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Measure 37: Approaching Year Zero Plus Three

by Charles F. Hudson

In November 2004, the Oregon voters passed Ballot Measure 37 (now codified as ORS 197.352), which allows property owners to make claims for compensation if the value of the claimant's property has been reduced by land use regulations enacted or first enforced after the claimant (or certain family members) came into ownership. The initiative, which passed by a substantial margin, was the culmination of years of work by property rights advocates and others dissatisfied with the system of statewide land use planning that had evolved in Oregon since the passage of Senate Bill 100 in 1973. While observers of the electoral process will continue to debate the intentions and understanding of the voters who enacted Measure 37, the impact of land use restrictions on the density of development, particularly in suburban and rural areas, was clearly a central concern. Proponents of the measure were able to point to concrete examples where, as the result of regulations intervening since the acquisition of their property, individual owners were no longer able to subdivide their property to permit an additional dwelling for their children, or allow development to provide anticipated retirement income.

In 2002, the Oregon Supreme Court invalidated a prior voter initiative, Measure 7, as an impermissible amendment of more than one portion of the Oregon Constitution in a single ballot measure. While Measure 7 presented an amendment to the Oregon Constitution, Measure 37 created a purely statutory scheme under which the government was required to compensate the affected property owners unless it chose to "modify, remove, or not to apply" the regulation within 180 days of the owner's written demand for compensation. Legal challenges to the validity of Measure 37 appear to have been resolved by the Oregon Supreme Court's unanimous 2006 decision in *MacPherson, et al. v. Dept. of Administrative Services, et al.*, which upheld the constitutionality of the new law. Midway through the third year since its enactment, however, the uncertainty concerning how Measure 37 will be applied by the courts or amended by legislation seems as great as it has ever been.

<u>Issues Pending in the Courts</u>

Under the statutory scheme established by Measure 37, nearly all of the cases now pending in the courts result from a process that began with claims for compensation presented to the affected agencies of state and local government, typically a county board of commissioners or its delegate, and the Oregon Departments of Administrative Services ("DAS") and Land Conservation and Development ("DLCD"), the two state agencies normally designated to receive claims. If the state or local agency failed to grant a waiver of the pertinent regulations within 180 days, if the claim was denied for other reasons, or if a claimant believed the waiver granted was insufficient, the claimant might then seek redress in the courts. Because the governments involved generally have chosen to waive regulations rather than pay compensation, most of the resulting court litigation is concerned, in one way or another, with issues of the claimant's standing to demand compensation and the adequacy of any waiver granted. In attempting to resolve these disputes, the courts are also forced to confront a number of unanswered questions concerning jurisdiction and procedure. These legal uncertainties can translate into formidable real-world risk and expense for the claimants unfortunate enough to be drawn into the process. Ironically, such risk and expense often weighs heaviest on those individual claimants whose Measure 37 goals are the most modest.

- **Standing and Waiver**

By far the largest portion of the claims now pending in circuit court involve disputes over the standing of the claimant and/or the scope of the waiver allowed by the county or state. Often these cases turn on disputes concerning what constitutes "ownership" for purposes of Measure 37, or the continuity of ownership, as these issues affect the determination of the date on which the present owner acquired the property. The statute's definition of ownership is quite broad, and includes "the present owner of the property, or any interest therein." ORS 197.352(11)(C). While this definition implies that holders of interests other than deeded fee simple ownership are entitled to protection, the outer limit of ownership for purposes of Measure 37 remains to be determined. Many questions regarding the scope of the ownership definition remain unanswered, including the rights of tenants in common; holders of a life estate or long-term ground lease; the holder of the remainder interest that is subject to the life estate or long-term lease; the settlor of a revocable living trust; a spouse not on the title; individuals claiming interests in property held in a partnership; the member of single-member limited liability company; the sole shareholder of a closely held corporation that is the title owner of the property.

Particularly where family relationships are involved, it is not uncommon to encounter situations where the property in question has been in the family for more than 50 years, perhaps always under the control of the same individual, and yet has undergone one or more transfers of record title based on family, business or estate planning considerations. The governmental response to these scenarios has not been uniform, and many Measure 37 claimants have received waivers from a county board that may apply the definition broadly, only to find that the state agencies take a different view and will only waive regulations to the date of the last change in record title.

- "**Transferability" and "Vesting"**

Another unanswered question is the extent to which a Measure 37 waiver is specific to the present owner of the property, or may be transferred to a buyer or other future owner. In the view of the Oregon Attorney General and many local governments, Measure 37 development rights are personal to the holder and, even when they have been legally vindicated in the claims process, are not transferable with the property. According to this view, the economic value of a waiver of regulations remains ephemeral until the permitted development is actually implemented to the extent that it can be considered "vested" as a characteristic of the property itself. It is unclear when such "vesting" is complete. Some claimants have been advised to place septic systems, or even temporary manufactured homes, in an effort to preserve development rights after a Measure 37 waiver.

