

1600 SE 190th Avenue, Portland Oregon 97233-5910 • PH. (503) 988-3043 • Fax (503) 988-3389

**STAFF REPORT FOR THE PLANNING COMMISSION HEARING
NOVEMBER 5, 2018**

**Amendments Relating to Ground Disturbing Activity Including Minimal Impact Projects,
Grading and Erosion Control (*Erosion and Sediment Control*), Agricultural Fill,
Stormwater Drainage Control, Hillside Development (*Geologic Hazards*) and Large Fill
Permits (PC-2016-5384)**

Staff Contact:

Adam Barber, Deputy Planning Director
adam.t.barber@multco.us (503) 988-0168

SECTION 1.0 INTRODUCTION

This Proposal, PC-2016-5384, relates to the regulation of ground disturbing activities. The Planning Commission held Work Sessions on this proposal February 6, 2017 and July 2, 2018. In general summary, this Proposal is intended to:

1. Clarify and strengthen regulations within, and distinctions between, categories of ground disturbance regulation (Minimal Impact Project; Grading and Erosion Control (to be renamed Erosion and Sediment Control); Agricultural Fill; Hillside Development (to be renamed Geologic Hazards); and Large Fill);
2. Clarify stormwater drainage control requirements;
3. Regulate fill activities that support a farming practice;
4. Implement Comprehensive Plan policies relating to ground disturbing activities.

SECTION 2.0 PROPOSED CODE AMENDMENTS

Proposed code amendments are separated by topic area and provided within the following attachments to this staff report. The proposed code amendments are provided in the consolidated land use code (Chapter 39) recently adopted by the Board of Commissioners and to Chapter 38 applicable inside the Columbia River Gorge National Scenic Area.

Attachment A.1 – Chapter 39 amendments relating to Minimal Impact Projects, Erosion and Sediment Control Permits, Agricultural Fill Permits and Stormwater Drainage Control requirements

Attachment A.2 – Chapter 39 Geologic Hazards Permit amendments

Attachment A.3 – Chapter 38 (Columbia River Gorge National Scenic Area) Geologic Hazards Permit amendments

Attachment A.4 – Chapter 39 Large Fill Permit amendments

Attachment A.5 – Chapter 39 Definitions

Attachment A.6 – Chapter 39 Administrative Procedures

SECTION 3.0 JULY 2, 2018 WORKSESSION SUMMARY

The Planning Commission last considered these code amendments at a Worksession held on July 2, 2018. At that Worksession, the Planning Commission asked for additional information and revisions from staff. Responses to those requests are provided below.

3.1 Agricultural Fill Permit Stormwater Drainage Control Requirements

The Commission recommended that staff consider adding thresholds to the Agricultural Fill permit standards for compliance with county stormwater drainage control requirements. A hypothetical scenario discussed by the Commission involved mounding of fill, which could change the nature, velocity, or direction of stormwater flow and affect a neighboring property.

Under Oregon case law, a property owner generally is not liable for surface water that flows onto a neighbor's property in locations and amounts that are consistent with the natural drainage on the property. *See Garbarino v. Van Cleave*, 214 Or 554, 556-62, 330 P2d 28, 29-30 (1958). In addition, a property owner is generally not liable for installing a drainage system that may accelerate the flow of water onto a neighbor's property, as long as the water is not diverted from its natural channels and does not otherwise create "unreasonable inconvenience" to the neighbor. *Id.* As a result, it is possible that a property owner could place fill on the property that would accelerate the flow of surface water, but not otherwise change the location or amounts of surface water flowing off the property, leaving a neighbor with limited, if any, ability to recover from the property owner for damage caused by the accelerated flow.

Therefore, staff believes it is reasonable to introduce stormwater review thresholds into the Agricultural Fill provisions to reduce potential stormwater impacts. Multnomah County land use regulations require professional stormwater review when certain thresholds are exceeded, such as the amount of new or replaced impervious surface proposed. The recommended changes are shown in Appendix A.1 and relate to fill being placed in a waterbody, when existing stormwater drainage will be diverted to a new location, or when fill thickness exceeds 4-feet at any point,

which aligns with a trigger for geotechnical review (for unsupported finished slopes) in the Geologic Hazards provisions. These triggers were crafted, based on staff's professional judgement, for non-discretionary circumstances where it is not unreasonable to suspect stormwater runoff could be impacted. Filling a waterbody, for example, is one such instance. Diverting runoff to a new location is another. The third scenario of concern is mounding fill in excess of 4-feet, which begins to alter the topography to a degree professional oversight is required when unsupported fills are proposed on geotechnical sensitive lands.

