

Renee France  
Zoe Lynn Powers  
111 SW Columbia Street, Suite 700  
Portland, Oregon 97217

September 28, 2023

VIA: Email to [LUP-comments@multco.us](mailto:LUP-comments@multco.us)

Mr. Alan Rappleyea  
Hearings Officer for Multnomah County  
Land Use Planning  
1600 SE 190th Avenue  
Portland OR 97233-5910

**Re: Applicant's Final Written Argument Under ORS 197.763(6)(e) – #T3-2022-16220**

Mr. Rappleyea,

This letter provides final legal argument on behalf of the applicant, the Portland Water Bureau (the "Water Bureau" or "applicant").

We ask that you uphold County staff's recommendation of approval. As you know, the record of this case is voluminous, and staff's comprehensive assessment led to a recommendation for approval based on their review of that record and knowledge of the Multnomah County Code ("MCC") and other local standards, such as the Multnomah County Road Rules and the Design and Construction Manual. Even during the open record periods, staff have continued their support of the approval of this application, while adding or modifying conditions of approval in response to testimony. Exhibit J.45 (Land Use Planning); Exhibit J.44 (Transportation Planning).

The impact of this project on our state cannot be overstated. At the core of this application is a commitment to public health and the provision of clean water to a quarter of the state's population – a million people that depend on the Bull Run supply every day. Exhibit D.17 (Oregon Health Authority).

If the schedule is delayed, Portland Water Bureau will no longer be able to provide Bull Run Water without issuing a boil water order, which will have massive economic effects on the state. The City of Sandy and the 7 other wholesale water districts in this area are also depending on this project to protect the populations they serve from *Cryptosporidium* as well as fire, landslides, algae blooms, large storms, volcanic events, and fires in the watershed. Exhibit A.2, pages 1-3. As explained by the Public Works Director of the City of Sandy, "[t]he impact of not having safe water for the community and economy of the region is enormous. It is critical for the public and economic welfare of the community to build this once-in-a-generation project as quickly as possible." Exhibit E.23 (Sandy Public Works). For this reason, the applicant asks that the Hearings Officer apply whatever conditions of approval are needed to support findings that all applicable approval criteria are met and to uphold staff's recommendation of

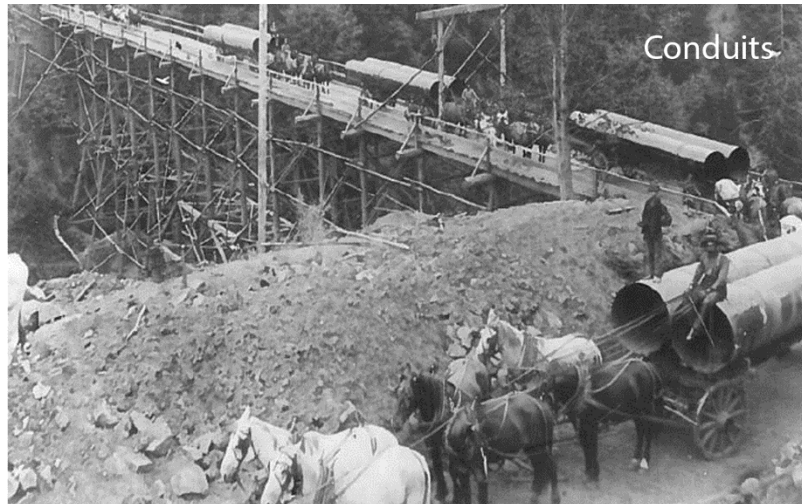
{01383913;2}

approval. See MCC 39.7510 ("The approval authority may attach conditions and restrictions to any community service use approved.").

Many of the opponents commenting on the application have overlapping concerns. As a result, many of the following sections respond to the general issues raised rather than to specific comments, while others address specific comments. In addressing those concerns, relevant conditions of approval from staff or being proposed by the applicant have been called out in offset boxes for ease of reading. Each of these conditions of approval is also provided in a full set in Appendix A.

Defined terms, whether or not capitalized, are intended to be given the meanings provided in the application narratives (Exhibit A.2, pages iv-v, provides a glossary) or in other applicant materials in the record relevant to the topic being addressed.

We realize that this document is lengthy, and the public testimony in the casefile is voluminous. We have attempted to thoroughly organize this document to provide some structure to the analysis. A detailed table of contents for that purpose is included on the following pages. Additionally, all of staff's conditions of approval, proposed modifications, and additional applicant proposed conditions are provided in Appendix A. and proposed modifications are also included in Appendix A).



*Original pipeline conduits through this area to create a gravity-fed supply of clean water in late 1800s.*

*Exhibit H.42*

## Table of Contents

Table of Contents.....	iii
I. Overarching Legal Topics .....	1
A. Temporary Construction Activities Are Not Subject to the Approval Criteria that Apply to the Permanent Use .....	1
1. Opponents’ Interpretation Would Violate the Rules for Code Interpretation under PGE/Gaines .....	1
2. This is Not a Case of First Impression in Like Circumstances.....	3
a. Citizens Against LNG Holds That Temporary Construction Activity Is Not “A Use in Itself” Governed by The Land Use Regulations .....	3
b. The County Has Never Applied Their Code in This Way Before.....	5
3. Opponents’ Interpretation Would Violate ORS 215.416(8)(a) Requiring Decisions to be Made Based on Standards and Criteria Set Forth In Code.....	6
4. The Definition of Development Does Not Change This Analysis; the Legislative History Shows 2018 Amendment Was Not a Substantive Change.....	8
5. Conclusion.....	11
B. The Project Exceeds Standards for Transportation Planning .....	13
1. Operational Traffic.....	14
2. Construction Traffic.....	15
a. On Average, 3 Seconds of Delay .....	17
b. Transportation Demand Management (TDM).....	19
c. Crash Severity or Frequency .....	21
3. Road Improvements & Suitability of Roads For Construction and Operation of Project .....	22
a. Carpenter Lane West of Cottrell Road.....	24
b. Pavement Conditions .....	25
c. Pedestrian, Horse, and Non-Vehicular Traffic .....	28
d. Sight Distance & Vegetation .....	31
e. Truck Routes & Turning Movements .....	32
f. Traffic Control Plans (TCP), Access to Properties and for Emergencies, & Notice and Communications .....	35
C. Conditions of Approval Do Not Create Impermissible Deferral.....	39
1. Transportation Demand Management Plan (TDMP).....	40
2. Traffic Control Plan (TCP).....	43
D. Clackamas County’s Jurisdiction .....	45
E. Filtration Facility Site Selection is Legally Irrelevant.....	45
F. Expert Qualifications.....	47

- G. Staged Videos..... 49
- II. MCC 39.7515 Community Service Use Approval Criteria ..... 50
  - 0. Introductory Legal Topics..... 50
    - 1. Mitigation Conditions and Restrictions Are Expected and Appropriate..... 51
    - 2. The Limited Area of Administrative Office In the Administration Building is Part of the Utility Facility Use ..... 51
    - 3. The Conditional Use Criteria Apply to a Wide Range of Conditional Uses that Include, but are not Limited to, Community Service Uses..... 52
  - A. MCC 39.7515(A) Is consistent with the character of the area;..... 53
    - 1. The Area and the Rationale for its Selection Are Well Defined ..... 54
    - 2. The Analysis of the Character of the Area and the Character of the User are Consistent with Caselaw ..... 64
    - 3. Project Noise Will Be “below measurements of ambient noise” and Confirmed With a Condition..... 66
    - 4. Project Lighting Will Not Extend Beyond Site Boundaries or Impact Dark Skies..... 71
    - 5. The Filtration Facility Landscaping, Mitigation Plantings, & Open Space will Enhance Wildlife Habitat ..... 85
    - 6. Traffic and Road Improvements Are Consistent With County Standards and the Use of Trucks in the Area ..... 86
    - 7. No Off-Site Odors – From Chemicals or Otherwise – and Safe Chemical Storage..... 86
    - 8. Dust Will Be Only From Rare Maintenance Trips on Well-Maintained Gravel Roads ..... 87
    - 9. Well Designed Systems Will Protect Area Water Quality ..... 88
    - 10. The Sandy River Is Protected And Provides a Natural Boundary for the Study Area ..... 89
    - 11. Safety and Security are Prioritized..... 89
    - 12. Visually, the Project Will Blend into the Landscape..... 90
    - 13. Rural Reserve ..... 92
    - 14. Conclusion..... 92
  - B. MCC 39.7515(B) Will not adversely affect natural resources;..... 93
    - 1. The Communications Tower is not Subject to this Criterion ..... 93
    - 2. Natural Resources Subject to this Criterion are those the County has Inventoried and Mapped..... 94
    - 3. Past Interpretations of Natural Resource Impacts has been Limited to Mapped Resources. 97
    - 4. Comprehensive Plan Natural Resource Topics and Policies ..... 98
      - a. Water Quality and Erosion Control ..... 99
        - i. Johnson Creek Water Quality Protections ..... 103
        - Stormwater ..... 103

Facility Water .....	104
Spill Containment.....	105
ii. Beaver Creek Water Quality Protections .....	105
b. Rivers, Streams, and Wetlands .....	107
c. Fish and Wildlife Habitat.....	109
i. Wildlife Habitat .....	110
The Water Bureau Conducted Habitat Assessments Consistent with the Level of Impacts in Mapped Habitat Areas .....	110
Adversely Affecting Wildlife Habitat does not Extend to Indirect Impacts Outside of an SEC-h zone.....	113
ii. Fish Habitat .....	114
iii. Finding of No Significant Impact (FONSI).....	116
d. Scenic Views and Sites .....	117
e. Tree Protection .....	117
f. Air Quality, Noise, and Lighting Impacts.....	120
C. MCC 39.7515(C) The use will not: (1) force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; nor (2) significantly increase the cost of accepted farm or forest practices on surrounding land devoted to farm or forest use. ....	122
1. The State Law Test Does Not Apply Directly and the Comprehensive Plan Indicates Test Should Be Less Onerous in MUA-20 Exception Area .....	122
a. Quoting Part of the Test Does Not Mean No Conditions Allowed.....	123
2. Core Elements of Caselaw Interpreting the State Statute; Definition of Significant .....	123
a. There is no \$20,000, Single Dog, or “De Minimus” Threshold for Significance in Caselaw..	124
3. Impacts of Construction Are Not Impacts of the Proposed Use.....	125
a. Any Construction Impacts Are Temporary, Which Must Be Calculated into the Determination of Significance .....	127
b. Requested Findings on Farm Impacts Test Related to Construction .....	128
4. The Study Area Complies with Guidance for Defining “Surrounding Lands” Under the Statute .....	128
5. The “Surrounding Lands” Do Not Include the Filtration Facility Site nor the Easement Areas (the Subject Properties) .....	133
a. The Same Analysis Applies to Easement Areas.....	134
b. Despite Not Being Part of the Surrounding Lands, the Water Bureau has Reduced Any Impacts Below the Level of Significance .....	135
6. The Emergency Access Road is in Clackamas County’s Jurisdiction, and Subject to a Different Legal Standard.....	139

7.	“Accepted Farm Practices” Is Not Broadly Anything Associated with Farming; a Change or Increased Cost of Practices is Not Broadly Any Impact .....	139
8.	There is Extensive Analysis of Farm Impacts In the Record, Including Cumulative Impacts	141
a.	Traffic Impacts.....	142
i.	Operations.....	142
ii.	Construction Generally .....	143
iii.	Caselaw Provides a High Bar for Significance for Use of Shared Public Roads.....	144
iv.	Mr. Kleinman Ignores the Facts of <i>Van Dyke</i> , and the Extensive Evidence in This Application .....	151
v.	Haul Routes .....	152
vi.	Road Safety & Sharing the Road .....	153
vii.	Access to R&H Nursery Will be Specifically Protected During Construction: .....	158
b.	Construction in the Public Right of Way (Pipelines and Road Improvements).....	159
i.	Detours.....	165
ii.	Concerns About No Alternate Route & Peak Seasons in Farm Traffic Report.....	167
iii.	Wide Equipment and One-Lane or Flagged Passage Through Construction Zones.....	169
iv.	Product Shipping .....	171
c.	Dust And Particulates.....	172
i.	Operations.....	172
ii.	Construction.....	173
d.	Noise .....	177
i.	Operations.....	177
ii.	Construction and Workers .....	178
e.	Use of Farm Chemicals and Spraying Practices.....	181
f.	Wells.....	186
g.	Loss of Customers / Reputational Harm .....	186
i.	Operations.....	186
ii.	Construction.....	186
h.	Security .....	187
i.	Cumulative Impacts .....	187
9.	Mr. Prenguber Qualifies as an Expert .....	187
10.	Forest Use also Addressed in Exhibit A.37 .....	188
11.	Conclusion.....	188
D.	MCC 39.7515(D) Will not require public services other than those existing or programmed for the area; .....	189

1.	Emergency Services that Could be Required Exist in the Area .....	190
a.	Fire Protection Services .....	190
b.	Specialty Emergency Services .....	192
2.	The Criterion Only Applies to Public Services that Could be Required By This Project .....	194
a.	Schools .....	194
b.	1000 Friends.....	195
E.	MCC 39.7515(E) located outside big game winter habitat area;.....	195
F.	MCC 39.7515(F) Will not create hazardous conditions; .....	196
1.	The Project Will Not Create a Hazardous Condition When Considering the Plain Language of the Code.....	196
2.	Past County Interpretations Provide a Reasonable Interpretation of the Criterion.....	197
3.	The Interpretation Proposed by Project Opponents Leads to an Absurd and Untenable Result	198
4.	Filtration Facility Operations Will Not Create a Hazardous Condition .....	200
a.	The Use of Chemicals .....	200
i.	Filtration Facility Use of Chemicals .....	201
ii.	Filtration Facility Design .....	204
iii.	Staff Training.....	205
iv.	Transport of Chemicals .....	206
b.	Facility Operation Traffic.....	208
i.	Planned Roadway Improvements .....	208
ii.	Carpenter Lane.....	209
iii.	Intersection Improvements .....	210
iv.	County Transportation Conclusion on Safety .....	211
c.	Emergency Vehicle Access .....	211
d.	Geotechnical .....	214
e.	Crime .....	215
G.	MCC 39.7515(G) Will satisfy the applicable policies of the Comprehensive Plan.....	215
1.	Comprehensive Plan Structure .....	215
2.	“Applicable Policies” Does Not Mean All Policies .....	216
3.	Introductory Chapters.....	216
4.	Exclusive Farm Use (EFU) Zones.....	217
5.	Multiple Use Agricultural Land .....	217
6.	Natural Resources .....	219
7.	Historic and Cultural Resources .....	219

- a. Evidence in the Record does Not Support Additional Archeological Discovery Methods Prior to Construction ..... 220
    - b. To the Extent Applicable, the Project Complies with Policy 6.2 and Policy 6.5..... 223
  - 8. Public Facilities ..... 225
  - 9. Transportation – Transportation System Plan ..... 228
  - 10. West of the Sandy River Pan ..... 230
- H. MCC 39.7515(H) Will satisfy such other applicable approval criteria as are stated in this Section. 230
- I. MCC 39.7515(I) In the West of Sandy River Rural Planning Area, the use is limited in type and scale to primarily serve the needs of the rural area..... 230
- III. Other Code Sections Not Fully Addressed by Staff ..... 231
  - A. Multiple Use Agriculture (MUA-20) (Staff Report Section 5.0)..... 231
  - B. Rural Residential (Staff Report Section 6.0)..... 233
  - C. Exclusive Farm Use Approval Criteria (Staff Report Section 7.0)..... 233
  - D. Commercial Forest Use Approval Criteria (Staff Report Section 8.0) ..... 234
  - E. Utility Facilities Community Service Conditional Use Approval Criteria (Staff Report Section 9.0) ..... 234
  - F. Radio Transmission Towers Community Service Conditional Use Approval Criteria (Staff Report Section 10.0) ..... 235
  - G. Design Review Criteria (Staff Report Section 11.0)..... 237
  - H. Significant Environmental Concern (Staff Report Section 14.0) ..... 242
  - I. Geologic Hazards Permit (Staff Report Section 15.0) ..... 249
  - J. Dark Sky Lighting Standards (Staff Report Section 17.0) ..... 254
- IV. Mitigation of Temporary Construction Impacts ..... 255
  - A. Construction Noise..... 256
  - B. Construction Traffic ..... 258
  - C. Construction in Roadways – Access and Communications..... 258
  - D. Construction Emissions ..... 259
  - E. Construction Dust ..... 259
  - F. Construction Safety & Security ..... 260
    - 1. Site Security..... 260
    - 2. Substance Abuse Prevention ..... 260
    - 3. Fire Safety ..... 260
    - 4. Safety Protocols ..... 261
    - 5. Chemical Management ..... 261
  - G. Ground Water Protection ..... 262



H. Water Quality and Erosion Control.....	263
I. Schools .....	268
6. School Avoidance .....	268
7. School Buses.....	272
J. Construction Farm Impacts.....	273
V. Conclusion.....	273
Appendix A – Proposed Conditions of Approval.....	1
A. Conditions from the Staff Report.....	1
B. Exhibit I.45 Land Use Planning Post Hearing Memo to Hearings Officer .....	8
C. Exhibit J.45 Memorandum from Multnomah County Land Use Planning to Hearings Officer regarding Cultural Resources.....	9
D. County Transportation Proposed Conditions (Full Set In Exhibit J.44) .....	10
E. Additional Water Bureau Proposed Conditions.....	16
1. Recommend additions to County Transportation Condition 7.....	21

## I. Overarching Legal Topics

### A. Temporary Construction Activities Are Not Subject to the Approval Criteria that Apply to the Permanent Use

Opponents claim that the temporary construction activities that are required to build the permanent use, themselves constitute “uses” under the MCC and are therefore required to meet all the same applicable approval criteria as the permanent use. This claim runs afoul of the standard rules for interpreting code provisions under *Portland General Electric Company v. Bureau of Labor & Industry*, 317 Or 606, 610, 859 P2d 1143 (1993), *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009) and their progeny (*PGE/Gaines*). The goal of code interpretation is “to discern the intent of the body that promulgated the law” – in this case, the County Board of Commissioners. *City of Eugene v. Comcast of Or. II, Inc.*, 263 Or App 116, 127 (2014) *affirmed* 359 Or 528 (2016).

Such a claim also ignores the requirement under ORS 215.416(8)(a) that the County approve or deny a permit application on standards and criteria that are set forth in the zoning ordinance and which must be reasonably discernible from the provisions of the code itself. *Waveseer of Or., LLC v. Deschutes County*, 308 Or App 494, 501 (2021).

#### 1. Opponents’ Interpretation Would Violate the Rules for Code Interpretation under *PGE/Gaines*

Under *PGE/Gaines*,<sup>1</sup> the “first level of analysis, the text of the statutory provision itself, is the starting point for interpretation and is the best evidence of the legislature's intent,” followed by the context found in related code provisions. *PGE*, 317 Or at 610-11. When considering the text, we cannot “insert what has been omitted, or omit what has been inserted.” ORS 174.010; *PGE*, 317 Or at 611.

The express text of the code does not regulate or apply approval criteria to temporary construction activities. MCC 39.4305 (“Uses”) commences with the following language: “No ... land shall be used and no building ... shall be hereafter erected ... in this base zone except for the uses listed in MCC 39.4310 through 39.4320 when found to comply with MCC 39.4325 through 39.4345....” (Emphasis added.) This introduction to the MUA-20 zone<sup>2</sup> expressly defines the land altering activities that are subject to the MUA-20 approval criteria: namely, the uses listed in MCC 39.4310 through 39.4320. The next question is whether temporary construction activities are a use listed in MCC 39.4310 through MCC 39.4320. They are not. MCC 39.4320 identifies the conditional uses regulated by approval criteria and states that the

---

<sup>1</sup> These rules apply to local codes as well. “The proper construction of a municipal ordinance is a question of law, which we resolve using the same rules of construction that we use to interpret statutes.” *Waste Not of Yamhill Cty. v. Yamhill Cty.*, 305 Or App 436, 457, 471 P3d 769 (2020).

<sup>2</sup> Similar language is found in other zones for the project, but this section will focus on the MUA-20 zone as it is the focus of most of the arguments – particularly because most of the opposition testimony is related to construction generated from the filtration facility site.

“following uses may be permitted when found by the approval authority to satisfy the applicable standards of this Chapter.” The first use on the enumerated list is “Community Service Uses listed in MCC 39.7520[.]” The code section continues with a defined list of uses that are subject to the approval criteria of the MUA-20 zone. Temporary construction activities for a permanent use are not on the list either as a separate use or as a use related to the permanent use. Temporary construction activities for a permanent use are simply not listed as a use that is subject to the approval criteria.

The cross reference for Community Service Uses to MCC 39.7520 leads to the specific chapter that regulates Community Service Uses in all zones. There, the code continues that the “Community Service approval shall be for the specific use or uses approved.” MCC 39.7505(A). MCC 39.7510 then states that the conditions and restrictions which may be imposed by the approval authority apply to the Community Service use itself and MCC 39.7515 explicitly states that the approval criteria apply to the Community Service use. Lastly, and most importantly, MCC 39.7520 specifically lists the Community Service uses. “Utility facilities” is listed as a conditional Community Service use under MCC 39.7520(A)(6) subject to the applicable approval criteria. Again, as in the MUA-20 zone, there is no language in any of the listed Community Service uses that includes construction activities to build the use as either an element of the use or as a separate use category that also must meet the approval criteria that otherwise apply to the permanent use.

As important *PGE/Gains* context, there are temporary construction uses that are called out as uses to be regulated by the code. For example, MCC 39.4320 also identifies as a conditional use “Large Fills as provided for in MCC 39.7200 through 39.7220[.]” Large Fills are a temporary<sup>3</sup> construction use, and MCC 39.7200 through 39.7220 expressly regulate how the fill can be conducted. The permit standards in MCC 39.7215 further require specific information about construction, such as how access and traffic will be managed and submittal of a traffic management plan. Other parts of the MCC also expressly regulate construction. For example, one of the approval criteria for the Geologic Hazards permit requires that “soil disturbance shall be done in a manner which will minimize soil erosion, stabilize the soil as quickly as practicable, and expose the smallest practical area at any one time *during construction*.” MCC 39.5090(H) (emphasis added). The requirements of the Erosion and Sediment Control permits are another example. MCC 39.6225. All of these provisions show that the County knew how to call out and regulate construction when that was the intended result. *See Bert Brundige, LLC v. Dep't of Revenue*, 368 Or 1, 3, 485 P3d 269 (2021) (quoting *PGE*, 317 Or at 611) (“the use of a term in one section of a statute and not in another is evidence of a purposeful omission”). Where the context “shows that the [enacting body] knows how to” regulate in a certain way, other sections of the code must be interpreted in light of that context. *Id.* at 11.<sup>4</sup> The scope of the use subject to the approval criteria must be viewed in light of the general rule in land use that it is the permanent use regulated, not the construction of that use (which is regulated by construction-level review during the building permit and other subsequent

---

<sup>3</sup> Large fills must “not impede future uses” of the property after the temporary use is finished and reclamation for those future uses is required. MCC 39.7200(E); MCC 39.7215(A), (B)(11).

<sup>4</sup> *See, e.g., State v. Turnidge*, 359 Or 364, 480 n 69, 374 P3d 853, 923 (2016) (“That conclusion is bolstered by the fact that the legislature knows how to use the term ‘proximate cause,’ when that is what it means, and it has done so in a small handful of statutes.”)

processes).<sup>5</sup> Where the County wanted to regulate construction through its zoning code, it knew how to do so. It is a massive leap to conclude that, based on silence, the County intended to regulate construction of some Community Service uses under the same approval criteria as the permanent use.

The text and context of the code is plain and unambiguous and simply does not provide any textual support for a claim that temporary construction activities required for a permanent use are also subject to the approval criteria for the long-term use. Such an interpretation would be patently inconsistent with the text and context of the MCC and would insert words into the code that have been omitted in violation of ORS 174.010 and *PGE/Gaines*.

## 2. This is Not a Case of First Impression in Like Circumstances.

### a. *Citizens Against LNG Holds That Temporary Construction Activity Is Not "A Use in Itself" Governed by The Land Use Regulations*

In *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011), LUBA reviewed an approval of a proposed pipeline with a permanent 50-foot-wide easement and an additional 45-foot-wide temporary construction easement. *Id.* at 171 n.2. Petitioners argued that the text of the code only allowed easements "50 feet or less in width" for a pipeline use. *Id.* at 171. Thus, the petitioners claimed that, because the construction activity itself was subject to the approval criteria applicable to the permanent use and inherently could not meet those approval criteria, the use itself was not permitted. *Id.* at 172. That is, the petitioners argued that because 50 + 45 feet is greater than the "50 feet or less in width" permanent use category in the code, the application objectively had to be denied. LUBA disagreed, even though LUBA found that the code was silent regarding temporary construction use. *Id.* at 172. Instead, LUBA recognized that construction is regulated differently and that the "focus of the [land use regulation] is clearly the permanent" use and, therefore, temporary construction activity is not a "use in itself [governed by the land use regulations], but rather an accessory function that is necessary to construct the authorized use." *Id.* at 172.

The case in front of you now is indistinguishable from LUBA's holding in *Citizens Against LNG*. Like in *Citizens Against LNG*, the "focus of the [approval criteria in the MCC] is clearly the permanent" use of the land for the Project. In the MUA-20 zone and under the Community Service use criteria specifically,

---

<sup>5</sup> Land use reviews and building-permit level reviews are different things. The regulation of construction generally occurs at the time of building permit. "Although building codes and zoning regulations are traceable to the police power, building codes are designed to protect the public welfare from a wholly different standpoint from that of zoning laws. Building codes deal with the safety and structure of buildings; they regulate details of construction, use of materials, and electrical, plumbing and heating specifications, all contingent upon the type of occupancy. ... Zoning ordinances, on the other hand, regulate use of buildings, structures and lands as between various purposes; the location, height, number of stories of buildings and structures; the size of lots and open space requirements, etc." *Taschner v. City Council*, 31 Cal App 3d 48, 60, 107 Cal Rptr 214, 224-25 (1973). "In land use law generally, the possibility that a proposal could fail if construction-level standards are not met subtracts nothing from the nature of a prior use approval for the proposal." *Lands Council v. Wash. State Parks & Recreation Comm'n*, 176 Wash App 787, 798, 309 P3d 734, 740 (2013) (emphasis of "use" in original). Unless the zoning code expressly seeks to regulate construction-level standards, the general structure of this area of law dictates that land use law is not intended as a regulation of construction.

the code refers only to the permanent use that is regulated by the approval criteria and is silent on temporary construction of that permanent use. In no place does the MCC express or imply a requirement to subject the temporary construction activities to the approval criteria that apply to the permanent use. Thus, under *Citizens Against LNG*, an interpretation that subjects temporary construction activities to the same approval criteria as the permanent use would be inconsistent with the text and context of the code. *PGE*, 317 Or at 610.

Mr. Kleinman's attempt in Exhibit I.35, page 4, to limit the holding in the *Citizens Against LNG* case is misplaced. Mr. Kleinman cites to the fourth assignment of error, which pertains to whether the pipeline will have impacts on oyster beds. *Citizens Against LNG*, 63 Or LUBA at 173. The holding on whether temporary construction activities are regulated like a permanent use is found in the third (not the fourth) assignment of error; the third assignment of error – which is relevant here – has nothing to do with the approval criteria for the oyster beds. Instead, in the third assignment of error the question presented was whether temporary construction activities that do not themselves meet the approval standards, are regulated as permanent uses. LUBA's answer was a definitive no. Despite Mr. Kleinman's representation to the contrary, there was absolutely no discussion in this third assignment of error or its holding that turned on "temporary and insignificant" impacts. Mr. Kleinman's argument grossly misrepresents the *Citizens Against LNG* holding relevant here.

Ms. Richter in Exhibit I.35, on the first page of her Clackamas County argument, points out that Clackamas County has agreed with the applicant that "the impacts associated with construction are not relevant" to reviewing the ultimate use. She objects to that conclusion by mutilating the facts and reasoning of *Citizens Against LNG*. First, she argues that the pipeline in that case was "conditionally allowed outright", perhaps distinguishing it as a lower, "allowed use" review, that is less strenuous than what is required here. In fact, the use in that case is found at OAR 660-006-0025(4)(q), and an applicant for that use in the forestry zone is required under OAR 660-006-0025(5)(a) to show that "The proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands[.]" The review in *Citizens Against LNG* is the same type of conditional use permit process, subject to some of the same approval criteria, as in this case.

Ms. Richter next argues that the case is about forestry zoned lands, and that the Clackamas County case is about EFU land – "a much more strict and statutorily controlled farmland protection scheme." Forestry zones are also strict, statutorily controlled zones – as evidenced by OAR 660-006-0025, so the argument doesn't even make internal sense related to the EFU zone in Clackamas County. For Multnomah County, if we accepted her logic, construction should be even less relevant to review in the MUA-20 zone, given that the MUA-20 zone is explicitly a "non-resource" and "exception lands" base zone to which Goal 3 does not apply. MCC Chapter 4.B.<sup>6</sup> Moreover, *Citizens Against LNG* was recently reaffirmed in *McLaughlin v. Douglas County*, \_\_\_ Or LUBA \_\_\_ (2020) (LUBA No. 2020-04), regarding a project that does cross EFU zones. This argument is a red herring.

Ms. Richter also objects that *Citizens Against LNG* only works because the entity had a specific condemning authority that the Water Bureau does not have (she then identifies the incorrect statute providing the Water Bureau's authority). However, the relevant part of *Citizens Against LNG* is not

---

<sup>6</sup> Caselaw relevant to the Farm Impacts Test is addressed under the analysis of MCC 39.7515(C) below.

dependent on the condemning authority of that entity. LUBA does note that the state statute provides express authority to obtain the easement, but only as a secondary support for its conclusion (after “In any case,” on page 172). Regardless of whether the entity applying for the use has condemnation authority like the Water Bureau has, the body that promulgated the law “did not view such temporary construction area to be a ‘use’ in itself, but rather an accessory function that is necessary to construct the authorized use.” *Citizens Against LNG*, 63 Or LUBA at 172.

As noted, LUBA also reaffirmed *Citizens Against LNG* in *McLaughlin v. Douglas County*, \_\_\_ Or LUBA \_\_\_ (2021) (April 13, 2021, LUBA No. 2020-004). In that case, LUBA agreed that “some impacts are inevitably associated with pipelines and that the allowance of pipelines in the relevant zones as conditional uses reflects a legislative determination that those inevitable impacts are also allowed.” Accordingly, LUBA affirmed county findings that “all pipelines would create a linear clearcut, and all pipelines would have [temporary extra work areas.] Therefore, that could not be the type of impact that the legislature and drafters had in mind. **The same can be said of construction related impacts, such as trenching, blasting, power hammering etc.**” *Id.* See also *Davis v. Polk County*, 58 Or LUBA 1, 7 (2008) (county findings denying a CUP for a race track due to a lack of harmony with other uses because the race track would be unable to prevent any dust from leaving the property were inadequate where numerous listed conditional uses would necessarily generate dust). Here, the construction related impacts of the project are inherent to all conditional uses, and were “not the type of impact that the legisla[tive] drafters had in mind.”

*b. The County Has Never Applied Their Code in This Way Before*

The County has also never accepted the opponents’ proffered interpretation on any like case in the past. The applicant reviewed over 2,000 prior County decisions and has provided for the record key examples of this fact, at Exhibits I.70, I.71, I.72, and I.73. For example, in Exhibit I.70, the County, with an analysis performed by the same County planner as is involved with this project, specifically looked at only “Once construction is complete” (page 4).<sup>7</sup> This is despite the use being an electrical substation with the potential to release chemicals, explode, catch on fire, or electrocute trespassers – hazards that presumably do not magically appear for the first time “once construction is complete”. Page 13. The construction and installation of that substation had multiple construction-related hazards that were not evaluated, despite being subject to the same Community Service Use approval criteria applicable to this project. Each of those exhibits is a final decision on similar applications for either a conditional use, design review, or an SEC permit. These cases unequivocally demonstrate that the County has never applied the permanent use approval criteria to the temporary construction activities necessary to build the permanent use.<sup>8</sup>

---

<sup>7</sup> Page 4 refers to reviewing traffic impacts of the permanent use, and not considering construction traffic under the approval criteria. Beyond there simply being no discussion of construction impacts, there are various other references in the document that make clear the analysis performed was of the use “after it is completed” (page 12) and of the potential impacts “by the proposed facility” (page 14) rather than anything related to construction.

<sup>8</sup> At Exhibit 35, page 4, Ms. Richter does not dispute that “the County has no practice of considering construction impacts.” Instead of offering a single review decision into the record to show that the county has considered

If the County desires now to create an exception – to intentionally subject temporary construction activities to the same approval criteria as the permanent use – it would have had to apply the familiar framework of *PGE/Gaines* by examining the text and context enacted in the code, along with legislative history, with the goal “to discern the intent of the body that promulgated the law.” *City of Eugene*, 263 Or App at 127. There is no such analysis by the County in the staff report or later recommendations to the Hearings Officer. In fact, in the text of its staff report analysis, the County recommended approval of the permanent use without subjecting the construction related activities to the vast majority of the approval criteria. Instead, the staff report’s analysis of the approval criteria is mostly consistent with the previous cases in the County records: it does not sweep broadly into construction. Staff have never listed the temporary construction activities as a use that is regulated by the same approval criteria that apply to the permanent use, did not offer any contrary interpretation with any specificity or application of basic code interpretation principles, and did not change its overall recommendation of approval of the applications. Presumably if, this were something the code required, it would have been easily and early identified. Instead, there is no mention of this in the pre-application conference (Exhibit A.159), nor in the completeness review and determination (Exhibits C.1 and C.3).<sup>9</sup>

For these reasons, the Hearings Officer will render the initial interpretation as to whether the conditional use approval criteria applicable to the Community Service use, in text or context, express an intent to subject the temporary construction activities to the same approval criteria as the permanent use, despite there being no clear language in the code and no past interpretation by the County that would support such an interpretation. We request that the Hearing Officer apply the common rules of statutory construction under *PGE/Gaines* and find that the MCC does not regulate temporary construction activities under the conditional use approval criteria code sections.

**3. Opponents’ Interpretation Would Violate ORS 215.416(8)(a) Requiring Decisions to be Made Based on Standards and Criteria Set Forth In Code**

The opponents’ argument also violates ORS 215.416(8)(a), which states:

Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and

---

construction impacts, she attempts to show that Exhibits I.70, I.71, I.72, and I.73 are somehow invalid because they are not identical to the project. As explained below, deciding whether or not to consider construction based on case-by-case approach that is discretionary and not derived from standards in the code violates ORS 215.416(8)(a). That line drawing must come from the code itself. Moreover, Ms. Richter discounts the relevance of I.70, I.72, and I.73 because I.71 “is the only decision evidencing any indication of anything more than minimal opposition.”) *Id.* at page 5. The existence of opposition does not change the code or the evidentiary requirements to meet that code.

<sup>9</sup> It is worth noting once more that a “Construction TIA is an unusual request - normally a TIA is only prepared for ongoing operations of a project.” Exhibit I.84 (Global Transportation 1stORP Response), page 2; Exhibit H.8 (Ard), page 4 (noting an “absence of detailed data for construction site uses”). It is highly abnormal to prepare a Construction TIA because construction is not part of the land use under review for which TIAs are prepared.

comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole.

The Court of Appeals has recognized that the nearly identically worded provision applicable to land use decisions by cities is satisfied only if the applicable code “contains provisions that can reasonably be interpreted and explained as embodying the standards and criteria applicable to the particular decision.” *Waveseer of Or., LLC v. Deschutes County*, 308 Or App 494, 501 (2021) (quoting *BCT Partnership v. City of Portland*, 130 Or App 271, 276, 881 P2d 176 (1994)). In *Waveseer*, the county’s interpretation and application of the term “youth activity center” rested on criteria that were not signaled by the county code, that were not discernible by reading the applicable criteria, and rested on a case-by-case approach that was largely discretionary and standardless. There, the Court of Appeals recognized that it can be a close call between whether a county has in effect promulgated new approval standards or criteria through the review process or merely refined by interpretation existing codified standards. The Court of Appeals ultimately concluded that, regardless of whether the county could put forth a plausible interpretation, such an “interpretation and application of the county code contravenes the codification requirement” because the approval criteria were not “reasonably discernible from the provisions of the code itself.” *Id.* at 501; *see also Zirker v. City of Bend*, 233 Or App 601, 610, 227 P3d 1174, *rev den*, 348 Or 415, 233 P.3d 818 (2010) (“standards must be ‘set forth in the development ordinance,’ requiring that the standards be adopted and published exclusively in the development ordinance prior to the decision. *See [BCT Partnership]* (ORS 227.173(1) “seems [\*\*\*15] to have the purpose of assuring that permit decisions will be based on pre-existing legislation”)); *Lee v. City of Portland*, 57 Or App 798, 802, 646 P2d 662 (1982) (“ORS 227.173(1) does not require perfect standards, but only standards that are clear enough for an applicant to know what he must show during the application process.” (citing *Sun Ray Dairy v. OLCC*, 16 Or App 63, 72, 517 P2d 289 (1973))).

In plain terms, ORS 215.416(8)(a) does not permit a county to develop land use approval standards and criteria through quasi-adjudicative decision-making. Rather, the standards must be reasonably discernible from provisions of the code itself. In no way do the conditional use criteria or any related part of the code establish provisions that one can reasonably discern are applicable to temporary construction activities. The MCC maintains a consistent structure. Under the MUA-20 zone and the conditional use criteria for Community Service uses, the code first states, as detailed above, that the approval criteria apply to the “uses” listed below. The code then lists the “uses” that are subject to those criteria, and in neither the description of the use nor the approval criteria does the code express or imply any intent to expand the use description to all the temporary construction activities required to build the use and the code does not express any reference to temporary construction activities in the approval criteria. Like in *Waveseer*, the opponents’ interpretation here that temporary construction is a use category is not in any way signaled by the provisions of the MCC and is therefore not a permissible interpretation under *Waveseer* or ORS 215.416(8)(a).

For these additional reasons under ORS 215.416(8)(a), the Hearings Officer should reject the argument that temporary construction is a use subject to the same approval standards as a permanent and listed use.



**4. The Definition of Development Does Not Change This Analysis; the Legislative History Shows 2018 Amendment Was Not a Substantive Change**

As discussed above, this blatant lack of any direction in the code to apply approval criteria to the temporary construction activity has, understandably, meant that the county has never applied its code this way. See Exhibits I.70, I.71, I.72, and I.73. After this was pointed out in Exhibit H.3 (Applicant's Pre-Hearing Statement), staff responded in Exhibit I.45, page 2, which, in its entirety, argues:

Construction Impacts:

The applicant discusses construction activities starting on page 8 and mentions the construction of the Lattice tower at their Lusted Hill Facility (Staff Exhibit B.11). Various improvements to the Lusted Hill Facility site have occurred over a number of years: 1983, 1991, 1995, 1996/1997, 2006, 2012, 2017, 2019, 2022 and now as part of this application in 2023. These improvements to the site did not occur in a single land use project, but incrementally with various land use reviews.

In 2018, Multnomah County amended its definition of Development in its zoning code. The prior definition read "Development – Any act requiring a permit stipulated by Multnomah County Ordinances as a prerequisite to the use or improvement of any land, including a building, land use, occupancy, sewer connection or other similar permit, and any associated grading or removal of vegetation."

The current definition reads "**Development** – Any act requiring a permit stipulated by Multnomah County Ordinances as a prerequisite to the use or improvement of any land, including, but not limited to, a building, land use, occupancy, sewer connection or other similar permit, and any associated ground disturbing activity. As the context allows or requires, the term "development" may be synonymous with the term "use" and the terms "use or development" and "use and development."

If planning staff has failed to **realize a significant change in the definition has occurred** in past decisions, it does not preempt the County from correctly applying its code as part of this land use application.

(Emphasis added.)

Once again, staff have not attempted to perform an interpretation of the code using text, context, and legislative history as required by *PGE/Gains*. There is no interpretation of how the definition of "Development" applies in the code nor any application to the facts of this case. There is no determination that the definition of the term is relevant or applicable to this proceeding.

Instead, staff defend that they may have "failed to realize a significant change in the definition has occurred in past decisions" and that is why the county has never required an applicant to provide evidence related to temporary construction. That "significant change" occurred, the statement asserts, "In 2018 [when] Multnomah County amended its definition of Development in its zoning code."

But the legislative history of the code change in 2018 that amended the definition of Development makes very explicit that it was a reorganization – not a substantive change. The Staff Report to the Planning Commission, provided in Exhibit J.74, states that the code project:

- Eliminates redundant text **without changing existing regulations**, resulting in a more concise zoning code (approximately half the length of the existing code);

This Project differs from most proposals brought before the Planning Commission and the Board in that the majority of the Project is **an administrative exercise** of merging existing code **without substantive changes**. However, the Planning Commission's review (and, subsequently,

So, the legislative history is explicit that the project completed a reorganization “without changing existing regulations” and was merely “an administrative exercise of merging existing code without substantive changes” other than one that retained “more permissive” standards. **How can it be that the County made a “significant change” as staff say – a massive one, to suddenly require analysis of temporary construction activities – through a code project that would not “chang[e] existing regulations”?**

Of course, that cannot be true. Instead, the definition of Development is irrelevant in this case.<sup>10</sup> Even if it were relevant, under a *PGE/Gains* analysis, it would only further support the forgoing analysis.