Another aspect of this uncertainty is the risk that a claimant, after investing time and money in the legal process associated with a Measure 37 claim, might die before the process is complete or before vesting is achieved. Given the age of many claimants and the potential for a protracted appeals process, in many cases this is unfortunately a very significant risk.

- **Jurisdiction and Procedure**

As originally enacted, Measure 37 provides a claimant has a cause of action for compensation in circuit court if the affected regulations have not been waived and continue to apply to the property more than 180 days after the claim is filed, and further provides that a prevailing claimant is entitled to recover its attorney fees and litigation expenses. ORS 197.352(6). The statute also allows affected government agencies to adopt procedures for handling claims, provided such procedures do not "act as a prerequisite to the filing of a compensation claim" in circuit court. ORS 197.352(7). By providing governmental decisions on Measure 37 claims will not be considered land use decisions, the statute also makes it clear that such decisions may not be appealed to the Oregon Land Use Board of Appeals ("LUBA"). ORS 197.352(9). Beyond these provisions, however, Measure 37 does not spell out how the cause of action established by ORS 197.352(6) affects the jurisdiction and procedural limitations that are arguably established under other preexisting statutes.

Absent some statutory or common law basis for independent jurisdiction, decisions by county governments are generally subject to review in circuit court pursuant to a "writ of review" obtained by the aggrieved party under procedures established in ORS Chapter 34. An application for a writ of review must be made within 60 days of the county decision to be timely. Assuming a timely petition, the circuit court reviews the county action under a relatively deferential standard, accepting any factual findings made by the county unless it can be shown that they are not supported by the record. In contrast, a claim for compensation arguably requires the circuit court itself to make similar determinations, including the owner's date of acquisition, without any particular deference to the county.

A similar process exists for the review of state agency decisions under the Administrative Procedures Act ("APA"). In the case of decisions made by the agency without a contested case proceeding, an aggrieved party may appeal to circuit court within 60 days of the decision. In contested case proceedings, which follow a somewhat different procedure and typically require an evidentiary hearing before the agency, an aggrieved party may appeal directly to the Oregon Court of Appeals within 60 days. The state agencies have treated their Measure 37 determinations as orders in "other than contested case" proceedings, and have routinely advised claimants that they have the right to an appeal in circuit court. Early in 2007, however, the Oregon Court of Appeals issued a preliminary decision in *Corey v. Department of Land Conservation and Development*, 210 Or. App. 542, 152 P.3d 933, *adhered to on reconsideration*, 212 Or App. 536, 159 P.3d 327 (2007), *petition for review pending*, which has cast doubt on this view of the proceedings required at the agency level and the path of appeal.

In *Corey*, the claimant appealed directly to the Court of Appeals, and to the surprise of many, the court declined to dismiss for lack of jurisdiction. Instead, the Court of Appeals suggested that, at least if the agency proposes to grant a Measure 37 waiver, it must hold a contested case hearing from which the path of appeal would run directly to the Court of Appeals rather than to circuit court. As no such hearings have been held, *Corey* raises the possibility that all of the appeals now pending in circuit court will need to be transferred to the Court of Appeals and then remanded to the agencies for a hearing. As the *Corey* court's ruling remains preliminary and a petition for review by the Oregon Supreme Court is pending, it may be months before this threshold jurisdictional issue is resolved. In many cases, circuit court judges have simply stayed proceedings until then. In the meantime, even more far reaching changes to the Measure 37 landscape are looming on the legislative front.

New Legislation

While the Oregon legislature has been criticized for its failure to craft a workable compromise in the years preceding Measures 7 and 37, there was renewed discussion of a legislative "fix" in the current legislative session. For the most part, this discussion focused on efforts to limit the scope of the remedy and involved a debate over Measure 37's impact on the preservation of farmland, particularly in the Willamette Valley. The proposals most frequently discussed allowed for a smaller number of additional dwellings on agricultural land but blocked larger-scale subdivision development. Because the focus of the legislative discussion was on this sort of larger compromise, it was often difficult to determine how the different proposals might affect the details of the statute that are pending in the Oregon courts.