3.2 Authority to Regulate Agricultural Fills

In the context of the proposal to add an Agricultural Fill permit, the Commission asked for a greater understanding of the extent of jurisdictional authority of both the County and the Oregon Department of Agriculture (ODA) to regulate that type of farming practice.

The regulation of agricultural activities, and the development needed to support those agricultural activities, is shared by multiple agencies. This arrangement is not uncommon. For example, the County works closely with the Oregon Liquor Control Commission in the regulation of Marijuana Business activities; with the Oregon Department of Forestry when considering development related to forest practices; and with the Oregon Department of Fish and Wildlife and Oregon Department of State Lands when considering natural resource enhancement projects.

The Oregon Department of Agriculture (ODA) is the agency responsible for regulating food production and safety with the organizational mission to "ensure healthy natural resources, environment, and economy for Oregonians now and in the future through inspection and certification, regulation, and promotion of agriculture and food." In the context of agricultural fills, ODA's primary regulatory concern is water pollution from agricultural activities and soil erosion. *See* ORS 561.400 (describing duties and powers of Natural Resources Division of ODA). As a result, ODA's regulations do not address many of the public health, safety, and welfare concerns surrounding agricultural fills. The County's proposal is intended to fill that gap.

The County has authority to regulate agricultural fills to address the public health, safety, and welfare. Certain restrictions in state law, including the "right to farm" law, do limit the County's authority to regulate certain farming practices. For example, the "right to farm" law prohibits local governments, like counties, from making certain farming practices a "nuisance" or "trespass," which includes but is not limited to actions or claims based on noise, vibration, odors, smoke, dust, mist from irrigation, use of pesticides and use of crop production substances. *See* ORS 30.932 and ORS 30.935. However, that and other state laws do not prohibit the County from regulating agricultural fills in the ways proposed for the purpose of protecting the public health, safety, and welfare.

In fact, the County regulates certain aspects of other agricultural activities as well, including application of setbacks and maximum height limits on agricultural buildings. Additionally, ground disturbance associated with construction of agricultural buildings and stormwater runoff from the roofs of agricultural buildings are subject to county regulations. Construction of

agricultural buildings is exempt from structural building permits but still subject to local electrical, mechanical and plumbing building permits.

Staff discussed the concept for the proposed Agricultural Fill permit with ODA staff who recognized the County's authority to adopt reasonable standards to help address community concerns related to these fill activities from a health and safety perspective. Examples of how the Agricultural Fill permit addresses health and safety issues includes the prohibition of fill placement in hazard areas, encroachment in wetlands, and limitations on hours of operation for fill being transported on a public roadway. The County – rather than ODA – typically receives community complaints, understands the local issues, and is in the best position to regulate the health and safety aspects of agricultural fills.

Multnomah County can also consult with ODA when reviewing a proposal. In the past, the County often consulted with ODA when deciding if a fill was a routine agricultural practice, but the new Agricultural Fill standards will serve that function in the future. Because both agencies could have some degree of oversight for water quality impacts, it is possible that both agencies could be involved in an enforcement action related to water quality impacts generated by an agricultural fill activity.

3.3 Other Issues and Questions Discussed at July 2, 2018 Planning Commission Worksession

Some of the issues raised at the July 2, 2018 Planning Commission meeting resulted in revisions to the proposal, while others did not. The summary below is organized to first address issues that resulted in revisions, followed by issues that did not result in revisions.

ISSUES RESULTING IN REVISIONS

| | Issue Discussed or Question Raised By Planning Commission | Staff Response |
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| 3.3(a) | The Commission supported prohibiting Large Fills in additional sensitive areas, as proposed (additional SEC layers, WRG and high value soils). The Commission asked staff to research the definition of high value soils. Maps in Attachments C&D of the July 2, 2018 Worksession staff report only contained class 1 & 2 soils, but high value also includes class 3 soils. | County Exclusive Farm Use (EFU) regulations define “high-value farm land” in MCC 39.4210, which derives from ORS 215.710. The proposed ordinance has been updated to refer to “high value farm land” as defined in the EFU for consistency in regulatory application. <i>High-Value Farm Land – means land in a tract composed predominately of soils that are:</i> <i>(1) Irrigated and classified prime, unique, Class I or Class II; or</i> |