Development is defined in MCC 39.2000 as:

Any act requiring a permit stipulated by Multnomah County Ordinances as a prerequisite to the use or improvement of any land, including, but not limited to, a building, land use, occupancy, sewer connection or other similar permit, and any associated ground disturbing activity. As the context allows or requires, the term “development” may be synonymous with the term “use” and the terms “use or development” and “use and development.”

The term “Development” is not used in the MUA-20 zone or the conditional use approval criteria for Community Service uses. It is not present as text to either describe the “uses” that are regulated by the zone and it is not a term present in the conditional use approval criteria. Again, the MUA-20 code, and the conditional use criteria use the term “use” and then specifically list the uses that are subject to the

---

<sup>10</sup> Interestingly, County Transportation notes “that construction impacts in and of themselves are not code criteria for County Transportation to review objectively to recommend approval or denial of any proposal.” Exhibit J.44 (County Transportation New Evidence Rebuttal), page 10. Thus, at least as to traffic and impacts on the County's transportation system, the County's expert does not interpret the relevant local enactments as sweeping broadly into construction. Instead, conditions related to construction from County Transportation resulted from the applicant's voluntary efforts to address community concerns and agreement to memorialize those efforts as conditions. That is, “[t]he applicant has been willing to provide substantial construction information with the understanding that this is information that can help mitigate the construction traffic” even though not related to compliance with applicable approval criteria. Exhibit J.44, page 10. County Transportation's disagreement with Land Use Planning further shows that the County has never applied their code this way before and provides further clarity that applying the permanent use approval criteria to the temporary construction activities is not reasonably discernable from the text of the code itself in violation of ORS 215.716(8)(a).

approval criteria. The term “Development” does not appear in the list of uses or in relation to the list of uses. As addressed above, the code does not express any requirement to subject temporary construction activities to the approval criteria that apply to a permanent use. Thus, the code cannot be reasonably interpreted through the definition of Development to create a separate use category for construction activities. To now insert the defined term “Development” into the code where it presently does not exist and use that insertion to effectively create a new use category that is subject to the same approval criteria as the permanent use, violates the rules for statutory construction under *PGE/Gaines*. In this case, the inchoate effort at an “interpretation” goes far beyond refining existing code standards and is instead an effort to promulgate new criteria for a new use in violation of ORS 215.416(8)(a). *Waveseer*, 308 Or App at 501-502.

The reference to the “context” in the last sentence of the “Development” definition does not support any counter interpretation. Note that, contrary to staff’s statement on page 47 of the staff report, the County’s code does not “state that the terms ‘development’ and ‘use’ are synonymous.” Instead, the last sentence of the definition states “as the context allows or requires, the term ‘development’ **may be** synonymous with the term ‘use’...” (Emphasis added.) To be consistent with *PGE/Gaines*, the term context must mean the context of the code provisions. As detailed above, the context of the code provisions is that in no place throughout the consistent structure of the MUA-20 zone or the conditional use criteria for Community Service uses does the code ever imply or express that the temporary construction activities are a “use” and subject to the approval criteria of a permanent listed use. Instead, in “merging existing code without substantive changes” (Exhibit J.74), a definition of “development” related to where the county does regulate construction explicitly was merged into the definition of “use”. This is why the context of the code provisions is critical, and the only logical interpretation of the “context” in the last sentence of the definition is a reference to the context of the code provisions where the definition is used.<sup>11</sup>

If instead the term “context” is used to mean that, on a case-by-case basis, the context of the Development may permit the county to make a determination that the temporary construction activity is a use category, that is prohibited by applicable law. As LUBA recognized in *Waveseer*, if it is not reasonably discernible from the code that temporary construction activities are a use category, and the county uses a case-by-case approach to apply uncodified factors to the construction activities to determine if the context justifies treating the construction as a use, that act would violate ORS 215.416(8)(a). In such a case, as here, **there are no codified standards that the county can use** (and

---

<sup>11</sup> As noted above, there are times where the County has chosen to regulate construction activities, and has done so clearly and explicitly. One example is MCC 39.5075 for Geologic Hazard Zones. There, “development” in the Geologic Hazards Overlay zone or where land has a slope >25% is subject to specific regulations that relate to the manner of construction. For example, an applicant for that kind of development must show that “soil disturbance shall be done in a manner which will minimize soil erosion, stabilize the soil as quickly as practicable, and expose the smallest practical area at any one time *during construction*.” MCC 39.5090(H) (emphasis added). The context of MCC 39.5075 in MCC 39.5090 makes clear that the development is the construction activities. As discussed above, the County knew how to call out and regulate construction when that was the intended result. See *Bert Brundige, LLC v. Dep’t of Revenue*, 368 Or 1, 3, 485 P3d 269 (2021) (quoting *PGE*, 317 Or at 611) (“the use of a term in one section of a statute and not in another is evidence of a purposeful omission”). Where the context “shows that the [enacting body] knows how to” regulate in a certain way, other sections of the code must be interpreted in light of that context. *Id.* at 11.

that the applicant would be aware of) **that define the factors or types or level of construction activities that would result in a contextual determination that construction activities have become a use.** Under *Waveseer*, that kind of interpretation left to a case-by-case basis using uncodified factors “represents an interpretation and application of the county code that contravenes the codification requirement.” *Waveseer*, 308 Or App at 503. “[T]he requirement that a discretionary permit decision be based on standards and criteria necessarily means that the standards must operate to guide official discretion in deciding whether to issue the permit, so that those standards, and not some other predilection of the decision maker, provide the sole basis for determining whether a discretionary permit application is approved.” *Zirker v. City of Bend*, 233 Or App 609 (internal quotation omitted).

Opponents and staff claim that this project has more than the typical construction timeline so it should be regulated as a use.<sup>12</sup> Staff Report, page 47. But there is no code language that says, “if construction is long” then it is a “use” and subject to permanent use approval criteria, even though it is not included or listed as a “use.” This argument also improperly relies on uncodified criteria presented by the opponents to determine when temporary construction activities become a “use” – inconsistent with *Waveseer* and ORS 215.416(8)(a). Further, even if “takes too long” were the test for when construction becomes subject to permanent use approval criteria, the test as advocated by opponents and staff completely ignores the code allowances for the length of construction. MCC 39.1185(B)(1) states that construction must commence within 2 years of the date of the final decision and (B)(2) states that construction must be completed within 4 years of the date construction commences. Thus, the code assumes that the temporary construction use can continue for a period of at least 4 years. This time period is not unusual; instead, it is expressly permitted by the code. These timelines have specifically been included as conditions of approval in this case (staff’s proposed conditions 1 and 2), and the project does not extend beyond the code standards for length of construction. The applicant has accepted these conditions of approval and will commence and complete construction within the timelines required by the MCC.

## 5. Conclusion

For these reasons, the Hearings Officer should reject the argument that temporary construction is a use subject to the same approval standards as a permanent and listed use. **Even where there was mathematical certainty** that construction impacts could not meet the requirements imposed on a permanent and listed use – as in the case of the 95 foot wide easement where only 50 was allowed in *Citizens Against LNG* – LUBA has made clear that the temporary construction activity is not a “use in itself [governed by the land use regulations], but rather an accessory function that is necessary to construct the authorized use.” 63 Or LUBA at 172. Furthermore, applying a requirement that construction be considered a use regulated by the permanent approval criteria violates the codification

---

<sup>12</sup> Note that it does not have an atypical construction timeline relative to other water treatment facilities that would be allowed as community service uses at this site. Exhibit I.79. At about 4 years (see Land Use Planning’s condition 1.b), it is extremely typical of water treatment facility construction and within the timeline that would have been contemplated when the code was enacted.

requirement of ORS 215.416(8)(a) because such a requirement is in no way “reasonably discernible from the provisions of the code itself.” *Waveseer*, 308 Or App at 501.<sup>13</sup>

Were the county to deny the application based on standards and criteria not set forth in the MCC, the county would be acting outside the range of discretion allowed under the MCC. Accordingly, the decision would be subject to reversal, with an order on appeal requiring approval of the request, together with an award of attorney fees to the applicant and against the local government. ORS 197.835(10); *see also*, *Hollander v. City of Astoria*, \_\_ Or LUBA \_\_, (LUBA No. 2021-061, September 30, 2021) (slip op 17) (LUBA reversing denial of permit extension and ordering issuance of permit); *see also*, *Hollander v. City of Astoria*, LUBA No. 2021-061, March 21, 2022 (Notice of Appellate Judgment and Order on Fees and Costs) (acknowledging the award of attorney fees is “mandatory” under ORS 197.835(10)(b)).

Regarding the one section of code that staff and opponents argue shows that the code requires such an analysis – the definition of development – the legislative history shows that definition was explicitly not intended to create any substantive change in the code. It would be a major substantive change for the county to suddenly start subjecting temporary construction activities to the same approval standards as the permanent and listed uses.

If line drawing is necessary, the only test for when construction is “too much” that perhaps could be “reasonably discernible from the provisions of the code itself” in compliance with ORS 215.416(8)(a) is the requirement of MCC 39.1185(B) related to completion of construction within 4 years of the date construction commences. As noted, these timelines have specifically been included as conditions of approval in this case (staff’s proposed conditions 1 and 2), and the applicant has accepted these conditions of approval and will commence and complete construction within the timelines required by the MCC. Therefore, even if construction could be “too much” and trigger consideration under permanent use approval criteria contrary to *Citizens Against LNG*, this project does not exceed the only “too much” threshold discernable from the provisions of the code itself.

---

<sup>13</sup> We note that the Clackamas County decision (Exhibit I.2, page 16) held that construction activities associated with construction of the Emergency Access Road are not a separate use subject to review:

Staff concurs that construction activities are a necessary prerequisite to implementing many approved uses of land and often are not subject to land use review. If, for example, a land use approval is issued to construct a dwelling on EFU land, the construction activities associated with implementing that approval (contractor traffic, staging of building materials, framing, roofing, etc.) do not themselves require land use approval. They are simply necessary steps to implement the approved land use.”

....

It follows that if the emergency access road is found to comply with the required land use approval criteria, related construction activities adjacent to the permanent easement are allowed.

## B. The Project Exceeds Standards for Transportation Planning

Opponents are primarily focused on construction traffic and roadwork and the extensive gridlock they assert it will create in the area. They tie those concerns to almost every approval criterion. As discussed above, construction is not subject to the same approval standards as permanent and listed uses. Nevertheless, given the almost exclusive focus on traffic and road construction by opponents, this section will provide an overview of transportation planning for the project and how all applicable standards are met or exceeded.

Importantly, County Transportation has reviewed and verified the conclusions of Global Transportation Engineering, the project's transportation engineer, that the project will not create gridlock or safety hazards. County Transportation's "staff have special expertise in the safe and efficient use of the right-of-way and various demands on streets, including traffic, parking, and loading." *NDNA v. City of Portland*, 80 Or LUBA 269, slip op. at 27 (2019). In addition to that expert status, County Transportation's testimony should be given additional weight as a neutral reviewer of applicant and opposition testimony. See *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261, 277 (2006) (a local decision maker may assign additional significance to the testimony of city or state engineers based on their neutrality regarding the development proposal). Exhibits B.16 (County Transportation Pre-Hearing Memo) and J.44 (County Transportation New Evidence Rebuttal) are particularly important for this reason.

Documents relevant to this topic include:

- From Global Transportation Engineering:
  - Exhibit A.31 (Project TIA)
  - Exhibit A.230 (Construction TIA)<sup>14</sup>
  - Exhibit H.3, Attachment 3 (Original TDMP)
  - Exhibit I.84 (Global Transportation 1stORP Response)
  - Exhibit I.86 (One-Access Analysis)
  - Exhibit J.85 (Updated TDMP)
  - Exhibit J.87 (Global Transportation 2ndORP Response)
- From Multnomah County Transportation:
  - Exhibit A.160 (County Transportation Pre-App Comments)
  - Exhibit B.16 (County Transportation Pre-Hearing Memo)
  - Exhibit J.44 (County Transportation New Evidence Rebuttal)

Evidence from opponents is scattered throughout the record, with various levels of detail. Much of this is summarized and responded to in Exhibit I.84 (Global Transportation 1stORP Response), Exhibit J.87 (Global Transportation 2ndORP Response), Exhibit J.87 (Global Transportation 2ndORP Response), and Exhibit J.44 (County Transportation New Evidence Rebuttal).

---

<sup>14</sup> Exhibit A.230 replaced Exhibit A.227, which had inadvertently omitted the appendices.

## 1. Operational Traffic

The overwhelming majority of opposition testimony focuses on construction traffic. This is understandable, given that there is no credible evidence that traffic from operations will be significant. Exhibit A.31 (Project TIA) explains that even using extremely conservative assumptions – such as that all 26 full-time employees would be there at the same time (which is not true, the maximum will be 10 employees on any given shift), and that all of the delivery / haul-off trucks for operation will be “entering and exiting the site during each of the peak hours[,]” (instead of more realistically delivered across the daytime hours) – all intersections “continue to operate at a Level of Service B or better, well exceeding the standards established by their corresponding jurisdictions under the 2040 total Traffic (Buildout) conditions.”

Given that the Project TIA relies on a conservative estimate of employee counts, the applicant accepts staff's proposed Condition 12.a related to the number of employees. The balance of Condition 12.a is discussed below in Section III.A (related to the on-site septic system).

Staff's Condition of Approval:

12.a ... If the applicant provides an alternative [septic] treatment technology system, the water filtration facility shall have a maximum of 26 full-time employees, with a maximum of 10 on the largest shift, and no more than 30 visitors per day...

In total, “The filtration facility will be staffed by an estimated 26 full-time employees, with a maximum of 10 employees working any individual shift. ... The filtration facility will see a maximum of 16 chemical delivery trucks entering and exiting the site during a 5-day work week and a maximum of 9 solids haul-off trucks entering and exiting the site during a 5-day work week. Combined, this amounts to 25 trips per week.” Exhibit A.31 (Project TIA), page 11. During operations, pipelines do not generate any material traffic, with about one trip to the intertie as part of routine duties per *week*. That trip was overestimated at one per *day* and included in the analysis. *Id.* at 9.

The qualitative assessment of this information comes in the County's Level of Service and related standards, such as seconds of delay and volume to capacity ratio (V/C). These standards are designed to capture driver perception of the quality of flow in the transportation network. The County's Design and Construction Manual provides objective measures of the road network's performance, requiring that transportation facilities shall accommodate a “Level of Service” of “C” or better. County Design and Construction Manual, Section 1.1.5. As the County Design and Construction Manual explains:

The roadway level of service (LOS) concept is applied in the U.S. as a qualitative assessment of the road user's perception of the quality of flow. LOS is represented by one of the letters “A” through “F,” with “A” representing free flow operation and “F” stop and go operation. LOS reflects the quality of flow as measured by some scale of driver satisfaction. Measures of effectiveness such as average travel speed, volume to capacity ratio, average seconds of delay, and others have been developed to approximate these qualitative representations quantitatively. ....

In rural areas, such facilities shall be designed to accommodate level of service "C" or better during the design hour.

As noted above, the Project TIA, validated by County Transportation, concludes that in 2040 (so, including the growth in background traffic in addition to the small amount of project traffic), all of the roads will operate at a level of service "B" or above. County Transportation classifies LOS A and B as "good". Exhibit J.44, page 5. That is, the roads in the project area can accommodate the proposed traffic for the project without dropping "the road user's perception of the quality of the flow" below good levels, even considering background traffic growth between now and 2040.

## 2. Construction Traffic

Opponents fear gridlock from construction traffic, but that is simply not what the objective evidence in the record shows. Level of Service requirements "serve as a gauge to allow the [County] to objectively measure the performance, or lack thereof, of its transportation system." *Montlake Cmty. Club v. Hearings Bd.*, 110 Wash App 731, 739, 43 P3d 57 (2002). Exhibit A.230 (Construction TIA) "concludes that the collective construction traffic will have minimal impacts on intersection and roadway operations, including during needed roadway closures for pipeline construction" with the use of Transportation Demand Management (TDM) strategies. Page 1.

Not only is there objective evidence in the record to show that level of service (and all other) county transportation standards will be met – the County Transportation staff have reviewed the reports, and the opponents' criticisms of the reports, and validated the applicant's approach and conclusions. Exhibit J.44 (County Transportation New Evidence Rebuttal). Mr. Ard's objections to the Construction TIA are matters of opinion on different potential approaches to the analysis – and County Transportation has validated the approach taken by Global Transportation Engineering. As noted above, County Transportation's "staff have special expertise in the safe and efficient use of the right-of-way and various demands on streets, including traffic, parking, and loading." *NDNA v. City of Portland*, 80 Or LUBA 269, slip op. at 27 (2019). In addition to that expert status, County Transportation's testimony should be given additional weight as a neutral reviewer of applicant and opposition testimony. *See Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261, 277 (2006) (a local decision maker may assign additional significance to the testimony of city or state engineers based on their neutrality regarding the development proposal).

Opponents argue that the total volume of traffic over the entire construction period is just too much. However, County Transportation made its recommendation of approval fully informed of the volume of traffic: "While County Transportation recognizes that aggregate or cumulative numbers over the entire construction period are large, it is common practice in Transportation and Engineering to break this down into daily totals and peak hour activities. The Construction [TIA] has provided sufficient daily trip information for the County to recommend conditions of approval that can mitigate ... the impact of the construction and ongoing facility traffic on the local transportation network and those who use, or live, next to it." Exhibit B.16 (County Transportation Pre-Hearing Memo), page 32.

The Construction TIA further assures that the road network will not be paralyzed by making extremely conservative assumptions at every possible decision point. For example:



- “The analysis was modeled for conservative traffic scenarios, meaning that all peak hour construction traffic was assumed to travel through the study intersections. Realistically, some traffic will disperse through other area roadways.” Exhibit A.230 (Construction TIA), page 2.
- “For a conservative estimate, [all] Commuter vehicles are modeled to travel to and from the Filtration Facility site during the AM and PM peak periods” rather than being distributed across workday hours to any extent. Exhibit A.230 (Construction TIA), page 7.
- “All Project traffic is modeled as traveling to and from the Filtration Facility, again for a conservative analysis, as this assumption will have the potential for the greatest concentration of impact and potential to trigger intersection performance issues. Realistically, trips traveling to the Filtration Facility will be lower than that assumed in this study, as much of the construction traffic traveling to and from the pipeline construction locations will travel directly to those locations and not actually travel to the Filtration Facility.” Exhibit A.230 (Construction TIA), page 7.
- “Four trip distribution routes were modeled to make conservative assumptions of potential travel patterns” although traffic, particularly Commuter traffic, is “likely to disperse more than these conservative estimates, resulting in fewer trips through study intersections.” Exhibit A.230 (Construction TIA), page 9.
- “For the Truck trips, four scenarios were developed where 100% of Trucks were distributed along each route for a conservative analysis. Realistically, there are many import/export destinations in different directions from the Project work sites, and truck trips will likely disperse[.]” Exhibit A.230 (Construction TIA), page 9. Stated another way, “the Distribution Scenarios represent a conservative analysis by assuming that all Trucks are taking a single route, to ensure that even with 100% of Trucks on one of Routes 1-4, any issues are identified and addressed. This is a conservative analysis because Trucks will instead be dispersed among Routes 1-4 and because alternative haul routes exist that will disperse trucks through the transportation system.” Exhibit A.230 (Construction TIA), page 20.
- “The detours outlined in this section send all vehicles previously utilizing the closed roadways through the next closest study intersections to get them back to their original path for a conservative analysis.” Exhibit A.230 (Construction TIA), page 14.
- Re-analyzing Scenario 4 as part of the One-Access analysis in order to ensure that conclusions would “address the lesser potential for delays in Scenario 3.” Exhibit I.86 (One-Access Analysis), page 1.

Even in this worst-case scenario with all of those conservative assumptions – particularly that *all* of the trucks would be heading in the same direction along the same exact route – County level of service and other standards are still met with the TDM strategies in place. The Construction TIA also takes into account shifts in traffic caused by road closures. This conservative approach provides a buffer in the data that ensures an accurate analysis that will protect not only the safety of the roads, but also “the road user's perception of the quality of flow [and] driver satisfaction[.]” County Design and Construction Manual, Section 1.1.5; Exhibit I.84 (Global Transportation 1stORP Response), page 2 (“If traffic operations meet County operational standards for a worst-case condition, fewer trips would also be acceptable from an operational perspective.”).

This is possible because the road network has a high level of available capacity that can accommodate construction with minimal delays. “Traffic volumes along project area roadways are well below the volumes these roadways are designed to support.” Exhibit I.84 (Global Transportation 1stORP

Response), page 2. Most roads are designed to carry between 1,000 and 4,000 Average Daily Trips (ADT), including, explicitly, “truck transport ... out of rural districts,” but are currently carrying much less than that. *Id. at 2-3*; Multnomah County Functional Classification of Trafficways Findings and Recommendations Technical Report, Appendices A and E.

*a. On Average, 3 Seconds of Delay*

So, how much delay are we talking about? At the very worst (peak construction) at the most delayed intersection (Carpenter/Cottrell), the delay caused by the project is all of 15 and a half seconds. Table 1 below shows those calculations, done by subtracting the existing, background conditions seconds of delay from the peak construction (with road closures) seconds of delay. The information comes from the Construction TIA and One-Access Analysis. Note that this also includes growth in background traffic, so it is a conservative estimate of the seconds of delay caused by the project.

The average (mean) of these seconds of delay is all of 3.3 seconds for the Dodge / Altman closures and 3 seconds for the Lusted/Cottrell closures. This is what the traffic engineer means when he says that the road network has a high level of available capacity that can accommodate construction with minimal delays.

**Table 1: Closure Scenarios Mitigation Analysis Intersection Performance Summary Of Delay From Construction and Background Growth.**

#	Intersection	Peak Hour <sup>15</sup>	Dodge / Altman Closures	Lusted / Cottrell Closures
			Delay From Construction (in seconds)	Delay From Construction (in seconds)
1	SE Oxbow Drive / SE Altman Road	AM	0.0	6.2
		PM	0.0	7.2
2	SE Oxbow Drive / SE Hosner Road	AM	2.1	0.2
		PM	2.1	0.6
3	SE Lusted Road / SE Altman Road	AM	1.4	2.1
		PM	7.2	2.6
4	SE Lusted Road / SE Cottrell Road	AM	2.7	0.0
		PM	5.3	0.0
5	SE Dodge Park Boulevard / SE Altman Road	AM	1.2	3.7
		PM	2.2	5.8
6	SE Dodge Park Boulevard / SE Cottrell Road	AM	5.2	4.9
		PM	3.1	5.3
7	SE Carpenter Lane / SE Altman Road	AM	0.0	0.1
		PM	0.1	0.1
8	SE Carpenter Lane / SE Cottrell Road	AM	15.6	15.6
		PM	7.0	7.0
9	SE Bluff Road / SE Altman Road	AM	3.3	2.9
		PM	3.7	3.5
10	SE Bluff Road / SE Cottrell Road	AM	5.8	5.8
		PM	4.1	4.1
11	SE Bluff Road / SE Proctor Road	AM	1.5	1.2
		PM	1.1	1.0
12	SE Dodge Park Boulevard / SE Lusted Road	AM	0.1	0.2
		PM	0.0	0.1
13	SE Lusted Road / SE Hudson Road	AM	0.0	0.1
		PM	0.0	0.1
14	SE Lusted Road / SE 302 <sup>nd</sup> Avenue	AM	0.0	0.0
		PM	0.9	0.7
15	SE Bluff Road / SE Orient Drive	AM	2.6	2.6
		PM	11.0	1.7

<sup>15</sup> Note that because the peak hour factor for some intersections changed between the data sets compared here, as shown in Exhibit A.230 (Construction TIA), Appendix C, negative numbers are not reflected and are shown as zeros as there is no peak delay caused, and in order to not skew the average of 3 seconds downward artificially. The peak hour factors were validated by County Transportation. Exhibit J.44, page 6.

b. *Transportation Demand Management (TDM)*

As was contemplated in the original Construction TIA (Exhibit A.230, pages 18-20), and then updated with the Exhibit I.86 (One-Access Analysis) and Exhibit J.85 (Updated TDMP), the Carpenter Lane at Cottrell Road intersection will be able to meet level of service requirements because of the implementation of Transportation Demand Management strategies.

Opponents point to the TDMP as if its existence shows some evidence of impacts to the area roadway capacity. See Exhibit I.46 (Ard), page 1. The opposite is true. Exhibit J.87 (Global Transportation 2ndORP Response), page 31 (“part of the function of a TIA [is] to provide feedback on ways to ensure that there will not be impacts, even under conservative assumptions.”). Instead, “296 total peak hour vehicles represents the number determined by the sensitivity analysis to be able to access the site before exceeding Multnomah County performance standards **for the construction peak, rather than average**, conditions. This provides reduction of the aggregate impact on the transportation network during construction below what is required for Multnomah County performance standards.” Exhibit I.86 (One-Access Analysis), page 3 (emphasis added). The TDMP is required to be implemented throughout construction with the lower, peak, restriction. Exhibit J.85. The difference is in truck traffic. For this reason, for most of construction other than the peak, volumes will be lowered by the TDMP more than is actually needed to keep Carpenter / Cottrell within standards – and the intersection will instead exceed standards.

Reducing volumes using TDM strategies is feasible. The TDMP at Exhibit J.85 provides a series of options. “The TDM mitigations provide a toolbox of strategies that are used in construction to reduce trips to the Project.” Exhibit I.84 (Global Transportation 1stORP Response), page 17. “TDM strategies are typically implemented under temporary conditions to handle traffic mitigations as permanent improvements are not needed to support normal traffic conditions. Agencies do not want to be responsible for additional infrastructure that is not warranted after the end of construction as it creates liability and increases maintenance and operations for them. For this reason, TDM strategies are appropriate mitigation for the scenarios that present intersections of concern. These are commonly used under temporary traffic conditions in lieu of unnecessary and expensive infrastructure improvements that, once construction is done, are not warranted and would require the County to operate and maintain.” *Id.* at 19. This is why TDM strategies are so common for construction projects – they are both feasible with a toolbox of options, and reduce volumes rather than change the infrastructure in the area when it would not be warranted over the long term after the temporary construction period.

The TDMP itself provides estimated percent reductions in traffic for each strategy based on the contractor’s experience in implementing similar strategies on similar projects. Commuter shuttling alone is expandable to exceed the level of reduction that would be needed to meet the Carpenter Lane capacity threshold requirements. Exhibit J.87 (Global Transportation 2ndORP Response), page 32.

The TDMP additionally defines a plan to provide a means of monitoring traffic accessing the site to ensure that the appropriate toolbox of strategies is implemented to reduce traffic volumes to acceptable operational standards. The plan includes a forecast of trips using a look ahead of construction activities as well as a tube counter or similar device for monitoring actual traffic volumes. The plan also requires the applicant to submit monitoring reports to the County.

Criticisms of the TDMP have been considered and feedback incorporated into the Exhibit J.85 (Updated TDMP). In particular, see Exhibit J.87 (Global Transportation 2ndORP Response), pages 9-11, 22-23 (expert explaining that the TDMP is a “toolbox of mitigation measures that, in my experience and that of the contractor, have been proven as effective methods of controlling traffic volumes”), and 31-34.

Applicant accepts staff’s proposed condition of approval, incorporating additional restrictions as shown below.

County Transportation Condition of Approval (revised):

4. Pursuant to MCRR 6.100D, Water Bureau is required to comply with, [and submit to County Transportation for review and approval prior to commencing construction](#), a revised Transportation Demand Management (TDM) Plan which, at a minimum, must:
  - a. Address construction truck and commuter traffic management based on access to the filtration facility construction site via SE Carpenter Ln.
  - b. Incorporate the revised peak hour capacity limit for SE Carpenter Ln of 296 vehicles (which maintains LOS 'C'), as detailed in the Water Bureau's One-Access Analysis (Exhibit I.86).
  - c. Water Bureau will use tube trip counters at SE Carpenter Ln and SE Cottrell Rd intersection to take counts of trips to ensure the LOS C threshold (see b above) is met.
    - i. Water Bureau must also collect trip numbers to account for peak hour turning capacity monitoring in addition to total trips in order to allow for LOS monitoring based on real conditions not just the forecasted model (Exhibit I.86)
  - d. Identify TDM strategies and how they can quantifiably reduce trip demand at the Peak Hr(s) at the SE Carpenter Ln/SE Cottrell Rd intersection. TDM Strategies will:
    - i. Specify the priority of strategy implementation, based on the expected management of traffic demand.
    - ii. Specify when and how the strategy can be combined with other strategies to help mitigate traffic demand, as appropriate.
    - iii. In the event of selecting and implementing shuttle buses as a TDM strategy, Applicant must:
      - A. Specify criteria for selection of shuttle bus pickup and drop-off locations.
      - B. Ensure that pickup location(s) are on private property and do not involve parking vehicles on public streets, that the locations have sufficient parking capacity for the number of commuter vehicles that would need to be reduced at peak construction to meet the revised peak hour capacity limit, and that the locations are outside of the project study area set out in Exhibit A.31.
      - C. Demonstrate that all necessary contracts, agreements, permits for commuter vehicle parking can be obtained prior to selection as a TDM strategy.

- e. Based on long term and one-month forecasting, take a proactive approach to ensure an appropriate TDM strategy is in place and available 2 weeks before they are anticipated to be needed, and implemented in time, to reduce traffic volume to LOS C (see b above).
- f. Water Bureau will provide regular monthly reports to County Transportation demonstrating that Peak Hour trips and Peak Hour turn capacity at the SE Carpenter Ln/SE Cottrell Rd intersection remains within LOS C and the threshold set out in criterion b above.
  - i. Report will show how the TDM strategies implemented have reduced demand from the actual trip counts and forecasted demand.
- g. Reports will be required for as long as Peak Hr intersection demand remains at levels above LOS C (see b above).

*c. Crash Severity or Frequency*

An increase in construction vehicles does not mean there will be an increase in construction vehicles causing crashes nor an increase in crash severity. There are many factors such as speed, volume, seat belts, drowsiness, distraction, and impaired or drunk driving that determine the cause and severity of crashes. All construction trucks will be operated by professional, trained, licensed drivers that receive comprehensive safe driver training and are directed to follow this training at all times. There is no reason to believe that crash severity will be higher because of truck traffic. Exhibit I.84 (Global Transportation 1stORP Response), page 23.

The Water Bureau proposes the following conditions related to driver education, appropriate signage and accountability to support and enforce safe truck travel:

**Water Bureau Proposed Conditions of Approval:**

During construction, the Water Bureau or its representative shall:

**[Signage]**

- c. Post on-site signs that notify truck drivers and commuters that they are required to yield to farm traffic, horses, school buses, bicyclists, and pedestrians.
- d. Mark primary and detour haul routes with arrow signs for truck drivers for the project to follow.
- e. Water Bureau is required to post speed limits on Carpenter Lane east of Cottrell, along with driver speed feedback signs.
- f. When construction impacts the public right-of-way in front of a business, post "business open" signs typical of roadway construction projects in any

area where road construction and/or pipeline installation is occurring and where business would anticipate visitors.

**[Education and Visor Cards]**

- g. Require all truck drivers to display visor cards mapping the allowed haul routes, indicating that staying on the haul routes is required, and reminding drivers that they are required to yield to farm traffic, horses, school buses, bicyclists, and pedestrians.
- h. Require truck drivers for the project to attend a safe driver training that includes, without limitation: (a) safety related to farm vehicles and slow moving vehicles such as tractors that are on the roads; (b) the requirement to yield to farm traffic, school buses, bicyclists, and pedestrians; (c) the requirement to comply at all time with speed limits; and (d) allowed haul routes. Water Bureau shall require truck drivers to follow this training at all times.

“Allowed haul routes” includes both the concept of which specific routes are allowed and routes that are not allowed, including Carpenter Lane west of Cottrell and routes that are not allowed in order to avoid schools as explained in Applicant’s Proposed Condition 1.p.

**[Accountability]**

- i. Perform random “spot checks” of key intersections in the study area to confirm truck drivers are staying on the designated haul routes, staying off of Carpenter Lane west of Cottrell, and complying with rules regarding avoidance of schools.
- j. Implement an accountability plan to penalize trucks if they are seen off the route or in prohibited areas. This can include being removed from the job for multiple violations.

**3. Road Improvements & Suitability of Roads For Construction and Operation of Project**

The “roads the construction Trucks will be traveling on (the haul routes [including detour haul routes]) were [] intended by design [and] policy to be used for heavy truck traffic. The County’s Transportation System Plan specifically classifies those roadways identified for haul routes in the Construction TIA as freight routes, able to accommodate heavy vehicles. This is important, because the area already handles significant freight travel, particularly from large nurseries and a fruit processing facility. *See, e.g.* Exhibit I.85 (photographs of area trucks, including an oversized load); Exhibit J.58 (oversized load on Dodge Park).

The only road on a haul route, including detour haul routes, that is not on a designated freight route is Carpenter Lane. The County’s Road Rules require the Water Bureau to use Carpenter Lane as an access, as access must be taken from the lowest classification street. Carpenter Lane will be widened and

upgraded to accommodate construction traffic and will be consistent with Multnomah County Standards. Exhibit J.87 (Global Transportation 2ndORP Response), page 4. As Carpenter Lane is the exception to being on a designated freight route, special accommodations (such as those for pedestrians described below) are proposed.

County Transportation is the authority on whether the proposed mitigation is sufficient to keep the County's roads both safe and within county standards, given the potential impacts in the Construction TIA and Project TIA. See Multnomah County Road Rules 8.100.B (off-site improvement requirements are "based upon the additional traffic generated by the development that result in conditions that exceed the design capacity of the facility, create a safety hazard or create an on-going maintenance problem.") As shown in Exhibit J.44, **County Transportation has determined** that, with the extensive required off-site improvements, **the project will "ensur[e] that the transportation network maintains a condition that is safe, does not create a safety hazard for the traveling public, nor creates an on-going maintenance problem."** Exhibit J.44, page 11.

The applicant accepts all of County Transportation's proposed conditions relevant to improvement of the roads in the project area, with an updated reference to plans in the record.

County Transportation Conditions of Approval:

3. Complete and record right of way (ROW) dedications to meet the share of the 60 feet ROW width standard for Rural Local roads (MCRR 6.100A; MCDCM Table 2.2.5):
  - a. 15 feet on the northern (SE Carpenter Ln) frontage of the subject property for the Filtration site (ref R994220980);
  - b. 15 feet on the southern frontage of 35227 SE Carpenter Ln (R994220850);
  - c. The above dedications can be included in any re-plat of the property or by contacting Pat Hinds, County ROW Specialist, Pat Hinds (patrick.j.hinds@multco.us), to complete the ROW dedication process.

....

5. Prior to construction in the Right of Way (ROW), obtain Construction permit (MCRR9.200, 18.200) for:
  - a. All frontage/ road improvements of SE Carpenter Ln and SE Cottrell Rd consistent with the preliminary Civil Plan set, Exhibit A.16, A.17 [as updated in Exhibits A. 205 thru A.208 and in Exhibit J.89](#) (MCRR 6.100B; MCRR 8.000)

....

*[The "fix-it-first" and other pavement related conditions are discussed below.]*



a. *Carpenter Lane West of Cottrell Road*

The project will not use Carpenter Lane west of Cottrell Road for construction traffic, as clearly stated in the Construction TIA. Construction traffic will not be permitted to use that section of Carpenter Lane and a “local access only” sign will be posted to remind drivers and reinforce the restriction. Contractors and material suppliers have multiple means to enforce the restriction, including “spot checks” with a visual survey for compliance up to and including termination of employees who do not comply with the restriction. Exhibit J.87 (Global Transportation 2ndORP Response), page 22.

Furthermore, LUBA has held that signage (which is not the only measure proposed by applicant) is an appropriate condition of approval for mitigating traffic impacts. *Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291 (2012). This case is discussed further below related to farm impacts.

Given the concerns about Carpenter Lane west of Cottrell Road, the Water Bureau proposes a number of conditions as accommodations:

Water Bureau Proposed Conditions of Approval:

1. During construction, the Water Bureau or its representative shall:

**[Carpenter Lane Pedestrian Route]**

- a. Provide an ADA-compliant paved pedestrian route on Carpenter Lane east of Cottrell Road to the site access. The route will be delineated with pedestrian channelization devices when adjacent to the driving lanes with openings for property access. The paved pedestrian route will be installed prior to beginning off-hauling of excavated materials from the filtration facility site. After the temporary certificate of occupancy for the filtration facility is issued, the paved area will be removed and returned to County standards.
- b. Post driver feedback radar speed signs in each direction on Carpenter Lane.

**[Accountability]**

- i. Perform random “spot checks” of key intersections in the study area to confirm truck drivers are staying on the designated haul routes, staying off of Carpenter Lane west of Cottrell, and complying with rules regarding avoidance of schools.
- j. Implement an accountability plan to penalize trucks if they are seen off the route or in prohibited areas. This can include being removed from the job for multiple violations.

2. Applicant may not include Carpenter Lane west of Cottrell as a detour option in traffic control plans or signage.

County Transportation Condition of Approval:

8. ....
  - b. County restrictions within the project vicinity include, but are not limited to:
    - i. No through trucks on SE Carpenter Ln from SE 327<sup>th</sup> Ave to the FiltrationPlant site.
    - ii. No through trucks on SE Miller Rd from SE Bluff Rd to SE 327<sup>th</sup> Ave.
    - iii. No through trucks on SE Homan Rd.
    - iv. No through trucks on SE Oxbow Parkway.
    - v. No through trucks on SE Stone Rd and SE Short Rd between US26 andSE Dodge Park Blvd.
    - vi. S Buxton Rd and S Troutdale Rd are limited to trucks 40ft overall length.

*b. Pavement Conditions*

Opponents express concern about the pavement conditions of area roadways. County Transportation has proposed, and the applicant has accepted, conditions of approval requiring “that the applicant improve roadways to its minimum Pavement Condition Index standards during and after construction to ensure that roadways are safe for the traveling public and the impacts are minimized.” Exhibit B.16, page 34. “County Transportation has accepted the ‘fix-it first’ approach suggested by the Applicant” and proposed revised conditions of approval in Exhibit J.44, which are set forth below. With these conditions, the project includes mitigation of all of the roadways identified as areas of concern in the Construction TIA and will ensure that the road network is in a safe condition during construction as well as during operations.

The Water Bureau will be replacing roadway surfaces and maintaining roadways (as described in County Transportation’s condition of approval 7) along haul routes for construction Trucks, along detour routes, and along pipeline installation routes within the study area, resulting in safer roads without potholes and deterioration. Improving the road surfaces and bringing roadway surfaces up to serviceable condition before use eliminates potential hazards created by substandard pavement conditions such as potholes, excessive rutting, and others. It also improves response times for emergency vehicles over the current condition before the project starts construction. The Water Bureau’s fix-it-first proposal will dramatically improve the safety of the local transportation network by upgrading roads that are currently quite degraded and with a low Pavement Condition Index (PCI) score. Exhibit J.87 (Global Transportation 2ndORP Response), page 8., 23.

The following conditions relate to the “fix-it-first” approach and the additional requirement to “at the end of applicant's use of the route, return the road used as a primary or detour through truck haul route to as good or better condition (PCI) than it was[.]” Note that the requirement for “fix-it-first” extends not only to the enumerated roads, but also includes “any roads used as a primary or detour through truck haul route” in subsection i.

County Transportation Conditions of Approval (revised):

5. Prior to construction in the Right of Way (ROW), obtain Construction permit (MCRR 9.200, 18.200) for:
  - a. All frontage/ road improvements of SE Carpenter Ln and SE Cottrell Rd consistent with the preliminary Civil Plan set, Exhibit A.16, A.17 **as updated in Exhibits A. 205 thru A.208 and in Exhibit J.89** (MCRR 6.100B; MCRR 8.000)
    - i. Applicant must ensure that all geologic hazard and environmental overlaypermits from County Land Use have also been obtained, if applicable.
  - b. All roads requiring full or partial road work due to pipeline installation:
    - i. SE Dodge Park Blvd from east of SE Cottrell Rd to east of SE Altman Rd.
    - ii. SE Altman Rd from SE Lusted Rd to SE Oxbow Dr.
    - iii. SE Cottrell Rd from SE Dodge Park Blvd to SE Lusted Rd.
    - iv. SE Lusted Rd from the Intertie Site to SE Altman Rd.
    - v. SE Lusted Rd just north of Clackamas County line/adjacent to SE corner and existing driveway of 36910 SE Lusted Rd.
  - c. All roads requiring preliminary or ongoing maintenance due to projected use:
    - i. SE Altman Rd from SE Oxbow Dr to Dodge Park Blvd.
    - ii. SE Cottrell Rd from SE Lusted Rd to SE Dodge Park Blvd.
    - iii. SE Lusted Rd from SE Pleasant Home Rd to SE Cottrell Rd.
    - iv. SE Hosner Rd from SE Lusted Road to SE Oxbow Dr.
  