Ultimately, near the close of the session, the Oregon legislature passed two bills:

- **HB 3546 – The "Moratorium"**

  The first, House Bill 3546, which was signed by the governor and took effect on May 10, 2007, is a response to the pleas of state agencies for additional time to process the avalanche of claims that were filed in November 2006 as one of Measure 37's statute of limitations periods was drawing to a close. Under Measure 37, a claimant may bring suit in circuit court to recover compensation for diminution in property value if a challenged regulation continues to restrict the development of the property 180 days after the claim is filed with a local government or state agencies. While most counties were able to satisfy this deadline, DLCD, which is also responsible for most claims filed across the state, was overwhelmed. HB 3546 adds a year to the 180 day timeline and postpones the time at which those claimants may file for compensation in circuit court. Because of concerns that some claimants might die in the interim, it also preserves their rights to their successors, providing some limited protection with respect to the vesting concerns discussed earlier. HB 3546 does not extend the 60-day timeline in which to file for a writ of review (in the case of a county or other local government decision), or an appeal under the APA (in the case of an agency decision).

- **HB 3540 – The "Referendum"**

  The second piece of legislation, HB 3540, is a more sweeping proposal to amend Measure 37 that will be referred to the voters in November. The proposal contains a host of detailed provisions, and a thorough analysis is beyond the scope of this article. In general, however, the measure reflects an effort to repeal much of the existing law while retaining some more limited relief for current claimants who are seeking residential development of their property. Landowners would only be entitled to compensation for regulations restricting residential development. Restrictions on commercial or industrial development would not entitle landowners to compensation under the proposal.

Under HB 3540, existing claimants with property in rural areas generally would be entitled to up to three dwelling sites, provided that total includes any existing dwellings and does not exceed either their claim or the limits of any waiver previously granted by the state. Claimants in rural areas whose property does not consist of "high value" farm or forest land, as defined by the act, may seek to develop four to ten dwellings, but they would be subject to a significantly more detailed and rigorous claims process, including appraisals. Claimants in urban areas may seek to develop up to ten dwelling sites, again, under a much more rigorous claims process. Under the proposed law, the right to present new claims is triggered by the enactment of land use regulations rather than by their application and enforcement, and those who have not filed Measure 37 claims by the close of the legislative session would be limited to claims based on land use regulations enacted after January 1, 2007.

While the focus of the legislation is on the entitlement to additional dwelling sites as the vehicle for compensating current claimants, the rules defining the value of any monetary compensation available would require an exacting analysis of appraised values shortly before and after each challenged regulation, and not, as Measure 37 now provides, at the time the claim is made. Instead, the successful claimant would be entitled to interest on the resulting values at Treasury Bill rates.

HB 3540 also would resolve most procedural and jurisdictional questions in favor of greater restrictions on the enforcement of private property rights. Measure 37's primary cause of action in circuit court for compensation would be eliminated, as would the claimant's related entitlement to recovery of attorney fees. Instead, HB 3540 places primary jurisdiction in the state and local government agencies and provides for appeal to circuit court on a writ of review or, in the case of state agencies, under the APA (absent continuing constitutional objections, this provision would expressly resolve the jurisdictional issue presented in *Corey* in favor of the "other than contested case" treatment proposed by the state). Judicial review by the circuit court would be limited to the record made before the state and local governments, and would give significant deference to any factual determinations made by those bodies.

For current claimants who are successful in obtaining a waiver of regulations, HB 3540 would provide for the transferability of the rights obtained, eliminating for that class of claimants the uncertainty of the current "vesting" process.

HB 3540 also would resolve most of the questions of standing that are at the heart of many of the Measure 37 appeals now pending, almost always by eliminating standing. The new law would repeal the current broad definition of ownership under Measure 37, which includes the owner of "any interest" in the property, and instead determine standing based on the acquisition of recorded title. The only exceptions under the new definition would be for the surviving spouse of a title owner, for the purchaser under a land sale contract, and for the settlor of a revocable trust (the last two exceptions are consistent with the treatment of most agency and court decisions under the current law). If HB 3540 is enacted by the voters, the application of the new law to claims in progress, and the remedies available to those claimants adversely impacted, are likely to provide another chapter in the saga of Measure 37.

For the present, nearly three years into the story, the one thing that can be said with certainty is that nearly everything remains uncertain.

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New Markets Tax Credits — The New Brownfields Development Tool

by Karen M. Williams

Introduction

The federal government has created many tools for economic stimulus, but none that foster public-private partnerships as New Markets Tax Credits do. New Markets Tax Credits ("NMTC") are distributed through a federal program that generates funds for community and economic development projects. The subsidy may be used to support commercial, industrial and retail real estate projects, as well as business loans or equity investments, among others. It may also be used to subsidize the cost of providing technical assistance and financial counseling to qualifying commercial or industrial activities. The tax credits are available through a program established by Congress in 2000, and continued during the Bush administration. The program has strong bipartisan support and is expected to be reauthorized.