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| | | <p><i>(2) Not irrigated and classified prime, unique, Class I or Class II; or</i></p> <p><i>(3) Willamette Valley Soils in Class III or IV including:</i></p> <p><i>(a) Subclassification IIIe specifically, Burlington, Cascade, Cornelius, Latourell, Multnomah, Powell, Quatama;</i></p> <p><i>(b) Subclassification IIIw specifically, Cornelius;</i></p> <p><i>(c) Subclassification IVe, specifically, Cornelius, Latourel, Powell, and Quatama.</i></p> <p><i>Location and the extent of these soils are as identified and mapped in "Soil Survey of Multnomah County, published by the Soil Conservation Service, US Department of Agriculture, 1983."</i></p> <p><i>The soil class, soil rating or other soil designation of a specific lot or parcel may be changed if the property owner submits a statement or report pursuant to ORS 215.710(5).</i></p> |
| 3.3(b) | Exemptions should more clearly call out hand work as exempt from regulation as a ground disturbing activity. Confirm code has not lost the motorized equipment trigger for ground disturbing activity. | <p>This concern has been addressed through definitions, rather than exemptions. County code regulates "Ground Disturbing Activity," defined as either excavating or filling. Both excavating and filling require the use of motorized equipment and do not include work conducted by hand. The following phrase has been added to the definition of both Excavation and Fill:</p> <p><i>Excavation... "Work conducted by hand without the use of motorized equipment is not excavating."</i></p> |

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| | | <p><i>Fill... “Work conducted by hand without the use of motorized equipment is not filling.”</i></p> <p>Staff contemplated using the broader term ‘mechanical’ (produced or operated by a machine or <u>tool</u>) but ultimately felt this created ambiguity given work using hand tools is exempt. The proposed code reverted to the usage of ‘motorized’ equipment as seen in the definition of ground disturbing activity in existing code. The term ‘motorized’ has worked well in the past and we think best aligns with the intent of the Worksession discussion where staff heard a desire to exempt hand work but regulate ground disturbance caused by construction type equipment such as backhoes, graders and dozers.</p> |
| 3.3(c) | <p>The term “grading” in the Agricultural Fill permit section 39.6230(B)(4) is awkward and should be reworded for clarity:</p> <p><i>“The Agricultural Fill Permit shall not authorize excavation, other than grading of the fill”</i></p> | <p>This is a technically complex proposal that, like many other parts of the Code, relies on the use of various defined terms such as excavation. At times, the reader will need to refer to the definitions to accurately interpret the code. However, because grading is not a defined term, staff agrees that in this instance, revision would be helpful.</p> <p>The intent of the proposed Agricultural Fill standard is to allow placement and leveling of fill on the ground surface, but not excavating into the native ground. The standard has been written to avoid the term “grading” within the standard, which has caused confusion as highlighted by the Commission discussion.</p> <p>It is important to keep in mind that other farming practices, besides filling and placement of structures, are exempt from the MIP, ESC, and GH permit requirements and therefore can be carried</p> |

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| | | out without any permit. One example is agricultural tilling. |
| 3.3(d) | Stormwater impacts should be addressed in the Agricultural Fill code. The concern raised was a mound of fill redirecting stormwater onto a neighboring property. The stormwater drainage control section would only apply when new impervious surfaces exceeding 500 square feet proposed. | See response under section 3.1 of this report. The proposal has been amended to require compliance with the stormwater provisions in the Code for an Agricultural Fill permit when: (1) Fill is proposed in a waterbody, or (2) Existing stormwater drainage will be diverted to a new location, or (3) Fill thickness will exceed 4 feet |
| 3.3(e) | The stormwater drainage control exemption MCC 39.6235(A) is awkward and overly restrictive. A building permit is required if more than ¼ of shingles replaced but this should not trigger stormwater review. Intent should be to trigger stormwater review when new impervious surfaces added, not replaced through re-roofing a lawful structure. | The exemption has been re-drafted to remove the limitation that the roof replacement (including shingle replacement) must be subject to building permit requirements. |
| 3.3(f) | The Commission did not support a new '200-feet from landslide' GH permit trigger. How large a landslide? What is or is not a landslide? Remove and defer to landslide mapping update project. | This conceptual trigger has been removed from the Proposal. |
| 3.3(g) | Add a prohibition for on-site night work in the Agricultural Fill permit to minimize impacts on neighbors | Standards relating to allowable hours of operation were borrowed from the Large Fill permit and added into the Agricultural Fill permit. |
| 3.3(h) | Support voiced for proposed clarification to existing residential | Staff retained the intent of the proposed clarifying language but further refined the exemption by reducing the residential |