6. Pursuant to MCRR 6.100 and MCRR 8.100 road improvements will be required to ensure that the transportation network maintains a condition that is safe, does not create a safety hazard for the traveling public, nor creates an on-going maintenance problem, for the roads listed in Condition 5.c. Accordingly, the applicant is required to enter into a Project Agreement (pursuant to MCRR 9.500), that requires the applicant to perform thefollowing work at the following times:
  - a. For SE Hosner Rd from SE Lusted Rd to SE Oxbow Dr: Full depth reclamation, or other approved pavement replacement methods, prior to use as primary or detour through truck haul route.
  - b. For SE Altman Rd from Multnomah County Line to SE Lusted Rd: Full depth reclamation, or other approved pavement replacement methods, prior to use asprimary or detour through truck haul route.
  - c. For SE Lusted Rd from SE Cottrell Rd to SE Hosner Rd: Full depth reclamation, or other approved pavement replacement methods, prior to use as primary or detour through truck haul route.
  - d. For SE Lusted Rd from the Beaver Creek culvert to SE Hosner: Full depth reclamation, or other approved pavement replacement methods, prior to use asprimary or detour through truck haul route.
  - e. For SE Lusted Rd from SE Altman to the Beaver Creek culvert: At any time

- when using as a primary or detour through truck haul route, maintain in a serviceable condition. After completion of installation of pipelines in this section of road, replace roadway surface.
- f. For SE Altman from SE Lusted Road to SE Oxbow Drive: At any time when using as a primary or detour through truck haul route, maintain in a serviceable condition. After completion of installation of pipelines in this section of road, replace roadway surface.
  - g. For SE Cottrell Rd from SE Lusted Road to SE Dodge Park Blvd: At any time when using as a primary or detour through truck haul route, maintain in a serviceable condition. After completion of installation of pipelines in this section of road, replace roadway surface.
  - h. For SE Dodge Park Blvd. from east of SE Cottrell Rd to west of SE Altman Rd (where pipeline work will occur): At any time when using as a primary or detour through truck haul route, maintain in a serviceable condition. After completion of installation of pipelines in this section of road, replace roadway surface.
  - i. If not already accomplished through the work described in a. - h. above, for any roads used as a primary or detour through truck haul route, the applicant will: (a) maintain the route in a serviceable condition at any time when being used as a primary or detour through truck haul route; and (b) at the end of applicant's use of the route, return the road used as a primary or detour through truck haul route to as good or better condition (PCI) than it was in on the date of the County's most recent PCI score prior to the applicant's use.

A **“primary or detour through truck haul route”** is one identified in the Construction TIA in Exhibit A.230 as modified by the One-Access Analysis in Exhibit I.84, and any additional truck route incidentally used by the project, which incidental use must follow county designated freight routes. However, a "primary or detour through truck haul route" is not one that is being used to directly access a construction site, such as when pipelines are being installed in Lusted and Altman Roads or for improvements to the roadway itself.

**“Serviceable condition”** means the roadway is safely usable for the purpose for which it was constructed (i.e., potholes are repaired timely, striping can be seen, etc.).

7. ...

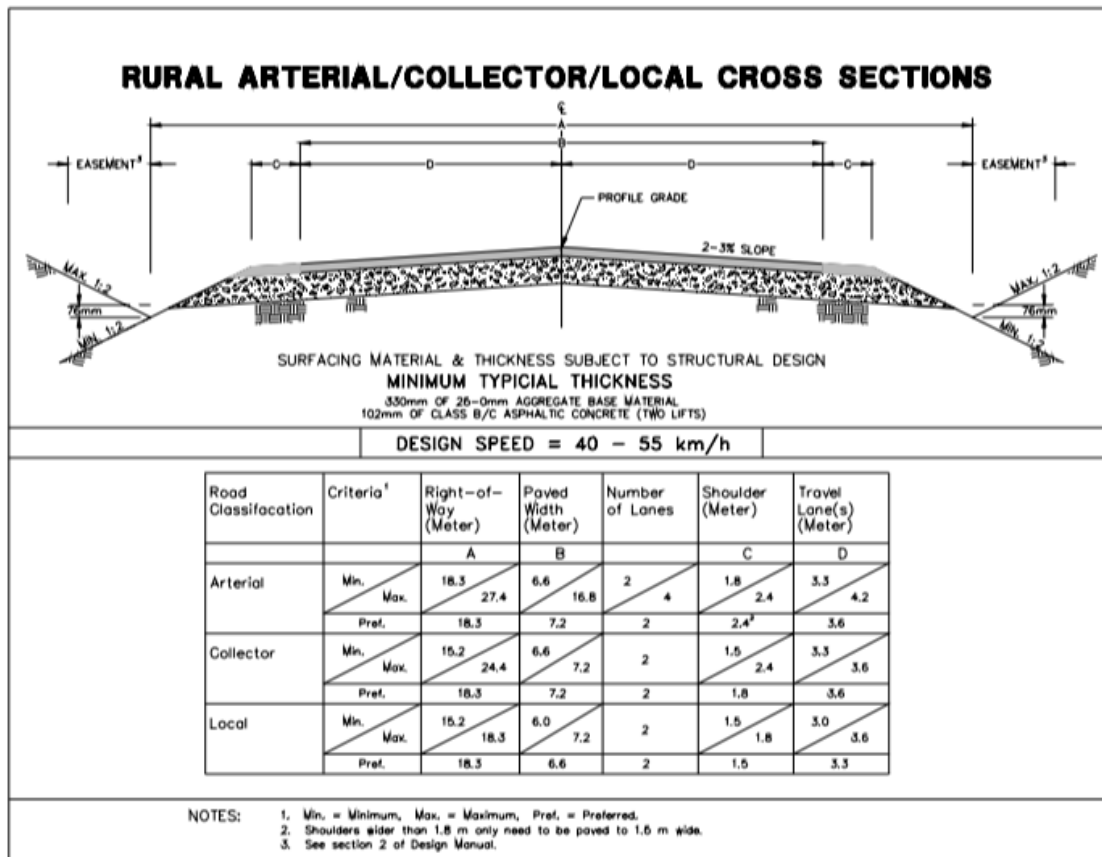
a. ...

b. Except for those roads where specific work will be required by the Project Agreement described in Condition 6, rural roads with a Pavement Condition Index (PCI) rating below 50 must not be used as detour routes in the Traffic Control Plan unless the applicant submits construction plans to mitigate impacts and improve the PCI. The Construction Permit process (see condition 5 above) will be used to review TCP and confirm appropriate detour routes.



*c. Pedestrian, Horse, and Non-Vehicular Traffic*

Another concern opponents have relates to pedestrian, bicycle, horse, and other non-vehicular traffic along area roadways. As shown in various photographs and videos in the record, roadways currently have limited accommodations for this kind of traffic and yet they share roadways successfully with large farm vehicles and trucks. This is consistent with rural road standards, which do not include bike lanes or sidewalks, as shown in the following figure. Exhibit I.84 (Global Transportation 1stORP Response), pages 14-16.



Multnomah County Design Standards  
**Table 2.2.5 Rural Cross Sections**  
 Part I - Design Manual

Additionally, the use of marked haul routes will also allow pedestrians, bicyclists, equestrians, and other non-vehicular traffic to choose to recreate or travel on other roadways. Speed limits will be posted, and the Water Bureau will conduct safety meetings with the drivers of vehicles entering and exiting the site to emphasize maintaining speed limits. Other traffic calming measures that could be used if speed becomes a concern are driver feedback radar speed signs, speed humps, or transverse rumble strips. Exhibit J.87 (Global Transportation 2ndORP Response), page 2.

Nevertheless, to accommodate safe pedestrian and bicycle travel on Carpenter Lane east of Cottrell Road during construction of the filtration facility, the applicant will pave a pedestrian route to provide an ADA-compliant surface outside of the vehicle travel lanes. A paved and delineated pedestrian route on this section of Carpenter Lane will be provided for the construction period with pedestrian channelization devices when adjacent to the driving lanes with openings for property access. The paved pedestrian route will be installed prior to beginning off-hauling of excavated materials from the filtration facility site, which is when significant truck traffic for the construction will begin. After the temporary certificate of occupancy for the filtration facility is issued, the paved area will be removed and returned to County standards.

There are a number of proposed conditions of approval relevant to this topic:

Water Bureau Proposed Conditions of Approval:

1. During construction, the Water Bureau or its representative shall:

**[Carpenter Lane]**

- a. Provide an ADA-compliant paved pedestrian route on Carpenter Lane east of Cottrell Road to the site access. The route will be delineated with pedestrian channelization devices when adjacent to the driving lanes with openings for property access. The paved pedestrian route will be installed prior to beginning off-hauling of excavated materials from the filtration facility site. After the temporary certificate of occupancy for the filtration facility is issued, the paved area will be removed and returned to County standards.
- b. Post driver feedback radar speed signs in each direction on Carpenter Lane.

**[Signage]**

- c. Post on-site signs that notify truck drivers and commuters that they are required to yield to farm traffic, horses, school buses, bicyclists, and pedestrians.
- d. Mark primary and detour haul routes with arrow signs for truck drivers for the project to follow.
- e. Water Bureau is required to post speed limits on Carpenter Lane east of Cottrell, along with driver speed feedback signs.
- f. When construction impacts the public right-of-way in front of a business, post "business open" signs typical of roadway construction projects in any area where road construction and/or pipeline installation is occurring and where business would anticipate visitors.

**[Driver Education and Visor Cards]**

- g. Require all truck drivers to display visor cards mapping the allowed haul routes, indicating that staying on the haul routes is required, and reminding drivers that they are required to yield to farm traffic, horses, school buses, bicyclists, and pedestrians.
- h. Require truck drivers for the project to attend a safe driver training that includes, without limitation: (a) safety related to farm vehicles and slow moving vehicles such as tractors that are on the roads; (b) the requirement to yield to farm traffic, school buses, bicyclists, and pedestrians; (c) the requirement to comply at all time with speed limits; and (d) allowed haul routes. Water Bureau shall require truck drivers to follow this training at all times.

“Allowed haul routes” includes both the concept of which specific routes are allowed and routes that are not allowed, including Carpenter Lane west of Cottrell and routes that are not allowed in order to avoid schools as explained in Applicant’s Proposed Condition 1.p.

**[Accountability]**

- i. Perform random “spot checks” of key intersections in the study area to confirm truck drivers are staying on the designated haul routes, staying off of Carpenter Lane west of Cottrell, and complying with rules regarding avoidance of schools.
- j. Implement an accountability plan to penalize trucks if they are seen off the route or in prohibited areas. This can include being removed from the job for multiple violations.

*d. Sight Distance & Vegetation*

Opponents are concerned about sight distance issues at area intersections. As with any development, improvements performed by the project within the public right-of-way, including intersections and access points, are required to meet County Standards. This includes sight distance requirements. The intersections of SE Cottrell Road / SE Carpenter Lane and SE Cottrell Road / SE Dodge Park Boulevard will be improved as part of the Project and County sight distance requirements met. Exhibit I.84 (Global Transportation 1stORP Response), page 20.

Vegetation can be a frequent cause of sight distance restrictions. Field evaluations at study intersections did not identify sight distance obstructions. *Id.* Opponents particularly express concerns about the Dodge Park / Cottrell Road intersection and a number of accidents that they have observed there. Traffic engineering assesses information about how or why accidents occurred in order to draw conclusions about mitigatable patterns. *Id.* at 22. Initially, official information about these accidents was not yet available. *Id.* During the open record periods, this data became available from ODOT and showed that “three out of the four accidents in 2022 were caused by southbound motorists at the intersection violating the stop control. One accident record noted vegetation was an issue.” Exhibit J.87 (Global Transportation 2ndORP Response), page 20.

The accidents at Dodge Park / Cottrell having been caused by southbound motorists “violating the stop control” is consistent with the assessment by the opponent in the video at Exhibit J.65. She notes:

“So, as you can see, that car was going extremely fast, did not see the stop ahead sign, did not see the ... um... stop sign at all. **And, there was brush in the way, as there often is.**”

Exhibit J.65, minute 00:48. The same opponent describes this incident again in Exhibit J.66, minute 01:54:



“He was hit by a car that failed to stop at the stop sign at Cottrell. **A neighbor** coming down the hill, and plainly couldn’t see it...”

Contrary to opponents arguments that out-of-area traffic always is the issue, this major accident was apparently caused by a neighbor.

This southbound approach to this intersection clearly had an issue with the stop control – as evidenced by the ODOT data as well as the various neighbor reports in the record. As is seen in the video at Exhibit J.65, as well as was seen in the traffic engineer’s field evaluations at study intersections, the vegetation here has been removed and the stop sign is now more visible.

Note that the Water Bureau will not be using that approach to the intersection. The opponent actually notes the route for inbound Water Bureau traffic: “heading east, and then turning south on Cottrell Road, and turning east on Carpenter Lane.” Exhibit J.65, minute 01:55. So the point is not that the Water Bureau will be using it. Rather, this neighbor’s argument is that retaining walls – rather than the stop sign everyone, including locals, missed when it was covered by vegetation – will be a hazard. Instead, those retaining walls will increase sight distance by pulling back the banks that currently block views along Dodge Park when coming northbound on Cottrell. Exhibit J.89 (Truck Turning Paths), page 2 (“construction of a retaining wall, regrading at the intersection, and removal of vegetation on the south side of Dodge Park Boulevard will increase sight distances for vehicles stopped northbound on Cottrell Road[, giving those vehicles] an unobstructed view of traffic ... both east and west – well before entering the intersection.”)

A full sight distance evaluation was performed as part of the Exhibit A.31 (Project TIA), pages 5-8. However, given the importance of sight distance and clearing of vegetation that can obstruct signage, the Water Bureau will perform ongoing mitigation of vegetation in the right of way along haul routes during construction in order to resolve any sight distance or intersection signage obstructions.

Water Bureau Proposed Conditions of Approval:

During construction, the Water Bureau or its representative shall:

- I. Remove vegetation in the public right of way in sight distance triangles at study area intersections along primary and detour haul routes.
  
- m. Remove vegetation in the public right of way obscuring intersection regulatory signage (e.g. stop, yield, do not enter, no right turn, lane use control, etc.) at study area intersections along primary and detour haul routes.

*e. Truck Routes & Turning Movements*

Opponents are concerned that the trucks for project construction will not be able to make turns, particularly at Cottrell / Dodge Park and Carpenter / Cottrell. Exhibit I.56 (Leathers).

Both Cottrell / Dodge Park and Carpenter / Cottrell intersections are being substantially improved as part of the project. With the widening of Carpenter Lane and improvements to the Carpenter Lane / Cottrell Road and Cottrell Road / Dodge Park Boulevard intersections, truck turning paths will be accommodated. Detailed evidence on this point is provided in Exhibit J.89 (Truck Turning Paths). As explained in that memorandum from the technical experts, the intersections will accommodate “the largest truck that will be used for the project during or after construction without special oversized load procedures, such as flaggers.” Page 2. The majority of trucks will actually be smaller, dump truck with trailer (“pup”) type trucks, with a tighter turning path. *Id.*; See also Exhibit J.87 (Global Transportation 2ndORP Response), pages 45 to 50 (responding to Mr. Leathers’ testimony). Cottrell / Dodge Park and Carpenter / Cottrell are key intersections because they will serve as the route for trucks related to ongoing operations of the filtration facility.

Safety is of high importance to the Water Bureau, as evidenced by the extensive work the Water Bureau has done with County Transportation both before and during this proceeding. “The applicant has been willing to provide substantial construction information with the understanding that this is information that can help mitigate the construction traffic” even though “construction impacts in and of themselves are not code criteria for County Transportation to review objectively to recommend approval or denial of any proposal.” Exhibit J.44 (County Transportation New Evidence Rebuttal), page 10. The Water Bureau will continue to work with County Transportation during construction of the project to determine if the transportation system continues to meet county standards.

Even outside of land use,<sup>16</sup> County Transportation continues to have the authority to restrict truck movements, including by “designat[ing] through truck routes for movement of trucks in the County road system.” *Multnomah County Road Rules* at 15.300. They have done so. All roadways proposed for the haul routes (primary and detours) within the project area are designated as freight routes, except for Carpenter Lane. As shown in the below image, Figure 9B from the County’s **Transportation System Plan**, red colored roadways are freight routes with “no restrictions.”<sup>17</sup> Exhibit I.84 (Global Transportation 1stORP Response), page 3.

---

<sup>16</sup> Section 15 of the *Multnomah County Road Rules* is not limited to being a “condition of approval of Design Review or any other development permit” as is the case with exactions like frontage improvements and dedication of rights of way. *Multnomah County Road Rules*, Section 6.100. Therefore, the authority to keep the transportation network safe and restrict truck movements exists independently of the land use process – as of course it must. If a particular roadway is not safe for use for trucks (either for the trucks themselves or other users of the roadway), County Transportation does not have to wait for there to be a land use case to prevent that hazard.

<sup>17</sup> “Restrictions include roadways limited to 40-foot-long vehicles, to 50-foot-long vehicles, and to local deliveries only.” *Transportation System Plan*, page 95.

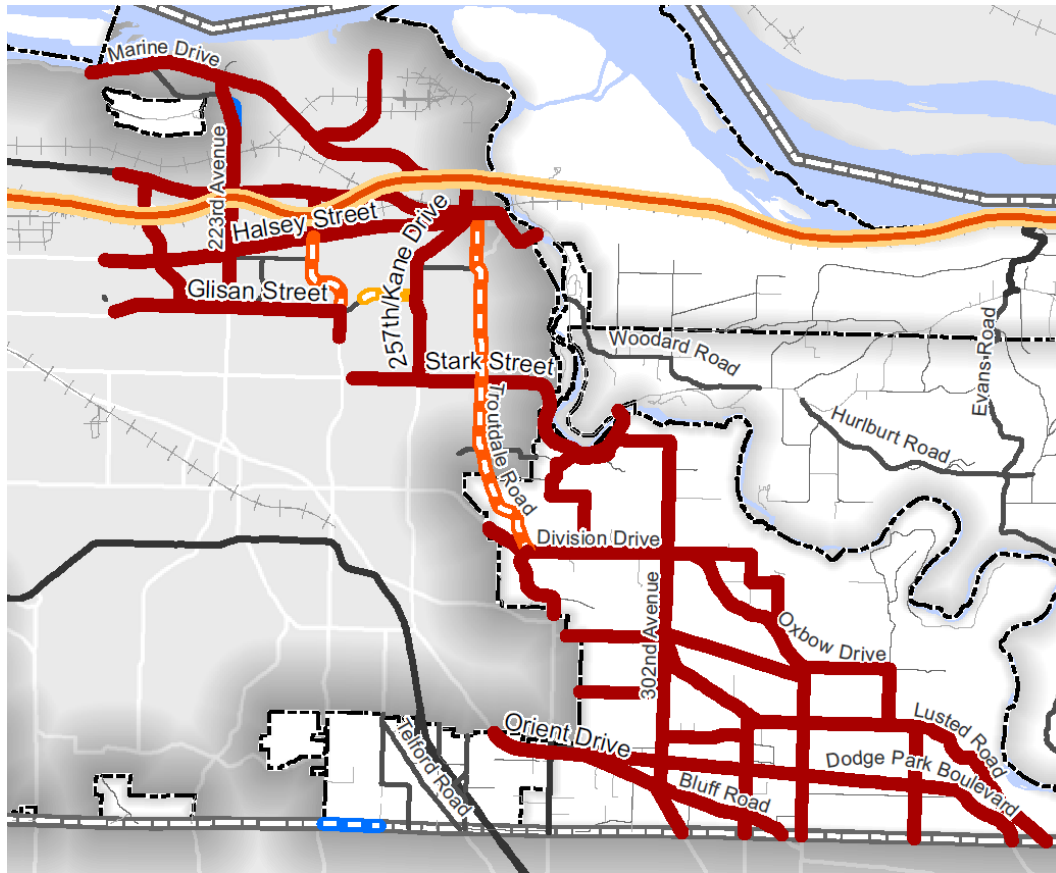


Figure 9B from the County's Transportation System Plan  
Colored roadways are freight routes with "no restrictions".

Given that the roads to be used for haul routes currently serve large trucks and are explicitly the area's designated freight routes, County Transportation has determined that no additional intersection upgrades are warranted beyond Cottrell / Dodge Park and Carpenter / Cottrell, which will serve as the route for trucks related to ongoing operations of the filtration facility. As shown in Exhibit J.44, County Transportation has determined that, with the extensive required off-site improvements including those to these two intersections, the project will "ensur[e] that the transportation network maintains a condition that is safe, does not create a safety hazard for the traveling public, nor creates an on-going maintenance problem." Exhibit J.44, page 11.

County Transportation has recommended a number of conditions of approval related to truck routes and intersections:

- County Transportation Conditions of Approval (revised):
5. Prior to construction in the Right of Way (ROW), obtain Construction permit (MCRR 9.200, 18.200) for:
    - a. All frontage/ road improvements of SE Carpenter Ln and SE Cottrell Rd consistent with the preliminary Civil Plan set, Exhibit A.16, A.17 [as updated](#)

in Exhibits A. 205 thru A.208 and in Exhibit J.89 (MCRR 6.100B; MCRR 8.000)

....

8. Pursuant to MCRR 15.000 and ORS 810.040, the applicant is required to obtain Over-Dimension Permits for all truck movements through Multnomah County which exceed the legal limit and weight specified by Oregon Department of Transportation (ODOT): (<https://www.oregon.gov/odot/mct/pages/over-dimension.aspx>).
- b. Pursuant to MCRR 15.200 and 15.300, the County may restrict truck movements as authorized under State and Federal law on all roads established as arterials and collectors, and also restrict through truck movements on other road classifications, bridges, culverts, overpasses and underpasses, which may not accommodate larger vehicles.
- c. County restrictions within the project vicinity include, but are not limited to:
  - i. No through trucks on SE Carpenter Ln from SE 327<sup>th</sup> Ave to the FiltrationPlant site.
  - ii. No through trucks on SE Miller Rd from SE Bluff Rd to SE 327<sup>th</sup> Ave.
  - iii. No through trucks on SE Homan Rd.
  - iv. No through trucks on SE Oxbow Parkway.
  - v. No through trucks on SE Stone Rd and SE Short Rd between US26 andSE Dodge Park Blvd.
  - vi. S Buxton Rd and S Troutdale Rd are limited to trucks 40ft overall length.

*f. Traffic Control Plans (TCP), Access to Properties and for Emergencies, & Notice and Communications*

Traffic control plans will be developed for the project, this is best explained by the traffic engineer in Exhibit J.87:

Proposed Condition 7 relates to the Traffic Control Plan (TCP). The contractor will develop a TCP prior to performing work within the public roads. The required consultation/engagement with agricultural businesses and school districts in Condition 7 was incorporated into the condition from the applicant's own plan in the Construction TIA as an accommodation to those businesses and districts and is not needed to satisfy the standards. Moreover, the Water Bureau has already done substantial outreach for consultation and engagement with the farming community (years of work and extensive conversations by Globalwise) and with schools (see the summary of these efforts provided [in Exhibit J.73]). This demonstrates that PWB can and will do the required outreach.

Instead, the TCP is developed in accordance with the Manual on Uniform Traffic Control Devices for Streets and Highways, issued by the Federal Highway Administration, U.S. Department of

Transportation (the “MUTCD”), which is the industry standard for construction projects throughout the United States. MUTCD Part 6 on Temporary Traffic Control provides 184 pages of specific standards for the needs and control of all road users (motorists, bicyclists, and pedestrians) through a temporary zone where the normal function of the roadway is suspended. In compliance with the MUTCD, the TCP plan describes in detail how construction activities will maintain access for all traffic, including but not limited to emergency responders, pedestrians, vehicles, and commercial activity.

Additionally, the Water Bureau has developed Construction Specifications 01 55 26 - Temporary Traffic Control and 01 55 26.13 - Accommodations for Public Traffic which specify that all traffic control methods used by contractors on the project must comply with industry standards from Multnomah County, Oregon Department of Transportation, and the MUTCD. The requirements listed in the contract specifications dictate that the contractors shall provide for the safety and convenience of the public when performing work within the roadway.

Exhibit J.87 (Global Transportation 2ndORP Response), pages 23-24. Additional information is provided in Exhibit I.75 (Construction Supplemental Information):

Specific language [in the contract specifications] pertaining to emergency access is as follows:

- They shall allow emergency vehicles, incident response units, and transit vehicles immediate passage at all times, maintain 24-hour access to all businesses and residences adjacent to the areas of work for the project and along haul routes, do not block driveways or sidewalks, and maintain safe pedestrian accesses.

Additionally, the contract specifications require that all contractors shall provide notice to businesses and residents of upcoming construction at least 14 days, but no more than 28 days, before construction is expected to begin in front of their property. They are also required to provide notice to public agencies impacted by any proposed roadwork, including, but not limited to, the Local Fire Protection Agency, Multnomah County Sheriff, Gresham Police Department, and Portland Water Bureau Emergency Dispatch.

When temporary lane or roadway closures are needed to safely complete construction activities, the Water Bureau will communicate with emergency responders and provide information about anticipated traffic impacts in the area. The Water Bureau will provide emergency responders weekly updates to planned road impacts with details about hours and days of the week when work will be occurring. Emergency responders will also be provided with the contact information for the site foreman to allow direct communication between the parties. For example, emergency responders call ahead to a construction temporary road closure to ensure that emergency vehicles can proceed efficiently through the work zone. This coordination allows the construction workers to adjust their work accordingly, such as by placing steel plates in order to allow the emergency vehicles to pass immediately upon arrival.

Adjustments to TCPs will be made throughout construction as needed to improve response time if the construction team receives comments from emergency responders.

To ensure that the necessary information is relayed to emergency responders that could need access to or through the construction areas, we recommend addition of the following emergency coordination specifications<sup>18</sup> to County Transportation's TCP Condition 7:

Water Bureau's Proposed Additions to County Transportation's Condition 7:

7. ...
  - ....
    - c. The TCP must include an emergency coordination section that at minimum includes the following requirements:
      - i. Satisfy the minimum requirements of the Manual on Uniform Traffic Control Devices for Streets and Highways;
      - ii. Provide construction update reports to emergency responders that include, at a minimum, the following information:
        - A. Dates and times of closure/partial closure
        - B. Name of contractor and emergency contacts (required on-site contact)
        - C. Purpose of closure
        - D. Location of closure and number of lanes
        - E. Work hours and times of road closures
        - F. Traffic control layout plan
        - G. Legend
          - North arrow
          - Street names within a certain distance of the site
          - Physical features such as medians, shoulders, etc.
          - Identified method for passage of emergency response vehicles (including temporary conditions/detour plan)
          - Location of significant construction items such as dumpsters and heavy equipment
      - iii. The construction update reports must be provided at least weekly unless an alternative frequency is requested by an emergency responder.
    - d. The TCP must provide for access through construction zones as follows:
      - i. Where no detour is available, such as to access Lusted Flats via Dodge Park Boulevard or to access the only access to a farm field, the applicant shall (1) ensure that work zones allowing a single lane of traffic to pass are wide enough to accommodate farm traffic up to 16

---

<sup>18</sup> David Stacy of Performance Based Fire Engineering recommended the minimum emergency coordination elements identified as the minimum requirements in the condition provided below that requires an emergency coordination section of the TCP. Exhibit J.79, pg. 3 (Performance Based Rebuttal). The reason for the condition is explained in greater detail in the hazardous conditions section.

- feet wide; and (2) flag farm traffic, service providers, and local residents (within the closure) through otherwise closed work zones.
  - ii. The Water Bureau shall (1) ensure that work zones allowing a single lane of traffic to pass are wide enough to accommodate emergency vehicles; and (2) flag emergency vehicles through otherwise closed work zones. Access for emergency vehicles shall be provided at all times.
  - iii. The Water Bureau shall require the contractor to take measures to ensure they can accommodate this traffic through a work zone regardless of the stage of construction. For example, if pipeline construction obstructs a road that cannot be detoured around, the contractor will have on-hand the materials needed to plate the excavation or otherwise allow this traffic to proceed through the work zone.
- e. Water Bureau shall comply with the following constraints for pipeline construction.
- i. No work shall be performed simultaneously on two County roads at the same time with the exception that:
    - A. S.E. Dodge Park Boulevard and Altman Road work is allowed to be performed concurrently; and
    - B. S.E. Lusted Road (between Finished Water Intertie and S.E. Altman Road) and S.E. Cottrell Road work is allowed to be performed concurrently.
  - ii. The segment of Dodge Park Blvd east of the intersection of S.E. Cottrell Road and S.E. Dodge Park Boulevard can only be constructed during the time frame of August through October.
  - iii. The intersection of S.E. Cottrell Road/S.E. Dodge Park Boulevard can only be closed in the month of October.
  - iv. The closing of S.E. Dodge Park Boulevard to cross the road onto the private property at the west end of the Finished Water Pipes can only be closed in the month of October.
  - v. S.E. Cottrell Road cannot be closed or limited to traffic while work is being accomplished on S.E. Dodge Park Boulevard limiting traffic.
  - vi. Pipeline installation across the private property is recommended to only be conducted during the summertime (non-wet periods).
  - vii. A minimum single lane of traffic flow is required at all times along S.E. Dodge Park Boulevard while work is being accomplished, and the traffic limitations shall only be restricted by the rolling lane closure (with the exception of the closures noted in iii. and iv., but only in compliance with those two constraints).
  - viii. Closure of S.E. Lusted Road between the Finished Water Intertie to S.E. Altman Road is allowed with the following limitations:
    - A. [Intentionally Omitted, incorporated into Condition 7.d above.]

- B. A farm direct and u-pick peach orchard located approximately 900 feet east of S.E. Altman Road shall be provided with unimpeded access for their customers during the month of August.
- ix. The completion of the C4FWP pipeline from the stop sign on S.E. Altman Road at S.E. Oxbow Drive to S.E. Oxbow Drive for connection to the existing Conduit 4 can only occur during the months of June/July or October/mid-November to not impede farmers' shipping traffic at other periods of the year.
- x. The finished water S.E. Lusted Road closure cannot be done simultaneously with the closure of S.E. Altman Road.
- xi. The C4FWP pipeline in Oxbow Drive and connection in Oxbow Drive cannot be constructed simultaneous with the work on finished water pipes in S.E. Lusted Road.
- f. Pipeline construction must additionally comply with the following:<sup>[19]</sup>
  - i. S.E. Altman Rd between S.E. Lusted Rd and S.E. Pipeline Rd will be allowed full closure for pipeline installation but access must be maintained for (1) farm traffic, service providers, and local residents (within the closure) who have no detour alternative and for (2) emergency vehicles.
  - ii. S.E. Altman Rd from S.E. Pipeline Rd to the stop sign at the intersection of S.E. Altman Rd/SE Oxbow Drive can be fully closed for the duration of the pipeline installation but access must be maintained for (1) farm traffic, service providers, and local residents (within the closure) who have no detour alternative and for (2) emergency vehicles.
  - iii. For the pipeline connection work on S.E. Lusted Rd at the Multnomah Connection to each of the existing conduits, daytime road closure is allowed but access for (1) farm traffic, service providers, and local residents (within the closure) who have no detour alternative and for (2) emergency vehicles, must be maintained through the construction zone. Outside of construction work hours, single lane access through the construction zone shall be provided by either flagging or signalization.

### **C. Conditions of Approval Do Not Create Impermissible Deferral**

Opponents argue that proposed conditions of approval (collected in Appendix A at the end of this memorandum) will impermissibly defer a determination of compliance with applicable standards and

---

<sup>19</sup> These additional proposed conditions of approval have been incorporated here from the requirements for the contractor, and as such are additional commitments the Water Bureau can make related to pipeline construction.



criteria. Particularly given the work done to improve the County Transportation conditions, this is not the case. See Exhibit J.44, pages 10-19.

To begin, it is important to note that the applicant is not asking to defer “discretionary determinations concerning compliance with approval criteria”. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992). There is substantial evidence in the record to show, right now, that all approval criteria are met. Many proposed conditions of approval from the applicant are accommodations that can be publicly committed to through this process, but are not needed to show compliance with applicable approval criteria.

For those conditions related to applicable approval criteria, “assuming a local government finds compliance, or feasibility of compliance, with all approval criteria during a first stage (where statutory notice and public hearing requirements are observed), it is **entirely appropriate** to impose conditions of approval to assure those criteria are met and defer responsibility for assuring compliance with those conditions to **planning and engineering staff** as part of a second stage.” *Id.* None of the conditions proposed in this case defer “discretionary determinations regarding compliance with approval criteria” to a second stage. For example, if related to any approval criterion, the Transportation Demand Management Plan (TDMP) provides a clear, non-discretionary threshold of the capacity of Carpenter Lane at which particular strategies will be deployed (for example, at 75% of the capacity of Carpenter Lane, vanpooling and offset shifts will be implemented. Exhibit J.85, page 2 (“Tiers of TDM Measures”). There does not need to be notice and a hearing every two weeks to review the applicant’s tube counts and determine if  $X > Y$ , because it is not discretionary. This is exactly the kind of decision that it is “entirely appropriate to ... defer responsibility for assuring compliance with those conditions to planning and engineering staff[.]” *Id.*

County Transportation is the authority on whether the proposed mitigation is sufficient to keep the County’s roads both safe and within county standards, given the potential impacts in the Construction TIA and Project TIA. See Multnomah County Road Rules 8.100.B (off-site improvement requirements are “based upon the additional traffic generated by the development that result in conditions that exceed the design capacity of the facility, create a safety hazard or create an on-going maintenance problem.”) As shown in Exhibit J.44, County Transportation has determined that, with the extensive required off-site improvements, the project will “ensur[e] that the transportation network maintains a condition that is safe, does not create a safety hazard for the traveling public, nor creates an on-going maintenance problem. Exhibit J.44, page 11. Thus, the county can “find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary.” *Rhyne*, 23 Or LUBA at 447.

### 1. Transportation Demand Management Plan (TDMP)

Opponents focus particularly on County Transportation’s Proposed Condition 4, related to the Transportation Demand Management Plan. See, e.g., Exhibit H.2 (Kleinman), page 8. Applicant is proposing only a minor change to Staff’s condition, as shown in the box immediately below. (All conditions and proposed modifications are also included in Appendix A).

Transportation Condition of Approval (revised):

4. Pursuant to MCRR 6.100D, Water Bureau is required to comply with and submit to County Transportation for review and approval prior to commencing construction, a revised Transportation Demand Management (TDM) Plan which, at a minimum, must:
  - h. Address construction truck and commuter traffic management based on access to the filtration facility construction site via SE Carpenter Ln.
  - i. Incorporate the revised peak hour capacity limit for SE Carpenter Ln of 296 vehicles (which maintains LOS 'C'), as detailed in the Water Bureau's One-Access Analysis (Exhibit I.86).
  - j. Water Bureau will use tube trip counters at SE Carpenter Ln and SE Cottrell Rd intersection to take counts of trips to ensure the LOS C threshold (see b above) is met.
    - i. Water Bureau must also collect trip numbers to account for peak hour turning capacity monitoring in addition to total trips in order to allow for LOS monitoring based on real conditions not just the forecasted model (Exhibit I.86)
  - k. Identify TDM strategies and how they can quantifiably reduce trip demand at the Peak Hr(s) at the SE Carpenter Ln/SE Cottrell Rd intersection. TDM Strategies will:
    - i. Specify the priority of strategy implementation, based on the expected management of traffic demand.
    - ii. Specify when and how the strategy can be combined with other strategies to help mitigate traffic demand, as appropriate.
    - iii. In the event of selecting and implementing shuttle buses as a TDM strategy, Applicant must:
      - D. Specify criteria for selection of shuttle bus pickup and drop-off locations.
      - E. Ensure that pickup location(s) are on private property and do not involve parking vehicles on public streets, that the locations have sufficient parking capacity for the number of commuter vehicles that would need to be reduced at peak construction to meet the revised peak hour capacity limit, and that the locations are outside of the project study area set out in Exhibit A.31.
      - F. Demonstrate that all necessary contracts, agreements, permits for commuter vehicle parking can be obtained prior to selection as a TDM strategy.
  - l. Based on long term and one-month forecasting, take a proactive approach to ensure an appropriate TDM strategy is in place and available 2 weeks before they are anticipated to be needed, and implemented in time, to reduce traffic volume to LOS C (see b above).
  - m. Water Bureau will provide regular monthly reports to County Transportation demonstrating that Peak Hour trips and Peak Hour turn capacity at the SE Carpenter Ln/SE Cottrell Rd intersection remains within LOS C and the threshold set out in criterion b above.

- i. Report will show how the TDM strategies implemented have reduced demand from the actual trip counts and forecasted demand.
- n. Reports will be required for as long as Peak Hr intersection demand remains at levels above LOS C (see b above).

In *Friends of Collins View v. City of Portland*, 41 Or LUBA 261, 275-77 (2002), draft transportation and parking plans were relied upon to find compliance with an approval criterion. Opponents argued that, because the conditions required the city to approve final plans at a later approval stage without public process, there was impermissible deferral. LUBA disagreed, noting that:

[T]he city's decision imposed conditions I and J, which (1) state the minimum contents of required plans; (2) note that the draft versions are included in the record; (3) require modification to the draft parking plan; (4) require that the final plans be reviewed and approved by the city transportation division; and (5) require that the final plans be implemented prior to occupancy.

*Id.* With all of that, LUBA found no impermissible deferral, because the city had made a finding of compliance and there was evidence in the record that compliance was feasible. This is exactly how the condition of approval for the Transportation Demand Management Plan works:<sup>20</sup>

- (1) It states the minimum contents of the plan (incorporate the peak hour capacity limit, use tube trip counters, specify TDM strategies and the strategy for implementation of those strategies, for shuttles in particular, have pickup locations with sufficient parking capacity and at a location outside of the project study area,<sup>21</sup> and many other specific minimum details);
- (2) There is a draft of the proposed TDM plan in the record, at Exhibit J.85;
- (3) The Condition of Approval proposed by staff – as it may be modified by the Hearings Officer – can require any modifications that are needed to the plan in Exhibit J.85;
- (4) The applicant accepts the Condition of Approval to require final review by County Transportation to ensure compliance with the minimum contents of the plan; and
- (5) The applicant will submit a final plan in compliance with the minimum contents of this condition prior to commencement of construction.

County Transportation agrees that implementation of this and other conditions is feasible, noting that “The applicant [has] provided substantial evidence for County Transportation to determine that the conditions can and will be met[.]” Exhibit J.44, Page 3. The draft TDMP in Exhibit J.85 explains the percent reductions that the contractors have seen for similar programs (Page 3: 10-20% for vanpooling,

---

<sup>20</sup> Note that this case does not require this level of evidence in order to find no deferral of the condition.

<sup>21</sup> Any traffic impacts at a proposed parking locations for shuttles will be analyzed under that jurisdiction’s land use requirements applicable to the zoning of the parking location. The applicant fully understands that any parking location may require land use permits before it is approved for use – but those land use permits, and any related analysis of the transportation infrastructure there, are not the subject of this application.

20-25% for shift offsetting). The contractors “have identified and vetted multiple sites that individually and/or collectively meet a set of criteria defined for site selection” in the TDMP and in staff’s proposed condition of approval, including sites that have the capacity for a conservative worst-case estimate of approximately 300 vehicles. As the opposition’s traffic engineer explains, even if we needed to shuttle 453 people – which is unlikely, as it is more than the 445 commuters anticipated to the filtration facility site at peak construction<sup>22</sup> – it would only be 9 bus trips.<sup>23</sup> Exhibit J.36, page 5. The evidence in the record shows that the TDMP is feasible to reduce trips on Carpenter Lane to ensure that the County’s standards for levels of service are met.

Ms. Richter argues that the TDMP is “infeasible because it is unenforceable” -- but it is unclear why it would be unenforceable. Exhibit J.35, page 2. The condition provides that “Applicant is required to comply with” the plan. There are extensive provisions in the plan to provide information to the county to monitor that compliance. And, if the applicant were ever out of compliance, a whole sub-chapter of the MCC addresses violations, including, specifically, “violation of any provision of [the] conditions of any permit issued under these code provisions[.]” MCC 391510. That sub-chapter allows the county to enforce the TDMP, including through issuance of a “Stop Work Order.” MCC 39.1540.

## 2. Traffic Control Plan (TCP)

Opponents argue that the Traffic Control Plan (TCP) should be fully baked and in the record in order to not create impermissible deferral. Exhibit H.2 (Kleinman), page 11. But neither *Friends of Collins View* nor any other caselaw (literally none is cited by Mr. Kleinman) requires a piece of paper marked “plan” to be in the record to avoid impermissible deferral. The key is whether the county makes the appropriate finding of compliance at the approval stage, and that finding is based on substantial evidence in the record. *Meyer v. City of Portland*, 67 Or App 274, 281-282, 678 P2d 741, *rev den*, 297 Or 82, 679 P2d 1367 (1984); *see also, Gould v. Deschutes County*, 216 Or App 150, 161, 171 P3d 1017 (2007) (“Thus, *Meyer* instructs that a proposed land development plan must be specific and certain enough to support findings that the proposal satisfies the applicable approval criteria. If the nature of the development is uncertain, either by omission or because its composition or design is subject to future study and determination, and that uncertainty precludes a necessary conclusion of consistency with the decisional standards, the application should be denied or made more certain by appropriate conditions of approval.”)