In the Northwest, this program has been used to finance the revitalization of the Portland Armory into a performing arts center, to remodel the old Meier & Frank building in downtown Portland (now Macy's), and to create commercial and office space in Tacoma. Other projects now reviewing the program include a health care clinic, a retail center and an industrial plant.

The program's purpose is to encourage private investment in qualified low-income communities through federal income tax credits. A Low-Income Community is a census tract in which the median income is 80 percent of the area median, or in which 20 percent of the households have incomes below the poverty line. Since many brownfields sites are located in qualifying census tracts, NMTCs are emerging as a powerful new tool for brownfields redevelopment.

The legislation authorized tax credits equal to approximately 39 percent of a total of $15 billion over a period of seven years. The program is administered by the Community Development Financial Institution Fund, within the U.S. Treasury Department (the "CDFI Fund").

In order to use the credits, an applicant must create a Community Development Entity ("CDE"). The CDE must invest substantially all of its assets into eligible projects and activities. There is a safe harbor of 85 percent of gross assets, to meet the "substantially all" test. The CDFI Fund is raising the bar on this measurement through the competitive application process.

There are several alternative approaches to utilizing NMTCs. Some sponsors may elect to form and qualify a CDE, and propose a single project or undertaking for a credit allocation. Others develop a broad community development strategy that utilizes combined sources of funding in order to accomplish a blend of small business lending, marquee projects, venture capital participation and related community development activities. Some sponsors use the program to provide funds for loan pools or other activities.

The list of eligible undertakings is unusually broad and the funds are surprisingly flexible, particularly for a federal program. The use of these funds generates true public/private partnerships in order to create wealth and new jobs in low-income areas. Approximately 40 percent of Portland's geography qualifies for this program.

The Community Development Entity

NMTCs are awarded to qualified CDEs. An entity must meet certain criteria to be recognized as a CDE:

- *Legal Structure:* Non-profit and for-profit domestic corporations or partnerships that are duly organized and validly existing under the laws of the jurisdiction in which they are incorporated or established may apply for an allocation of tax credits. Non-profits cannot utilize tax credits, so their application must include their plan for reallocating any award they receive to for-profit subsidiaries.

- *Primary Mission:* An applicant entity must demonstrate that it has a primary mission of serving, or providing investment capital for, low-income communities or low-income persons, and that at least 60 percent of its activities are targeted to low-income persons or low-income communities.

- *Accountability:* The applicant must identify a qualifying geographic service area and demonstrate that it maintains accountability to the residents of the low-income communities in that area. To demonstrate accountability, the CDE must establish a board (governing or advisory, depending on CDE structure) in which at least 20 percent of its members represent the low-income communities within the service area. Board members can represent the community either by being a resident of a low-income community in the service area, or being a representative. Representation includes owning a business in the community, or serving as an employee or board member of an organization that serves the community.

Application Process and Timelines

After an entity receives status as a CDE, it must make a competitive application for an allocation of NMTCs. Entities that are not certified as CDEs have to apply for that status before the NMTC application deadline in order to be recognized and still have time to make an allocation application, though CDE certification is rolling. There are good reasons for entities that do not intend to apply for an allocation to nonetheless pursue CDE status, which is relatively simple to do. Generally, applications are due in mid-September, and awards are made in late March or early April of the following year.

The application form includes applicant instructions, requirements for assurances and certifications, general information and a glossary. The substantive material is divided into four parts:

1. Business Strategy, which includes: Products, Services and Investment Criteria; Prior Performance; Prior Performance in Disadvantaged Communities or with Disadvantaged Businesses; Projected Business Activities; and Investments in Unrelated Entities.

2. Capitalization Strategy, which includes: Investor Commitments; Investor Strategy; Sources of Capital; and Flow of Allocations.

3. Management Capacity, which includes: Management Team; Experience Deploying Capital or Services; Experience Raising Capital; Asset Management and Risk Management Experience; and Program Compliance.

4. Community Impact, which includes: Targeting the Use of Proceeds within Low-Income Communities; Community Accountability; and Economic Impacts.

A successful applicant will earn a high score in each of the four areas, though for some areas it may rely on the track record of its management team or certain related entities. Applicants may partner with government or community development entities, service providers, or engage managers and consultants who will strengthen a proposal.

Successful applicants include large financial institutions and small, single-project community enterprises, and many in between. While the program does require sophisticated advisors because of the financial and tax structuring aspects, it is not inaccessible for smaller organizations. Transaction costs mean it is probably not generally suitable for projects smaller than about $5 million in total financing.