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| | gardening and landscape maintenance exemption | <p>gardening exemption area from 10,000 square feet to 2,500 square feet and by establishing a 10,000 square feet cap for the landscape maintenance exemption. Upon further reflection, Staff felt a 2,500 square foot gardening was a more reasonable threshold than 10,000 square feet given the small size of most residential gardens (hundreds, not thousands of square feet) and that a size cap should be established for exempt landscape maintenance activities.</p> <p>Based on feedback from the Commission that the exempt activities should not jeopardize water quality, the proposal was modified to state that the exempt activity must be at least 100 feet from any watercourse located at a lower elevation to and in the surface drainage path of the ground disturbing activity.</p> |
| 3.3(i) | Deleting two previously proposed Large Fill exemptions | <p>The latest draft removes the following two previously proposed exemptions to the Large Fill permit.</p> <p><u><i>(B) Fill required for a flood control project approved by a local soil and water conservation district or the Oregon Natural Resources Conservation Service.</i></u></p> <p>Large Fills are prohibited in the 100-year floodplain by current code. The exemption above may send a mixed message to then exempt fill for flood control projects from the Large Fill provisions given flood control projects would likely occur in the floodplain. The previously proposed exemption (B) above has been deleted.</p> <p><u><i>(C) Fill required for a natural resource restoration or</i></u></p> |

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| | | <p><u>enhancement project approved by a local soil and water conservation district or the Oregon Natural Resources Conservation Service.</u></p> <p>Upon further reflection, staff believes such a blanket exemption above may not be appropriate. It would not be unreasonable for the county to require land use review if over 5,000 cubic yards of fill is proposed. The previously proposed exemption (C) above has been deleted.</p> |
| 3.3(j) | Deleting references to grading and erosion control standards in base zones | <p>Some, but not all, base zones contain a reference to the Grading and Erosion Control (GEC) permit and list one of the many GEC criteria. This incomplete approach is not helpful and has the potential introduce interpretation conflict. Staff proposes deleting these outlying references for consistency.</p> <p>Example - § 39.4325 [33.2855]DIMENSIONAL REQUIREMENTS AND DEVELOPMENT STANDARDS.</p> <p>(J) Grading and erosion control measures sufficient to ensure that visible or measurable erosion does not leave the site shall be maintained during development. A grading and erosion control permit shall be obtained for development that is subject to MCC 39.6200 through 39.6235.</p> |

ISSUES NOT REQUIRING REVISIONS

| | Issue Discussed or Question Raised By Planning Commission | Staff Response |
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| 3.3(k) | The Commission would like to better understand what the Department of Agriculture regulates so that the | See full response under section 3.2 of this report. Although the proposal regulates some issues over which ODA also has jurisdiction, staff believes this proposal is |

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| | County does not have overlapping regulations. | necessary to address some of the health, safety, and welfare impacts not addressed by ODA. ODA is supportive of the proposed regulatory concept. |
| 3.3(l) | The Commission supports no volume limit on an Agricultural Fill permit as proposed. | There are no volume limits on the Agricultural Fill permit. However, no Agricultural Fill permit is available in the Geologic Hazards Overlay. |
| 3.3(m) | Is gravel pervious or impervious under County code? Does converting gravel to >500 sf of asphalt require a stormwater certificate? | The County does not require a stormwater certificate for placement of gravel which staff interprets to be a pervious material. Converting more than 500sf of gravel to asphalt (or any other impervious surface) would require stormwater certificate review. |
| 3.3(n) | How was the 5,000 cubic yard (cy) threshold in the Large Fill permit originally established? | <p>County staff reviewed construction projects involving a sizable volume of fill when the Large Fill code was drafted in the late 1990s and determined that 2,500 cy was an average representation of a large fill project at that time.</p> <p>It was determined through the legislative process in the 1990s that exceeding 5,000 cubic yards of fill should require the more complex Type 3 Conditional Use land use permit.</p> |