The primary problem with Mr. Kleinman’s argument is that the county is not relying on Condition No. 7 to demonstrate compliance with MCC 39.7515(C) or any other approval criterion. Nor does Condition No. 7 improperly defer a finding of compliance to a later date. Condition No. 7 merely sets the parameters for a Traffic Control Plan (TCP). The county’s findings of compliance, as they relate to transportation, are based on the transportation impact studies and associated materials submitted by

---

<sup>22</sup> Exhibit A.230, page 8, Table 2, “Peak Daily Vehicles (B)”.

<sup>23</sup> Mr. Ard also seems to imply there would be some issue if “multiple buses/drivers” were necessary. Even if there were multiple buses, the number of trips would be the same. Note also that Mr. Ard is responding to the prior TDMP, at Exhibit H.3. The updated TDMP at Exhibit J.85 has taken into consideration the feedback in the record and provided significantly more detail about the proposed mitigation options.

the applicant. The TCP merely implements provisions of the prior studies. There is simply no argument that the county is deferring a finding of compliance nor is there any basis to argue that there is not sufficient evidence in the record to support the finding of compliance.

For example, Condition No. 7 provides, in part, “Temporary road closures, partial or complete, in relation to the construction of the Pipelines and facilities that form this land use application, requires prior review and approval by County Transportation (MCCR 13.000).” Temporary road closures were fully evaluated in the Construction TIA (Exhibit A.230). For example, the Construction TIA recognizes that “During roadway closures for pipeline construction, trip distribution routes will change as Commuters and Trucks are detoured. This is further discussed in the Pipeline Construction Lane and Roadway Closures section.” Exhibit A.230 at 9. There is, in fact, an entire section of the Construction TIA devoted to the analysis of “Partial and full roadway closures.” Exhibit A.230 at 14-26. This section of the Construction TIA specifically examines the impact of full and partial closures on farm access and transportation routes. *Id.* The county’s findings of compliance with MCC 39.7515(C) rely on the Construction TIA, with the TCP merely implementing the recommendations of the Construction TIA. Condition No. 7 provides that, prior to any closures contemplated in the Construction TIA, the County Engineer review and approve the closures. Condition No. 7 vests no power in the County Engineer to evaluate the closures in relation to the Farm Impacts Test or any other discretionary standard. Subsection (a) to Condition No. 7 provides: “Traffic Control Plan (TCP) shall be submitted during the Construction Permitting process that shows detours and road closures. Any deviation to the approved TCP during construction shall require a resubmittal of the TCP for approval.” Nothing in this condition “kicks the can down the road” as argued by Mr. Kleinman. Lastly, Condition No. 7(b) limits the use of roads not meeting a Pavement Condition Index (PCI) of 50 “unless the applicant submits construction plans to mitigate the impacts and improve the PCI.” The mitigation referred to here is mitigation of the pavement condition and does not defer any finding of compliance with relevant approval standards until a later date.

Mr. Kleinman’s comments reflect a willful disregard for the evidence in the record and the conditions themselves. Mr. Kleinman argues that the Construction TIA does not identify “the nature and volume of the impacted farm traffic” or explain whether construction is “seasonal or year around.” The Construction TIA addresses these factors. It notes “Pipeline construction will be sequenced to minimize farm detours and impacts during seasonal peaks for agricultural traffic.” Exhibit A.230 at 20. The Construction TIA identifies the construction period (Exhibit A.230 at 2), identifies peak hour analysis (Exhibit A.230 at 5), evaluates existing traffic volumes (*id.*), explains that construction traffic will peak in 2025 (Exhibit A.230 at 7). The assertion that the Construction TIA did not evaluate existing transportation volume or identify construction windows is simply false.

As explained above, the applicant is not asking to defer findings of compliance. Instead, the county can “find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary.” Rhyne, 23 Or LUBA at 447. It is clearly feasible to develop a traffic control plan, as evidenced by the fact that every project doing work in the right-of-way must have one that compiles with the “184 pages of specific standards” provided by the Federal Highway Administration if “the normal function of the roadway is suspended.” Exhibit I.75 (Construction Supplemental Information).

Lastly, Mr. Kleinman ignores the transportation related conditions (1 through 10). Mr. Kleinman ignores the Transportation Demand Management plan required by transportation Condition No. 4, which

imposes several performance standards and mitigation measures, Condition No. 5, which imposes frontage improvement requirements, ongoing maintenance of several area roads, Condition No. 6 which imposes road improvements prior to construction, Condition No. 8 which imposes requirements for over-dimension vehicles and authorizes the county to limit traffic on several area roads. All of these conditions are imposed based on the Construction TIA as well as the county's findings of compliance with relevant approval standards.

Additional conditions of approval are addressed throughout this memorandum. There is simply no basis to suggest that the county is impermissibly deferring a finding of compliance with any relevant approval standard.

#### **D. Clackamas County's Jurisdiction**

Several opponents' arguments relate to the emergency access road south of the filtration facility site. *See, e.g.,* Exhibit E.17 (Courter); Exhibits E.36 and I.31 (Surface); Exhibit H.25.b (OTA). As established in the record, the emergency access road that extends south of the filtration facility is located entirely within Clackamas County. Therefore, Clackamas County has exclusive jurisdiction over land use review of the emergency access road, and whether the emergency access road satisfies the Clackamas County approval criteria is outside of the scope of this Multnomah County review. *See* Exhibit B.16 (County Transportation Pre-Hearing Memo), page 30 ("Multnomah County Transportation has no comments to make about the SE Bluff Rd access, as this is not within its jurisdiction.").

As provided in Clackamas County Notice of Decision included in the record at Exhibit I.2, Clackamas County issued a decision in its concurrent land use review of the access road approving the construction and use of the road for emergency access, but prohibiting use of the access road for purposes of construction of the filtration facility in Multnomah County. As a result of that decision, the Water Bureau submitted updates into the record reflecting that change in construction access routes. As detailed below, even with the change, the portion of the project within Multnomah County continues to satisfy all applicable approval criteria. Exhibit I.86.

#### **E. Filtration Facility Site Selection is Legally Irrelevant**

Several opponents argue that the Water Bureau could have selected an alternative site within Portland's Urban Growth Boundary for a filtration facility. The evidence provided to support the claim is misleading and one sided.<sup>16</sup> More importantly, for this land use decision it is irrelevant. The filtration facility is permitted as conditional Community Service use within the MUA-20 zone. There is not an alternatives analysis required in order to site a Community Service use in the MUA-20 zone. In other words, even if an alternative site were available for a filtration facility, the alternative site is not a relevant consideration in determining if the proposed facility in the proposed location satisfies applicable MUA-20 approval criteria.

As explained in the application introduction narrative at Exhibit A.2, accessories to the filtration facility are located in exclusive farm use (EFU) zones in both Multnomah County and Clackamas County. Specifically, the emergency access road in Clackamas County discussed above crosses EFU zoned land. In Multnomah County, both the raw water pipeline and the finished water pipelines cross through areas

zoned EFU. As explained in the Pipelines Overview narrative at Exhibit A.7, the segments of the pipelines in EFU zoned lands located entirely in the subsurface of the existing right-of-way the pipelines are allowed uses under MCC 39.4220.G. Where the raw water pipeline must tunnel under EFU zoned land outside of the right-of-way, it is considered a utility facility necessary for public service. Pursuant to MCC 39.4225.A.3.a, which in turn requires compliance with ORS 215.275, a utility facility is necessary for public service on EFU land if an applicant demonstrates that the facility must be sited on the EFU land due to one or more factors identified in the statute. The application narrative at Exhibit A.10 identifies alternatives and evaluates the factors to demonstrate the raw water pipeline is a utility facility necessary for public service allowed in the EFU zone pursuant to ORS 215.275.

The attorney for 1000 Friends, Mr. Mulkey, suggests the filtration facility cannot be separated from the raw water pipeline for purposes of compliance with ORS 215.275, and therefore the Water Bureau must consider alternatives in which the filtration facility and pipelines can be located outside of EFU designated lands. Exhibit H.11, pgs. 5-6 (1000 Friends).<sup>24</sup> The clear flaw in Mr. Mulkey's argument is that the filtration facility is located in MUA-20 zone, which is not a Multnomah County EFU zone. By its express terms, ORS 215.275(2) only applies to utility facilities established under ORS 215.283(1)(c).<sup>18</sup> ORS 215.283 identifies uses permitted in EFU zones. Because the filtration facility will not be established under ORS 215.283, ORS 215.275 does not apply to the filtration facility. Stated another way, because the filtration facility is located in the MUA-20 zone it is a Community Service use, a completely different use than the raw water pipeline in the EFU zone. Mr. Mulkey offers no support for his contention that the filtration facility and the pipelines are a single facility across all zones.

LUBA has specifically held that land use approval criteria that apply in the zone crossed by an accessory use do not by extension also apply to the primary use located in a different zone. In *Del Rio Vineyards, LLC v. Jackson County*, 73 Or LUBA 301 (2016), a mining use was proposed in the Aggregate Resource (AR) and the Woodland Resource (WR) zones of Jackson County. The primary mining activity was located exclusively in the AR zone – where mining was a permitted use – but a portion of an accessory haul road was located in the WR zone – where mining was a conditional use. Citing EFU cases that confirm that access roads leading to wineries are an accessory use to the winery and finding that non-EFU zones crossed by the access road must also permit wineries, opponents of the proposed mine argued that the primary mining activity occurring in the AR zone must satisfy the conditional use standards of the WR zone because the mining uses were accessed by the haul route. LUBA rejected the “attempt to extend the holdings” in the winery cases, holding instead that only the “accessory driveway in the WR Zone is subject to the WR conditional use standards” and that the “primary mining activities that occur only in the AR zone are [not] themselves subject to the WR zone conditional use standards.” *Id.* slip op. at 13. In other words, LUBA rejected the argument that approval criteria applicable to an accessory use should also be used to evaluate the primary use, where the primary use is in a separate zone. Each element of a uses are subject to the standards of the zone where they are located. The raw water pipeline is directly

---

<sup>24</sup> Ms. Richter made a similar argument on behalf of the Cottrell CPO in in the Clackamas County case related to the emergency access road. Exhibit J.35, Attachment, pg. 3. The reasons set forth below for why the location of the raw water pipeline in the Multnomah County EFU zone does not extend ORS 215.275 to filtration facility apply equally for the emergency access road across EFU zoned land in Clackamas County.

analogous to the road in *Del Rio Vineyards*. As in the case of the haul road for the mining use, the raw water pipeline in this application is a linear facility necessary to connect the primary facility located outside of an EFU zone to existing infrastructure. Therefore, just like LUBA did in *Del Rio Vineyards*, the County must reject the single facility or “but for” test Mr. Mulkey seemingly tries to use to extend to compliance with ORS 215.275 to the filtration facility itself.

Mr. Mulkey’s argument would lead to absurd results and set an impossible approval standard. Under Mr. Mulkey’s logic, rather than first selecting a location for the filtration facility outside of a resource zone, the Water Bureau would have had to identify a route for the pipeline that does not cross EFU land and—assuming such a route could even be found—then and only then, find a suitable location for the main facility that would also avoid EFU land. That is simply not the relevant standard under ORS 215.275. What Mr. Mulkey ignores is that the project in Multnomah County avoids EFU land by locating the primary facility on MUA-20 land and by routing the vast majority of the pipeline (approximately 4 miles) through non-resource areas. In Multnomah County the pipeline will *tunnel* under a *single* EFU-zoned property, with no surface disturbance of the EFU-zone property. (Exhibit A.10; Figures 2 and 3). The only other EFU zoning along the pipeline route is within the right-of-way where it is an allowed use. Mr. Mulkey’s reasoning is also at odds with long-standing precedent. In *City of Albany v. Linn County*, 40 Or LUBA 38 (2001) LUBA recognized that the “justification for siting one component of a utility facility in an EFU zone does not necessarily justify siting other components in that zone.” *Id.* at 48. In other words, the Water Bureau could not first have selected a pipeline route through EFU land under ORS 215.275 and then justified locating the filtration facility on EFU simply because the pipeline met the locational standards of ORS 215.275. Here, in fact, just the opposite occurred. The Water Bureau selected a non-resource zone property for the filtration facility, routed the overwhelming majority of pipelines through non-resource lands and, as a result, only a single EFU property outside of the right-of-way is needed—with the tunnel being located between 147 and 217 feet *below the surface* of the property. (Exhibit A.10; Figure 3).

Finally, the core purpose of the evaluation of reasonable alternatives in the utility facility necessary for public services statute is to identify the options for locating the utility facility outside of the EFU zone. *City of Albany v. Linn County*, 40 Or LUBA at 46. In this case, the Water Bureau has done precisely that by siting the filtration facility on non-EFU land. Applying the approval criteria for EFU land to the filtration facility would be nonsensical. If Multnomah County were to apply the requirement to consider alternatives to the filtration facility located on non-EFU land, it would effectively enact an impermissible rezone of the filtration facility site and impose standards that simply do not apply in the MUA-20 zone.

## F. Expert Qualifications

Various reports in the record have been prepared by experts in the topic of the memorandum. Resumes for each of these experts have also been provided at the following locations in the record to show how each is “qualified by education or experience” to render an expert opinion. See *Concerned Citizens v. Jackson County*, 33 Or LUBA 70, 101 (1997) (“qualified by education or experience”); *Oien v. Beaverton*, 46 Or LUBA 109, 132 (2003) (resume showing 14 years of experience in field demonstrated consultant was “[q]ualified to render an expert opinion”).



First	Last		Firm	Resume Exhibit
Ken	Ackerman	PE	Portland Water Bureau	A.155
Rajiv	Ali	PE GE	RhinoOne Geotechnical	A.155
Todd	Alsbury		Altap Restoration	I.88
Travis	Arnzen	PE	Elcon	A.155
Mark	Bastasch	PE INCE Bd Cert	Jacobs	A.155
Dana	Beckwith	PE PTOE	Global Transportation Engineering	A.155
Todd	Cotton	PE	Jacobs	I.88
Qianru	Deng	PE	Carollo	A.155
Allan	Felsot	PhD	Washington State University	A.155
Mark	Graham	PE PMP	Stantec	A.155
Jeff	Grassman	PE	Valmont	A.155
Sarah	Hartung	PWS	ESA	I.88
Mary	Hofbeck		Stantec	A.155
Michelle	Horio		Carollo	A.155
Adam	Jenkins	PE INCE Bd Cert	Greenbusch Group	A.170
Basel	Jurdy		Stantec	A.155
Brent	Keller		Mason Bruce & Girard	A.155
Marilee	Klimek	LC	Elcon	A.155
Wolfe	Lang		Delve Underground	J.68
Morgan	MacCrostie		Jacobs	A.155
Richard	Martin	EIT	Global Transportation Engineering	A.155
Roy	Martinez		Portland Water Bureau	J.81
Adrian	McJunkin	PE	Valmont	A.155
Dennis	Mengel	PhD CPSS	Jacobs	A.155
Rick	Minor	PhD RPA	Heritage Research Associates	I.88
Justin	Morgan	INCE	Greenbusch Group	I.171
Robert	Musil	PhD RPA	Heritage Research Associates	I.88
Albert Carl	Oetting	PhD RPA	Heritage Research Associates	I.88
Brad	Phelps	PE	Jacobs	A.155
Bruce	Prenguber		Globalwise	A.155
Farid	Sariosseiri	PhD PE	Delve Underground	I.88
Anita	Smyth	MS SPWS	WinterBrook	A.155
Robin	Smyth	PE	Gillespie Prudhon & Associates	A.155
David	Stacy	PE	Performance Based Fire Protection Engineering	I.91
Kathryn Anne	Toepel	PhD RPA	Heritage Research Associates	I.88
Pat	Tortora	PE	Emerio	A.155

## G. Staged Videos

The record includes several videos submitted by project opponents (Exhibits J.25 through J.30, J.48 through J.66). While it is not exactly clear who applied the titles to the videos, what is clear is that, despite the titles of the videos (e.g. "Large Trucks are Dangerous in Rural Areas" Exhibit J. 25) the videos do not depict any type of dangerous conditions, nor do many of the videos depict actual traffic conditions. Many of the videos are staged. There is no other way to explain the presence of the same two large trucks in several of the videos. "Staged" is defined as "deliberately planned and arranged for effect or deception: contrived." ("Staged." *Merriam-Webster's Unabridged Dictionary*, Merriam-Webster, <https://unabridged.merriam-webster.com/unabridged/staged>. Accessed 23 Sep. 2023.)

Except to the extent that the majority of the videos actually demonstrate that roads can accommodate farm, pedestrian, and truck traffic, they should be disregarded by the hearings officer. Exhibits J.26 and J. 57 are perhaps the most egregious examples of staged videos. These purport to show the same two trucks that are included in Exhibit J.25 traveling along Carpenter Lane. The only material difference between the two is that Exhibit J.25 was edited to remove the dialogue of the videographer whispering the word "perfect" after the truck almost strikes a dog. This video simply does not reflect actual traffic conditions. Rather, it was staged by the opponents "for effect." A handful of the videos are discussed below, with a general response at the end of this section.

Exhibit J.25 is clearly staged, as the videographer is, for a portion of the video, inside one of the trucks. The video purports to demonstrate that "large trucks" are "dangerous," that they "obstruct vision," "swing into oncoming lanes" and that "passenger cars are impatient." The video does not include random trucks or passenger vehicles on the road under typical driving conditions. Rather, they are part of a staged video production "arranged for effect or deception." There is no evidence that the "impatient" red car was not part of the production and, even if it were not, Truck 1 was stopped on the side of the road blocking traffic for no apparent reason and the passenger car simply followed the Truck 2 when it passed Truck 1. With respect to the alleged "swinging" into oncoming lanes, the truck had ample room on the passenger side pavement to make the turn appropriately without swinging into the oncoming lane. The only danger demonstrated in the video is the participants intentionally blocking traffic and pulling into oncoming traffic for dramatic effect. As for the "near miss," a properly executed right turn followed by a properly executed left turn, with ample space and time between the two movements, can hardly be characterized as a "near miss." Moreover, the alleged "near miss" had nothing to do with the two trucks.

Exhibit J.27 shows a truck passing an oncoming farm vehicle. Far from identifying the alleged dangers associated with trucks and farm equipment on the road, the video shows that these types of vehicles can easily co-exist on farm roads. It should also be noted that the farm vehicle was traveling in the middle of the road for "effect or deception"—there was ample room available on the passenger side of the vehicle before the fog line and shoulder. Even in a staged production, the video demonstrates that roads can accommodate farm and truck traffic.

Exhibit J.28 shows the same farm vehicle from Exhibit J.27 occupying the middle of the road and making no effort whatsoever to stay on the right side of the road. The only "need" for the large truck to back up

arises from the fact that the tractor was partially on the wrong side of the road and was unwilling (for dramatic effect) to proceed forward when there is clearly ample room to do so.

Exhibit J.29 shows the existing water towers in the distance—demonstrating that water utility facilities are, in fact, already present in, and part of the character of the area. Similarly, the video shows a semi tractor trailer in the distance, demonstrating that large truck traffic is already present and common in the area. Lastly, farm traffic can be heard in the distance, and the narrator acknowledges that transportation noise from Bluff Road is *already* audible in the area, demonstrating that the area is by no means free from transportation-related noise.

Exhibit J.30 shows a truck stopped in the road, with no explanation of what it is doing, why it is stopped, whether it is part of the video production or for some other reason. The video then transitions after a left turn to show dog walkers, with the voiceover indicating that the morning sun is “making them very hard to see” when, in fact, the dog walker is the first and only thing that catches a viewer’s eye. There is simply nothing in this video to demonstrate any type of dangerous situation or condition. This video too demonstrates that large semi tractor trailers are common in the area at all times of the day.

Many of the videos, perhaps inadvertently, include evidence that demonstrates that large trucks are a common site on area roads. (E.g., Exhibit J.48 (showing a semi tractor trailer exiting from farm); Exhibit J.49(although staged, demonstrates that large trucks and farm equipment are able to pass); Exhibits J.54 and J.28 (staged videos with same truck and tractor from two perspectives demonstrating that there is ample room for vehicles to pass when not staged for dramatic effect); Exhibit J.30 (showing that semi tractor trailers are common in the area); J.60 (while purporting to show the need to enter oncoming traffic when turning, there is ample room for trucks to make right turn when not staging the event for dramatic effect. The only reason “truck 1” entered the oncoming lane was due to the driver’s decision not to utilize approximately 8 feet of pavement adjacent to stop sign).

The Hearings Officer should reject the videos that are clearly staged. These videos do not represent actual road and traffic conditions and, even if they did, they do not, as their titles proclaim, demonstrate any dangerous conditions on the road. Even if the Hearings Officer were to accept the videos at face value, they demonstrate that the surrounding area already includes large trucks on local roads and that these vehicles already do, and will continue, to co-exist with local traffic and farm vehicles.

## II. MCC 39.7515 Community Service Use Approval Criteria

### 0. Introductory Legal Topics

There are several preliminary legal issues specific to the conditional use approval criteria that must be addressed before addressing each conditional use approval criterion.

## 1. Mitigation Conditions and Restrictions Are Expected and Appropriate

Several project opponents claim that mitigation cannot be considered in the evaluation of whether the applicant has demonstrated compliance with the conditional use approval criteria applicable to the Project. *See, e.g.*, Exhibit H.2 (Kleinman), pg. 2, 7 (“the county does not have a code provision allowing an applicant to achieve compliance with [the Farm Impacts Test] via mitigating conditions”). Mr. Kleinman apparently has not read the county code, as MCC 39.7510 does allow exactly that. Moreover, that position is contrary to the nature of conditional uses generally in addition to MCC 39.7510 specifically. How could it be a “conditional” use if no conditions are allowed?

MCC 39.7510 provides:

*The approval authority may attach conditions and restrictions to any community service use approved. Conditions and restrictions may include a definite time limit, a specific limitation of use, landscaping requirements, parking, loading, circulation, access, performance standards, performance bonds, and any other reasonable conditions, restrictions or safeguards that would uphold the purpose and intent of this Chapter and **mitigate any adverse effect** upon the adjoining properties which may result by reason of the conditional use allowed. [emphasis added]*

Not only is it permissible for the local government to impose conditions of approval on a Community Service use, but those conditions may be applied for the specific purpose of mitigating adverse effects upon adjoining properties.

Project opponents seemingly argue that the Portland Water Bureau sought to subvert the land use process by requesting conditions of approval necessary to meet approval criteria. To the contrary, the proposed conditions of approval provided in the record previously and in this closing argument, as well as any other conditions of approval deemed necessary by the decision maker to satisfy an applicable standard, are expressly permitted by the code and are entirely consistent with this land use proceeding related to a “conditional” use.

## 2. The Limited Area of Administrative Office In the Administration Building is Part of the Utility Facility Use

Andrew Mulkey, on behalf of 1000 Friends, argued that “I do not believe that administrative office facilities are technically qualified as utility facilities listed within the county code. And, moreover, I believe the applicant has failed to demonstrate that these administrative office buildings or even other facilities fit within the scope of the utility use allowed by the code.” Hearing Recording, minute 03:29:00. He went on to cite OAR 660-011-0005 and the definition of “Public Facility.”

First, the OAR reference is simply inapplicable. By its terms, Division 11 applies to compliance with Goal 11 and a jurisdiction’s needs to adopt a “public facilities plan.” Simply because an acknowledged public facility plan is not required to address “buildings, structures or equipment incidental to the direct operation of those facilities” does not equate to a prohibition on including these facilities at the filtration facility.

Administrative offices are not “incidental” but are essential and integral to the direct operation of water treatment facilities. Exhibit I.74 explains the operational characteristics of the filtration facility and the administration building:

“[T]he filtration facility will be staffed with trained and certified operators to make sure the systems are managed in a manner that fully protects public health and the environment. Operator responsibilities include overseeing the treatment process and 24/7 monitoring and control of the Supervisory Control and Data Acquisition (SCADA) and other critical systems from the Administration Building. The Administration Building also includes a water quality analysis area equipped for staff to conduct testing to make sure drinking water continues to meet all federal and state standards.”

Offices are specifically contemplated in the Community Service use categories identified in MCC 39.7520(A)(6) “Utility facilities, including power substation or other public utility buildings or uses, subject to the approval criteria in MCC 39.7515(A) through (H).” (Emphasis added). The filtration facility will employ approximately 26 people (Application Narrative Section A.2.3). The administration building, the use of offices and other work areas by employees within the building fall squarely within “other public utility buildings or uses.” Employees cannot operate the facility if they do not have a place to work. Employees need a location to perform their work, to place computers, desks and other equipment typically associated with a modern workforce and necessary to operate the filtration facility. To suggest that MCC 39.7520(A)(6) would only permit the operational treatment facilities, with no place for employees of the facility to actually work, defies both common sense and the plain language of MCC 39.7515(A)(6). Under Mr. Mulkey’s reasoning, librarians could not have their own offices and would have to work in the general library areas (MCC 39.7515(A)(4), group care managers would be prevented from having an office (MCC 39.7515(A)(2), pastors and principals too would be without private offices despite the sensitivity of their work (MCC 39.7515(A)(1), (11). And where would Mr. Mulkey draw the line? Are bathrooms allowed in a group care setting? What about a break room in a recycling collection center? Could a fire station include kitchen facilities? The obvious answer to all of these questions is “yes” because elements such as offices, bathrooms, kitchens and breakrooms are integral components of the underlying use. They are not separate from or even accessory to the use, they are part of the use and not subject to independent review.

### 3. The Conditional Use Criteria Apply to a Wide Range of Conditional Uses that Include, but are not Limited to, Community Service Uses

As discussed under individual conditional use criteria addressed below, project opponents argue for interpretations of the criteria at MCC 39.7515 that would be impossible for almost any conditional use to satisfy. To lend support to the extreme interpretations, project opponents seemingly argue that the criterion at issue only apply to similar community service uses or only apply to a certain types of community service use within the West of Sandy River Plan area. See e.g., Exhibit I.55, pg. 1 (Courter). Neither of those assumptions are true.

The approval criteria for Community Service uses at MCC 39.7515 apply to all uses identified as Community Service uses at MCC 39.7520, which include, but are not limited to: churches, childcare

facility, group care facility, parks and playgrounds, riding academies and horse boarding for profit, private and public schools, ambulance service substations, and fire stations. In some planning areas such as the East of Sandy River Rural Planning Area, the West Hills Planning Area, and Sauvie Island, Community Service uses subject to the MCC 39.7515 approval criteria include, but are not limited to: boat moorages, camps and campgrounds, and hospitals.

Additionally, the general Conditional Use approval criteria at MCC 39.7015 that apply to a broad spectrum of conditional uses across multiple zones have wording that is identical to the Community Service use criteria at MCC 39.7515. Conditional uses vary depending on the base zone, but some examples include: commercial activities in conjunction with farm use, community centers, a facility for processing forest products, and rural schools in the EFU zone; fire station for rural and forest fire protection, state and local parks, log scaling and weigh stations, and expansion of aircraft landing areas auxiliary to forestry practices in the CFU zone; and tourist commercial uses including gas stations and taverns, light manufacturing uses including metal shops, blacksmithing, automobile repair or maintenance, and commercial processing of agricultural or forestry products primarily grown in the vicinity in the Rural Center zone.

Of course, each conditional use requires a project specific evaluation of compliance with applicable approval criteria. However, as discussed under specific approval criteria addressed below, if the interpretations articulated or suggested by project opponents were applied consistently by the County, many of the identified uses could never meet several of the MCC 39.7515/39.7015 conditional use approval criteria. Therefore, those interpretations from project opponents cannot be correct. See *Davis v. Polk County*, 58 Or LUBA 1, 7 (2008) (county findings denying a CUP for a race track due to a lack of harmony with other uses because the race track would be unable to prevent any dust from leaving the property were inadequate where numerous listed conditional uses would necessarily generate dust)."

### **A. MCC 39.7515(A) Is consistent with the character of the area;**

To address this first criterion, the applicant's materials:

1. specifically identify "the area" being considered,
2. "include ... some justification or rationale for its selection of 'the area' to be considered...",
3. "describe the character of the area", and
4. "discuss the character of the user and how it fits the area."

*Multnomah County v. City of Fairview*, 18 Or LUBA 8, 12-16 (1989); *Columbia River People's Utility District v. City of Columbia City*, 9 Or LUBA 198, 208 (1983). These are all requirements of the County's findings as well.

This Section A will address topics that were the subject of opposition testimony, as an extensive analysis was provided in the application. The application narratives:

1. Evaluate the potential impacts of the project, including transportation, noise and vibration, light and glare, air quality, water quality, and hazardous conditions.
2. Define the limits of these potential impacts to create a study area. Due to proposed development location, buffers, and screening, no potential impacts extend beyond the filtration facility site boundary other than transportation.
3. Identify the types of uses in the study area: agricultural processing and nursery, forest, public facilities, and residential.
4. Compare the character of the proposed use to those uses and their characteristics, with the closest comparable user being a mid to large-scale nursery in the area.

Most neighbor testimony related to “character of the area” compares the proposed facility with the existing condition of undeveloped land. However, consistent with character does not mean consistent with current site status as undeveloped property. The baseline for conditional use comparison is not undeveloped land, but an analysis of the character of the user and the character of other users in the area. Notably, a mid- to large-scale nursery has more significant impacts in every category (noise, dust, light, traffic) than the proposed filtration facility.

### **1. The Area and the Rationale for its Selection Are Well Defined**

The project study area is discussed in detail in the project application narratives:

- Exhibit A.2 Introduction, pp. 8-15
- Exhibit A.3 Section 1 Overview, pp. 5-9 (facility)
- Exhibit A.4 Filtration Facility Conditional Use Application Narrative, p. 8 (facility)
- Exhibit A.7 Section 2 Overview, pp. 3-5 (pipelines)
- Exhibit A.8 Section 2.A Pipelines Conditional Use Application Narrative, pages 5-9

As noted above, the narratives specifically identify and map “the area” being considered and “include ... some justification or rationale for its selection of ‘the area’ to be considered[.]” More than just “some”, the justification for selection of the area was carefully detailed in the application.

The relevant section of Exhibit A.2, pages 8-14 is provided below. Other exhibits in the above list contain additional justification for the selection of the study area.

#### **Exhibit A.2 Introduction**

##### **Rationale for Consolidated Project Study Area**

This subsection identifies and describes the boundaries of the study area (see Figure 9), summarizes land use characteristics of the study area, and discusses how the area has developed and changed over the last 50 years. In Section 1 (related to the filtration facility site)

and in Section 2 (related to the pipelines and intertie), core analysis areas for specific potential impacts of project components are described.

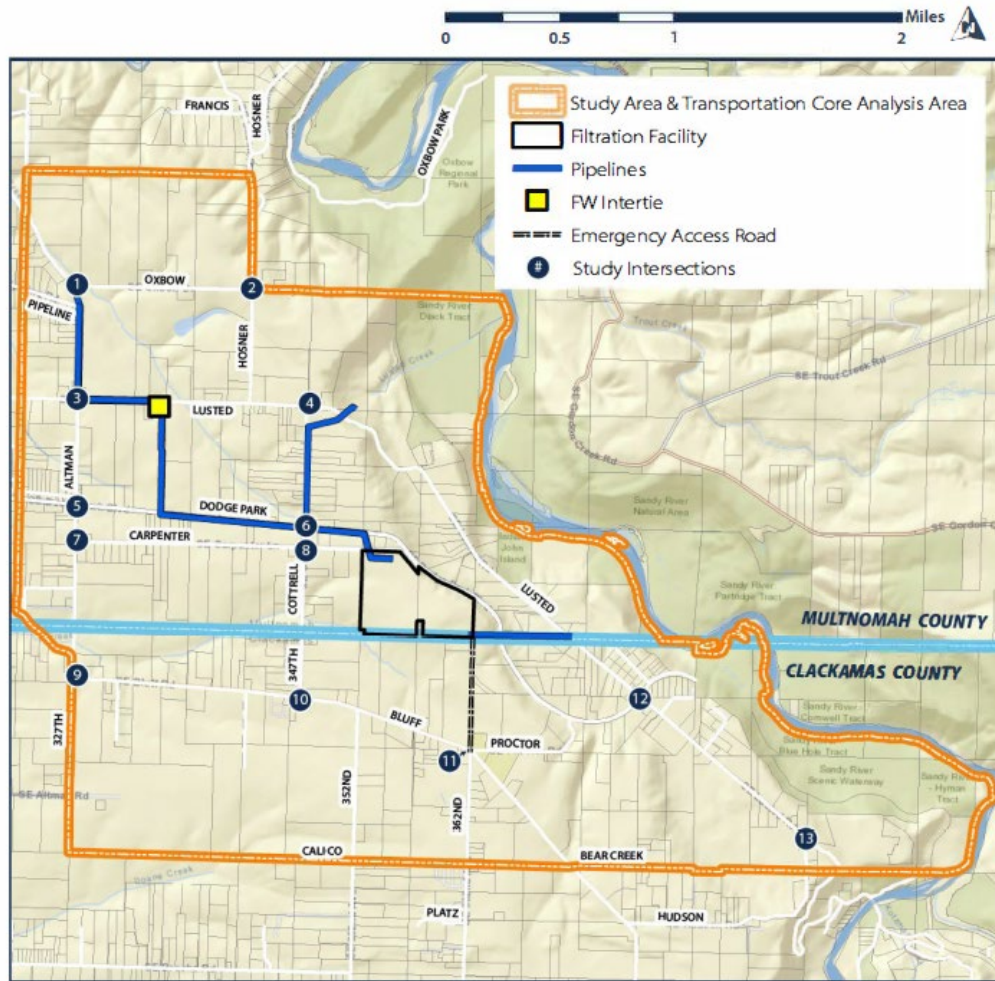
The project includes the filtration facility, the communications tower, the intertie, an emergency access road, and approximately three miles of connected underground pipelines spanning an area west of the Sandy River.

- Because project facilities extend through and have the potential to affect people and properties in two counties, the proposed study area includes land in both Multnomah and Clackamas counties. The study area boundary is large enough to consider all areas where the externalities or sensitivities of the proposed use could potentially have impacts, as described in more detail in the following sections of this Introduction.
- As many of the land use applications for the project require an analysis of the area potentially impacted by the project, and because of the consolidated nature of the procedure for review of these applications, the Water Bureau identified a consolidated, unified study area. This study area ensures that the analysis is comprehensive and does not fail to consider cumulative impacts across the project, even where components of the project are subject to separate land use applications.

#### **Study Area Based Primarily on Transportation Impacts**

Because the filtration facility itself will be quiet, odorless, safe, and relatively unobtrusive with extensive visual screening as demonstrated in [Exhibit A.4] Section 1.A, the main potential for off-site impacts relates to the transportation intersections and roadways analyzed in the TIA found in [Exhibit A.31] Appendix C.1.





**Figure 5. TIA Core Analysis Area—Showing Roads and Intersections Analyzed**

Figure 5 shows the intersections analyzed in the TIA and the project study area. The transportation engineer chose these intersections because they could be affected by project operations based on his professional judgment and in response to feedback received during the Water Bureau's public engagement process. The Multnomah County Transportation Planning & Development Department reviewed and approved the thirteen intersections included in the TIA, as documented in [Exhibit A.160] Appendix 0.2b Multnomah County Transportation Comments, page 4.

**Water District Service Areas Considered**

Figure 6 shows cities and water districts within five miles of the filtration facility site served by the Bull Run water system. The project will improve water quality and reduce risks from waterborne bacteria for customers served by these cities and water districts. The Pleasant Home and Lusted Water Districts serve residential and business customers generally west of the proposed filtration facility, many of which are within the study area boundary.



nursery stock, and typically own land that accommodates more intensive office, storage, processing, and distribution facilities.<sup>25</sup>

For example, Figure 7 is copied from [Exhibit A.33] Appendix D.1 and shows the Surface Nursery headquarters (operations center) on Lusted Road and land that is owned or leased by Surface Nursery for growing nursery crops. Surface Nursery's 12 identified field locations extend to the area south of Proctor and Bluff roads immediately north of Lusted Road (near the LHTF) and west of Altman Road.<sup>26</sup>



Figure 7. Surface Nursery Headquarters and Field Crop Locations

<sup>25</sup> As documented in [Exhibit A.33] Appendix D.1, several smaller nursery operations and fields also are located in the study area.

<sup>26</sup> Field locations were identified in early 2021 and may change based on lease arrangements and other factors.

As documented in [Exhibit A.33] Appendix D.1, the relationships between nursery headquarters and nursery cropland are similar for Sester Farms and J. Frank Schmidt nurseries.

- Sester Farms nursery headquarters is located north of Oxbow Drive, with four satellite operational centers and 13 field locations extending from east of Lusted Road to both sides of Oxbow Drive.
- Frank Schmidt Nursery headquarters are located on 357th Avenue (the extension of Altman Road) with field locations concentrated near the intersection of Bluff and Altman roads.

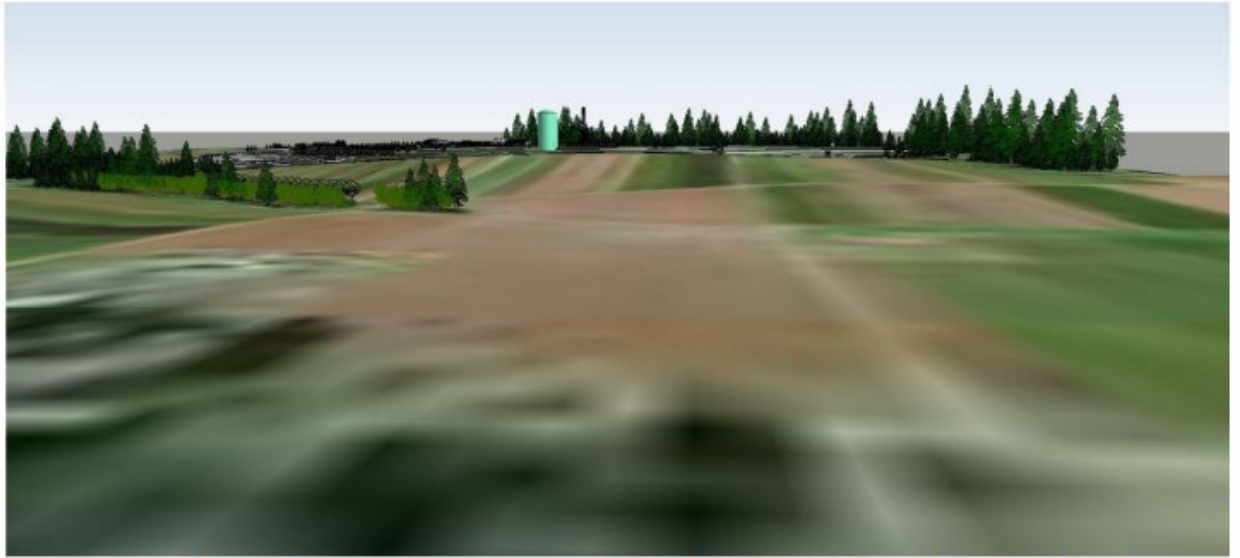
[Exhibit A.4] Section 1.A of this narrative, [Exhibit A.33] Appendix D.1 and [Exhibit A.157] Appendix 0.1 identify and describe the characteristics of additional nursery operations in the study area.

### **Views of the Filtration Facility and Intertie Sites**

As shown on Figure 8, the existing PHWD storage tanks are clearly visible from Bluff Road. The tanks are also visible from other areas as documented in [Exhibit A.4 and A.5] Sections 1.A and 1.B. Both sections provide a more detailed analysis of potential filtration facility view impacts, and [Exhibit A.217] Section 1.C explains how potential view impacts from the proposed communications tower are mitigated. [Exhibit A.8] Section 2.A provides a more detailed analysis of potential view impacts from the intertie structure near Lusted Road. The study area shown on Figure 9 is designed to be large enough to include these potential viewshed impact areas.

As described in more detail in the sections referenced above, visual impacts are mitigated through a variety of design measures including extensive building and parking setbacks, placement of buildings and structures in the lower area of the site, and land placement of landscape berms and plantings.

Figure 8 is a computer-generated graphic showing the existing PHWD storage tanks and the proposed filtration facility buildings and communications tower viewed from Bluff Road, about a half-mile to the south. The color and bulk of the existing water tanks makes them easier to see than the proposed communication tower (barely visible immediately northeast of the tanks), which is designed and painted to blend in with the adjacent trees and the sky. The filtration facility is also barely visible to the left of the PHWD tanks, in part because it will be placed in a lower area of the site.