In the last round, the CDFI Fund received approximately 400 applications and made awards to 41 applicants. Generally, awards are limited to not exceed $150 million, though exceptions may be made. Many awards are much smaller, particularly if an applicant presents an application comprised of a single project. In order to be successful, the applicant must show that the project or undertaking is essentially ready to proceed, except for the financing gap to be filled with the NMTC subsidy. Projects that are speculative, or have a great deal of predevelopment work remaining to be completed, are unlikely to receive an award.

However, those projects may apply for financing to entities that have received awards and are making loans or investments in the project geographic area. For instance, an awardee focuses on helping nonprofits construct primary care health clinics by combining the NMTC subsidy with tax-exempt bonds and technical development and architectural assistance. Health care providers may use this service instead of making their own applications.

Other allocatees are providing below-market loans for commercial and retail real estate development, mixed-use projects and other job-related construction. A summary of allocatees and their business plans is available at the CDFI Fund website (http://www.cdfifund.gov).

Utilization

After receipt of the allocation, the CDE will have five years to issue equity investments or the unused portion of the allocation will terminate. The CDE must ensure that substantially all of its assets are invested in qualifying investments, a requirement which may be met by meeting the safe harbor of assuring that 85 percent of its aggregate gross assets are invested in qualified activities. The CDFI Fund may recapture the tax credit if the CDE fails to meet the program requirements for investment and reinvestment of returned capital. Returned capital must be reinvested within twelve months of receipt, as long as the twelve months will terminate within the seven-year compliance period (capital returned to the CDE in the 73rd month or later, probably need not be reinvested).

Investments of funds raised through NMTCs must be made in qualified Low-Income Communities. Those investments may consist of:

- any loan or equity investment in any qualified Low-Income Business;
- the purchase from another CDE of any loan made by such entity that is a qualified Low-Income Community investment;
- technical assistance to help in the organization or operation of a business in Low-Income Communities; or
- investments in other CDEs that are making investments or providing technical assistance in Low-Income Communities to Low-Income Businesses and Low-Income Persons.

A qualified business may not engage in certain prohibited activities that include massage parlor, golf course, sale of alcoholic beverages or development of property to be licensed, such as software. In addition, a qualified low-income business:

- derives at least 50 percent of its income from doing business in the Low-Income Community, or
- 40 percent of the low-income business is located in the Low-Income Community, or
- 40 percent of the services provided by the company's employees are provided in the Low-Income Community.

NMTCs can either provide a seven-year interest subsidy, or, in the leveraged method, provide up to about a 20 percent subsidy of the total amount financed. The leveraged method is most appropriate for financing packages in excess of $10 million. The subsidy comes from investors who buy equity in the CDE, in exchange for the right to use the tax credits to offset the investors' federal income tax liability. The tax credits are best utilized by institutional investors, whose capital is then loaned or reinvested by the CDE into the project. It is generally not appropriate for wealthy individuals to invest in NMTCs because they are likely to trigger alternative minimum tax liability.

The transaction involves generating funds from an investor, potentially leveraging that equity with bank or other borrowing, and placing the combined fund as equity into the CDE. The CDE then uses the proceeds to make its own loans or equity investments in a qualifying project. The funds from the investor constitute a subsidy for the project because the investor receives the benefit of the tax credits and does not need to have all of its money paid back.

This is a sophisticated and somewhat complex financial transaction. It is not an appropriate tool for small projects because of the transaction costs. However, for the right project, the transaction can result in a subsidy of up to approximately 20 percent of the overall financing package.

The complexity and transaction costs are somewhat made up for by the unusual flexibility of this program. It has broad eligible uses for the funds.

Because the program requires that the subsidy funds remain invested during the seven-year compliance period, most CDEs structure their participation in a project such that the CDE receives only interest payments for the first seven years. Some CDEs allow longer terms at below-market interest rates. Other CDEs make equity investments in businesses. These transactions are frequently on a venture capital model.

There are certain types of businesses that are ineligible for financing by CDEs. These include businesses that hold certain financial assets such as promissory notes, those that sell alcohol or tobacco, golf courses, and those that produce intellectual property (software development). A manufacturing or retail facility within a qualified census tract is an ideal target for this program.

NMTC proceeds may also be used for real estate acquisition, construction, and permanent phase financing. So-called "soft costs" are eligible, including architectural and engineering, development, financing and other fees, as well as traditional "hard costs" related to actual construction. Equipment and working capital are also eligible, with certain limitations. Transactions may be structured as financing leases, equity investments or loans.

