

RIPARIAN PROTECTION

Questions & Answers

1. What is a riparian corridor and why is it important?

Answer: A riparian corridor is a space on both sides of a stream or around a lake or wetland. The corridor is defined by a distance measured back from the water by so many feet. This measured area is called a setback. Special land use rules then apply to the setback area. These rules restrict certain kinds of development to protect the riparian area from damage.

Riparian areas are important for two main reasons. First, natural riparian areas are almost always occupied by trees and shrubs that hang over the water, providing shade. The shade keeps water cooler and cool water is essential for healthy fish and other aquatic species. Second, natural riparian areas also provide critical food and shelter for many kinds of land-going animals and the plants that support them. When natural riparian vegetation is disturbed or removed both animals and plants lose essential habitat.

There are other important health and safety benefits that come from protecting streams, lakes and wetlands. When plants are removed along the shores of streams, or soils are dug up, erosion is very likely to happen. Not only does spoiled water harm fish and other stream animals, but water moves faster when vegetation is gone. This increases the risk of erosion and flooding and the chance streams will move, which often puts homes and other developments in harm's way. Healthy riparian corridors are an important part of flood prevention.

2. Why is the county trying to change its stream setback rules now?

Answer: This is not a new project. It is part of a process called "periodic review." Periodic review comes from an Oregon law that requires local governments to update their planning rules every 10 years. The update process starts when the county enters into an agreement with the state to make specific changes to its planning rules. The county's periodic review started in 1995 with an agreement that covered 10 planning tasks. It has since been amended a few times at the request of the county. Under the current agreement, the county is required to adopt a riparian protection plan that complies with state law. The county adopted a new riparian ordinance in 2000, but then repealed it a few months later. In response, the state remanded the project back to the county in late 2003. "Remanded" means the state has returned the riparian project to the county with an order to complete it according to the periodic review agreement.

3. Why are there two proposals?

Answer: There are two proposals because the state rules give the county two options. One option is to adopt rules for riparian areas that follow exactly the way they are set out in state laws, called Oregon Administrative Rules, or “OARs”. These rules are uniform for the whole state and apply unless the county does special additional work. This option is called the *safe harbor*.

The safe harbor choice specifies a stream inventory and then applies a two-level setback requirement. Streams with flows that average more than 1,000 cubic per second (cfs) must have a 75' setback. Streams with 1,000 cfs or less must have a 50' setback if the Oregon Department of Fish and Wildlife also designates them as fish-bearing.

The second option allows the county to do something different as long as state and local participants all agree to the differences. This option is called Regional Problem Solving (RPS). The county chose to do RPS and created a special committee made up of private property owners, farmers, miners, county planners, and representatives from five state agencies (the departments of Land Conservation and Development, Geology and Mineral Industries, Fish and Wildlife, State Lands and Environmental Quality). This group worked on the problem for five years and sought input from community groups and property owners throughout the county. The group eventually agreed on setbacks that are greater than the safe harbor option. However, before these changes can go into effect, the Josephine County Board of Commissioners must also agree. That is why the Board is having hearings now.

The Regional Problem Solving option, sometimes referred to as Ordinance 2000-3, proposes a 75' setback for all streams with flows greater than 10 cfs; 50' for streams with flows of 2-10 cfs (which are also fish-bearing); and 25' for all other streams that do not bear fish.

In comparing these two options, it may be helpful to know something about how the cubic feet per second standard applies to the county's streams. Only two streams go above the 1,000 cfs threshold, and they are the Rogue River along its entire length and the Illinois River after the East and West Forks join. Williams Creek and Jump Off Joe Creeks are examples of streams that have average annual flows of 10 cfs or more. The county has 145 streams at or above 10 cfs.

4. How do you measure the setback from a stream?

The proposed ordinance says the setback distance will be measured from the top of the bank for streams, the high water mark for lakes, and the upland edge of wet areas for wetlands.

The county already has a definition for “top of the bank.” This definition says the top of the bank is the place where water overflows the natural banks and begins to flood the upland.

In the hearings so far, a number of speakers have questioned whether top of the bank is the right definition for starting the setback measurement. It turns out that all of the state agencies use a different definition, called the “ordinary high water line” or OHWL.

The OHWL is the line on the bank or shore to which the high water ordinarily rises annually in season, but excludes exceptionally high water levels caused by flooding. The OHWL is often a place below the top of the bank that is established by physical evidence, such as a clear natural line impressed along the shore, together with changes in the character of soil and plant conditions from riparian to upland.

For many reasons, some of which are too complicated to explain here, planning staff will recommend changing the definition from the high bank to the OHWL.