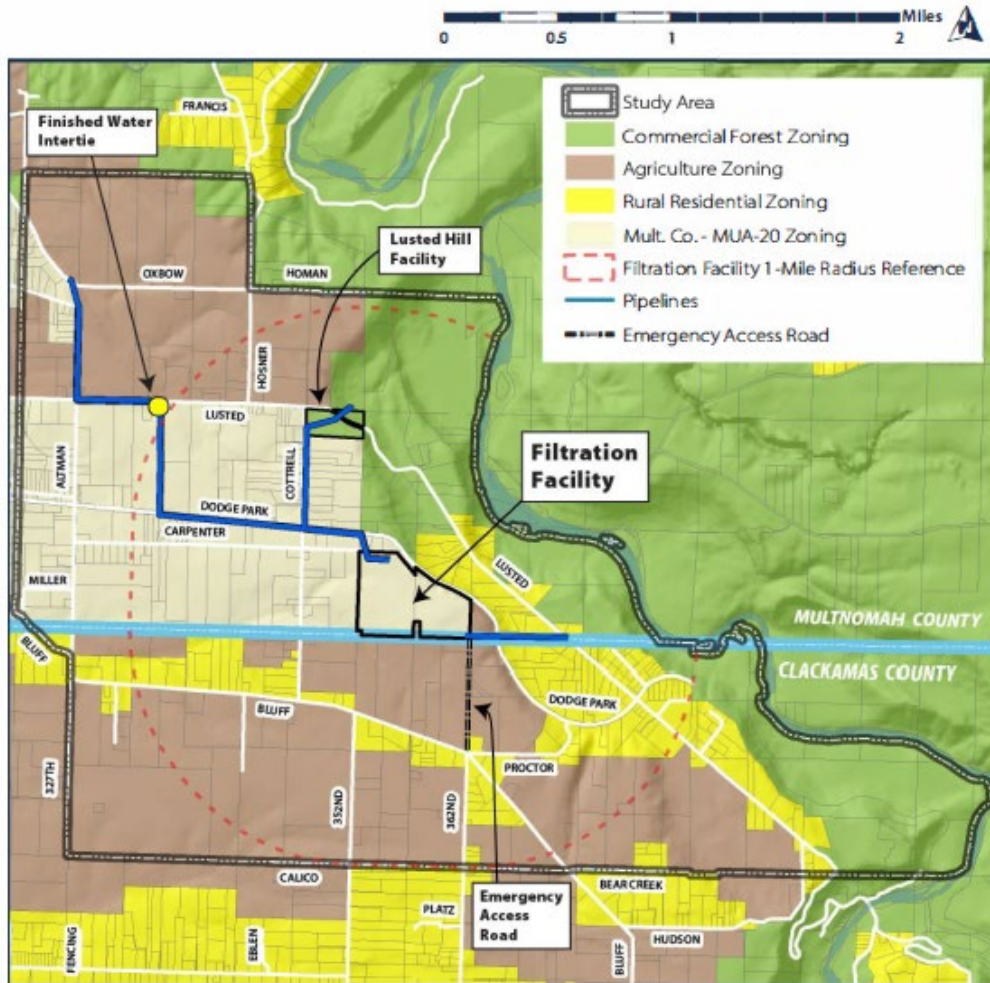
**Figure 8. View of Existing PHWD Tanks and Proposed Filtration Facility Structures Looking North from Bluff Road**

### **Other Potential Impact Categories**

In addition to traffic, views, and agriculture, participants in outreach meetings have raised concerns related to potential lighting, noise, hazardous materials, olfactory, and water and air quality impacts from project operations. Each of these potential impact categories has been analyzed as part of the planning and design of the project, but none has a potential for an impact area larger than the study area created by considering traffic, views, and agriculture.

### **Study Area Boundary**

Figure 9 shows the project's consolidated study area. As described above, this study area is designed to be large enough to include the entire project as well as all areas where the externalities or sensitivities of the proposed use could potentially have impacts, with the potential transportation and agricultural impact categories driving the study area boundaries. The study area includes the filtration facility, communications tower, an emergency access road from Bluff Road, the intertie on Lusted Road, and related raw and finished water pipelines. The boundaries of the study area take into consideration roadways and topographical features which clearly divide areas of the counties.



**Figure 9. Consolidated Land Use Study Area with Generalized Zoning**

Moving counterclockwise from the northwest corner, the study area boundaries are described below:

- Northern Boundary: The western portion of the northern boundary includes large EFU parcels abutting and immediately north of Oxbow Drive used for growing crops and more intensive nursery operational facilities. The eastern portion of the northern boundary is defined by Holman Road extended due east to the Sandy River.

- Eastern Boundary: The Sandy River defines the eastern boundary of the study area. [27] The steep Sandy River bluff and inherent disruption of the street network by the river itself separates land east of the river from potential impacts west of the river.
- Southern Boundary: The southern boundary is defined by Bear Creek and Calico roads near the southern edge of the one-mile radius [28] from the filtration facility. This area to the south of the filtration facility site includes the emergency access road to the filtration facility, crop land, nursery operations, a large solar facility, and rural residential areas in Clackamas County served by Bluff Road.
- Western Boundary: The southern portion of the western boundary is defined by 327th Avenue, a major road near the western edge of the one-mile radius from the filtration facility. The western boundary follows Bluff Road northwest to align with two roads and property lines west of the northern pipeline terminus.[29]

---

<sup>27</sup> Ms. Richter objects that the study area "exclude[s] the Sandy River area directly to the northeast" and that "only one or two residential properties separate the filtration facility from the mapped Sandy River SEC-H area." Exhibit H.4, page 3. It isn't clear where these two residential properties are located, but they certainly are within the study area -- as it extends many properties in every direction from the filtration facility site. The study area uses the Sandy River as the eastern boundary because it naturally serves as an edge of the area already. As shown in Exhibit A.11 (2.D Pipeline SEC Review Application Narrative), a large amount of SEC-H area, including adjacent to the Sandy River, is included in the study area. Ms. Richter does not provide any reason that adding any additional area to the northeast would change the analysis.

<sup>28</sup> Why a one-mile reference area? The one-mile line is just that, a reference line. It is helpful to understand the scale of the comprehensive analysis that the applicant undertook. It is also the radius that includes most of pipelines as well as most of the intersections that needed to be studied (that is, where the potential for impacts at an intersection was determined by County Transportation). Where a larger area was needed to capture these potential impacts, the area extends beyond the one-mile reference line to some logical boundary like a major road. The reference line is intentionally conservative, intending to consider a larger potential area of impact than, for example, is required under OAR 660-023-0180(5)(a) for mining uses (1,500 feet), or than was required by Multnomah County in the Water Bureau's Lusted Hill Facility review ([Exhibit A.162] Appendix 0.3, T3-2019-11784) (1,320 feet).

<sup>29</sup> As is clearly shown in the maps, the pipelines do not "extend to the western edge of the study area" as Ms. Richter asserts. Exhibit H.4, page 3. As noted below, it does appear she did not read this section of the application, as she asserts there is no "explanation of how or why the impact area boundaries were selected[.]" *Id.*

To provide context, land within a one-mile radius of the filtration facility site is shown with a dashed red line in Figure 9.<sup>30</sup>

Ms. Richter complains that the “applicant does not explain what methodology justifies the location of the impact area boundaries[.]” Exhibit H.3, page 3. Ms. Richter clearly did not read the extensive explanation in the above quote from the application.<sup>31</sup> The application explains in detail every boundary of the proposed study area and how it was selected.

“[N]othing in the MCC defines or prescribes the relevant study area for the purposes of the MCC 39.7515(A) Compatibility Standard.” *Tarr v. Multnomah County and Ibrahim*, 81 Or LUBA 242, slip op. at 33 (2020). However, caselaw does give us some guidance. Specifically, LUBA has said that it should include areas “directly affected by the proposed use” or areas “within sight and sound, or other effects of the proposed use.” *Multnomah County*, 18 Or LUBA at 15.<sup>32</sup> Accordingly, the study area is designed to

---

<sup>30</sup> A one-mile radius exceeds the 1,320-foot impact area radius Multnomah County analyzed in the Water Bureau’s Lusted Hill Facility review ([Exhibit A.162] Appendix 0.3, T3-2019-11784), which radius appears to be related to the area required for reviews in the Columbia River Gorge National Scenic Area under MCC 22.18.050. A one-mile radius reference is established in Multnomah County Code for solar facility study areas in EFU zones and therefore was a logical reference point for the project study area, which includes EFU lands. MCC 39.4230(U)(10). As described in this Introduction, the study area for the project was designed based on the potential impact areas and therefore is larger than in the Water Bureau’s previous Lusted Hill Facility application and larger than the 1-mile reference radius.

<sup>31</sup> Ms. Richter also misreads the caselaw she cites, *Wetherell v. Douglas County*, 51 Or LUBA 699, 726-727 (2006). First, the section of the case refers to a very different test, related to the “stability of the overall land use pattern in the area.” Regardless, the only holding of that case relevant here is that the county needs to “explain what justifies the scope and contours of the chosen study area.” *Id.* at 727. The applicant has done exactly that. Moreover, there would be no need to skew the study area to arbitrarily include Schmidt Nursery as Ms. Richter asserts. The application explains: “With a footprint of 89,6000 sf (not including greenhouses) and 35 employees, Surface Nursery is most similar to the filtration facility.” Exhibit A.4 (1.A Filtration Facility Conditional Use Application Narrative), page 10. Surface Nursery is well within the study area, and indeed farms land directly adjacent to the filtration facility site. The study area actually bumps east (making a smaller study area) along the southern portion of the western property line, where Schmidt Nursery is located, in order to continue to follow a major road while still capturing the entirety of the pipeline to the north.

<sup>32</sup> Note that this guidance is very similar to the guidance for the Farm Impacts Test’s “surrounding lands” under ORS 215.296(1) (identical to MCC 39.7515(C)). There, the

... study area must be based on evidence of the likely impacts of the *proposed conditional use* on farm practices on surrounding [] lands that are close enough to be subject to those impacts. ... Stated differently, “surrounding lands” ... are those lands in such proximity to the proposed ... conditional use that the **externalities or sensitivities of the proposed use** could potentially cause significant changes in or significantly increase the cost of accepted farm practices on nearby lands.



be large enough to include the entire project as well as all areas where the externalities or sensitivities of the proposed use could potentially have impacts, with the potential transportation, visual, and agricultural impact categories driving the study area boundaries.

As noted in some of the previous footnotes and below, opponents argue the conditional use study area is both too small (should include more natural resource areas or farm uses) and too large (because it includes some large-scale nursery operations). Line drawing is always difficult. As “nothing in the MCC defines or prescribes the relevant study area” line drawing has to occur based on the limited guidance in caselaw. *Tarr*, 81 Or LUBA, slip op. at 33. We continue to consider the methodology used by the application as inclusive and appropriate to evaluate the conditional use.

Of particular note, Jim Johnson, Oregon Department of Agriculture argues in Exhibit E.24 that “the “cooperating nature” of the industry and the critical mass needed to support agricultural infrastructure needs requires analysis of a larger area.” He indicates that “a larger area that recognizes the transportation requirements of the industry is needed. An area that includes lands north to I-84, west to the Metro urban growth boundary and south to line the generally runs from Damascus to Sandy would better reflect the transportation needs of area nursery and greenhouse operations.” These suggestions would lead to a study area that includes over 36 square miles of land. However, the filtration facility use impacts are extremely limited. Nearly all potential impacts are contained to the site. The only use impact extending beyond the site boundaries is transportation, which is Mr. Johnson’s concern.

Ms. Richter similarly suggests that a larger study area is needed because trucks will leave the study area. Exhibit H.3, page 3. As shown in Exhibit A.31 (Project TIA), the filtration facility traffic will have no significant impact on area street or intersection capacity. Street and intersection capacity evaluated in the Project TIA include background and through traffic – i.e., traffic using these facilities from around the region. Given no significant impact on the transportation system within the study area, and given that traffic impacts will disperse as they travel further from the project, extending the study area to include thousands of acres of additional land would be an unreasonable burden that has no reasonable expectation of changing the analysis or outcome of the traffic study or analysis of character of the area.

## 2. The Analysis of the Character of the Area and the Character of the User are Consistent with Caselaw

Just recently in 2020, in *Tarr*, LUBA affirmed a Multnomah County decision approving a mosque subject to this exact approval criterion. LUBA noted that the MCC “does not compel any particular approach” to the consistency analysis. *Tarr*, 81 Or LUBA slip op. at 37. However, a “multi-factor approach that considered, among other things, traffic and noise generation,” was upheld. *Id.*

---

*Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314, slip op. at 7 (2013) (italics in original; bolding added). For this reason, it is appropriate, although not required, that the study area and the surrounding lands for this case are coterminous.

Opponents in *Tarr* argued that the only comparison should be to a single-family residence. LUBA disagreed, explaining:

an application of the MCC 39.7515(A) Compatibility Standard that would determine compliance based solely or primarily on whether such impacts of community service uses exceed those generated by a single-family dwelling, or other use predominant in the relevant area, would make it very difficult for any community service use to gain approval. The county governing body, in adopting the MUA-20 zone and the MCC 39.7515(A) Compatibility Standard, was presumably aware that community service uses typically and ordinarily generate more traffic and similar impacts than residential uses.

81 Or LUBA slip op at 37. As explained below, the impacts of the filtration facility and pipelines when operating are actually equivalent to mid- or large-sized nurseries in the area. But even if they were higher (or, if construction were part of the permanent use), the test cannot simply be that those impacts are higher than other uses.

The Hearings Officer's decision upheld in *Tarr* also used analysis methodologies that are consistent with the approach taken by the application here. 81 Or LUBA slip op at 30 n11. Those include:

- Conducting a “a “multi-factor approach that considered, among other things, traffic and noise generation[.]”
  - The many factors considered in the application are summarized below.<sup>33</sup>
- “The comparison provided by the applicant includes dwelling sizes and surrounding developed or cleared areas such as driveways and parking areas. Other lots are similarly sized with structures with a similar developed footprints.”
  - The application narrative for this project also considers the size and footprints of comparable uses. Exhibit A.2, pp. 16-21; Exhibit A.4, pp. 9-15.
- “As discussed in the applicant’s narrative, the site could be developed with a single-family residence that is larger than the proposed masjid structure.”
  - The application narrative for this project also considers the reasonable worst case development scenario that would be allowed outright on the filtration facility site. Throughout, explained on Exhibit A.4, pages 9, 16.
- “In addition, as the applicant noted, religious buildings are often located in residential areas and are not *per se* incompatible.”

---

<sup>33</sup> Ms. Richter discards the multi-factor approach used successfully in *Tarr*, in favor of “a collective or shared personality or significance” and an “overall character or feeling[.]” Exhibit J. 35, page 3. She does not suggest a methodology for how one would legally define the “feeling” or “personality” of an area and whether a use is “consistent with” it – presumably because no legal methodology can capture such overwhelmingly subjective topics.

- The application narrative for this project also considers that water filtration facilities are more often than not located in more rural areas in Oregon. Exhibit A.4, pp. 16-20; Exhibit A.45 (Oregon's Water Treatment Plant Operations).

Ms. Richter argues that the character of the area analysis "cannot be done considering elements of permitted uses within the zone" without any support for why that would be the case. Richter Oral Testimony, minute 96; Exhibit H.4, page 3 ("Because plant nurseries are allowed outright and the proposed non-farm use is only conditionally permitted, any comparative evaluation relying on permitted farm impacts is irrelevant."). Not only is this inconsistent with *Tarr*, but it is also unclear what analysis Ms. Richter would like to have happen. Should the applicant only consider the character of conditional uses in the area? If so, those conditional uses – including the Lusted Hill facility and various other utility uses – would only make it even more clear that the proposed project is consistent with the character of the area. Exhibit A.4, pp. 16-20; Exhibit A.45 (Oregon's Water Treatment Plant Operations).

Ms. Richter continues this line of argument, stating that nothing in the code "suggests that impacts from a non-farm use are, by definition, consistent with the neighborhood character, even if they are somehow commensurate with impacts from farming." Exhibit J.35, page 4. that is, Ms. Richter argues that, "by definition" any "non-farm use" cannot be "consistent with the neighborhood character, **even if**" consistent in all factors of a multi-factor test with the character of farm uses in the area. This clearly cannot be true. The only uses that are subject to this test are "non-farm use[s]." The approval criterion cannot be interpreted so broadly as to prohibit whole categories of enumerated uses subject to the test. There must be a comparison to the character of other users in the area, including farmers, who make up a large part of the character of the area.

### 3. Project Noise Will Be "below measurements of ambient noise" and Confirmed With a Condition

Opponents have provided testimony that noise generated by the filtration facility will not be consistent with the character of the area because:

- "operational noise will be significantly exceed ambient noise levels" and "will drown out many of the naturally occurring sound from the wind, birds, trees, etc." (Exhibit H.31)
- "even at their lowest projected noise values, 50 dBA, the plant will increase ambient sound in the area by 1.3 to 7.9 times over the current measured levels" and "PWB's higher 60 dBA projection [will increase ambient sound] by 12.6 to 79 times." (Exhibit I.39)<sup>34</sup>
- "despite all the sound mitigation strategies proposed by PWB in their application and referred to in I.74, the baseline continuous noise level will be much higher, the sounds will be unnatural, and they will be 24 hours in nature. The current Character of the Area is a low dBA level of

---

<sup>34</sup> Exhibit I.39 contains several inaccuracies regarding sound levels, energy, and perception of sound. Exhibit J.82 provides a description of how decibels actually interact with human hearing, and concludes that "while a 10 dBA increase is a 10-fold increase in energy, it is perceived by humans as only twice as loud rather than ten times as loud when comparing similar sounds. Therefore, the discussion and table of ratios included in the Cottrell CPO memo are incorrect."

natural sounds (within the 30s decibel range) with intermittent farm or vehicle noise throughout daylight hours, with almost 0 non-natural sounds at night.” (Exhibit J.21)

Opposition testimony relating to area noise significantly underrepresents existing noise levels, despite also identifying that farm related noise, “motorcycle rallies, cruise-ins[,] and rod runs” are characteristic of the area. Exhibit I.24, page 1. The foundation of opposition noise evidence on existing conditions is Exhibit H.31, wherein sound measurements prepared by a resident using an iPhone 12 app are presented. Opposition testimony builds on this faulty evidence and assumptions, adds a faulty understanding of decibels and sound energy, and comes to entirely inaccurate conclusions.

The filtration facility was carefully designed to mitigate noise generation through screening, topography, and structural buffering. The filtration facility Exterior Noise Analysis (Exhibit A.49) was prepared by acoustical engineers at the Greenbusch Group, and “evaluated the highest noise levels generated by simultaneous operation of all equipment, including those with intermittent operation.” Exhibit J.69, page 1. This evaluation was a worst-case scenario including emergency equipment operation. In reality, the “loudest equipment at the Facility is used only intermittently” and the emergency equipment is only operated for periodic testing, other than in an actual emergency. But even in an emergency, and even with all the intermittent equipment operating simultaneously, “noise levels at the facility property line during operation will be within or below the range of current ambient sounds levels, and the type of noise generated by the facility will be similar to noises currently existing within the study area”. Exhibit J.69, page 2.

Opponents do not, and indeed cannot, point to any evidence of problematic sound generation by existing water treatment facilities. Hearing testimony was provided by Mike Grimm from the West Slope Water District (starting at 1:03:40) indicating that water treatment plants are designed and operated to be “the best neighbor in the area” and “tend to be the best silent neighbors due to their ability to fit well into existing neighborhoods”. Information about sound generation impacts of existing treatment facilities is provided by Exhibit A.45. Water treatment facilities exist in residential and rural areas across the state, and are considered good neighbors, generating no sound complaints from nearby farmers or residents. There is no reason to believe that the filtration facility will be any different.

The Water Bureau has prepared many exhibits directly addressing sound generation, ambient noise levels, and the results of extensive designed mitigation including topography and building materials. These exhibits are identified below, with relevant sections excerpted.

- Exhibit A.4 Filtration Facility Conditional Use Application Narrative Section A.3.1 pp 32-34
- Exhibit A.45 Oregon Water Treatment Plant Operations p. 19
- Exhibit A.49 Bull Run Facility Exterior Noise Analysis
- Exhibit A.51 Potential Local Impacts of Facility Operation: Air Quality, Dust, Noise, and Vibration
- Exhibit A.65 Acoustical Analysis Finish Water Intertie
- Exhibit A.172 Acoustic Baseline Measurement
- Exhibit A.175 Pre-construction Ambient Sound Level Measurement
- Exhibit I.74 Operations Supplemental Information, page 5
- Exhibit J.69 Facility Operational Noise Response
- Exhibit J.82 Acoustics and Nighttime Generator Sound Levels

**Exhibit A.4 Filtration Facility Conditional Use Application Narrative (Noise Analysis, pp. 32-34)**

A.3.1.2 Filtration Facility External Noise Analysis

As documented in [Exhibit A.49] Appendix E.3, the filtration facility is designed to minimize potential noise levels that could otherwise be experienced by rural development uses in the area:

- The filtration facility is located near the center of the site to maximize distance between the filtration facility and noise-sensitive uses.
- Proposed noise-attenuating measures minimize noise escaping from noise-generating equipment (including air handling units, centrifugal blowers, flocculators, air source heat pumps, sediment pumps, water pumps, condensing units, generators, and transformers).
- Landscape berms and vegetation installed around noise-generating buildings and structures will further mitigate noise impacts on sensitive uses.

Multnomah and Clackamas County have adopted noise standards. Compliance with relevant sections of MCC Chapter 15.269 (Multnomah County Noise Code) and CCC 6.05 (Clackamas County Noise Code) is demonstrated in [Exhibit A.49] Appendix E.3. Both codes require that:

1. Decibel levels do not exceed 50 dBA at the property line of noise sensitive uses (for example, residences and schools) at night (from 10:00 p.m. to 7:00 a.m.).
2. Decibel levels do not exceed 60 dBA at the property line of noise sensitive uses (for example, residences and schools) during the day (from 7:00 a.m. to 10:00 p.m.).”

Figure 24 shows that noise levels from normal filtration facility operations will be less than 50 dBA at the property line at all times. The numbers shown at the site perimeter indicate testing locations.



**Figure 24. Noise Levels from Normal Filtration Facility Operations**

[Exhibit A.49], Table 2 and Figure 3 show the location of 10 measurement points to the north, east, south, and west of the filtration facility site and provides the expected sound levels at these points. At all times, the sound level at each of these points will be below the nighttime sound level of 50 dBA—that is, the sound generated by the normal operation of the filtration facility will be below the sound level of normal speech.

Unlike many of the noise-generating activities that characterize the study area and the rural development core analysis area, filtration facility operational noise will not produce sound exceeding the level of normal speech at the property line.

**Exhibit A.51, Potential Local Impacts of Facility Operation: Air Quality, Dust, Noise, and Vibration, page 4**

5.0 Potential Noise and Vibration Impacts

Equipment used for operation and maintenance of the Facility that will generate noise and vibration include:

- a. Pumps
- b. Diesel engines
- c. Blowers

- d. Centrifuges
- e. HVAC Systems
- f. Dry chemical handling equipment

To prolong service life and reduce maintenance, equipment will be mounted with appropriate mass and base isolation to limit vibration. These efforts will also limit the areas where equipment vibration can be perceived to those areas immediately adjacent (within the same room or closer than 10 feet away outdoor) to the equipment within the property boundary.

Noise levels inside and outside structures will be limited to those allowable by health and safety rules and by code. As described in the Bull Run Filtration Facility Exterior Noise Analysis Technical Memorandum, noise levels at the property line will not exceed the code-allowable levels of 60 dBA during the daytime and 50 dBA at night.

**Exhibit J.69, Facility Operational Noise Response, page 1 (Emphasis added)**

During daily operation, the character of the noise generated by the Facility will be consistent with other noise generated in the area, which includes farm equipment, large trucks, irrigation pumps, and ventilation equipment serving farms, businesses and residents. Noise generated at the Facility will include water treatment equipment, water pumps, delivery trucks, and ventilation equipment serving the operations and maintenance buildings. The loudest equipment at the Facility is **used only intermittently**. Engine generators and the fire pump station are operated only for periodic testing (during the day) or during an emergency. As shown in Table 2 of the Exterior Noise Analysis (Stantec, 2022, Exhibit A.49), without operation of the emergency equipment, **noise levels generated by the Facility are below measurements of ambient noise**. The Facility will not create a constant background hum; much of the non-emergency equipment will also operate intermittently. For example, filter backwash pumps and filter air scour blowers will typically operate four to six times per day for ten to thirty minutes. The noise analysis evaluated the highest noise levels generated by simultaneous operation of all equipment, including those with intermittent operations. Facility noise generation at property lines during the day will be equivalent to or lower than measurements of background ambient noise and similar in the intermittent character. Nighttime (10 p.m. to 7 a.m.) ambient noise was reported at six locations along the Facility property line in the Acoustic Baseline Measurement. The existing median hourly nighttime Leq sound levels range between 40 dBA and 50 dBA. The noise levels at the property line generated by the equipment at the Facility (excluding equipment operated only during emergencies), as reported by Facility Exterior Noise Analysis, are predicted to range between 29 and 46 dBA. As shown in Table 1, nighttime noise generated by the facility is within or below the range of measured ambient noise.

Staff recognized the relevant noise concerns are limited to testing of emergency generators and fire pumps, providing the following finding on p. 50 of the Staff Report:

Land Use Planning recommends the Hearings Officer limit the testing of the emergency generators and fire pumps to daylight hours. In addition, once the facility is fully operational, a noise

verification study will be conducted to verify that the noise at the property lines does not exceed 50 dBA at all times during normal operations and 60 dBA during testing of emergency equipment.

While unnecessary given the evidence in the record, the Water Bureau will verify that the engineering calculations are correct after construction is complete, in compliance with staff's proposed condition:

Staff Condition of Approval:

14. The property owner shall complete a noise study within six-months of the Water Filtration Facility becoming fully operational in order to verify noise at property lines does not exceed 50 dBA at all times during normal operations and does not exceed 60 dBA during testing of emergency equipment. The study shall be conducted by a Professional engineer and the results documented in a written report that shall be available for public inspection. The property owner shall notify Multnomah County Land Use Planning if the study determines any of the noise thresholds have been exceeded and what modifications to the Facility are proposed to bring it into compliance.
  - a. The noise study and proposed modifications if any shall be submitted to Multnomah County Land Use Planning within 45 days of the six-month anniversary of the Water Filtration Facility becoming fully operational. [MCC 39.7515(A)]
  - b. Any modifications to the Water Filtration Facility found to be necessary to mitigate noise, as agreed by Multnomah County Land Use Planning and Portland Water Bureau, shall be completed within six months of the noise study's completion.
  - c. After any modifications, a new noise study will be completed within a time period agreed upon by Multnomah County Land Use Planning and the Portland Water Bureau to verify that the modifications were successful.

Overall, the filtration facility and site have been carefully designed to not create noise above ambient levels and will have no noise impact on the character of the area.

**4. Project Lighting Will Not Extend Beyond Site Boundaries or Impact Dark Skies**

Opponent video and photo testimony (Exhibits I.22.a, I.22.e, and I.22.f) showed, unsurprisingly, that the undeveloped site is currently dark at night; evidence was also presented that the filtration facility has a higher number of lights than Scenic Fruit, a local nursery.

As discussed and shown in the application narratives, unlike area lighting that is often unshielded, the proposed lighting will not extend beyond site boundaries and will have no impact on surrounding uses or dark skies. The filtration facility is purposefully located in a lower elevation portion of the site and buffered by landscaping, and all filtration facility lighting is shielded. Facility lighting was carefully designed to not extend beyond the boundary of the site (Exhibit A.47, pages 2-3, Attachment B); nor will it travel upward and add to existing area light pollution (Exhibit J.70, page 5).



Narrative and evidence submitted relating to project lighting are listed below, with key sections excerpted below:

- Exhibit A.4 Filtration Facility Conditional Use Application Narrative Section A.3.2, pages 35-46
- Exhibit A.5 Filtration Facility Design Review Application Narrative, page 45
- Exhibit A.45 Oregon Water Treatment Plant Operations, page 19
- Exhibit A.47 Land Use Permitting Lighting Report
- Exhibit I.74 Operations Supplemental Information, page 5
- Exhibit A.63 Exterior Light Analysis Finish Water Intertie Facility
- Exhibit J.70 Impacts of Lighting at Filtration Facility

#### **Exhibit A.4 Filtration Facility Conditional Use Application Narrative (Light Impacts pp.35-46)**

##### A.3.2 Light Impacts and Included Mitigation Measures

Multnomah County Dark Sky Lighting Standards (MCC Section 39.6850) apply to new development including residences, public utilities, and new agricultural or forest structures constructed after October 22, 2016.<sup>35</sup> Potential impacts on rural development uses from the reasonable worst-case development scenario on the filtration facility site include unscreened light that could emanate from nighttime nursery field or outdoor processing or loading operations.

[Exhibit A.47] Appendix E.2 Exterior Lighting Analysis (Elcon Associates, 2022) prepared for the filtration facility demonstrates that all proposed lighting is designed not to trespass beyond the filtration facility site boundary, as required by Multnomah County's Dark Sky Lighting Standards Ordinance (MCC 39.6850).

##### A.3.2.1 Existing Light Impacts

As documented in the *Introduction* [Exhibit A.2], the study area is characterized by farming (primarily nursery crops and production), residential, forestry, public facility, solar facility, and utility land uses. The rural development core analysis area is characterized primarily by nursery crop land and production facilities, residential, and public and solar facilities (school, PHWD water tanks, and solar facilities), with limited non-commercial forestry activities.

As documented below, most of these uses generate light and are not subject to MCC 39.6850 Dark Sky Lighting Standard. The Dark Sky Lighting Standard applies to the filtration facility but does not apply to lighting fixtures lawfully installed before the effective date of the ordinance (October 2016) or to lighting associated with most farm and farming practices if they occur for less than 60 nights in a year.

---

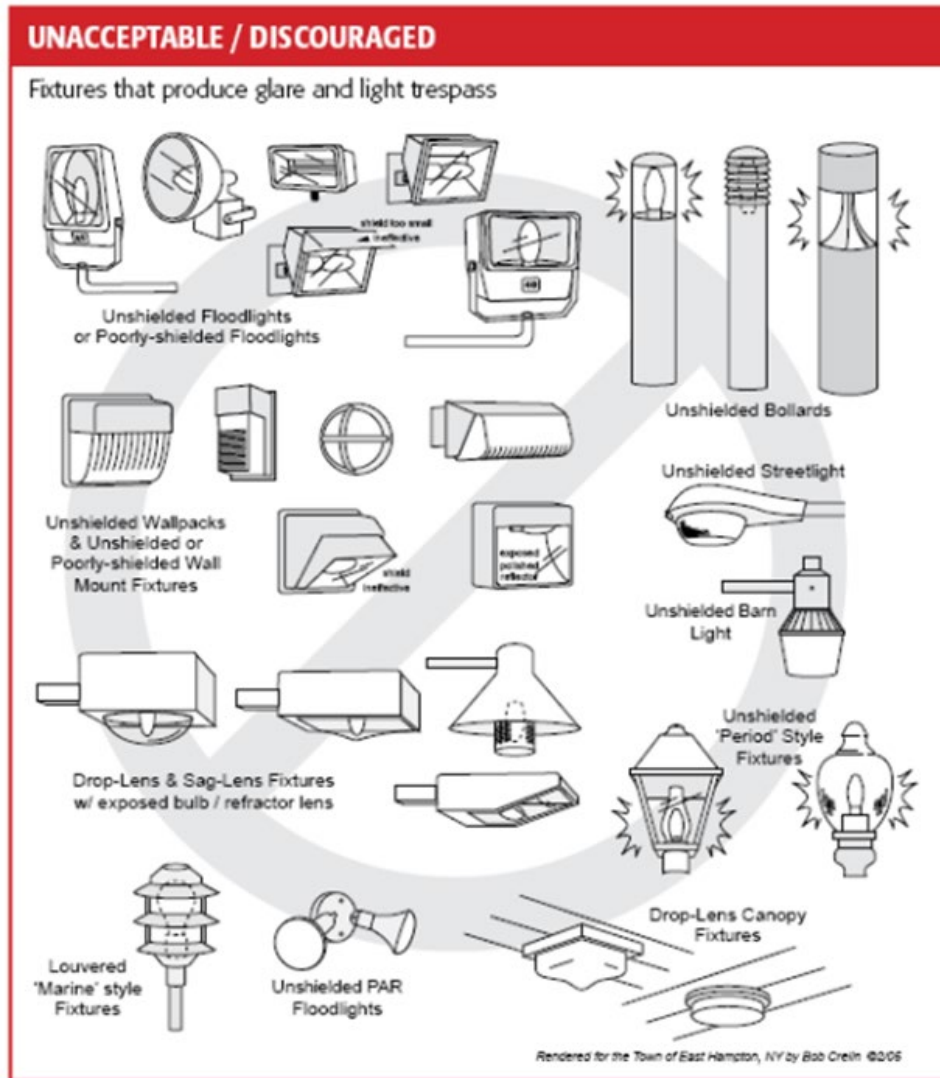
<sup>35</sup> MCC 39.6850(B) exempts agricultural and forest operations from county lighting standards but does not exempt new agricultural or forest buildings: "...permanent lighting on buildings, structures or poles associated with farm practices and agriculture use is subject to the requirements of this section." A comparable provision exempts forest operations.

When considering the incremental effect that the proposed filtration facility will have on the night sky within the study area, it is useful to establish a baseline. Based on Winterbrook observations,<sup>36</sup> residential homesites frequently have outdoor security or safety lighting fixtures that are not shielded and, therefore, do not meet current Dark Sky Ordinance lighting standards. Residential homesites with multiple unshielded outdoor lighting fixtures were observed along every main road surveyed within the study area, with over a third of all residential homesites having at least one unshielded outdoor light *on and in use* during the hour survey.

Figure 1 (below) is copied from county's Dark Sky Ordinance staff report and shows "unacceptable or discouraged" outdoor light fixtures—the majority of which were commonly found in the study area. As shown in Figures 26-35 below, examples of unacceptable light fixtures are found around many homes, nurseries, and public facilities in the study area. In contrast, Figure 8 (several images below) shows acceptable lighting fixtures such as those proposed at the filtration facility.

---

<sup>36</sup> Winterbrook conducted a windshield survey of unshielded outdoor lighting near the filtration facility site and within the study area on Thursday, May 19, 2022, between 8:45pm and 9:45pm. The survey assessed outdoor lighting fixtures along Bluff, Hudson, Lusted, Altman, and Cottrell roads, Dodge Park Boulevard, and Carpenter Lane, in both Multnomah and Clackamas counties. Winterbrook does not provide in this narrative specific home addresses to avoid intruding into the privacy of residential property owners. Winterbrook recorded the general types and locations of unshielded outdoor lighting for residential homesites, as well as agricultural and public facilities operations. Note that only lights in use at the time of the windshield survey contribute to the observations described below, which likely resulted in an undercount of the total unshielded outdoor lighting in the windshield survey area.



**Figure 1. Fixtures that Produce Glare and Light Trespass**

*Unshielded Residential Light Fixtures*

As shown on the images below, older homes (pre 1990) often have unshielded or poorly shielded wall mount fixtures, "period" pole fixtures, and/or driveway entrance lights. Newer or recently remodeled homes often have more and larger unshielded light fixtures, including decorative entrance bollards, landscape lights, multiple wall sconces, "period" fixtures, ground path and driveway lights, security lights with exposed bulbs/transparent fixtures, and tall pole lights near outdoor building entrances, storage areas, and/or parking areas. Because the Dark Sky Ordinance did not become effective until 2016, it is likely that most of the fixtures shown below met county standards at the time of installation, but they nevertheless comprise the current character of the area.

Figures 26-30 show several representative examples of unshielded residential light fixtures observed in the windshield survey. Images are taken from Google Earth. All homesite images are within the study area. Home addresses are not included.



**Figure 2. Unshielded Wall Lights Illuminating Garage and Accessory Structure Parking Areas**



**Figure 3. Residential Unshielded Entry Lights Illuminating Driveway and Entrances**

*[Additional figures omitted]*

### Agricultural Light Fixtures

The light fixtures observed in agricultural operations centers were similar to residential homesites with multiple outbuildings. However, the concentration of unshielded lights for agriculture operations far exceeds any residential use. The glows from several agricultural operations centers are visible from a half-mile away or more. For example, agricultural operations centers along Lusted Road were visible driving along Dodge Park Boulevard, and agricultural operations centers along Oxbow Drive were visible driving along Lusted Road.

Agricultural warehouses and processing centers typically have unshielded security floodlights above their entrances, pole lights over their vehicle maneuvering and outdoor storage areas, and arena lighting over some fields. Light is sometimes visible from greenhouses. [Figures below and in the document] show examples of unshielded outdoor lighting fixtures but do not show the cumulative night sky effects of the industrial lighting found in large-scale nursery or agricultural processing operations.



**Figure 8. Unshielded Wall Lighting at Surface Nursery (Lusted Road)**



**Figure 9. J. Frank Schmidt Company Unshielded Wall Lighting (327<sup>th</sup> Avenue)**

*[Additional figures omitted]*

*Public Facilities Light Fixtures*

Public facilities (including the PGE substation, the LHTF, and the Oregon Trail Academy) also have unshielded security lighting that pre-dates the Night Sky Ordinance. Figure 6 shows unshielded pole and wall lights at the Oregon Trail Academy.

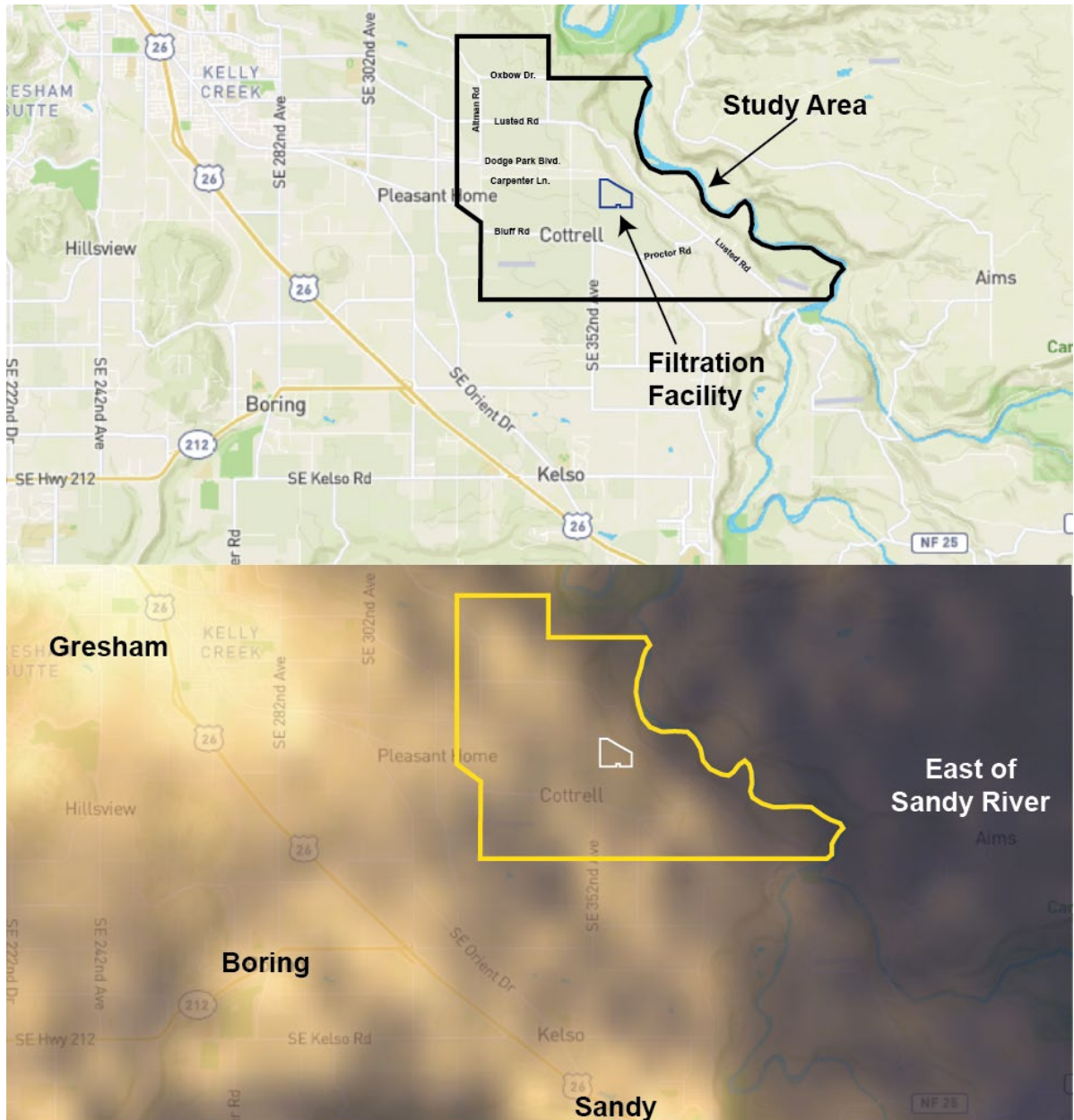


**Figure 11. Oregon Trail Academy (Proctor Road)—Unshielded Pole Lights for Building and Parking Area**

A.3.2.2 Cumulative Effects of Unshielded Lighting in the Study Area

As shown on Figure 12, existing lighting in the study area is visible from Google satellite images. The unshielded lighting associated with large-scale nurseries, agricultural processing centers, homesites, and a few public facilities contribute to the relatively bright sky conditions in the study area.