As with all federal programs, and particularly federal income tax programs, it is very important for participants to get appropriate advice early in their efforts so they do not waste time or money trying to put together a transaction that might not qualify.

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Developing Former Agricultural Land? Plan on Looking for Pesticides

by Donald H. Pyle

For real estate developers, yesterday's farms and orchards are tomorrow's industrial park, school or residential development. Redevelopment of former agricultural lands, as it turns out, is also a new focus for the Oregon Department of Environment Quality ("DEQ"). The reason for DEQ's new-found attention is that farms and orchards often contain traces of legacy pesticides that, although now banned, were legally applied to crops years ago. DDT, aldrin, chlordane and dieldrin, to name a few, are persistent organic pollutants that remain in soils just short of forever and potentially affect human health and ecological receptors. Bringing the pesticide issue front and center for Oregon developers and owners is a January 2006 DEQ guidance document entitled, "Guidance for Evaluating Residual Pesticides on Lands Formerly Used for Agricultural Production" (http://www.deq.state.or.us/lq/pubs/docs/cu/GuidanceEvalResidualPesticides.pdf).

Pre-Guidance — Covered or Not Covered?

Before DEQ issued the guidelines, sellers and buyers often were in the dark about how much to investigate for prior legal use of pesticides and, if they found residual pesticides, to what extent they would be required to conduct a cleanup. DEQ appeared to take the position that cleanup was necessary even if pesticides had been legally applied in the past, but it was willing to modify that approach if data showed residual pesticides did not present a risk of harm to potential receptors.

That's what happened in one transaction in which the author was involved. Our client planned to sell a large parcel of land near the Columbia River where previous users had grown row crops and apples for many years. The buyer's pre-purchase due diligence discovered that soil and groundwater samples contained pesticide residues (DDT and dieldrin). The buyer reported the findings to DEQ to determine if the residual pesticides were exempt from state cleanup requirements. DEQ concluded that its cleanup laws applied and ordered further investigation to evaluate potential risk to humans, terrestrial and aquatic biota.

The parties renegotiated the real estate deal to require the seller take over the pesticide assessment process and perform any potential remediation needed to obtain a No Further Action ("NFA") determination within one year after closing. In consultation with DEQ, the seller's consultant installed six groundwater monitoring wells on the site, and secured more soil and water samples. Soil sampling again detected pesticides, but new water sampling had fewer pesticide detects, leading to the conclusion that earlier detects were caused by cross-contamination from surface soil being dragged down the borehole during boring operations.

The seller then proceeded with a two-stage risk assessment. First, the consultant prepared a conceptual site model of the potential exposure of humans and birds to pesticides in the site's soils. On the human exposure side, the consultant noted that maintenance or repair work could expose workers to the soil. The consultant also found an exposure pathway for terrestrial birds. Birds could be exposed to site soils containing pesticides through the food chain of bald eagles eating small soil burrowing mammals that in turn have eaten plants and earthworms that have bioaccumulated DDT from the soil.

In the second step, the consultant performed a screening evaluation. Using the EPA Region 9's Preliminary Remediation Goals ("PRGs") for Industrial Soil, the levels of pesticides in soils did not exceed the PRGs. That result ruled out any significant human health risk from exposure to soils. Because, however, the pesticide detects in soil samples exceeded DEQ screening level values for birds and mammals, the consultant performed a focused risk assessment of the potential pathway of birds exposed to pesticides in the site's soils.

Bald eagles were chosen as the species requiring protection with site-specific screening levels because of the amount of food eagles ate on the site and the potential for contaminants to build up through the consumption cycle. Applying these measures, the consultant concluded that site surface soil and groundwater pesticide concentrations did not exceed the bald eagle's protective screening level value and, therefore, did not present an unacceptable risk to bald eagles using the site. With this information, DEQ issued a NFA that resulted in closing the property sale.

More Oversight and More Investigations
The DEQ guidance document, for the first time, clarifies many of the steps that our client took in the example above. In drafting this guidance, DEQ borrowed heavily from California's similar guidance, according to drafter Mary Camarata of the DEQ. With the issuance of the guidance, DEQ has set the stage for new levels of agency oversight and environmental due diligence. Phase I and II site assessments, as well as other DEQ-required site assessments, will need to investigate potential pesticides in the soil and groundwater of lands with an agricultural history. Once DEQ becomes involved in a site, which usually happens in the land development context when a party seeks a NFA determination from the agency, it is likely that DEQ will require sampling and, in some cases, focused risk assessment of residual pesticides.