5. Are property owners prohibited from doing anything within the riparian setback?

Answer: No. Property owners are allowed to do quite a bit within the setback area. To begin with, the proposed ordinance lists 9 uses that are allowed:

- Streets, roads, paths
- Drainage facilities, utilities, irrigation pumps
- Water-related and water-dependent uses
- Replacement of existing structures at the same location
- Enhancement of riparian areas
- Improvements for fish habitat
- Aggregate mining
- Forestry, including logging, when done with a permit under the Oregon Forest Practices Act
- Removal of non-native vegetation when replaced with native species

6. What if I have something I want to do within the riparian setback that is not on the list? Can this be worked out?

Answer: Yes. The proposed ordinance has a procedure for doing this. If you have a plan that does not fit one of the 9 uses listed above, you can make a request for a variance. During this process the county will work with officials from the Oregon Department of Fish and Wildlife to make a special plan. A county planner and the official from Fish and Wildlife will meet with the property owner to find a solution.

Variance rules can be used to permit any kind of use as long as the change results in equal or better protection to the riparian area and the exception does not take up more than 50% of the riparian area. One of the rules states that if the riparian setback renders a property undevelopable, uses will be allowed.

Over the last 10 years or so, the county has processed a number of variances under the existing riparian setback ordinance by working with the Oregon Department of Fish and Wildlife and property owners. All of these situations resolved to the mutual satisfaction of everyone. None of these decisions were appealed.

7. Are uses within riparian areas regulated by other laws?

Answer: Yes, but in different ways. The county's flood regulations adopted to qualify for federal emergency funding prohibit *any* kind of non-permitted excavation, fill work or structure development within the floodway areas that surround the county's major streams. This program comes through the Federal Emergency Management Authority, or FEMA. The rules here are very strict. If the county does not enforce these rules, then FEMA will not underwrite the cost of flood insurance for property owners who live in flood-prone areas.

The Oregon Forest Practices Act, administered through the Oregon Department of Forestry (ODF), prohibits logging without a special permit. Logging occurs when one or more trees are removed for sale, trade or barter. The rules require a written riparian mitigation plan that covers 100' from the ordinary high water line of streams. The twenty feet closest to the stream is designated as a "no touch" zone.

The removal, fill or alteration of materials within streams, lakes or wetlands requires a permit from the Oregon Department of State Lands (DSL). This covers all work conducted *at or below* the ordinary high water line. The rules differ somewhat for streams that are designated as essential salmon habitat, state scenic waterways or wetlands.

The mining of soil, rock or aggregate resources *above* the ordinary high water line requires review and permits by the Oregon Department of Mineral and Geology Industries (DOGAMI). Mining occurs whenever a property owner sells any of the mined materials to others. DOGAMI also uses the ordinary high water line in deciding when to apply its regulations. A mining plan that protects riparian areas is required.

According to rules administered by the Oregon Department of Environmental Quality (DEQ), the placement of septic tanks and drainfields must setback 100' from year around streams and 50' from seasonal streams. DEQ also uses the ordinary high water line. DEQ has another program, called the National Pollution Discharge and Elimination System (NPDES). This program is designed to comply

in part with the Federal Clean Water Act. The NPDES rules absolutely prohibit soils disturbed during development from being discharged into streams, lakes or wetlands. Substantial fines can be assessed for violations.

The Oregon Department of Agriculture (ODA) regulates farming and grazing within riparian areas. Its rules are designed to keep streambanks from sloughing, primarily through the protection of riparian vegetation. Two main reasons are stated for the rules. One reason is to keep water from being polluted. The other is to protect against increased flood hazards.

8. How does Measure 37 affect stream setbacks?

Answer: There are many questions about Measure 37 that do not have clear answers. This includes setback rules for riparian areas. While Measure 37 requires the county to pay compensation or waive restrictive land uses regulations adopted after someone buys property, it also exempts certain kinds of regulations from this requirement.

There are two exemptions that could apply to riparian setbacks. One exemption is for regulations that protect the public's health and safety. Because one of the important reasons for protecting riparian areas is to lessen flood hazards, setback rules may be exempt for safety reasons.

Another exemption is given for local land use regulations that are required to comply with federal law. The state's efforts to protect the water quality of streams, lakes and wetlands come from the Federal Clean Water Act. Protecting riparian areas is a key component for compliance. Therefore, the state rules that require counties to protect riparian areas arguably implement the federal law and are therefore exempt.

There is actually a court case from Hood River County that holds local setbacks implementing the National Columbia Gorge Scenic Easement Act pursuant to state regulations are exempt because they implement federal law. The sponsor of Measure 37, Oregonians In Action, has appealed this case to the Oregon Court of Appeals. We are now waiting for the court's decision.

In the event riparian setbacks are not exempt from Measure 37, the law allows property owners to make a claim when future land use applications are made. If the county tries to apply the setback during review, owners can make a claim for compensation or waiver, provided the regulation was adopted after the owner acquired title to the property.

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