As shown, night sky impacts from urban lighting are clearly visible in the Gresham portion of the regional urban growth boundary west of 282nd Avenue and in the Sandy urban growth boundary. The bright night sky above the unincorporated community of Boring also stands out. The Sandy River canyon and commercial forest land to the east are in dark contrast to the relatively bright farming and residential land that characterizes most of the study area.



**Figure 12. Night Sky Conditions in and around the Study Area**

A.3.2.3 Filtration Facility Light Impacts

The MCC 39.6850(C) Dark Sky Lighting Standards apply to the filtration facility site and require that:

1. The light source (bulbs, lamps, etc.) must be fully shielded with opaque materials and directed downwards. "Fully shielded" means no light is emitted above the horizontal plane located at the lowest point of the fixture's shielding. Shielding must be permanently attached.



2. The lighting must be contained within the boundaries of the Lot of Record on which it is located. To satisfy this standard, shielding in addition to the shielding required in paragraph {C}{I} of this section may be required.

**Response:** The March 7, 2015 Staff Report to the Planning Commission (March 7, 2015) regarding Proposed Dark Sky Lighting Requirements includes the following diagram showing acceptable light fixtures that minimize glare and light trespass and facilitate better night vision.



**Figure 13 Acceptable Light Fixtures**

As shown in the Exterior Light Plan ([Exhibit A.212] Appendix A.1a, Sheets E-322 through E-333 and GEN-E-140 through GEN-E-143), the project architects considered this diagram when considering light fixtures appropriate for the filtration facility. As documented in [Exhibit A.47] Appendix E.2, and [Exhibit A.5] Section 1.B Filtration Facility Design Review, all proposed filtration facility lighting will meet these standards.

- Fully shielded, full cut-off fixtures will be used for all on-site lighting.<sup>37</sup>
- [Exhibit A.47] Appendix E.2, Attachment B: Site Illumination Plan—Full Output shows that the proposed lighting scheme will not result in light spillover (trespass) beyond the property line—even at full output (which rarely occurs). All lighting will be contained within the boundaries of the filtration facility site.

#### A.3.2.4 Proposed Light Mitigation Measures

By using only fully shielded, full cut-off lighting fixtures that direct light away from neighboring property lines and the Carpenter Lane ROW, all applicable Dark Sky Lighting Standards will be met and all light will be contained within the boundaries of the filtration facility site.

#### A.3.2.5 Light Impacts Conclusion

The filtration facility is designed so that lighting is contained entirely within the boundaries of the filtration facility site, as shown in the Site Lighting Study (Appendix E.2 [Exhibit A.47]). The lighting plan, which incorporates effective mitigation measures, complies with Multnomah County's Dark Sky Lighting Standards Ordinance. Therefore, the filtration facility is consistent with the lighting character of the area.

### **Exhibit J.70, Impacts of Lighting at Filtration Facility (Excerpts)**

Compliance with Multnomah County Dark Sky Lighting Standards has been previously described in Land Use Permit Lighting Report (Exhibit A.47, September 2022). This report provides additional detail about the application of these standards in the design process and how compliance with these standards affects the experience of observing the facility and surrounding skies at night. In addition to the Multnomah County standards, the Facility design follows additional lighting design codes and guidelines, described below, which were developed for rural areas and for the protection of plants and animals.

....

#### 2.0 Site Arrangement

---

<sup>37</sup> Submerged lights needed for process monitoring of the filtration facility are exempt from this standard (MCC 39.6850(B)(13)) and have a different design. Despite being exempt, the underwater lighting is designed to ensure that the filtration facility lighting will be contained within the boundaries of the filtration facility site, as shown in [Exhibit A.47] Appendix E.2.

The arrangement of the Facility was designed to minimize off-site impacts, including the impacts of Facility lighting, by arranging the buildings and treatment facilities towards the center of the site and using berms and landscape plantings for screening.

Dark Sky Lighting Standards do not allow light to spill from fixtures across property lines, and this requirement is met in part by locating buildings, treatment facilities, and pathways well back from property lines, as shown in the night-time lighting simulations depicted in [Figures 1 and 2 in the report].

The impact of lighting at the Facility is further reduced by the construction of berms along the north and northwest where facilities are closest to the property line ... [T]ree clusters and screening plantings, which include a variety of native trees will, overtime, further reduce the visibility of the Facility from beyond the property line.

### 3.0 Lighting Design

The lighting design for the Facility meets the needs for safety and security while complying with best practice shielding and illumination guidelines. ...

The industry standard for preserving dark skies is the International Dark-Sky Association Model Lighting Ordinance (IDA MLO) guidelines. These guidelines include four Lighting Zones:

- a. LZ0: No ambient lighting
- b. LZ1: Low ambient lighting
- c. LZ2: Moderate ambient lighting
- d. LZ3: Moderately high ambient lighting
- e. LZ4: High ambient lighting

The lighting design for the Facility follows the guidelines for LZ1, described as follows:

"Lighting Zone 1 pertains to areas that desire low ambient lighting levels. These typically include single and two-family residential communities, rural town centers, business parks, and other commercial or industrial/storage areas typically with limited nighttime activity. May also include the developed areas in parks and other natural settings."

The IDA MLO further recommends that LZ1 includes: "**Areas where lighting might adversely affect flora and fauna or disturb the character of the area.** The vision of human residents and users is adapted to low light levels. Lighting may be used for safety and convenience, but it is not necessarily uniform or continuous. After curfew, most lighting should be extinguished or reduced as activity levels decline." [Emphasis added.]

To implement the IDA MLO guidelines, the design of the Facility includes a requirement that exterior light fixtures do not exceed maximum Backlight-Uplight-Glare (B-U-G) ratings. ... With a "U0" rating, **none of the Facility's luminaires will create the "uplight" which causes artificial sky glow or interferes with astronomy. The Facility will not interfere with or change the dark sky character of the area.** [Emphasis added.]

... exterior lights are illuminated only when they're needed and dimmed or off when unnecessary. Specific lighting control criteria include the following:

- Lighting automatically turns off when sufficient daylight is available.
- Non-essential building facade and landscape lighting automatically turns off between midnight and 6 a.m. or between times established by the authority having jurisdiction.
- All other lighting (including signage lighting) shall be automatically reduced by at least 50 percent in one of the following conditions:
  - From midnight to 6 a.m.
  - During any period when no activity is detected for a time no longer than 15 minutes.

To achieve this level of lighting performance, the Facility will have a flexible lighting control system programmed to keep the light levels as low as possible for safety and security, and only turn them on to full brightness when needed. While the project uses manual controls in some areas, the majority of the exterior lighting will be off or dimmed throughout the night. All of the exterior lighting is controlled by a wireless mesh network which is capable of adjusting and programming every fixture remotely.

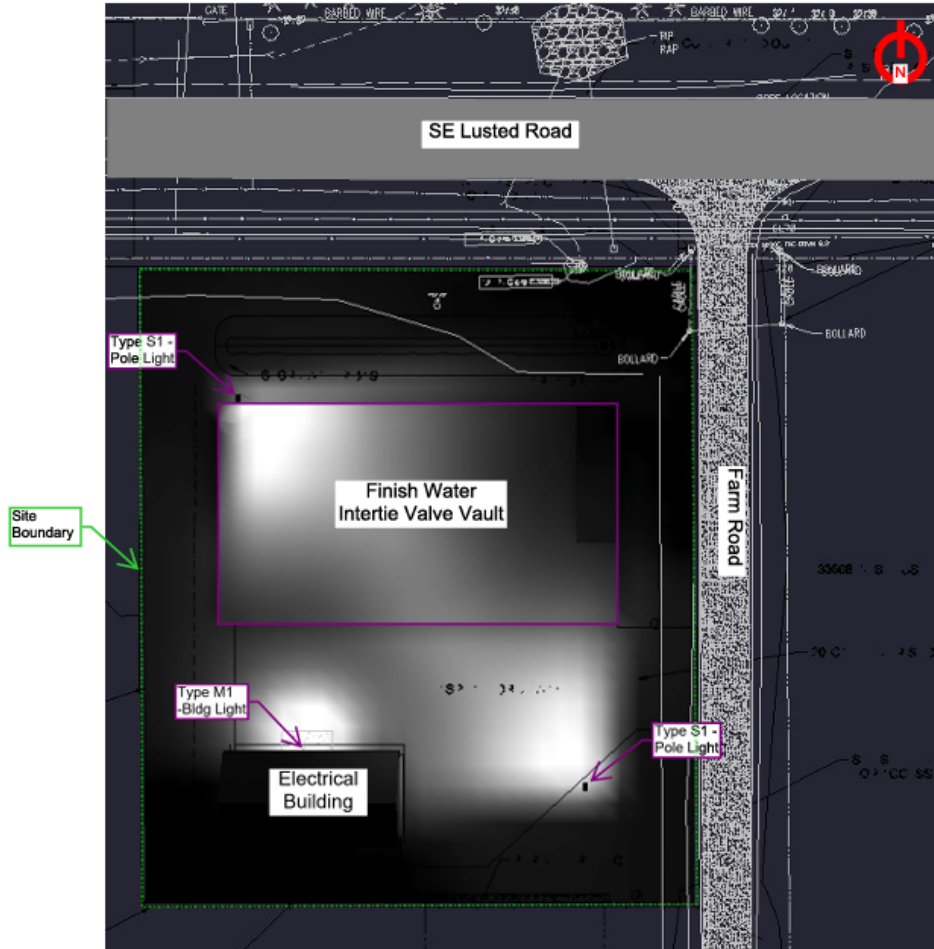
....

#### 4.0 Conclusions

The Facility has met the requirements of the Multnomah County Zoning Code to meet Dark Sky Lighting Standards and to be consistent with the character of the area, not adversely affect natural resources, and not create hazardous conditions. These requirements were met by:

- Configuring the buildings, facilities, and roadways on the site to minimize the off-site impacts of the lighting.
- Meeting Zoning Code requirements to contain light within the property boundary.
- Following IDA MLO guidelines for LZI (Low ambient lighting), specifying light fixtures with B-U-G ratings that minimize night sky impacts.
- Following Energy Code requirements to limit lighting levels and when lights are turned on.
- Implementing a flexible lighting control system that will allow Facility staff to adjust lighting levels and controls as needed.
- Providing appropriate lighting for site security and safe operation of the Facility.

Note that the pipelines themselves do not have lighting. The intertie is discussed in Exhibit A.63 Exterior Light Analysis Finish Water Intertie Facility, which includes the following depiction of the minimal, fully-shielded lighting proposed at the intertie.



Given the extensive evidence that the project will not create any light that spills over property boundaries nor create the “uplight” which causes artificial sky glow, Staff found project lighting to be consistent with County standards (Staff Report p.50), and recommended a condition of approval that is consistent with proposed facility lighting design:

Staff's Condition of Approval  
12....  
....  
e: All external lighting shall comply with the County's Dark Sky Lighting Standards of MCC 39.6850 [MCC 39.6850 & 39.7515(A)]. Placement of lighting shall avoid shining it directly into an undeveloped Significant Environmental Concern for water resource or wildlife habitat area. [MCC 39.5560(B)]

The Water Bureau has no concerns with this condition of approval.

## 5. The Filtration Facility Landscaping, Mitigation Plantings, & Open Space will Enhance Wildlife Habitat

Wildlife habitat is protected in Multnomah County through SEC zoning, as noted in the Staff Report (p. 52). The project has carefully evaluated every interaction with SEC areas at the facility site and along pipeline routes. The project avoids impacts to SEC habitat areas, and potential habitat impacts are addressed in detail under MCC 39.7515(B) responses.

Several neighbors testified about seeing assorted wildlife in their backyards, SEC areas, and the filtration facility site. Their assertion is that wildlife is related to the character of the area, and that the project will change that character. We do not dispute that wildlife is present within the study area, as is the case in most rural and urban areas of Oregon, especially near protected natural areas, such as the SEC-h area at the eastern edge of the filtration facility site and the southwest corner of the filtration facility site that is near Johnson Creek.

However, there is no reason to assume, and opponents have provided no supporting evidence that wildlife will stop visiting either the filtration facility site or the study area after the facility is built. In fact, opposition testimony indicates that wildlife has become generally habituated to the presence of humans in this area. As discussed above, noise and light will be limited at and near the property lines and at the existing SEC boundaries. Additionally, general landscaping as well as specific mitigation plantings and open space areas will improve the habitat at the site itself over current conditions. The project wildlife biologist summarized the habitat benefits of the filtration facility site design and mitigation plan:

Wildlife species are expected to continue using the protected habitat areas at the edges of the filtration site as a movement corridor (nocturnal and/or dawn and dusk), as well as stop-over habitat for birds. Native shrub/tree plantings identified in the mitigation plan would improve habitat along the margins of Johnson Creek headwaters and along the top of the hillslope on the east side of the filtration site. The open space areas near the southeast portion of the planned filtration facility will also provide open meadow habitat and improve wildlife habitat for songbirds, raptors, mammals and invertebrates (e.g., pollinators) that was not present in that area when the site was in agricultural use. Exhibit J.75, pg. 3 (Wildlife Habitat Memo).

The project will provide additional habitat for wildlife in the area so that wildlife continues to be part of the character of the area.

Evidence relating to the project's protection of Multnomah County habitat areas, including SEC-h and SEC-wr areas, is included in:

- Exhibit A.4 Filtration Facility Conditional Use Application Narrative p.68
- Exhibit A.11, Pipelines SEC Review Application Narrative
- Exhibit A.57 Potential Discharges to Johnson Creek
- Exhibit A.61 Oregon Department of Fish & Wildlife Deer & Elk Habitat
- Exhibit A.67 Raw Water Pipeline Wildlife Conservation Plan
- Exhibit A.69 Distribution Main Wildlife Conservation Plan
- Exhibit I.96 Potential Wildlife Habitat Impacts from the Water Filtration Project and Measures for Avoidance and Mitigation

- Exhibit J.75 Wildlife Habitat Topics

## 6. Traffic and Road Improvements Are Consistent With County Standards and the Use of Trucks in the Area

Opponent testimony relating to roads and traffic is predominantly oriented toward temporary construction impacts. Operational project traffic is consistent with the County road system and intersection capacity, as shown in Exhibit A.31 (Project TIA) and related evidence listed below. All aspects of traffic and road improvement have been extensively discussed in Section I.B above.

The use of trucks for moving materials in and out of the area is part of the current character of the area, as shown in Exhibit I.85 (Existing Traffic) as well as in various farmers' descriptions of their shipping practices.

Some opponent testimony indicates that improvement of Carpenter Lane to County local road standards would not be consistent with the character of the area because Carpenter Lane is currently not improved to County local road standards. "Consistent with" does not mean "exactly the same as current conditions". Otherwise, no development could ever occur. It is consistent with the character of the area that, when roads in the area are improved, they are improved consistent with adopted County requirements and plans for the County road system.

Mr. Waugh in Exhibit J.31 indicates that Carpenter Lane will be 32 feet wide with curbs, and this is inconsistent with the character of the area. It is unclear why Mr. Waugh believes this. A Carpenter Lane cross section is provided in Exhibit A.212 Sheet 00-LU-406. Carpenter Lane is shown as 20 feet of paved width, with no curbs. See also Exhibit I.84 (Global Transportation 1stORP Response), pages 15-16 (showing the cross section). Again, the Water Bureau is improving roads consistent with County standards and requirements.

Evidence relating to filtration facility traffic and road improvements are extensively discussed in Section I.B above, and include, among others:

- Exhibit A.31 Bull Run Filtration Project Traffic Impact Analysis
- Exhibit A.45 Oregon Water Treatment Plant Operations, p. 20
- Exhibit I.84 Response to Select Testimony from Land Use Review Process for the Filtration Facility and Pipelines pp. 5, 15, 20
- Exhibit I.85 Existing Traffic
- Exhibit J.87 Global Transportation Traffic Responses to Specific Testimony

## 7. No Off-Site Odors – From Chemicals or Otherwise – and Safe Chemical Storage

Opponent testimony contained concerns that the filtration facility's use of chemicals would produce off-site odors, and unsupported speculation that filtration facility chemical storage is larger than chemical storage at nurseries, therefore the filtration facility is inconsistent with the character of the area.

The filtration facility will produce no perceptible off-site odors. Exhibit J.71, page 1. By their nature, drinking water treatment plans generally do not have issues with odors. Exhibit A.45 Oregon Water Treatment Plant Operations, pages 19, 20. Odor simply is not an issue with the filtration facility.

Regarding storage of chemicals, the filtration facility uses different chemicals than a nursery, with different methods of application. However, the relevant consideration for storage is not simply whether the proposal is different, but how the difference relates to the character of the area. The filtration facility's chemical storage is consistent in form with area farm buildings and silos. Exhibit A.4, pg. 62; Exhibit A.5, pages 19-20. Neither chemical odors nor storage will pose any impact to neighbors or be inconsistent with area character. Safety of chemicals at the filtration facility is addressed in Section II.F.4.

Neither the pipelines nor the intertie have any potential to generate odors. Exhibit A.8, page 24. Chemicals will only be used at the filtration facility.

Evidence relating to odors and chemical storage:

- Exhibit A.4 Filtration Facility Conditional Use Application Narrative Section A.3.3 pp 46-49
- Exhibit A.45 Oregon Water Treatment Plant Operations p. 19, 20
- Exhibit A.53 Filtration Facility Odor Considerations
- Exhibit I.59 Hazardous Materials Management Plan
- Exhibit J.71 Odor Considerations Supplemental Information

## **8. Dust Will Be Only From Rare Maintenance Trips on Well-Maintained Gravel Roads**

Opponent concerns related to dust generation were primarily related to temporary construction impacts and are addressed in Section IV.

Staff addressed potential dust impacts and mitigation from the filtration facility use in the Staff Report p. 50:

Dust being generated from use of gravel roads can be mitigated in a variety of ways such as by driving very slowly while they are in use during the summer months, use of dust control sprays, sprinkling/irrigation. The use of gravel roads requires a deviation from the paving requirements of MCC 39.6570(A)(1). A Dust Control Plan for the use of these roads during the dry season can be required by the Hearings Officer pursuant to MCC 39.6570(A)(2).

As discussed in Exhibit A.4, page 47, and Exhibit A.51, the filtration facility site will be either landscaped or developed; this will produce dramatically less dust than existing and surrounding farming activities. For example, opponent testimony in Exhibit I.24 from a resident on Dodge Park identifies a concern relating to "Carpenter neighbors' night lights, farming noise and the tremendous amount of seasonal dust from tractors." The filtration facility proposal includes gravel roads along the perimeter. While Water Bureau maintenance using those roads will already produce less dust than the neighboring dirt farm roads, a dust mitigation plan has also been provided in Exhibit H.3, Attachment 8. Overall, a filtration facility on this site will significantly reduce dust impacts over existing conditions and as compared to other uses that are part of the character of the area.



The intertie site will have perimeter landscaping, a building, a covered vault, and a paved driveway that will not generate dust. The intertie site will be landscaped with evergreen and deciduous plants that will retain rainfall and help hold dust to a minimum. In addition to there being minimal opportunity to generate dust at the intertie site, there will be very limited activity at the site, with only one site visit per week by Water Bureau staff (Exhibit A.8, p. 21). The pipelines are underground and do not have any potential to generate dust.

Dust generation by the facility and pipeline / intertie project elements was fully addressed by submitted materials:

- Exhibit A.4 Filtration Facility Conditional Use Application Narrative Section A.3.3 pp 46-49
- Exhibit A.51 Potential Local Impacts of Facility Operation: Air Quality, Dust, Noise, and Vibration
- Exhibit H.3 Pre-Hearing Statement, Attachment 8, Dust Control of Bull Run Filtration Facility Perimeter and Emergency Access Roads
- Exhibit I.75 Construction Supplemental Info
- Exhibit J.81 Dust Management Supplemental Information

## **9. Well Designed Systems Will Protect Area Water Quality**

Most opponent testimony about water quality was focused on temporary construction impacts which is addressed in Section IV. As discussed in those sections, Johnson Creek is located near the southwest corner of the filtration facility site and Beaver Creek is located north of the finished water intertie site. The stormwater systems on both sites were conservatively designed to provide water quality protection for those water bodies and other surrounding areas.

The public water filtered and treated at the filtration facility will not be released to Johnson Creek or other water bodies. The filtration facility is designed to be a zero liquid discharge facility, meaning that all waste streams are treated so that concentrated solids are taken off site, and liquid streams are recycled to the head of the facility. Exhibit A.57 (Potential Discharges to Johnson Creek).

Additionally, the facility and intertie stormwater management solutions are carefully engineered and appropriately designed to filter and manage stormwater flows so there will be no impact on adjacent SEC-wr areas, groundwater or watersheds. The Water Bureau will avoid pesticide use in maintenance of landscaped and treed areas and the project will improve water quality over existing conditions.

For these reasons and the detailed descriptions of water quality protections below, the filtration facility will both protect and improve water quality in the area.

Evidence relating to avoiding and mitigation of water quality impacts is provided in:

- Exhibit A.4 Filtration Facility Conditional Use Application Narrative Section A.3.4 pp 49-51
- Exhibit A.57 Potential Discharges to Johnson Creek
- Exhibit A.125 Bull Run Filtration Pipelines Stormwater Report Addendum
- Exhibit A.73 Filtration Facility Stormwater Drainage Report
- Exhibit A.75 Finished Water Intertie Stormwater Report
- Exhibit A.77 Pipelines Stormwater Report
- Exhibit I.61 Effect of Raw Water Pipeline and Tunnels on Local Water Wells

- Exhibit I.92 Response to Exhibit E.21 concerning Stormwater Runoff to Beaver Creek
- Exhibit I.94 Climate Change Considerations in Design of Stormwater Management Systems Technical Memo
- Exhibit I.95 Best Management Practices to Protect Johnson and Beaver Creeks Memo
- Exhibit I.99 Stormwater Evidence Cover Memo

## **10. The Sandy River Is Protected And Provides a Natural Boundary for the Study Area**

Some opponent testimony indicated the Sandy River should have been more prominently featured in the study area. However, the Sandy River defines the eastern boundary of the study area and is specifically addressed in the application narratives as shown in the Area Boundaries discussion above (Section II. of this document). The steep Sandy River bluff and inherent disruption of the street network by the river itself separates land east of the river from potential impacts west of the river. No filtration facility or pipeline impacts extend to natural resource areas surrounding the Sandy River, or even across Lusted Road near the river. See also Section II.B responses to MCC 39.7515(B) natural resources.

Land use narrative sections relating to the Sandy River:

- Exhibit A.2 Introduction, pp. 8-15, specifically pp. 13-14
- Exhibit A.3 Section 1 Overview pp. 5-9 (facility)
- Exhibit A.7 Section 2 Overview pp. 3-5 (pipelines)

## **11. Safety and Security are Prioritized**

Some opposition testimony speculated the filtration facility will attract additional crime or even terrorism. However, there is no credible evidence to indicate that this secure water treatment facility or pipelines would add to area crime or terrorism.

Exhibit I.74 (Operations Supplemental Information), page 4, explains:

The Water Bureau's operation of current and future facilities prioritizes safety and security of critical infrastructure. The filtration facility will be accessible only to authorized personnel and is designed with safety and security monitoring systems. The facility will have 24/7 onsite operations staffing, security fencing, 24/7 offsite security personnel, remote monitoring, infrared cameras, and patrols.

Like other community water systems serving more than 3,300 persons, the Water Bureau complies with EPA America's Water Infrastructure Act requirements related to conducting risk and resilience assessments and developing emergency response plans that incorporate findings of that assessment. This process considers both potential malevolent acts and natural hazards as well as means to improve resilience of the system through physical and cybersecurity measures and monitoring practices. Exhibit I.74, pg. 4 (Operation Supplement).

Some testimony refers to security at surrounding nurseries and that no nursery has the level of security planned for the filtration facility. The opposition argues that this level of security is not consistent with the character of the area and nurseries "do not even keep their valuable trees fenced" (Exhibit J.21).

However, many nurseries in the study area do have security features such as fencing (refer to figures listed below). The Water Bureau's Lusted Hill Facility, which is a half mile away and in the study area, also has many of the security features proposed for the new filtration facility. The PHWD tanks, PGE electrical substation (SW of intersection of Altman Rd and Dodge Park Boulevard), and the photovoltaic solar power generation facility (36461 Proctor Road) all have security fencing. The project security is consistent with the character of the area.

- Exhibit A.2, Intro, Fig 13 (p. 21) – shows security fencing and cameras at Lusted Hill
- Exhibit A.4, Section 1.A, Fig 8 (p. 14) – shows security fencing at Sester Farms
- Exhibit A.4, Section 1.A, Fig 9.T.H (p 15) – these photos do not capture fencing, but farm fencing can be seen on google earth
- Exhibit A.4, Section 1.A, Fig 10 (p 17) – shows security fencing around the PHWD tanks
- Exhibit A.4, Section 1.A, Fig 11 (p 18) and Fig 35 (p 43) – shows security fencing around Oregon Trail Academy
- Exhibit A.4, Section 1.A, Fig 12 (p 19) – shows security fencing around the solar farm
- Exhibit A.4, Section 1.A, Fig 40 (p 57) – shows farm fencing around Schmidt nursery

## **12. Visually, the Project Will Blend into the Landscape**

There has not been any serious opposition to the design or visual compatibility of the filtration facility, pipelines, or intertie with the character of the area. Some concern was raised relating to visual compatibility of an "industrial plant" in a general manner. Instead, the opposition testimony shows that the Lusted Hill facility is "not noticeable at all". Exhibit J.51 at minute 5:40.

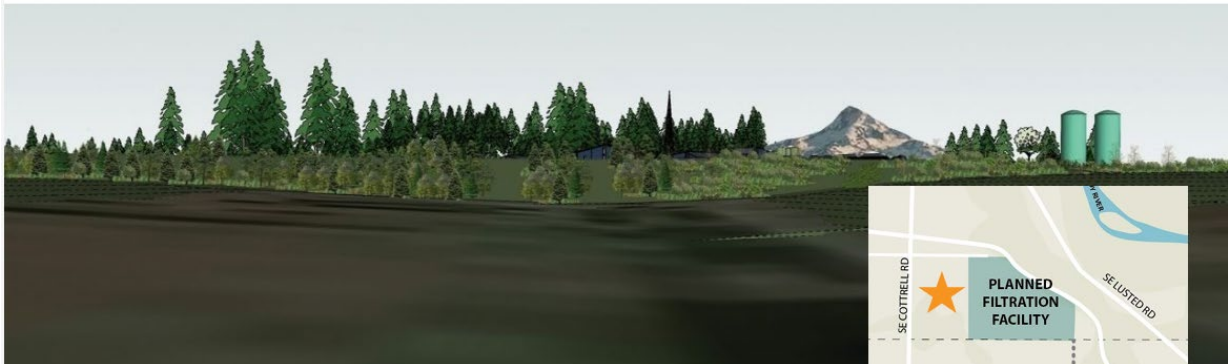
The project will have little visual impact, particularly when compared to the unscreened, utilitarian buildings and outdoor storage and parking areas of large nurseries in the area. The project building designs incorporate design features and color schemes consistent with buildings in the study area. Large setbacks that far exceed minimums and extensive landscaped berms and evergreen plantings will blend the intertie and filtration facility into the landscape. At the filtration facility, this blending is aided by clustering the buildings in a natural depression on the site, stepping down with the natural site contours. Exhibit A.4, pages 53-65, provide additional analysis. Indeed, as shown in the images below from the hearing PowerPoint (Exhibit H.42), neither the filtration facility nor the intertie will be visually very distinguishable from the wooded areas nearby.

## Views toward facility from Carpenter Lane



## View toward facility looking east

(Mount Hood location approximate)



Visual compatibility is also addressed in Design Review narratives, Exhibit A.5 (Filtration Facility) and Exhibit A.9 (Pipelines / Intertie). Based on those narratives, the Staff Report (p.77) indicated the facility and intertie meet the MCC 39.8040(A)(I)(a) standard that “The elements of the design review plan shall relate harmoniously to the natural environment and existing buildings and structures having a visual relationship with the site.” Staff proposed a condition of approval relating to confirmation of the location of a CPR cabinet, and indicated that, with that condition, pipelines also meet this standard.

Staff Condition of Approval

8. ...
  - a. The location of the proposed cabinet for the Raw Water Pipeline (Exhibit A.214, Sheet LU-200) in the Rural Residential zone adjacent to the Lusted Road right-of-way. The proposed cabinet shall meet the applicable Yard requirements of MCC 39.4375(C). In addition, the accessory building located within the 10-ft side yard on Sheet LU-200 shall be labeled to be demolished or moved to meet the 10-ft yard requirement.
- ....

### **13. Rural Reserve**

Some opponents testified that, because the project is within an area designated “Rural Reserve”, the proposed filtration facility is not consistent with the character of the area. However, the Rural Reserve designation does not change the area zoning, characteristics, or existing and allowed uses.

The rural reserve designation occurs through agreements between, in this case, the regional government Metro and Multnomah County. ORS 195.141. After designation of rural reserves, the county submits “amended plans, policies and land use regulations implementing the designations to the [state Land Conservation and Development] Commission for review and action in the manner provided for periodic review under ORS 197.628 to 197.650.” Oregon Administrative Rules (“OAR”) 660-027-0080. That is, the rural reserves designation is already implemented through the Comprehensive Plan and the zoning code. The time to challenge how the designation is implemented in the comprehensive plan and zoning code has long since passed. *City of Sandy v. Metro*, 48 Or LUBA 363, 373-374 (2005).

### **14. Conclusion**

The application diligently addressed formation of the study area and character of the area analysis. In response to testimony, the project team has provided numerous professional studies confirming the proposed project will cause no significant impacts to neighbors or the character of the area. Proposed staff conditions ensure project design objectives will be met, and all potential impacts will be mitigated consistent with conditional use requirements.

As discussed in the Design Review narratives, the project design, site topography, and proposed landscaping will ensure the treatment facility blends with terrain and continues the Water Bureau’s long record of compatibility with the character of the area. Opposition Exhibit J.51 at minute 5:40 provides a

great example of a Water Bureau facility in the study area integrating into the background: as the narrator passes the Lusted Hill facility, they describe it as “not noticeable at all”.

## **B. MCC 39.7515(B) Will not adversely affect natural resources;**

The filtration facility, intertie, and pipelines were carefully and thoughtfully designed to avoid impacts to habitat and natural resources the County designated as significant habitat under Statewide Planning Goal 5. Evaluation of all resource topics identified in MCCP Chapter 5, Natural Resources, further supports the role of Goal 5 in natural resources regulated through the County land use process and considered in this approval criterion.

Evidence in the record relating to natural resources is provided in:

- Exhibit A.4 Filtration Facility Conditional Use Application Narrative Section A.3.4 pp 49-51
- Exhibit A.11 SEC Review Application
- Exhibit A.57 Potential Discharges to Johnson Creek
- Exhibit A.67 Raw Water Pipeline Wildlife Conservation Plan
- Exhibit A.69 Distribution Main Wildlife Conservation Plan
- Exhibit A.73 Filtration Facility Stormwater Drainage Report
- Exhibit A.75 Finished Water Intertie Stormwater Report
- Exhibit A.194 Pipeline SEC Drawing Sheets
- Exhibit A.197 Stormwater Drainage Control Certificate Facility
- Exhibit A.198 Stormwater Drainage Control Certificate Intertie
- Exhibit I.61 Effect of Raw Water Pipeline and Tunnels on Local Water Wells
- Exhibit I.92 Response to Exhibit E.21 concerning Stormwater Runoff to Beaver Creek
- Exhibit I.94 Climate Change Considerations in Design of Stormwater Management Systems Technical Memo
- Exhibit I.95 Best Management Practices to Protect Johnson and Beaver Creeks Memo
- Exhibit I.96 Wildlife Habitat Memo/Mitigation Plan
- Exhibit J.75 Wildlife Habitat Topics

### **1. The Communications Tower is not Subject to this Criterion**

As established in the original application narrative, the proposed communication tower meets the definition of a transmission tower, a specific type of Community Service use. The communications tower is located near the northeast corner of the filtration facility site and outside of the mapped SEC overlay. Project opponents assert that the communication tower will cause bird injuries or fatalities and argue that as a result the tower does not satisfy the MCC 39.7515(B) natural resources criterion. See e.g., Exhibit E.17 (Courter); J.19 (Courter). However, the communication tower is not subject to the MCC 39.7515 standards, including subsection (B). The introduction to the Community Service use approval criteria at MCC 39.7515 states, “[i]n approving a Community Service use, the approval authority shall find that the proposal meets the following approval criteria, except for transmission towers, which shall meet the approval criteria of MCC 39.7550 through 39.7575...” The applicable approval criteria at MCC 39.7750 through 39.7575 include standards related to height, setbacks and design. They do not include

a standard related to adverse effects on natural resources, or other similar natural resources or habitat standard. The original application narrative demonstrates the tower complies with all applicable standards and staff agreed that all applicable approval criteria were met, or would be met through a condition of approval. There were no public comments challenging compliance of the tower with the applicable standards.

In this case, the Portland Water Bureau considered potential impacts to migrating birds and concerns related to avian impacts are addressed through tower height and design that significantly minimize the risks to migrating birds. Exhibit I.96, pg. 7 (ESA). However, even if the project opponents were correct in their assertion that the presence of the tower could result in impacts to migrating birds, that could not serve as the basis for denial for the communications tower conditional use permit.

## 2. Natural Resources Subject to this Criterion are those the County has Inventoried and Mapped

MCC 39.7515(B) requires a finding that the proposed use “will not adversely affect natural resources.” Project opponents argue that the term “natural resources” includes any natural resource category mentioned in the Comprehensive Plan, regardless of whether the resource is outside of the SEC Overlay and regardless of whether the “resource” has been inventoried and identified by the County as significant.<sup>38</sup> See Exhibit H.4 (Richter). This interpretation is inconsistent with the text and context of the code.

When interpreting a statute, the “first level of analysis, the text of the statutory provision itself, is the starting point for interpretation and is the best evidence of the legislature's intent.” *Portland General Electric Company v. Bureau of Labor & Industry*, 317 Or 606, 610, 859 P2d 1143 (1993) (PGE).

Under PGE, the opponent's interpretation cannot be affirmed because it imposes obligations which do not exist in the text and are therefore inconsistent with the express language of the applicable code and inconsistent with the underlying policy, purpose, and the context of the applicable code sections.

The starting point for this analysis is Statewide Planning Goal 5. OAR 660-023-0030 establishes the inventory process to locate and evaluate natural resources in the County and establishes a four-part inventory process: collect information about Goal 5 resource sites, determine the adequacy of the information, determine the significance of resource sites and adopt a list of significant resource sites. OAR 660-023-0030(1). Once these resources are identified, Goal 5 requires an Economic, Social, Environmental, and Energy analysis to determine which Goal 5 natural resources will be protected. Importantly here, OAR 660-023-0030(6) states:

“Local governments may determine that a particular resource site is not significant, provided that they maintain a record of that determination. Local governments shall not proceed with the

---

<sup>38</sup> Certainly many project opponents have provided testimony that seems to cast an even wider net for the term “natural resource” arguing, for example, that natural resources also includes individual animals, rather than wildlife habitat.

Goal 5 process for such sites and shall not regulate land uses in order to protect such sites under Goal 5.” (Emphasis added).

Thus, Goal 5 clearly distinguishes between natural resources that can be regulated in a local code under Goal 5 and Goal 5 resources that cannot, as a matter of law, be regulated under a local code.

Consistent with these Goal 5 rules, the County’s Goal 5 process is articulated in its Comprehensive Plan in Chapter 5 entitled Natural Resources. In Chapter 5, the County defines “natural resources” as those that are regulated by the Goal 5 process and are subsequently protected in the MCC through the application of the Significant Environmental Concern (“SEC”) Overlay:

“Goals 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and 6 (Air, Water, and Land Resources Quality) of Oregon’s statewide planning goals require cities and counties to plan for the management and protection of natural resources, including maintaining air, land, and water quality and protecting riparian corridors, wetlands, and wildlife habitat. Goal 15 (Willamette River Greenway) also protects the Willamette River and includes requirements for land uses and other activities adjacent to it. These goals and their associated administrative rules call for cities and counties to inventory significant natural resources and create and implement programs to protect them from impacts associated with land use and development. This chapter provides an overview of conditions and planning issues associated with natural resources and environmental quality, along with Comprehensive Plan policies and strategies to address them, including the following topics: • Water quality and erosion control • Rivers, streams, and wetlands • Wildlife habitat • Air quality, and noise and lighting impacts • Scenic views and sites • Tree protection • Wilderness areas • Mineral and energy resources.” (Multnomah County Comprehensive Plan at page 5-2).

“Multnomah County protects water quality, ecological function, and wildlife habitat associated with streams and rivers through the County’s Significant Environmental Concern (SEC) overlay zones for streams and water resources (SEC-s and SEC-wr), scenic waterways (SEC-sw), significant wetlands (SECw), wildlife habitat (SEC-h), and Willamette River Greenway (WRG). Although the SEC-h overlay does not directly apply to riparian areas, it protects upland wildlife habitat areas which in turn can have a beneficial effect on adjacent riparian corridors. The majority of the area within the West Hills, including numerous riparian corridors, is within a SEC-h overlay. The SEC overlay inventories and protection programs limit and regulate development activity within designated stream conservation areas and water resource areas associated with significant streams and protected water features.” (Emphasis added).

This text from the Comprehensive Plan consistently tracks the requirements outlined above under Goal 5. The Comprehensive Plan expressly defines “natural resources” as those resources that are deemed significant under Goal 5 and therefore protected “from impacts associated with land use and development.” There is no other definition of “natural resources” in the MCC. In fact, the only definition of “natural resources” is found in Chapter 5 of the Comprehensive Plan and that definition is limited to “significant natural resources” protected under Goal 5.



The Comprehensive Plan then expressly states that the “natural resources” referred to in the Comprehensive Plan are those that the County determined should be protected under Goal 5 through the SEC Overlay. Namely, the Comprehensive Plan states: “Multnomah County protects water quality, ecological function, and wildlife habitat associated with streams and rivers though the County’s Significant Environmental Concern (SEC) overlay zones for streams and water resources (SEC-s and SEC-wr), scenic waterways (SEC-sw), significant wetlands (SECw), wildlife habitat (SEC-h), and Willamette River Greenway (WRG).” (Emphasis added).

In turn the purpose statement of the SEC Overlay states in full:

“[T]o protect, conserve, enhance, restore, and maintain significant natural and human-made features which are of public value, including among other things, river corridors, streams, lakes and islands, domestic water supply watersheds, flood water storage areas, natural shorelines and unique vegetation, wetlands, wildlife and fish habitats, significant geological features, tourist attractions, archaeological features and sites, and

scenic views and vistas, and to establish criteria, standards, and procedures for the development, change of use, or alteration of such features or of the lands adjacent thereto.” MCC 39.5500.

There is no other reasonable way to read these Comprehensive Plan and SEC provisions than to conclude that “natural resources” as that term is used in the MCC are those natural resources that are deemed significant and are protected through the application of the SEC Overlay.

The opposition seems to be arguing that “natural resources” are instead any resource any person identifies on a site that have not been evaluated under Goal 5 and have not been protected under the SEC Overlay. There is no text, context or definitional support for this argument in the MCC or Comprehensive Plan. This is also patently inconsistent with OAR 660-023-0030(6) which again states:

“Local governments may determine that a particular resource site is not significant, provided that they maintain a record of that determination. Local governments shall not proceed with the Goal 5 process for such sites and shall not regulate land uses in order to protect such sites under Goal 5.” (Emphasis added).

The County cannot regulate land uses under Goal 5 to protect natural resources that are not deemed significant under Goal 5. This is not to say that the County could not adopt another program to protect non-significant resources, unrelated to Goal 5. But the County has not done that here. The County has expressly determined that “natural resources” are defined as those resources that have been inventoried and evaluated as significant and are thus subject to regulations that minimize impacts on those resources.

Opponents ask the Hearings Officer to flip this Goal 5 structure on its head and instead find that even though an area is outside of the SEC Overlay and contains no significant natural resources, it cannot be developed with a public utility because there are other non-significant natural resources and any adverse effect on those non-significant resources prohibits the use. The opponents’ preferred interpretation would mean that conditional use criteria have more restrictive approval criteria related to natural resources than the same use in an SEC Overlay which is designed to protect the County’s most

significant natural resources. Specifically, the SEC Overlay has a balancing test and an order of mitigation priorities that permit measured impacts on significant natural resources. Conversely, the conditional use criteria do not allow any adverse impact and express no balancing test and no mitigation.

The opponent's interpretation would in effect render meaningless the Goal 5 protection process and the SEC Overlay. In so far as possible, LUBA construes relevant local government comprehensive plan and code provisions together, to give meaning to both. *Neuenschwander v. City of Ashland*, 20 Or LUBA 144 (1990). The only way to give meaning to both the Comprehensive Plan and MCC 39.7515(B) is to find that the term "natural resources" in the MCC is the same term as "natural resources" in Chapter 5 of the Comprehensive Plan and that means that regulated "natural resources" are only those "natural resources" that have been deemed significant after a Goal 5 analysis.

