identified following the criteria created by the Division of State Lands pursuant to ORS 197.279(3)(b).

Once a LWI is created, the process to create a protection program requires the local government to conduct an ESEE analysis. The ESEE process for wetlands is the same as for riparian areas as discussed earlier.

SAFE HARBOR

For areas outside of an urban growth boundary or an unincorporated community, the safe harbor inventory is the statewide wetland inventory (SWI). If the local government elects to use safe harbor provisions to create its protection program, it must adopt land use regulations that require notification to Department of State Lands (DSL) concerning applications for development permits or other land use decisions affecting wetlands on the inventory, as per ORS 227.350 and ORS 215.418.

If the local government outside of the UGB or UUC elects to create a LWI, the local government may elect to use safe harbor provisions. The local jurisdiction must adopt two specific ordinances:

1. The protection ordinance shall place restrictions on grading, excavation, placement of fill, and vegetation removal other than perimeter mowing and other cutting necessary for hazard prevention; and
2. The ordinance shall include a variance procedure to consider hardship variances, claims of map error verified by DSL, and reduction or removal of the restrictions under

paragraph (A) of this subsection for any lands demonstrated to have been rendered not buildable by application of the ordinance.

WILDLIFE RESOURCES (OAR 660-0023-0110)

STANDARD PROCESS

To conduct the standard inventory process, local governments must collect habitat information from various state and federal agencies. At minimum, the local government must conduct an inventory process described in OAR 660-023-0030 based on:

- (a) Threatened, endangered, and sensitive wildlife species habitat information;
- (b) Sensitive bird site inventories; and
- (c) Wildlife species of concern and/or habitats of concern identified and mapped by ODFW (e.g., big game winter range and migration corridors, golden eagle and prairie falcon nest sites, and pigeon springs)

After the inventory is established, the standard ESEE procedures and requirements of OAR 660-023-0040 and 660-023-0050, which were discussed earlier, must be followed to develop the protection program.

SAFE HARBOR

For safe harbor, the local governments are required to collect the same habitat information as if they were conducting the standard process. However, to determine significance, they do not need to follow OAR 660-023-0030, instead they must designate significant wildlife habitat by choosing sites where one or more of the following conditions exist:

- (a) The habitat has been documented to perform a life support function for a wildlife species listed by the federal government as a threatened or endangered species or by the state of Oregon as a threatened, endangered, or sensitive species;
- (b) The habitat has documented occurrences of more than incidental use by a species described in subsection (a) of this section;
- (c) The habitat has been documented as a sensitive bird nesting, roosting, or watering resource site for osprey or great blue herons pursuant to ORS 527.710 (Oregon Forest Practices Act) and OAR 629-024-0700 (Forest Practices Rules);
- (d) The habitat has been documented to be essential to achieving policies or population objectives specified in a wildlife species management plan adopted by the Oregon Fish and Wildlife Commission pursuant to ORS Chapter 496; or
- (e) The area is identified and mapped by ODFW as habitat for a wildlife species of concern and/or as a habitat of concern (e.g., big game winter range and migration corridors, golden eagle and prairie falcon nest sites, or pigeon springs).

Once the inventory is completed and a determination of significance has been made, there are no safe harbor provisions to guide the creation of the wildlife protection program. Local governments must use the standard ESEE procedures and requirements of OAR 660-023-0040 and 660-023-0050, as discussed earlier.

COMPREHENSIVE PLAN UPDATE

SWCA, the county's consultant on Goal 5 compliance, recommends that Multnomah County use the safe harbor methodologies to identify new significant goal 5 resources. The inventories for riparian corridors, wetlands, and wildlife habitat have been completed using safe harbor provisions. However, SWCA has yet to identify which protection program methodology they will recommend. For riparian corridors and wetlands, the county may elect to use either the standard process or safe harbor. For wildlife resources, there are no safe harbor provisions so further discussion with DLCD and SWCA is needed.