- **DEQ Authority**. At the outset of the guidance, DEQ explains the legal basis for its power to require investigation and cleanup of sites containing legally applied pesticides. This authority, DEQ asserts, stems from OAR 240-122-003(2)'s provision that the state's hazardous waste rules apply to the "...deposition, accumulation, or migration [of hazardous substances] resulting from otherwise permitted or authorized releases." In other words, although a permitted pesticide application is otherwise exempt from state regulation under OAR 340-122-0073(d), once the pesticide accumulates in the soil or migrates, the state has authority to step in and impose its cleanup rules. Importantly, the guidance makes clear that DEQ will only exercise this authority when a landowner proposes converting former agricultural land to non-agricultural development.

- **Limited Investigation of Adjacent Properties**. Parties will not need to investigate whether pesticide contamination extends beyond the property proposed for non-agricultural use if two conditions exist: (1) the to-be-developed property and its surrounding properties grew the same crops or likely used the same pesticides; and (2) the pesticide contamination on the to-be-developed property is due to deposition or accumulation of a legally applied pesticide, rather than an accidental release. If these two conditions are satisfied, DEQ will only require a party to evaluate pesticide contamination on the tax lots that will be used for the non-agricultural use. But DEQ may require a party to evaluate both on-site and off-site pesticide contamination if data shows the likelihood of an accidental spill; unusually high concentrations of pesticides; or other site-specific factors that support an off-site investigation.

- **Assessment Guidelines**. The guidance offers specific instructions on how parties should investigate sites for historical pesticide usage, namely: interview people with knowledge about the site's agricultural operation and pesticides uses; identify areas where pesticides were stored and application equipment cleaned; search for evidence of spills or releases; and contact local agricultural extension agents for information about crops grown and pesticides used in the area.

  If Phase I evidence suggests the likely presence of persistent pesticides, then the party will need to conduct Phase II sampling of soils and groundwater if pesticides are likely present in groundwater. The number of soil samples required will vary with the history of the site and the nature of the proposed new use, with more sampling required for residential or school developments, and less for industrial/commercial reuse. The guidance provides tables of default sampling schemes, based on the size of the property and the nature of the proposed reuse. Parties will also have to collect samples from any ditch, stream, swale or other surface water body where evidence suggests pesticides may have accumulated.

- **Risk-Based Cleanups**. DEQ will use risk-based decision making to determine if pesticides need to be cleaned up or managed to reduce risk. If contaminant levels are above background, DEQ will compare the pesticide levels to EPA Region 9's preliminary remediation goals ("PRGs") and DEQ's risk-based concentrations ("RBCs") to evaluate whether the contaminants pose unacceptable risks to humans.

- **Ecological Evaluation**. According to the guidance, evaluation of ecological risk — potential risk to other species — will not be required unless the site includes wetlands, ponds or other significant natural habitat. In those circumstances, DEQ will require a Level I Scoping Assessment to assess whether ecological receptors or exposure pathways are present at the site. Further ecological assessment may be required if receptors are found on the site and exposure pathways exist between the receptors and contaminants.

- The new pesticides guidance undoubtedly will shed more light on the often murky history and legacy of pesticide use in Oregon. While the guidance is helpful in outlining the steps DEQ will require parties to take when preparing assessments of former agricultural lands for non-agricultural development, it necessarily means that developers and owners of former farms and orchards will have to evaluate the historical pesticide usage as a new element of their due diligence, at greater expense.

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The Puget Sound Partnership

by Alexandra K. Smith

One of Washington Governor Christine Gregoire's top priorities is protecting and restoring the environmental health of Puget Sound, and on May 7, 2007, she signed into law a bill creating the Puget Sound Partnership ("the Partnership"). The Partnership is a new state agency charged with overseeing and restoring Puget Sound to a healthy condition by the year 2020.

Genesis of the Partnership

The legislation that created the Partnership, ESSB 5372, grew out of a public-private task force the Governor convened in December 2005. The group met over the course of the past two years, and at the Governor's request, developed a list of recommendations for how to improve the health of Puget Sound. The task force's recommendations included:

- *Cleaning Up Areas With Septic Problems:* by partnering with the private sector and financial assistance to local governments.
- *Substantially Increasing Compliance With Existing Land Use and Water Quality Laws:* by providing funding to state and local governments for enforcement and technical assistance; and providing assistance to local governments updating their Shoreline Master Programs and Critical Areas Ordinances.
- *Accelerating Cleanup of Toxic Sites, Both In-Water and Within One-Half Mile of Puget Sound:* by preventing pollutants from entering the Sound; and using innovative "outcome-focused" state-private partnerships to achieve faster cleanups.
- *Significantly Reducing Polluted Stormwater Runoff:* by implementing and enforcing the recently revised municipal stormwater permit to local governments; providing funding for high-profile, low-impact developments; and providing incentives for pre-1990 developments to reduce polluted stormwater runoff.
- *Protecting Adequate Instream Flows in Puget Sound Rivers:* by developing rules for water use efficiency and water reclamation; expanding financial support and financial incentives for capital investments in reuse and reclamation projects; and requiring metering and more robust water compliance and enforcement plans in Puget Sound watersheds.