Thus, under *PGE*, the County cannot accept the opposition's argument that the "no adverse effect" standard applies to a new category of natural resources not identified or defined in the MCC and not protected under Goal 5. Instead, the "natural resources" in the no adverse effect standard must only be those resources identified as significant and protected under Goal 5 in the SEC Overlay. The text and context of the MCC and Comprehensive Plan support no other interpretation.

This interpretation is also consistent with how the County has repeatedly applied the SEC and conditional use provisions in prior decisions, as summarized below. In each decision, the County has determined that compliance with applicable SEC standards equates to compliance with MCC 39.7515(B).

### **3. Past Interpretations of Natural Resource Impacts has been Limited to Mapped Resources**

A survey of recent conditional use approvals in Multnomah County reveals that the County's evaluation of whether the conditional use natural resource criterion is satisfied has been properly limited to a determination of whether the standards that apply to mapped resources are satisfied, including specifically the SEC overlay standards.

For example, the Water Bureau received approval to add storage tanks, storage silos, a chemical building, new electrical equipment, new vehicle area, and new underground pipes and vaults to their Lusted Hill facility in 2019. In concluding that that the use "will not adversely affect natural resources" under MCC 39.7515(B), the Hearing Officer found:

A water treatment facility is an existing use on the property. The subject application is for an expansion of that use. **The natural resources on the site are forested wildlife habitat (SEC-h) and geologic hazard (GH) overlay. The SEC-h requirements are intended to protect this resource**, and findings demonstrating compliance with applicable SEC-h and GH standards are found later in Section 11 of this Final Order. **To the extent that SEC-h and GH standards are met, this criterion is also met.** [emphasis added] Exhibit I.72, pg. 26.

As noted, the project was an expansion of an existing use. However, the storage tanks, a portion of the paved vehicle area, and the underground pipes all extended into forested SEC-h significant habitat areas which required tree removal and resulted in an increase in the active use areas on and next to areas designated as significant wildlife habitat. *Id.*, pg. 52.

The County's 2019 approval of a religious center as a conditional use on a property located entirely within an SEC-h zone provides another example. The Hearing Officer in that case concluded that the religious facility with parking for 67 vehicles would not affect natural resources and found:

As demonstrated in Section 9 of this Final Order (Significant Environmental Concern permit), **the proposed development meets the criteria for development within the Significant Environmental Concern for Wildlife Habitat overlay and therefore will not adversely affect natural resources.** The proposed building and parking areas will preclude wildlife from using much of the site. However, development of a single-family residence or other permitted use on this site will have similar impacts. In addition, the site provides minimal habitat value as it is lacking in food, water and cover. [emphasis added] Exhibit I.71, page 22.

Unlike the proposed Water Bureau project where new surface impacts to SEC overlay areas are avoided in these cases, the entirety of the disturbance area for the project was located within the SEC-h overlay zone. In reaching a decision that the approval criterion was met, there was no evaluation of the impact of the use or activities associated with the use on those habitat areas outside of the disturbance area either within the site boundaries or on neighboring properties.

#### 4. Comprehensive Plan Natural Resource Topics and Policies

If the natural resources standard were interpreted in a manner to extend beyond mapped SEC overlay areas despite the clear requirements in Goal 5 for local jurisdictions to inventory and map natural resources and the County's past interpretations applying the criterion, the scope of potential natural resource evaluation is still not as broad as suggested by project opponents. Instead, what qualifies as a "natural resource" under the standard under a broader interpretation must be guided by the Multnomah County Comprehensive Plan chapter on Natural Resources, Chapter 5. Exhibit H. The relevance of MCCP Chapter 5 does not stop at the list of natural resource topics identified in the Chapter 5, however. As discussed above, the Comprehensive Plan provides relevant context for interpreting "natural resources." Specific policies for each topic provide relevant context that further define the limit of the natural resources as that term is used at MCC 39.7515(B). Any finding to the contrary would also run afoul of ORS 215.416(8)(a), as consideration of effects on natural resources outside of those identified in the Natural Resource chapter of the MCCP would not be discernible from the code.

MCCP Chapter 5, Natural Resources addresses the following topics: 1) water quality and erosion control; 2) river, streams and wetlands; 3) wildlife habitat; 4) air quality, and noise and lighting impacts; 5) scenic views and sites; 6) tree protection; 7) wilderness areas; and 8) mineral energy resources.<sup>39</sup>

MCCP Chapter 5 also identifies the state, regional, and local plans and policies "relevant to planning for natural resources in Multnomah County." MCCP Chapter 5, pg. 5-16. Each of the studies or plans listed are either not applicable to the geographic area of the project or specifically reference the Statewide

---

<sup>39</sup> A number of project opponents cited and quoted select portions of the West of Sandy River Plan to argue that natural resources are prioritized in the area. Notably, the end of MCCCP Chapter 5, Natural Resource specifically notes that there are no natural resource policies specific to the West of Sandy River Plan area.

Planning Goals and the SEC regulatory program. The list identifies Statewide Planning Goals 5 and 6 which both require inventories of natural resources to be protected, Metro Title 13 which was used to add stream corridors to the SEC-s and SEC-wr regulatory program, the West of Sandy River Rural Area Transportation and Land Use Plan Wildlife Habitat and Stream Corridor ESEE Report which forms the basis for the SEC protection program for water resources and wildlife habitat in the West of Sandy River planning subarea, and the SEC overlays identified in the MCCC. The only identified plan/policy that is not expressly connected to the mapped SEC overlay zone explains that the Oregon Department of Environmental Quality (DEQ) establishes standards for water quality and wastewater discharges, and notes that DEQ also monitors and administers regulations associated with air quality.

As detailed below, the record demonstrates that the project, with imposition of the recommended conditions of approval, will not adversely affect the natural resources identified through the policies under each topic in MCCC Chapter 5.<sup>40</sup>

*a. Water Quality and Erosion Control*

The MCCC description of water and riparian resources explains that “Multnomah County protects water quality, ecological function, and wildlife habitat associated with streams and rivers through the County’s Significant Concern (SEC) overlay zones for streams and water resources (SEC-s and SEC-wr), scenic waterways (SEC-sw), significant wetlands (SEC-w), wildlife habitat (SEC-h), and Willamette River Greenway (WRG).” There are also a number of water quality and erosion control policies that explain the scope of water quality as a natural resource.

*Policy 5.5        Protect the County’s water quality by adopting standards to protect the water quality resources from the impacts of development.*

*Policy 5.6        Protect vegetated riparian corridors in order to maintain their water quality functions...*

The County adopted water quality standards through identifying protected water features in SEC-Water Resource (SEC-wr) Areas.<sup>41</sup> See, MCC 39.5505. In this case, an SEC-wr permit under MCC 39.5800 is not needed because the project is not proposing development within any of the SEC-wr areas in or surrounding the project site. As detailed in the application and in the Water Bureau’s hearing

---

<sup>40</sup> Mineral and energy resources are not applicable to this application and were not identified in testimony as an applicable natural resource. Similarly, the project is not located in or near a designated wilderness area and wilderness area is not a natural resource that could be applicable to this project. Therefore, neither of those MCCC Chapter 5 topics are addressed below.

<sup>41</sup> The County also adopted a general stormwater drainage control standard at MCC 39.6235 that apply in addition to the SEC-wr water quality standards. As discussed below, the stormwater control facilities for the project meet and exceed the general stormwater drainage control standard.

presentation, both the facility design and pipeline alignments were carefully selected to avoid impacts within SEC-wr areas.<sup>42</sup>

As discussed extensively in the record, Johnson Creek is not located on the filtration facility site, but is located near the southwest corner of the site. There is an SEC-wr area that provides a 200-foot buffer around Johnson Creek. As depicted on the Proposed Conditions Site Plan (Exhibit A.212, 00-LU-302) the fence line for the filtration facility is located an additional 107 feet from the outside edge of the SEC-wr zone creating a 307 foot buffer between the development footprint and Johnson Creek. Because there will be no development within the SEC-wr, the project is not subject to the mitigation requirements of MCC 39.5800(F). Nonetheless, the Water Bureau is avoiding impact to the water resource and enhancing the existing vegetated riparian corridor surrounding Johnson Creek through implementation of a habitat restoration plan that includes planting native trees, shrubs and groundcover in the southwest corner of the facility site in between the filtration facility fence and the existing vegetated corridor surrounding Johnson Creek. As depicted in the Mitigation Plan included as Exhibit I.96, Attachment A, the Water Bureau is proposing to plant a mix of 312 native trees and native shrubs at a density of 399 shrubs per 10,000 square feet of mitigation area both within and outside of the SEC-wr boundary adjacent to Johnson Creek.<sup>43</sup> As depicted in Figure 5 of Exhibit A.3, pg. 7,<sup>44</sup> the southwest corner of the filtration facility site, including the SEC-wr overlay area is that until recently had been part of the area leased to neighboring farmers for nursery stock. Exhibit A.3. Therefore, the project will not only protect and maintain the existing vegetation surrounding Johnson Creek, but will significantly expand the vegetated buffer surrounding the creek and contribute to the water quality functions identified in the MCCP.

The intertie site is located directly south of SE Lusted Road in an existing agricultural area. There are no mapped SEC zones within the site boundaries. An SEC-h overlay zone surrounding an unnamed tributary of Beaver Creek is located across SE Lusted Road to the north. As a result of the road and the SEC-h buffer, the intertie is approximately 80 feet from the tributary. Exhibit A.214.u.

---

<sup>42</sup> There are two locations where the project must cross an SEC-wr zoned area. First, where the Beaver Creek SEC-wr overlay crosses Cottrell Road along the distribution main alignment needed to connect the filtration facility to the existing Lusted Road Distribution Main (LRDM) north of the Lusted Hill Treatment Facility. To avoid SEC-wr impacts, the distribution main is located entirely within the Cottrell Road right-of-way and is bored below the culvert that conveys the stream water beneath the road. Second, where the Beaver Creek SEC-wr overlay extends into the intersection of Altman Road and Oxbow Drive. The finished water pipeline must reconnect to the existing Water Bureau conduit at this location. To avoid SEC-wr impacts, the proposed pipeline is located entirely within the Altman and Oxbow Road rights-of-way with no proposed crossing of or disturbance to the creek or trees within the SEC-wr overlay. Both of these locations are described in the Staff Report, p. 105, which finds that the development meets SEC exceptions in MCC 39.5515(A).

<sup>43</sup> An applicant recommended condition of approval requiring implementation of Mitigation Plan is provided in the tree removal topic below. Also note that the referenced tree number is specific to the Mitigation Plan. The Water Bureau has proposed additional trees through its landscaping plan and may elect additional planting numbers and density both within and outside of the SEC overlay areas.

<sup>44</sup> See also, Johnson Creek Headwaters-1 photo in Exhibit E.37.k.

- 5.7 *Allow changes to existing development when the overall natural resource value of the property is improved by those changes and water quality will be improved.*

There are two above-ground developed areas included in the project: the filtration facility and the intertie. Both facilities are sited in areas currently or recently used for nursery crop production.

As detailed in the record, the existing filtration facility site is currently cleared of vegetation. The filtration facility site was previously leased to neighboring farmers and was used for nursery crop production<sup>45</sup> with crop rows generally oriented in a north/south direction. Exhibit A.73, Attachment B. The crop rows were oriented to drain as quickly as possible which results in surface runoff to low points of the site. Exhibit A.73, pg. 6. As detailed in the Stormwater Drainage Report for the filtration facility, the majority of the site slopes to the west or southwest and subbasin 3 near the southwest corner drains to the headwaters of Johnson Creek by sheet flow and by shallow concentrated flow. Subbasin 4 is located on the south side of the site which is bordered by a dirt road. The existing stormwater drains across the access road at an angle, eventually draining to the headwaters of Johnson Creek. Therefore, under the existing conditions water has historically flowed, uncontrolled, across and through nursery stock areas and a dirt road before discharging to Johnson Creek. In contrast to the existing conditions, and as discussed in detail below, the stormwater from the filtration facility site will be managed with a system of grassy swales, planters, and vegetated basins. Exhibit A.73.

The intertie site is approximately half an acre in size and is located within an existing nursery crop production area. The site is bound by an existing gravel road to the east, farm crops along the south and west sides, and SE Lusted Road to the north. As noted above, an unnamed tributary of Beaver Creek and the SEC-wr overlay zone providing buffer on either side of the tributary are located across SE Lusted Road to the north. The site currently drains to an existing roadside ditch and site runoff discharges to an area drain and is piped beneath Lusted Road through a corrugated plastic pipe. The existing farm field surrounding the site contains drain tiles that capture stormwater and irrigation runoff and connect to the existing area drain in the roadside ditch. Exhibit A.75. In contrast to the existing uncontrolled flow of agricultural and road runoff, stormwater will be managed for both stormwater quality and flow control with a lined basin and vegetated conveyance swales. Exhibit A.75.

The fish biologist consulting on the project, Todd Alsbury, evaluated the filtration facility site and the intertie site, the existing drainage patterns, the range of fish species in the proximate reaches of both Johnson Creek and Beaver Creek, the facility designs and layouts, the stormwater systems, and best management practices to be implemented at the facilities. Following his review, he concluded that based upon his experience and expertise that he is “confident that the proposed development and operation of the Bull Run Water Filtration Facility, and associated pipeline improvements, will not impact Johnson Creek or Beaver Creek.” Exhibit I.95. He also stated that the project’s stormwater

---

<sup>45</sup> The filtration facility site was leased by Surface Nursery before the Water Bureau terminated the lease in anticipation of the filtration facility. Exhibit A.3, pg. 1. Surface Nursery entered testimony into the record indicates that the nursery sprays pesticides on its nursery stock as an established farm practice. The testimony provided by the Courter’s documents that pesticides can harm salmonid species they have identified as being present in Johnson Creek. Exhibit J.19, pg. 20 (Courters).

management systems would result in an improvement over existing conditions that likely contribute high levels of sediment and reduced water quality to Johnson and Beaver Creeks.<sup>46</sup> *Id.*

Lauren and Ian Courter submitted a document in the final open record period related to purported impacts of the filtration facility on Johnson Creek and neighboring waterways.<sup>47</sup> The Courter's attempt to ascribe a flaw to Mr. Alsbury's consideration of the existing conditions of the filtration facility site and the historic, uncontrolled stormwater flow across nurse fields and the dirt road to Johnson Creek, by pointing out that agricultural uses are allowed uses that are not subject to a natural resource standard. The argument is without merit and misses the point. It is the case that most agricultural uses in the MUA-20 zone are uses permitted outright that are not subject to conditional use standards or any natural resource standard. However, that does not mean that historic use of the property for agricultural purposes and the resulting impacts to the water quality and fish habitat within Johnson Creek and Beaver Creek are not relevant for purposes of determining whether the proposed filtration project will adversely affect natural resources within those water bodies. Policy 5.7 does not reference the land use permitting category of either the existing or modified development. Developments that improve water quality provide natural resource enhancement even if the previous use was a use allowed outright. If the new development results in an improvement to water quality as a result of stormwater controls and management practices in combination with mitigation plantings to improve water quality functions, that same development cannot then be found to adversely affect water quality or fish habitat. The record clearly establishes that is the case for both the filtration facility site and the intertie site.

To further distinguish the filtration facility from historic uses and surrounding agricultural activities, the Water Bureau propose the following condition prohibiting the use of pesticides and herbicides on the filtration facility site.

Water Bureau Proposed Condition:

5. The Water Bureau will not apply pesticides or herbicides to any vegetation located on the filtration facility site or the intertie site.

---

<sup>46</sup> Ian and Lauren Courter challenged Mr. Alsbury's conclusion and directly questioned his level of expertise. As detailed in his resume, Mr. Alsbury has over 20 years of experience as a fish biologist, was the District Fish biologist with the Oregon Department of Fish and Wildlife for 15 years and is a licensed Construction Contractor. Exhibit I.88. It is disingenuous to suggest that a long-term district biologist for the state's fish protection agency does not understand the benefit and water quality protections provided by stormwater control systems with large areas of impervious service. Furthermore, his conclusions are supported by review of the stormwater reports prepared by the project's registered professional engineer that describes both the existing conditions and details of the stormwater control system at the filtration facility and the intertie site.

<sup>47</sup> The Courter's, who live near the southeast corner of the filtration facility site, individually authored multiple submittals related to several of the conditional use approval criteria. The document at J.19 is the document attributed to the Courters jointly in this section related to water quality as well as the habitat section below.

5.11 *Protect water quality of streams by controlling runoff that flows into them.*

5.14 *Stormwater drainage for new development and redevelopment shall prioritize water quality and natural stream hydrology in order to manage stormwater runoff...*

The stormwater drainage systems for both the filtration facility and the intertie have been conservatively designed to prioritize water quality and control the rate of flow to the natural stream hydrology and not exceed existing pre-development flows.

i. Johnson Creek Water Quality Protections

Stormwater

The filtration facility stormwater management system includes a combination of planters, basins, and grassy swales to provide stormwater quality treatment for all of the site's impervious areas. Exhibit A.73 (Facility Stormwater Drainage Report) and Exhibit A.197 (Stormwater Drainage Control Certificate). The stormwater system was designed to meet the City of Portland 2020 Stormwater Management Manual (SWMM), which meets or exceeds County standards. As detailed in Section 1.6.3 of the Facility Stormwater Drainage Report, one of the SWMM requirements is to reduce pollutants of concern in watersheds with Total Maximum Daily Load (TDML) limitations or Federal Clean Water Act Section 303(d) listings. The stormwater system design takes into account Johnson Creek's three TDMLs that include bacteria, temperature, and pesticides, as well as several 303(d) listings that include PCBs and PAHs. Exhibit A.73, pg. 4. Because runoff from the filtration facility impervious areas will contribute to Johnson Creek, runoff from all impervious surface areas will be routed through either one of five vegetated basins, flow-through planters, or grassy swale facilities that are designed to satisfy SWMM standards for water quality treatment. To control stormwater flow, the filtration facility includes a circuitous network of detention ponds and a sloped basin. Additionally, a design decision was made to maximize pervious surfaces by burying the clearwell and vegetating its surface to further increase stormwater management potential; this area functions as an ecoroof. Exhibit A.73, pg. 5. The facilities are sized to meet, and in the case of the detention ponds exceed, the City of Portland SWMM requirements, and were specifically designed with excess capacity to account for potential increases in rainfall due to climate change. Exhibit I.94 (Climate Change Considerations). In all cases, flow rates at all points of discharge will be equal to or lesser than existing flow rates. Exhibit A.73, Tables 10-12.<sup>48</sup> The

---

<sup>48</sup> The Courters erroneously claim that no measurements or quantification of existing stormwater runoff conditions are provided in the application materials. Exhibit J.19, pg21. This statement is entirely inaccurate and ignores the extensive evaluation and calculations of pre-development conditions in Sections 2.0 and 4.1, Tables 6 through 12, and Attachments C and E in Exhibit A.73, which indicates that the Courters either did not review the stormwater report or simply chose to ignore fundamental elements of the report that do not support their conclusions. Further, there is no support for arguments made by Lauren Courter in Exhibit E.17 that extensive pre-development evaluations such as baseline water quality conditions, soil moisture tests, seasonal stormwater sampling, or wildlife surveys are needed to support the conclusion that stormwater discharge will not exceed pre-development



primary source of discharge is a flow spreader located near the southwest corner of the filtration facility site and outside of the SEC-wr zone that flows through drain rock and a landscaped buffer for erosion control. Exhibit A.73, pg. 14 and Figures 3 and 4. Once the water leaves the flow spreader at a controlled rate, it surface flows a distance of approximately 230 feet through the enhanced and expanded vegetated buffer depicted on the Mitigation Plan (Exhibit I.96, Attachment A) before entering Johnson Creek.

Water Bureau Proposed Condition of Approval:

6. Stormwater:

- a. The Water Bureau will construct and implement a filtration facility stormwater treatment and management system that is in substantial compliance with the system identified in the Filtration Facility Stormwater Drainage Report, Exhibit A.73. At least annually, and more frequently as needed for proper function of the system, the applicant will inspect and maintain each element of the stormwater treatment and management system to ensure it continues to function properly.

Facility Water

The public water filtered and treated at the filtration facility will not be released to Johnson Creek. The filtration facility is designed to be a zero liquid discharge facility, meaning that all waste streams are treated so that concentrated solids are taken off site, and liquid streams are recycled to the head of the facility. A.57 (Potential Discharges to Johnson Creek).

The filtration facility includes two large overflow basins near the southwest corner of the site. See Exhibit A.212.d (Proposed Conditions Site Plan) The primary purpose of the overflow basins is to receive facility water in the unlikely event that one or more of the process basins at the facility overflow. The overflow basins can hold a combined volume of 13.5 million gallons of water. There are no connections between the overflow basin inlet and the stormwater or sanitary system drains. Therefore, with the limited exception of rain falling directly in the basins, stormwater will not enter the overflow basins. Water collected in the overflow basins is returned to the head of the plant through two pumping stations with high-capacity pumping volumes. Exhibit I.60 (Overflow Basin Overview).

Ms. Courter challenged the sizing of the overflow basins, claiming that a two-hour window for correction was an unreasonable assumption and more fundamentally, that having overflow basins at all was an acknowledgement of potential overflow and equipment failure. Exhibit E.17, pg. 10 (L. Courter). The

---

flows. Instead, the evaluation identified above clearly establishes the pre-development conditions as well as the points and rate of discharge. The more extensive studies are simply not needed for compliance with either water quality standards or the natural resource approval criterion for conditional uses.

Project Manager at Stantec, a registered professional engineer, provided the technical memo at Exhibit I.60 to respond to the claims. As detailed in the capacity of the overflow basins were sized to conservatively accommodate a worst-case scenario after evaluation of multiple potential failure scenarios. Based upon the conservative assumptions described in the memo and applying a safety factor of 1.5, the overflow basin capacity was established. In other words, rather than proof that the equipment will fail and facility water will be discharged to Johnson Creek as suggested by Ms. Courter, the conservative design and sizing of the overflow system provides that in the unlikely event of equipment failure, the overflow basins will have more than sufficient capacity to collect the volume of water that could be expected to be discharged in the window needed to correct the issue or stop the flow of water to the facility and avoid overflow to Johnson Creek.

### Spill Containment

The filtration facility is a modern facility with redundancies in facility design and operating practices to reduce the likelihood of any release of chemicals used at the filtration facility. In the unlikely event of a spill or release, all chemical handling and storage facilities include secondary containment, with provisions to safely remove spilled material by pumping them into a truck for off-site disposal. As described in the Hazardous Materials Management Plan for the filtration facility, the secondary containment areas are designed to hold, at a minimum, the full volume of the largest storage tank within the area plus 10 percent and additional volume for 20 minutes of flow from the fire sprinklers. Exhibit I.74, pg. 3. Chemical loading bays also include collection and monitoring features so that any material spilled during delivery will be contained, removed, and disposed of off-site. Exhibit I.74, pg. 2.

#### ii. Beaver Creek Water Quality Protections

As described above, the intertie facility is located south of SE Lusted Road and an unnamed tributary of Beaver Creek is located north of road. The intertie stormwater treatment and management system includes a combination of vegetated conveyance swales and a lined detention pond to provide stormwater quality treatment and management for the site. Exhibit A.75 (Finished Water Intertie Stormwater Drainage Report) and Exhibit A.198 (Stormwater Drainage Control Certificate). The stormwater system was designed to meet the City of Portland 2020 Stormwater Management Manual (SWMM), which meets or exceeds County standards. As detailed in Section 2.2.1 of the Intertie Stormwater Drainage Report, one of the SWMM requirements is to reduce pollutants of concern in watersheds with Total Maximum Daily Load (TDML) limitations or Federal Clean Water Act Section 303(d) listings. Beaver Creek has five total impairments that include bacteria, temperature, dissolved oxygen and pesticides, and the intertie stormwater system has been designed accordingly. Exhibit A.75, pg. 11. Because the intertie site will contribute runoff to a tributary of Beaver Creek, runoff from all impervious surface areas will be routed through either the swales or detention pond.

The design provides that pesticide-laden runoff from neighboring properties upgradient to the intertie site will enter a gravel cutoff trench installed at the upslope side of the site, as shown in FWI-CE-1004 and Stormwater Detail Sheet FWI-C-4000. Exhibit I.92 (Stormwater Runoff to Beaver Creek). Gravel filtration is an effective measure at removing TSS, which pesticides adhere to. After gravel filtration, the offsite runoff is routed to the existing catch basin in the roadside ditch along SE Lusted Road, which eventually discharges to Beaver Creek on the north side of SE Lusted Road. Sediment generated from

the onsite FWI stormwater will be controlled through onsite biofiltration as shown in FWI-CE-1004 and Stormwater Detail Sheet FWI-C-4000. The treated onsite stormwater then discharges to an existing catch basin in the roadside ditch along SE Lusted Road.

Water Bureau Proposed Condition of Approval:

6. Stormwater:

- a. ...
- b. The Water Bureau will construct and implement an intertie stormwater treatment and management system that is in substantial compliance with the system identified in the Finished Water Intertie Site Stormwater Drainage Report, Exhibit A.75. At least annually, and more frequently as needed for proper function of the system, the applicant will inspect and maintain each element of the stormwater treatment and management system to ensure it continues to function properly.

Opponents Arguments Fail to Consider the Projects Water Quality Protection Features or Existing Conditions

The Courters speculate that the filtration facility and intertie operations will have negative water quality impacts due to 1) the proximity of the facilities to Johnson Creek and Beaver Creek, and 2) stormwater runoff that includes residues from impervious surfaces and chemicals spills. However, the Courter's testimony fails to evaluate or even reference the multifaceted stormwater treatment and detention systems at the filtration facility and intertie, or the spill prevention and containment measures provided at the filtration facility. While the Courter's credentials certainly indicate that they are experts in their respective fields of toxicology and fisheries science, neither are certified engineers or stormwater management experts. While they provide detailed descriptions of what would occur to water quality if specific toxins or sediment loads were to enter the water, there is no expert testimony from project opponents in the record that directly challenges the effectiveness of the project's stormwater management facilities or other protective measures.

Instead, the Courters erroneously claim that that best management practices that focus on facility design prove that the natural resource criterion cannot be satisfied. That unsupported conclusion appears, once again, to be based on the false premise that mitigation is not available to demonstrate that the project will not adversely affect the identified natural resources.<sup>49</sup> In this case, the combined

---

<sup>49</sup> The Courter's make multiple claims that the project only minimizes natural resource impacts which is not consistent with the standard which requires a finding that the project "will not adversely affect natural resources." We agree that the ultimate finding must be consistent with a reasonable interpretation of the criterion. However,

effect of the stormwater treatment and management systems that prioritize water quality and natural stream hydrology, in combination with spill avoidance practices and containment features in the facility design, and the zero-discharge design on the facility provides that only treated stormwater will be discharged to Johnson Creek and Beaver Creek and at rates equal to or less than pre-development discharge rates. Alone that would be sufficient to conclude that the project operation will not adversely affect water quality in surrounding creeks. In this case, that conclusion is further supported by the improvements to water quality provided by facility stormwater systems that treat and manage release of stormwater when compared to the current uncontrolled and untreated flow of stormwater across undeveloped land currently and historically used for nursery stock. A stormwater system cannot simultaneously improve the quality of water discharged in a treated and controlled manner to adjacent creeks and adversely affect the water quality within the creek.

*b. Rivers, Streams, and Wetlands*

The policies related to rivers and streams identified under this topic within MCCP Chapter 5 are limited to the Willamette River Greenway and Wild and Scenic Waterways<sup>50</sup> that are not relevant to the project. The following policies apply to wetlands.

5.18 Designate as areas of Significant Environmental Concern, those water areas and adjacent riparian areas, streams, wetlands, and watersheds that warrant designation as protected Goal 5 resource or have special public value...

5.25 Although a wetland area may not meet the County criteria for the designation "Significant," the resource may still be of sufficient importance to be protected by State and Federal agencies.

Figures in MCCP Chapter 5, Natural Resources, provide the locations of wetlands that are either subject to the County's Significant Environmental Concern regulations, labeled as SEC wetlands (SEC-W) or which have been inventoried as wetlands by the State of Oregon (Statewide Wetland Inventory). There are no SEC-w or State Wetland Inventory mapped wetlands within the project boundary. While not a County or state inventoried wetland, the project avoids a manmade pond area within the raw water pipeline alignment by boring beneath it. Exhibit I.100, RWP-CE-1003.

While not a mapped wetland area, the Water Bureau has submitted details on how the pond area will be protected during construction activities. As discussed in more detail in the construction section below, in response to concerns about water quality impacts during construction the Water Bureau provided detailed plans from the erosion and sediment control permit application into the record during the first open record period. The plans included ESCP Filtration Facility General Notes at Exhibit I.100)-LU-501 that identify the best management practices that will be incorporated during filtration facility construction. The plans submitted also include Pipeline Erosion and Sediment Control Notes at Exhibit

---

that does not mean that mitigation cannot be considered in the project's ability to meet that standard. As discussed below, it also does not mean that pre-development impact of the site on natural resources should be disregarded.

<sup>50</sup> Several project opponents commented on the importance of the Sandy River, a designated wild and scenic river, to the area. However, the project is not located near the SEC overlay protecting the river and is too far away to be visible from the river or effect its scenic qualities. Therefore, it is not a natural resource relevant to this review.

I.101, ESC-004 that identify the best management practices that will be incorporated during pipeline installation.<sup>51</sup> The best management practices include actions for water quality and riparian areas that apply to both the mapped SEC areas and unmapped areas such as the pond. The plan sets at Exhibit I.101 and Exhibit I.102 include the sediment fence line, the tree protection fence lines, the limits of disturbance, and post construction seeding areas and mixes for each grid of the pipeline alignment. Mr. Ciecko and other project opponents had an opportunity to review and provide comments on the Erosion and Sediment Control Plan and BMPs related to water quality protection for all water bodies, but declined to do so.

Exhibit I.101 (ESC Plans for Pipeline Installations, Sheet RWP-CE-1003) shows the trenchless pipeline crossing of the subject pond. By boring below the pond, there is no surface disturbance or tree removal for the full length of the trenchless crossing, as indicated in Sheet Note 8. The drawing also shows a “100 ft. pond buffer” where BMPs will be employed to protect water quality and control sediment during construction. As described in Note 8 on Exhibit I.101 (Sheet ESC-004):

*“100 Foot buffers from streams and water bodies are shown on RWP-CE-1001 and FWP-CE-1010. Disturbance within the 100 foot buffer of Beaver Creek and Water Bodies is mitigated with BMPS to ensure minimum water quality standards are met.”*

Through this combination of design and construction impact avoidance measures, the manmade ponds in the area are protected.

Project opponent Charles Ciecko submitted a map that purports to show National Wetland Inventory and hydric or partially hydric soils into the record.<sup>52</sup> Exhibit E.9, pg. 22 (Ciecko). The map generally shows wetlands and hydric soils in the vicinity of the project, but does not identify any mapped wetlands on the filtration facility site or within the pipeline alignments that are not creeks already protected by the SEC-wr overlay zones addressed above. Furthermore, with the exception of the raw water pipeline segment and the finished water pipeline segment located along an existing farm road and adjacent to an active nursery crop area, the pipeline alignment is limited to the existing road right-of-way. Mr. Ciecko further argues that the Division of State Lands is required to review projects near wetland areas. As indicated in Policy 5.18, there may be wetlands that are not inventoried by the County that are protected by state or federal wetland regulations. While not necessary to satisfy the County’s conditional use natural resource criterion, the Water Bureau agrees to a condition to comply with all state and federal wetland laws.

---

<sup>51</sup> Note that ESC-004 also identifies the roadside seeding mix, the lawn seeding mix, the pasture seeding mix, the SEC seeding mix, and the native understory seeding mix. The final stabilization and landscape plans for each grid of the pipeline included in the plans also identify exactly where along each pipeline routes the mixes will be applied.

<sup>52</sup> The map was created using the Oregon Explorer Map Viewer and notes “data layers that appear on this map may or may not be accurate, current, or reliable.” The map also includes hand drawn pipeline alignments and the filtration facility site, and erroneously identifies the EFU property east of site as part of the filtration facility site.

Water Bureau Proposed Condition of Approval:

7. Water Bureau will comply with all Oregon and federal laws that regulate wetlands. If wetland permits are required under either Oregon or federal laws, the applicant shall provide the County a copy of permit(s) prior to engaging in any removal or fill activity within a jurisdictional wetland.

*c. Fish and Wildlife Habitat*

MCCP Chapter 5 includes two specific policies that clarifies the scope of the fish and wildlife habitat identified as natural resource areas within the County.<sup>53</sup>

*5.26 Designate as areas of Significant Environmental Concern, those habitat areas that warrant designation as a protected Goal 5 resource or have special public value...*

*5.27 Protect significant native fish and wildlife habitat and wildlife corridors and specifically limit conflicting uses within these habitats and sensitive big game habitat areas.*

Both policies 5.26 and 5.27 further support the fact that, as addressed in detail above, protected fish and wildlife habitat areas must be inventoried and evaluated through an ESEE analysis to determine whether to prohibit, limit or allow conflicting uses under Statewide Planning Goal 5. Policy 5.27 does not specifically reference Goal 5. However, the policy requires an identification of **significant habitat** and corridors and even then calls for the County to limit, rather than prohibit, conflicting uses.<sup>54</sup> This is consistent with the County's Goal 5 decision to "limit conflicting uses" within SEC zones. Thus, Policy 5.27 supports the conclusion that habitat resources subject to the conditional use natural resource criterion are limited to those habitat areas within mapped SEC zones. Also note that Policy 5.27 specifically calls for limited conflicting uses **within** the identified significant habitats. It does not direct the County to impose limitations outside of the SEC zone boundaries.

Additionally, there was significant public testimony related to individual animals and claims that the project would result in harm to those animals. It is important to recognize that the natural resource identified in the Comprehensive Plan is fish and wildlife **habitat**. While the project also seeks to avoid harm to individual animals, the relevant natural resource for purpose of the approval criterion at PCC 39.7515(B) is at the habitat level and does not require a finding that there will be not be an adverse effect on any individual animal or even species.

---

<sup>53</sup> Other policies under the Fish and Wildlife Habitat heading direct the County to take specific actions related to lot size, bird-safe building practices, agency coordination, housing and education that are not applicable to the proposed filtration facility project.

<sup>54</sup> Note that Strategy 5.27-2 calls for the County to provide information through various existing programs to the community about how wildlife habitat can co-exist with other uses on private property.

i. Wildlife Habitat

MCCP Chapter 5, includes an introduction for wildlife habitat and includes a map that illustrates wildlife habitat areas that have been inventoried and identified as significant wildlife habitat resources in the rural part of the County. MCCP Chapter 5, pgs. 5-10. The referenced map identifies 1) SEC-h habitat; 2) Critical Habitat as established by the US Fish and Wildlife Service (USFWS); and 3) black-tailed deer, elk, and black bear wildlife habitat areas as established by the Oregon Department of Fish and Wildlife (ODFW); and 4) elk and deer winter range as established by ODFW. MCCP, Chapter 5, Figure 5-6. The only mapped area within or anywhere near the project boundary is the SEC-h overlay areas that have been discussed and documented throughout the record.

The wildlife habitat introduction indicates that additional protections may be warranted in specific areas, and provides:

Additional protection may be warranted for lands adjacent to Multnomah Channel and lands in the East of Sandy River planning subarea based on current mapping of wildlife habitat areas by the Oregon Department of Fish and Wildlife. MCCP Chapter 5, pg. 5-11.

There is no mention of wildlife habitat resources within the West of Sandy River planning subarea that warrant additional protection, either through SEC or other provisions, *including Conditional Use approval criteria*.

The Water Bureau Conducted Habitat Assessments Consistent with the Level of Impacts in Mapped Habitat Areas

As described in Exhibit A.11, the Water Bureau has prioritized avoidance of natural resources throughout the project design process. The design of the Filtration Facility avoids all SEC areas at the site. The design of the pipelines avoids areas mapped as significant habitat except at two sites: the Raw Water Pipelines and Lusted Road Distribution Main. At these locations, protected habitat is avoided through a combination of design strategies and pipeline installation techniques:

- The RW pipeline within the SEC-h zone is designed as a trenchless (tunnel) crossing that avoids all surface impacts. The tunnel is bored beneath the surface and the tunnel portal and shaft are more than 100 feet back from the designated habitat area.
- The Lusted Road Distribution Main within the SEC-h zone is placed within an existing disturbed area (an existing driveway and utility corridor) and is then bored underground to connect to the existing main, with no impact to trees or designated habitat resources.

Thus, the project avoids areas mapped as significant habitat and protects the resource area.<sup>55</sup>

Project opponents also claim that the Water Bureau's wildlife habitat assessments were inadequate. For example, Mr. Ciecko claims:

It is noteworthy that the "Wildlife Conservation Plan"(the plan) is based on aerial photo interpretation and one site visit conducted on October 19, 2020 where the "study area included portal location, construction access and staging locations and existing cleared areas."

Apparently, applicant saw no value in actually physically inspecting the SEC-h area along the proposed tunnel route beyond the proposed tunnel portal site. Exhibit E.9, pg. 10 (Ciecko).

The Water Bureau prepared two Wildlife Conservation Plans, one for the raw water pipeline (Exhibit A.67) and one for the distribution main at the Lusted Hill Treatment Facility (Exhibit A.69). Both provided an assessment of the forest area and habitat conditions within the SEC-h zones. As stated in the Wildlife Conservation Plan (WCP) at Exhibit A.67, the environmental scientist "conducted a survey of habitat conditions and forested/non-forested areas of the site." Exhibit A.67, pg. 4. The WCP evaluates and describes the field-inventoried habitat conditions within the SEC-h zone:

The SEC-h overlay zone contains a mature mixed mesic forest dominated by Douglas fir (*Pseudotsuga menziesii*) and bigleaf maple (*Acer macrophyllum*) with red alder (*Alnus rubra*) and sweet cherry (*Prunus avium*). In the understory, osoberry (*Oemleria cerasiformis*), Oregon grape (*Mahonia aquifolium*), California dewberry (*Rubus ursinus*), and swordfern (*Polystichum munitum*) are common. This community has persisted in part due to the steep slopes that render other uses (e.g., rural residential) less feasible than more accessible terrain. Evergreen blackberry (*Rubus laciniatus*) and Himalayan blackberry (*Rubus armeniacus*) are found outside the SEC-h zone at the interface of the relatively unaltered forest and the adjacent fields.

The wildlife habitat functions provided by the forest are moderate in quality. Limiting factors for habitat include forest fragmentation and proximity to Dodge Park Boulevard, which passes through the SEC-h zone. The forest habitat provides forage, cover, movement corridor, and nest sites for birds and small mammals. The forest habitat includes structural elements such as snags and downed logs. Exhibit A.76, pgs. 4-5.

Exhibit E.9 provides a list of additional elements Mr. Ciecko claims are missing from the WCP. However, none of this information is required by the County for a WCP. The County deemed the application complete (Exhibit C.3), and the staff report confirms that all required elements of the SEC-h application

---

<sup>55</sup> Project opponents argue that the raw water pipeline tunneling activities will cause vibrations and noise that could adversely affect habitat within an SEC zone on the surface. First, for the reasons set forth above, the temporary construction activities are not the use subject to the Community Service use approval criteria, and therefore the natural resource approval criterion does not apply to the temporary tunneling. However, even if that were not the case, the focus of the Goal 5 habitat designation is protecting the surface habitat and tree canopy. This project accomplishes that by boring far beneath that surface habitat. Vibrations or noise that may temporarily impact individual animals within the habitat do not adversely affect the habitat itself. In other words, the trees and ground cover that serve as the permeant habitat areas protected by the SEC-h zone remain in place and unaffected.



(MCC 39.5520(A) and 39.5860 (A)) that trigger a WCP were provided. Staff Report, pp.105-106 and p.108.

Notably, the application requirements of MCC 39.5520(A) identify vegetation documentation but do not reference information on wildlife species or specific wildlife impacts:

Location and predominant species of existing vegetation on the parcel, areas where vegetation will be removed, and location and species of vegetation to be planted, including landscaped areas;

The focus of the WCP code language (39.5860.C) is on preserving “forested areas”: reducing impacts to forested areas (39.5860.C.3.a) and minimizing the amount of “newly cleared area associated with development” (39.5860.C.3.b). In other words, and consistent with the Comprehensive Plan topic, the focus is on habitat elements that are present, not identifying and protecting individual animals or even individual species. The project WCPs explain in detail the steps taken by the applicant to avoid all impacts to forested areas, and to create no new cleared areas. The SEC findings and WCP documentation is the same approach that the Water Bureau has taken in past land use applications at Lusted Hill, which County staff and County hearings officers have consistently approved. See, Exhibit I.72.

Much of the opposition testimony related to wildlife habitat relies on Oregon Department of Wildlife Oregon compass Mapping Tool developed for the Oregon Conservation Strategy. See e.g., Exhibit E-17, (L. Courter); Exhibit E.9 (Ciecko).<sup>56</sup> As explained by the project wildlife expert, the mapping relied upon by opponents provides coarse-scale, non-regulatory fish and wildlife information. Exhibit I.96, pg. 8.