The Legislation

The Partnership officially opened its doors on July 1, 2007. The agency consists of an Executive Director, a Leadership Council, an Ecosystem Coordination Board and a Puget Sound Science Panel. The initial Executive Director is Ron Schultz, former Director of Programs for the Puget Sound Action Team. The Leadership Council consists of seven members, and it will be responsible for adopting and implementing an "action agenda" for restoring Puget Sound. The Governor selected Bill Ruckelshaus to Chair the Leadership Council. The Ecosystem Coordination Board will assist the Leadership Council in developing the action agenda, and will have 23 representatives from a variety of geographic areas, including members of local governments, businesses, environmental interests, counties, cities, port districts, relevant state agencies, Puget Sound Tribes and federal agencies.

The Partnership is tasked with developing the first action agenda by September 1, 2008, and it is likely to be based upon the original recommendations made by the Governor's public-private task force. The agenda will be implemented through the existing authority of state agencies, local governments, Ports, Tribes and the federal government. To encourage these governmental entities to implement the action agenda, the legislation creates the concept of "Puget Sound partners," which are "entities that consistently achieve outstanding progress in implementing the action agenda." "Puget Sound partners" will be given preference for state funding for projects impacting the Puget Sound basin. Additionally, as of 2010, state funds may *not* be allocated to activities "that are in conflict with the action agenda developed by the Puget Sound Partnership."

To promote the restoration of Puget Sound, the legislature also appropriated $238 million of targeted funds for Puget Sound activities. This includes $52.9 million for toxic prevention and cleanup; $45 million to restore damaged habitat; $47.5 million to protect existing habitat; $29 million to reduce stormwater runoff; $53.8 million to cleanup septic systems and wastewater; and $6.2 million to promote citizen partnerships.

What Are the Practical Impacts of the Legislation?
The new legislation alone is unlikely to have on-the-ground impacts until the first action agenda is implemented in September 2008. Until the action agenda is developed, local governments, environmental groups and the business community will have a role in developing the agenda and can influence the projects, areas and priorities on which the Partnership will eventually focus. Additionally, while the action agenda is under development, the legislation and associated funding made available are likely to provide increased opportunities for development around Puget Sound. However, there eventually will also be increased environmental standards and enforcement.

- ***Increased Development Opportunities***

  The potential increase in opportunities for development is likely to arise from actions agencies took even before the Partnership was convened. For example, the Department of Ecology's ("Ecology") Toxic Cleanup Program identified a list of Puget Sound cleanup sites and sought additional funding and resources to make cleanup of those sites a priority. Ecology's additional resources and goal of expediting cleanup creates opportunities for development of properties around the Puget Sound through strategic public-private partnerships. Indeed, one of the recommendations from the Initiative was the use of "innovative outcome-focused partnerships with private and state entities to achieve faster cleanups." This provides a unique opportunity in which the Governor, the legislature and relevant state agencies are aligned on promoting this kind of development, and they have the funding to see it through.

- ***Increased Environmental Standards and Enforcement***

  In terms of increased environmental standards and enforcement, local governments and business are concerned that the Partnership will set the environmental bar higher, but no funds will be provided to allow local governments to reach that higher level of environmental enforcement or compliance. The fear is that the Partnership's action agenda will be an unfunded mandate.

One of the perceived unfunded mandates is related to polluted stormwater runoff. Stormwater runoff is considered a serious threat to the health of Puget Sound. The Puget Sound Initiative group's recommendations envisioned a role for the new Municipal Stormwater Permit (effective January 16, 2007) in reducing polluted runoff to Puget Sound. The Permit requires monitoring for chemicals and toxins previously not required. The cost of this additional monitoring will be borne by the municipalities. In addition, the Permit has new "minimum technical requirements" for development and redevelopment that go beyond what the federal Clean Water Act requires. For example, the Permit requires stormwater runoff from a developed or redeveloped acre or more to match the pre-development condition, and presumes the predevelopment condition was forested land cover. This requires developers to come up with ways to reduce stormwater runoff from impervious surfaces, which can add significant costs to any given development or redevelopment. Not surprisingly, the Permit has been appealed by municipalities, Ports and business interests.

More information about the Puget Sound Partnership can be found on its Web site at: http://www.pugetsoundpartnership.org/.

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