Project opponents then argue that a site-specific evaluation has not occurred, which is incorrect. The County provided a site-specific evaluation in its Goal 5 SEC-h designation that limited the significant habitat to the sloped area east of the filtration facility site. Moreover, the project wildlife expert further details more specific federal and state mapping for the northern spotted owl and the white-tailed deer, that confirms that critical habitat designation for the spotted owl, which requires relatively large tracts of mature, old growth forest, is 10 miles away,<sup>57</sup> and that white-tailed deer are known to occur several miles away, but do not occur within the project area. Id. Based upon the detailed evaluation of specific federal and state inventories, the project’s wildlife expert concludes that “no rare or state or federally

---

<sup>56</sup> While relying heavily on the crucial habitat mapping in his original testimony that specifically identified spotted owl and white-tailed deer habitat, in response to expert testimony that there is not spotted owl or white-tailed deer habitat within the project boundaries, Mr. Ciecko states that the presence of spotted owl and white-tailed deer habitat within the project boundaries is irrelevant. Exhibit J.7, pg. 9. The Water Bureau does not disagree except to the extent that the project opponents tried to improperly assign crucial habitat mapping to the areas of the project outside of the County designated SEC-h boundaries for purposes of expanding the wildlife habitat area that must be considered under the natural resource standard.

<sup>57</sup> Mr. Ciecko correctly points out that the memo prepared by the project’s wildlife expert states that the spotted owl habitat occurs 10 miles west of project. It is clear from the context and reference to the Mount Hood National Forest that the intent was to confirm that it occurs 10 miles to the east rather than west and was a mere typo.

threatened or endangered wildlife species are known to occur on or adjacent to the project area.”<sup>58</sup> Id. More importantly, as indicated above, the County’s wildlife habitat protections apply to inventoried and mapped significant habitat areas not to specific species irrespective of the species status.

While not required for the Multnomah County land use applications, additional documentation of natural resources includes:

- Documentation and review with federal natural resource agencies, including the EPA and US Fish and Wildlife Service, as evidenced in the FONSI letter (Exhibit J.80)
- Field review and documentation of wildlife habitat impacts and mitigation, as provided in Wildlife Biologist memos (Exhibits I.96 and J.75)
- Field review and documentation of fish habitat and distribution, and mitigation of fish impacts, as provided in Fish Biologist memo (Exhibit I.95).

#### Adversely Affecting Wildlife Habitat does not Extend to Indirect Impacts Outside of an SEC-h zone

Project opponents further claim that the project must be denied under MCC 39.7515(B) because activities on the filtration facility site outside of the SEC-h boundary could adversely affect species or habitat either within the SEC-h zone, or even outside of the SEC-h zone. While many of the arguments focused primarily on construction impacts, which are addressed in Section V below, several comments related to operational impacts. For example, in oral testimony, Ms. Richter suggested that headlights from cars in parking lots located on the filtration facility could shine into the SEC zone and adversely affect animals within the SEC. Similarly, others have suggested that noise, vibrations or light from the filtration facility could adversely affect habitat within the SEC. See e.g. Exhibit D.8 (Swinford). Still others have suggested that because animals have used the open areas of the filtration facility site outside of the SEC-h overlay zone in the past means that the facility will adversely affect natural resources.<sup>59</sup>

This overly broad interpretation is inconsistent with the wildlife habitat policies above which in turn provide context for the scope of “natural resources.” Moreover, such an expansive interpretation would

---

<sup>58</sup> Project opponents submitted tables that purport to show state and federal listed species at the project site. For example, Mr. Ciecko and Ms. Courter both submitted the same chart with a list of federal and state protected species. Exhibit E.9, pgs. 16-17 (Ciecko); Exhibit E.17, pgs. 7-8 (L. Courter). However, the tables are not specific to the project, but instead identify species within the upper Johnson Creek watershed and the Sandy River watershed. The Courters submitted a smaller list in the final rebuttal that purports to be from the project site but it lists species in the Trout Creek – Sandy River subwater shed. Exhibit J.19, pg. 27 (Courters). This more generalized geographic evaluation does not refute the statement of the Water Bureau’s wildlife expert specific to the project area.

<sup>59</sup> While it is the case that animals will no longer be able to cross developed and fenced areas of the filtration facility site, as established by the project’s wildlife expert, the mitigation plantings near the SEC-h boundary on the northeast side of the facility and the open landscaped areas in the southeast portion of the site will provide improved and varied habitat over current conditions. Exhibit I.96, pg. 9 (Wildlife Habitat Memo).

likely render a large number of Community Service uses and other conditional uses prohibited uses. For example, it would not be sufficient for a Community Service or other conditional use to avoid SEC-h zoned areas on or near a site. Instead, those uses would need to locate a sufficient distance from any SEC-h zone to avoid any potential impact to habitat within the zone from light intrusion or noise impact.<sup>60</sup>

Furthermore, while not necessary to the meet the approval criterion, the facility design and landscaping provides there are no indirect adverse effects within the SEC-h zone from the facility. As discussed in the character of the area section above and as established in the record, during facility operations the noise levels at the property boundaries closest to the surrounding SEC-h and SEC-wr boundaries will be below 50 dba, and as importantly for habitat, consistent with background levels. Similarly, and as discussed above and established in the record, the facility will not cause vibrations discernable at the filtration facility site boundaries. Finally, the lighting at the facility will be shielded so that facility lights do not spill beyond the property boundaries. To address concerns raised about automobile lights from the facility shining into the SEC-h habitat, the applicant has provided a Mitigation Plan that includes a hedge row between the parking area closest to the SEC-h area and the SEC-h zone along the eastern edge of the property. I.96, Attachment A (Mitigation Plan)].<sup>61</sup>

**ii. Fish Habitat**

As explained above and throughout the record, neither the filtration facility nor the intertie encroach into the closest SEC-wr protection areas, and where the distribution pipeline must cross a culvert passing beneath Cottrell Road that is protected by an SEC-wr overlay, the pipeline will avoid the resource by remaining entirely within the Cottrell Road right-of-way and boring beneath the culvert located beneath the road surface. For the reasons set forth above in the water quality section and discussed below, the project will also avoid adversely affecting fish habitat in the surrounding water bodies through careful facility design and operation.

Project opponents generally, and the Courters, specifically, explain that there are several species of migratory and resident salmonids within Johnson Creek generally, with several species located in reaches close to the filtration facility. Exhibit E.17, pgs. 3-4 (L. Courter); Exhibit J.19, pg. 17. The Water Bureau's fish biologist largely concurs but notes that upper reaches of both Johnson Creek and Beaver Creek near the project are impacted by development in the area including agriculture, roads, and expansion of the urban/rural interface. Exhibit I.95, pg. 1. The fact that there is habitat for sensitive and protected fish species in Johnson Creek and Beaver Creek is not in dispute. However, the fact that there

---

<sup>60</sup> Note that MCC 39.5505(E) describes the SEC-h overlay and states that "habitat areas include the significant Goal 5 resource and a 25-foot buffer to protect the root zone of the vegetation." This is significant for two reasons. First, it signals that the focus of the SEC-h zone is on the vegetated wildlife habitat in those areas. Second, it indicates that the County did not see a need for an additional buffer area to protect habitat within the SEC zone from light, noise, or other activities outside of the overlay.

<sup>61</sup> It is further important to keep in mind that the SEC-h area adjacent to the filtration facility site is bifurcated by Dodge Park Boulevard. Therefore, the wildlife in that area regularly experience headlight glare moving through the habitat as well as motor and farm vehicle noise.

is sensitive and protected fish habitat in the creeks in relatively close proximity to the filtration facility and intertie does not itself support a conclusion that the project will adversely affect the habitat as project opponents claim.

Claims of adverse effects to fish habitat largely overlap with claims related to water quality addressed above. However, the Courter's specifically allege that facility operation will have four specific fisheries impacts: 1) fine sediment inputs, 2) toxic runoff, 3) temperature increases, and 4) flashy flows.

The Courters provide a detailed description of the harmful effects of fine sediments on fish habitat within streams and rivers. J.19, pg. 19 (Courtters). The introduction to that description is a conclusory and unsupported statement that facility operation will increase fine sediment loads in Johnson Creek. As discussed in the water quality section above, the filtration facility stormwater system is specifically intended to remove sediment loads from stormwater flowing to Johnson Creek. Multiple layers of sediment control are provided: elimination of bare soil by the establishment of native plants throughout the site, use of vegetated swales for moving stormwater, short-term storage of stormwater peak flows in vegetated stormwater ponds, and discharge of stormwater through outfall flow spreaders across vegetated strips and through native vegetation. The Courters fail to acknowledge or provide any substantive review of the stormwater systems included in the record. There is also no expert testimony in the record that challenges the effectiveness of the proposed systems in eliminating sediment from the stormwater discharge. Finally, both the record and expert testimony contradict the claim that facility operation will increase fine sediment discharge over the current discharge of stormwater from the filtration facility site that runs uncontrolled over and through bare earth to Johnson creek without the benefit of runoff conveyance or water quality treatment.

Ironically, to support an allegation that filtration facility operation will result in toxic runoff, the Courter's claim that "the local area does not have stormwater runoff conveyance, nor stormwater treatment facilities" and that therefore, most of the runoff from the proposed facility will flow into Johnson Creek carrying with it numerous toxins. Exhibit J.19, pgs. 19-20. As noted above, that is a true description of the current condition of the stormwater runoff coming from the filtration facility and the intertie site where stormwater runs uncontrolled over and through land historically used for nursery stock production. The statement, however, does not apply to the proposed filtration facility as it utterly ignores the on-site stormwater conveyance and treatment systems specifically designed to protect the water quality and remove toxins typically found in runoff from impervious areas.

Once again, the Courters identify the potential adverse effects of increased temperatures in fish bearing waters, and in Johnson Creek specifically, but do not sufficiently connect those effects to the stormwater system proposed at the filtration facility or at the intertie. As discussed above, the stormwater systems at both the filtration facility and intertie sites include detention ponds. However, stormwater is held in detention ponds for less than 30 hours, as shown in the Detention Pond hydrographs. Exhibit A.73, Attachment F. The short storage period will limit the solar energy transmitted to stormwater before it is released from the ponds. As depicted in site plans for both the intertie site and the filtration facility, the ponds will be vegetated, with trees within and adjacent to the ponds, further reducing the potential for temperature increases of stormwater. Exhibit A-13, LU-400-LU-402 (Filtration Site Plans); Exhibits A.187 and A.188 (Intertie Site and Landscaping Plans). Finally, the filtration facility stormwater will be discharged to Johnson Creek through outfall flow spreaders and the water will percolate across vegetated strips and through an expanded, shaded riparian area surrounding Johnson Creek.

Finally, to support claims that the project will contribute to flashy flows in the surrounding water bodies, the Courters state,

PWB proposes to collect stormwater in retention ponds, but this measure is only relevant to summer and fall seasons. Winter and spring storms in the area will be far too large to contain runoff from a facility as large as the one proposed and PWB will be forced to discharge directly to the creek.” Exhibit J.19, pgs. 20-21 (Courtters)..

This statement is wholly inaccurate. As described in the Filtration Facility Stormwater Drainage Report, Section 3.3, the five stormwater ponds have all been designed to contain runoff from storm sizes up to and including the 25-year storm event. Exhibit A.73, pg. 11 (Filtration Facility Stormwater Report). As shown in Tables 6 through 10, during and following these storm events, the flow rates released from each of these ponds will be less than the pre-developed flow rate, and will not be “discharged directly to the creek” but will be discharged through three points of discharge specifically designed to accommodate the flow from the stormwater ponds during the 25-year storm event. Exhibit 1.94 further explains that the stormwater system was conservatively sized to accommodate additional rainfall during all seasons. Exhibit I.94 (Climate Change Considerations). More specifically, the storm basins have been designed so that in the event a storm which has rainfall depth matching the current 50-year or 100-year storm events, the basin geometries would continue to provide adequate peak-flow matching detention and the basins would not overtop.<sup>62</sup> Exhibit I.94, pgs. 3-4. (Climate Change Considerations). The statement above that the filtration facility will be forced to discharge directly to Johnson Creek during winter and spring storms because of its size makes it abundantly clear that the authors either did not review the stormwater system documents for the project or did not understand them. Either way it wholly undercuts the cursory statements throughout the document that during operation the project **will** adversely affect water quality and fish habitat during facility operation.

### iii. Finding of No Significant Impact (FONSI)

As established in the record, the Environmental Protection Agency developed a Programmatic Environmental Assessment (PEA) under the National Environmental Policy Act (NEPA) to analyze the potential environmental impacts related to the issuance of credit assistance under the WIFIA program for water infrastructure finance. Exhibit J.80 (FONSI) The Water Bureau applied for a WIFIA loan and was therefore, required to comply with the PEA process. The Courters allege, without submitting evidence in the record to support the claim, that the Water Bureau did not submit accurate information to EPA in its application questionnaire. Exhibit J.19, pg. 22 and Attachment A (Courter).

The Water Bureau disputes the claims, but as importantly, it appears that EPA also disagrees. A WIFIA PEA Adequacy Memo is included in the record at Exhibit J.80. As provided in this final decision document, EPA 1) reviewed the PEA Environmental Questionnaire and supplemental information submitted by the Water Bureau and information directly obtained by EPA; 2) determined the adequacy of the information; 3) assessed site specific environmental impacts; and 4) determined that no

---

<sup>62</sup> As explained in the climate change memo, at these levels the ponds no longer meet all free boards standards, but will contain the water so that they do not overtop and discharge to the creek. Exhibit I.94.

significant environmental impacts are anticipated from the issuance of the WIFIA loan. The letter to EPA from the Cottrell CPO included as Attachment A to Exhibit J.19 confirms that EPA was made aware of the Mr. Courter's concerns. While there is nothing in the record that indicates whether EPA provided the requested response, the FONSI remains in effect.

d. Scenic Views and Sites

The MCCP introduction to scenic views and sites explains that:

In the West Hills and Sauvie Island/Multnomah Channel planning subareas, Multnomah County has identified scenic views of the West Hills from a number of specific viewing areas as significant. These include several parks and wildlife areas. The County's SEC-v overlay, which is generally located along the east slope of the West Hills, requires that development must be visually subordinate to the larger surrounding landscape in order to protect the area's overall scenic qualities as seen from identified viewing areas.

There are no SEC-v zone on or around the project. While project opponents have generally suggested that the areas scenic value must be preserved, it is clear from the context of the Comprehensive Plan that scenic view and site is not a natural resource applicable to this project or this review.

e. Tree Protection

5.40 *In order to minimize the detrimental environmental impacts and habitat fragmentation of extensive tree removal around structures, development, landscaping and yard areas, amend the Significant Environmental Concern overlay zones to require replanting of trees, in areas where tree removal has occurred, consistent with County fire -safety standards and legitimate farm uses.*

This is the only tree protection policy included in MCCP Chapter 5. It is particularly relevant here because it reveals that the County only has tree replacement standards for trees removed within an SEC overlay zone. The County has not adopted tree protection or replacement standards for trees removed outside an SEC zone.

As indicated in the application and the staff report, the Water Bureau will remove three trees from an SEC-h zone as a result of their proximity to the existing pipeline needed for the raw water pipeline connection to deliver raw water to the filtration facility. As described below in the SEC findings for MCC 39.5860(C)(1), the Water Bureau believes that these trees are exempt from SEC review but has also proposed mitigation at the required ratio for the SEC-h zone.

Project opponents argue that trees outside the SEC zone must be addressed under the Conditional Use Natural Resource criterion. Exhibit E.9 (Ciecko), p.7. As documented in this Final Argument, the Water Bureau respectfully disagrees. While there is no tree protection code or requirement that applies to the trees identified by opponents, the Water Bureau proposes extensive additional plantings to address opponents' concerns.

All regulated trees within the SEC zones are protected.<sup>63</sup> Additionally, with the exception of a scattering small former nurse stock, existing trees on the filtration facility will be preserved and protected. However, tree removal along certain pipeline segments is unavoidable. As described in the application narrative, in selecting the pipeline alignment between the fixed connection points, the Water Bureau prioritized placement of the pipelines with the right-of-way to protect surrounding farmland and mapped natural resource property. By prioritizing right-of-way areas, the Water Bureau also largely avoided tree removal on private property. However, there are trees located within the right-of-way at the edges of the road surfaces that must be removed to accommodate the pipeline. The Tree Plan provided in Exhibit J.75 (Attachment A) shows planned tree removal along each segment of the pipeline and distribution main corridors. The SEC zones in the area are shown and the plan illustrates the avoidance of tree removal within these zones.

As noted, most of the unavoidable tree removal is within public road right-of-way. The trees within the right-of-way are in areas that are already dedicated to public use for both vehicle travel and utility infrastructure. It is not possible to replace the trees removed from the right-of-way in the same location, as tree roots are incompatible with subsurface pipelines. Following trees removal, the roadside areas will be reseeded with a roadside seeding mix identified at Exhibit 101, ESC-004 (Erosion Control General Notes). Mitigation plantings of native trees and shrubs will be provided at the filtration site, with tree replacement being provide at a ratio of 1.5:1.<sup>64</sup> The project's wildlife expert explained the benefit of providing the mitigation plantings on the filtration facility site instead of within the right-of-way:

Proposed plantings of native trees and shrubs at the filtration site will compensate for the removal of woody vegetation within the Dodge Park ROW and the unfiltered water pipeline alignment off of Lusted Road and no adverse impact tot wildlife are anticipated to result. Mitigation would occur at the planned filtration site in relatively close proximity to the proposed impact locations but in an area not subject to frequent disturbances found in road rights-of-way (noise, dust, pesticide/herbicide, pruning, etc.). Replacing woody vegetation adjacent to SEC zones and expanding existing, larger patches of habitat would be a greater benefit to wildlife than replacing trees in or near road rights-of-way. Exhibit I.96, p. 6 (Wildlife Habitat Memo).

The proposed Mitigation Plan (Exhibit I.96, Attachment A) shows a total of 552 trees combined with dense shrub plantings (399 shrubs per 10,000 square feet). As shown in the Tree Plan attached to Exhibit

---

<sup>63</sup> Three exempt trees within an SEC-h area on SE Lusted Road are reviewed and addressed under MCC 39.5860(C)(1), below.

<sup>64</sup> As provided in the Tree Plan at Exhibit J.75, Attachment A, a large percentage of the trees to be removed are less than 6 inches DBH. For example, nearly 1/3 of the trees that must be removed within the Dodge Park Boulevard right-of-way to accommodate the pipeline are less than 6 inches DBH. Typically, trees under 6 inches DBH are not included in tree replacement calculations. To be conservative, the Water Bureau is including all trees in its tree removal count and has provided a replacement ratio recommended by the project's wildlife biologist of 1.5:1 and takes into consideration the range of trees sizes. Exhibit I.96, pg. 6 (Wildlife Habitat Memo).

J.75, a total of 363 trees<sup>65</sup> will be removed along the pipeline corridors; thus, the proposed planting exceeds a replacement ratio of 1.5:1.

In Exhibit J.7, Mr. Ciecko argues that the Water Bureau did not save more than 200 trees as stated in Exhibit I.96. The Exhibit J.75 attachment is an update to the plan provided with the Erosion and Sediment Control permit and notes that “201 trees [are] preserved by pipeline design change” in the area along Dodge Park Boulevard. The Water Bureau agrees that total tree removal in this area is 324 trees<sup>66</sup>, but as noted in Exhibit I.96 only about five percent are mature canopy trees and many of the trees are saplings. The point made is not that the roadside vegetation provides no habitat but that the habitat value is limited:

Although the trees and saplings provide some shelter and foraging opportunities for common birds and small- to medium-sized mammals habituated to living in urban environments, wildlife habitat functions are limited due to the proximity of the roadway, which generates noise and dust and reduces the quality of habitat, as well as the narrow width and overall sparseness of the hedgerow which limits areas for cover and other wildlife functions. Exhibit I.96, pg. 6 (Wildlife Habitat Memo)

In Exhibit J.7, opponents assert: “To be sure, a proposal to eliminate 324 trees in the City of Portland would not be treated with such arrogance and disregard.” While the proposal to replant trees at a 1.5:1 ratio is hardly a response of “arrogance and disregard,” the Water Bureau agrees that tree removal in the City of Portland would be treated much differently since Portland has a tree protection ordinance and requires tree mitigation for trees in ROWs and on private lands.

In sum, as documented in this Final Argument, the County does not have a tree protection ordinance and none of the trees identified by opponents outside of the SEC zone are subject to County land use regulation. While not required to do so by code or to satisfy the natural resource criterion, the Water Bureau proposes extensive additional plantings at the filtration facility in an area within and adjacent to the existing SEC-h where it will provide significant habitat value. Staff’s Condition 12.g will apply to all new plantings at the filtration facility site.

Water Bureau Proposed Condition:

18. Following all pipeline construction and road improvement activities, the Water Bureau or their representative shall provide a survey to the County confirming the size, location and species of all

---

<sup>65</sup> This number excludes the 3 trees that must be removed from the SEC-h zones because, as discussed below, those trees are mitigated separately for compliance with SEC replacement standards.

<sup>66</sup> Exhibit J.92 (Bennington) argues that 425 trees are being removed along Dodge Park Boulevard including 101 trees east of Cottrell Road. The tree count of 324 noted above (Exhibits I.96 and J.75) is accurate and covers removal both west and east of Cottrell Road. Ms. Bennington also makes similar tree arguments to those presented by Mr. Ciecko.



trees removed during pipeline construction and road improvement work. If the total number of trees removed outside of an SEC zone exceeds 363, the additional tree removal is only approved if each additional tree is replaced at a ratio of 1.5 to 1 on the filtration facility site. Additional tree removal outside of the right-of-way or project easement areas is prohibited.

19. Prior to issuance of the Certificate of Occupancy, Property owner shall implement the plantings identified in the Mitigation Plan at Exhibit I.96, Attachment A and plant any additional replacement trees identified in Condition 18.

**Staff Condition:**

12.g a. All planted areas must be continuously maintained, including provisions for watering planting areas where such care is required. The small grove of Douglas-fir, bigleaf maple, and walnut trees near the Pleasant Home Water District easement and SE Carpenter Lane (Exhibit A.212, Sheet LU-301) shall be protected and maintained on-going basis. Any required landscaping that becomes diseased, dies or is removed, shall be replanted within the next planting season with a similar species and a suitable size after discussion with and determination by the Planning Director [MCC 39.8040(A)(4) and MCC 39.8045(C)(4) & (5)].

*f. [Air Quality, Noise, and Lighting Impacts](#)*

Aside from a cursory reference to Statewide Planning Goal 6, there is not an introductory narrative in the MCCP that describes the purpose of this topic.

5.41 Cooperate in the development and implementation of regional efforts to maintain and improve air and water quality and reduce noise impacts.

Policy 5.41 is the only policy in MCCP Chapter 5 that makes any reference to air quality. It is clearly a directive to the County rather than a requirement for any specific use or project. Further the directive is simply to cooperate on regional efforts related to air quality. There are no references, requirements, or limits for specific uses or activities that contribute to air quality.

Project opponents argue that emissions from vehicles, particularly diesel trucks, will have air quality impacts and thus adversely affect natural resources. See e.g., Exhibit E.9 (Ciecko). The primary target of this line of reasoning is construction vehicles<sup>67</sup>, but as provided in the Project TIA and discussed above, operation will also include approximately 25 truck trips a week for deliveries and material hauling. There is nothing in the MCC Chapter 39, in MCCP Chapter 5, or in Policy 5.41 that indicates that the County has the authority to either regulate tail pipe or generator emissions or make land use decisions based upon

---

<sup>67</sup> Mr. Ciecko also identifies diesel generators as a source of impacts to air quality during construction. Exhibit E.9.

those emissions from either construction vehicles or operations vehicles.<sup>68</sup> Furthermore, if use of diesel vehicles were deemed to adversely affect natural resources, that would preclude the approval of any other Community Service or conditional use that regularly uses diesel vehicles or emergency generators, including fire stations, schools, and hospitals.<sup>69</sup>

- 5.42 If a land use proposed is a noise-sensitive use and is located in a noise-impacted area, or if the proposed use is a noise generator, the development must meet all of the following:
1. Building placement on the site must be in an area having minimal noise level disruptions to reduce impacts from surrounding noise generators if the use is a noise-sensitive use, or to minimize impacts on surrounding uses if the use is a noise generator.
  2. Building insulation or other construction technique must be used to lower interior noise levels in noise-impacted areas.

As discussed in detail in the character of the area criterion above, the filtration facility is not a noise generator. Nonetheless, the facility is placed towards the center of the site. The facility noise study indicates that the noise levels generated at the property line will both satisfy the noise standards and will be generally consistent with background noise levels.

---

<sup>68</sup> Project opponents seemingly argue that construction in particular will result in air quality impacts that are “significant and ongoing,” and that as a result the vehicle emissions will adversely affect natural resources. Exhibit E.9, pg. 7 (Ciecko). At the same time, project opponents have argued for a strict interpretation of “will not adversely affect natural resources” so that any adverse effect, and not just significant effects, mean the project cannot meet the standard. The opponents cannot have it both ways. If diesel emissions were deemed to adversely affect air quality generally as a natural resource, the County would have to find that any use subject to the “Will not adversely affect natural resources” standard, including other Community Service uses such as fire stations, schools, and hospitals could not meet the standard, as the County could not arbitrarily assign a number of diesel vehicles or generators that would be permitted under the criterion.

<sup>69</sup> The list of Community Service and other conditional uses is provided in Section II.3 above. Mr. Ciecko seemingly tried to distinguish the project by pointing to the large number of trucks needed for construction. Setting aside the issue that construction is not the use subject to the natural resource criterion, the County cannot determine that diesel emissions adversely affect natural resources and then arbitrarily determine how many trucks are too many through a quasi-judicial decision. In other words, would an estimated 200 diesel truck trips from a use be ok, but 250 would adversely affect air quality? Also, if an arbitrary number of diesel truck trips were deemed to not adversely affect natural resources, would the approval require a trip cap for the life of the use, and how would that be enforced for a use such as hospital or a fire station? For these reasons this project cannot be singled out and distinguished from the list of other Community Service or conditional uses that regularly rely on diesel vehicles to provide a public service.

5.43 Require outdoor lighting to be lower intensity and designed in a manner that minimizes the amount of light pollution.

Strategy 5.43-1 directs the County to adopt a “dark sky” ordinance and work with adjacent jurisdictions to reduce light pollution from sources outside of the County’s jurisdiction. As established in the application and further discussed below, the filtration facility satisfies the dark sky ordinance adopted in compliance with the policy and strategy.

**C. MCC 39.7515(C) The use will not: (1) force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; nor (2) significantly increase the cost of accepted farm or forest practices on surrounding land devoted to farm or forest use.**

**1. The State Law Test Does Not Apply Directly and the Comprehensive Plan Indicates Test Should Be Less Onerous in MUA-20 Exception Area**

The provision of county code at MCC 39.7515(C) contains language identical to the state statute at ORS 215.296(1) (colloquially known as the “Farm Impacts Test”), which provides standards of approval for “certain uses in exclusive farm use [EFU] zones.”<sup>70</sup> The Filtration Facility and the majority of the Pipelines are in the MUA-20 zone, not the EFU zone, and therefore ORS 215.296 does not apply directly. Mr. Kleinman argues that the difference between the MUA-20 zone and the EFU zone is a “distinction without a difference”<sup>71</sup> -- but this is plainly not the case. In fact, where the pipelines do cross EFU areas, a different, less-stringent standard applies because the use is classified as a utility facility necessary for public service in EFU. See Exhibit A.10, page 8 (Pipeline EFU Review Application Narrative); ORS 215.275 (providing standard for utility facilities in EFU outside of the right of way).

In EFU, the utility facility must be approved if conditions can “mitigate the identified impacts.” *Falcon Heights Water and Sewer District v. Klamath County* 64 Or LUBA 390, 399 (2011). The test being applied to the project in MUA-20 is more stringent than in EFU, despite the fact that the MUA-20 zone is explicitly a “non-resource” and “exception lands” base zone to which Goal 3 does not apply. MCC Chapter 4.B. This creates the paradoxical situation where, if the statutory Farm Impacts Test is implemented in the MUA-20 zone in the same way as it would be for a non-utility-facility or a business in EFU, it would be easier to site the Filtration Facility in a Goal 3 protected EFU zone than in the MUA-20 zone.

It does not appear that this higher bar for utility facilities in MUA-20 was the intention of the County when incorporating the Farm Impacts Test into the Community Service Use code (found in a subsection

---

<sup>70</sup> The same language is reflected in the implementing administrative rules of the Land Conservation and Development Commission (“**LCDC**”) found at Oregon Administrative Rules (“**OAR**”) 660-033-0130.

<sup>71</sup> Kleinman Oral Testimony, minute 01:10:50.

of the MCC separate from the MUA-20 code). Instead, the **Comprehensive Plan directs** that, in “Multiple Use Agriculture Land” the policies to “minimize conflicts between farm and non-farm uses” are intended to be **“less stringent than policies in Exclusive Farm Use zones.”** Comp. Plan, page 3-11.

This creates a conflict between the Comprehensive Plan and the zoning code implementing that plan in violation of ORS 215.050(2) because the zoning code standard that applies to the utility project in MUA-20 is more stringent than the code standard that would apply in EFU. Because the MUA-20 provision only refers to the Community Service Use code, and that Community Service Use code is not specific to the MUA-20 zone or utility uses, this conflict likely was an oversight because of the complexity of the code and the cross references. Even as an oversight, though, the conflict with the Comprehensive Plan is not permissible. See ORS 215.050(2) (“zoning ... ordinances ... shall be designed to implement the adopted county comprehensive plan”); ORS 197.175(2)(b) (counties must “[e]nact land use regulations to implement their comprehensive plans”).

Note that the County is not required to apply the EFU non-utility-facility standard simply because of using the language of ORS 215.296(1). Where local code “does not implement” the Farm Impacts Test in state law, “it is not necessarily the case that the county must undertake the same analysis required under the statute” and **“cases interpreting the statute do not control how the county interprets and applies the code”**. *Comden v. Coos County*, 56 Or LUBA 214, 220, 224 (2008).

The analysis below addresses the language of the code and caselaw related to the state law test. The application for the project meets even that higher bar that would be required for non-utility-facilities in EFU zones. However, applicant asks that the Hearing’s Officer additionally consider that the County’s comprehensive plan requires that the test to “minimize conflicts between farm and non-farm uses” should be “less stringent” than that in the EFU zone. In particular, the EFU zone would not merely look at the “significance” of an impact, but instead whether conditions “mitigate and minimize” any potential impacts.

*a. Quoting Part of the Test Does Not Mean No Conditions Allowed*

Mr. Kleinman argues that, because ORS 215.296(1) was copy/pasted into the MCC, but subsection (2) was not, no conditions can be used to demonstrate the satisfaction of MCC 39.7515(C). Exhibit H.2, page 2, 3. Without doing any text, context, or legislative history analysis, Mr. Kleinman asserts that this means the county wanted to provide even more protection in the MUA-20 zone than in the EFU zone (contrary to the Comprehensive Plan). Instead, it is more likely that the county did not think they needed subsection (2) as they already have a provision of the MCC that explicitly allows conditions for conditional uses: MCC 39.7510. This is further discussed in Section II.0.1 above.

**2. Core Elements of Caselaw Interpreting the State Statute; Definition of Significant**

The key Oregon Supreme Court case interpreting ORS 215.296(1) is *Stop the Dump Coal. v. Yamhill Cty.*, 364 Or 432 (2019). In *Stop the Dump*, a landfill sought to expand on EFU land in Yamhill County. Overall, the Court said that the Farm Impacts Test requires:

“(1) the applicant to properly identify the surrounding lands, the farms on those lands, the accepted farm practices on each farm, and the impacts of the proposed nonfarm use on each

farm practice;<sup>[72]</sup>”

“(2) the local government to determine whether the proposed nonfarm use will force a ‘significant’ change to, or cost increase in, an accepted farm practice, as that term is ordinarily used; and

“(3) if there is a significant change, the local government to determine whether the applicant has demonstrated that, with conditions of approval ..., the nonfarm use meets the test.”

*Id.* at 444-45 (formatting added). The Court starts with the definition of “significant” as meaning “having or likely to have influence or effect : deserving to be considered : IMPORTANT, WEIGHTY, NOTABLE.” 364 Or at 447. That definition relates to each of the subsections of the Farm Impacts Test:

“As used ... to modify a ‘change in accepted farm or forest practices on surrounding lands,’” a significant change is one that “has, or is likely to have, an important influence or effect on the farm or forest practices”.

“Similarly, ... with respect to an increase in the cost of accepted farm or forest practices” significantly increase means “to increase the cost in a significant manner, that is, in an influential and important way.”

364 Or at 447; *see also Van Dyke v. Yamhill County*, 80 Or LUBA 348, slip op at 22-23 (2019) (identifying this key language and summarizing the Farm Impacts Test).

The Farm Impacts Test applies “on a farm-by-farm and farm practice-by-farm practice basis.” 364 Or at 445; *see also Van Dyke*, 80 Or LUBA slip op at 23 (“The farm impacts test is applied to specific farm practices on individual farms.”).

Although the state law Farm Impacts Test does not apply directly to the Project – even where in EFU – the applicant has shown that the Project does meet the higher bar of the state law.

*a. There is no \$20,000, Single Dog, or “De Minimus” Threshold for Significance in Caselaw.*

Mr. Kleinman points to *Von Lubken v. Hood River County*, 28 Or LUBA 362, 365-9 (1994) (*Von Lubken VII*), with the inference that there is some \$20,000 or 2 ½ month construction period that constitutes significance: “And that alone – two and a half months, \$20,000 bucks – was enough to bring about a violation of the statute[.]” Kleinman oral testimony, minute 01:18:19. This is plainly not the holding of *Von Lubken VII*. LUBA by no means held that there was “a violation of the statute.” As explained further below in Section II.C.3, that case required remand *to consider whether those impacts were significant*, rather than just “rely on the fact that [the impact] has already occurred” and disregard them “simply because those impacts and costs occurred prior to approval of the disputed decision.” This language of

---

<sup>72</sup> Note that agritourism is not a farm use within the meaning of the Farm Impacts Test. ORS 215.283(4) addresses agritourism specifically, making clear that it is not a farm use allowed outright in EFU. However, there are very few agritourism businesses in the Surrounding Lands and any potential for impacts has been addressed – as their arguments are only related to construction and construction traffic.

the case is specifically quoted by Mr. Kleinman in Exhibit H.2, page 4, though apparently ignored. Just because those impacts had to be considered does not mean that they are inherently significant or that on remand the local jurisdiction would have to find that the statute was violated.

Nor is there a “single dog” threshold for significance as Mr. Kleinman argues at Exhibit H.2, page 16. Again, just because legislators wanted to make clear that immeasurable costs like shattered seed have to be examined, doesn’t mean that those immeasurable costs *de jure* exceed the level of significance. It may be that a dog running once through a field is insignificant, but a whole litter of dogs running through the field every day is significant. The facts of each case must be examined for significance.

Finally, in his conclusion, Mr. Kleinman makes his greatest stretch, claiming that the legislature intended the word they used -- “significant” -- to actually mean “minimal” or even “de minimis”. Minute 01:26:20. This is so much of a stretch that it actually flips the definition 180 degrees: “De minimis” is defined as “lacking significance or importance: so minor as to merit disregard.”<sup>73</sup> “Lacking significance” cannot be synonymous with the word the legislature used -- “significant.”

The line drawing for what exceeds the threshold of significance is difficult, as is frequently the case with legal line drawing. However, Mr. Kleinman’s attempts to contort caselaw and legislative history certainly do not provide the line.

### 3. Impacts of Construction Are Not Impacts of the Proposed Use

Perhaps because the ultimate use will be so innocuous, opponents urge the County adopt one specific aspect of a few cases applying the state law, which make references to construction impacts. As explained above in Section I.A, this is not otherwise a requirement of the MCC. As the state statutory test arises in its own text, context, and legislative history, a separate analysis is provided below. However, as the state statutory test does not apply directly, the context of the MCC is the relevant one, and for that reason construction is not part of the permanent use under MCC 39.7515(C).

To the extent that the cited cases imply a requirement for consideration of construction in addition to the proposed use, it is either dicta or wrongly decided. There is nothing in the text, context, or legislative history of ORS 215.296(1) that indicates that, contrary to the general rule in land use, the test is intended to apply to construction in addition to the proposed use itself. We reviewed the many hours of legislative history to confirm that the legislature did not indicate any intention to apply this test to construction rather than or in addition to the ultimate use. There is no legislative history, let alone included in the record, which indicates a legislative intent to require an evaluation of temporary construction impacts to farm practices. Any holding to the contrary fails to use the *PGE/Gaines* rules of statutory interpretation and should be overturned.

Mr. Klienman and Ms. Richter cite primarily to *Von Lubken v. Hood River County*, 28 Or LUBA 362, 365-9 (1994) (*Von Lubken VII*). In that case, there is absolutely no analysis of the text, context, and legislative history of ORS 215.296(1). Instead, LUBA holds that the county could not decide that the construction

---

<sup>73</sup> “De minimis.” Merriam-Webster's Unabridged Dictionary, Merriam-Webster, <https://unabridged.merriam-webster.com/unabridged/de%20minimis>. Accessed 22 Sep. 2023.

phase need not be considered “simply because those impacts and costs occurred prior to approval of the disputed decision.” *Id.* at 369. The procedural posture of *Von Lubken VII* was that the golf course had already been “constructed while the decisions approving that golf course were on appeal.” LUBA held that the “county may not allow the applicant to construct the golf course, prior to receipt of a decision approving such construction that is sustained on appeal, and thereafter rely on the fact that construction has already occurred to avoid showing that the impacts on accepted farm practices and the costs thereof during construction of the golf course are not significant.”

That is, LUBA only held that impacts of a use prior to a remand and reapproval should be considered in the reapproval process, and not disregarded “simply because those impacts and costs occurred prior to approval of the disputed decision.” This logic would apply to operational impacts as well, if created prior to the disputed decision on remand. They could not be disregarded “simply because” of the procedural posture of the case to include a remand and reapproval. Given the procedural posture of *Von Lubken VII*, it makes sense that LUBA did not do a *PGE/Gaines* analysis of the text, context, and legislative history. The holding in *Von Lubken VII* is really that, when a use is approved, appealed, remanded, and re-approved, impacts that otherwise would be subject to the Farm Impacts Test cannot be disregarded “simply because those impacts” occurred prior to the re-approval. The issue was that the county had decided to solely “rely on the fact that [the impact] has already occurred”, rather than a question of what the legislature intended to be covered by ORS 215.296(1).

Other cases cited apply different statutory tests, or simply do not address the question at all. For example, in *ODFW v. Lake County*, (LUBA Nos. 2019-084/085/093; LUBA Nos. 2019-086/087/088 (2020)), referenced by Ms. Richter, LUBA by no stretch of the imagination concluded that construction was part of the “use” nor did it conclude that construction-related impacts had to be evaluated as part of the farm impacts test. While LUBA recognized that there was testimony related to potential construction-related impacts, LUBA remanded because the county’s findings did not address the testimony. *ODFW v. Lake County*, slip op at 25. Statements that are not necessary to the outcome of the case do not create precedent. *See State ex rel. Huddleston v. Sawyer*, 324 Or 597, 621 n 19, 932 P.2d 1145 (1997) (“[T]hat statement [was] dictum, because it was not necessary to the outcome of the case.”). Even if the testimony in *ODFW v. Lake County* had only been related to operational impacts, the testimony was not addressed and still would have been remanded.

Looking at the question through the required lens of *PGE/Gains* makes clear that construction is not part of the use to be evaluated. The text of ORS 215.296(1) provides that it is the “use allowed under [the EFU statutes]” that is to be evaluated. ORS 215.296(1) refers to four locations of “uses” subject to its test: ORS 215.213(2); ORS 215.213 (11); ORS 215.283(2); and ORS 215.283(4). The vast majority of these uses describes the ultimate use, rather than construction. There are a few select categories that address construction directly, such as ORS 215.283(2)(q) (“Construction of additional passing and travel lanes...”) and ORS 215.283(2)(r) (“Reconstruction or modification of public roads and highways...”). This context further supports the analysis that for this project – which would be a “utility facility necessary for public service” in EFU – construction is not the subject to be evaluated under the test. The legislature knew how to call out and regulate construction when that was the intended result. *See Springfield Utility Bd. v. Emerald People's Utility Dist.*, 339 Or 631, 642, 125 P3d 740 (2005) (“[U]se of a term in one section and not in another section of the same statute indicates a purposeful omission[.]” (quoting *PGE*, 317 Or at 611)).

Similar to the MCC, where the legislature has required an evaluation of construction impacts in statute,

it has expressly imposed such a requirement. ORS 215.276(2) governs post-approval requirements for transmission lines approved under ORS 215.275 as “utility facilities necessary for public service.” ORS 215.276(2) provides, in relevant part:

after the route is approved by the siting authorities and before construction of the transmission line begins, consult the record owner of high-value farmland in the planned route for the purpose of locating **and constructing** the transmission line **in a manner** that minimizes the impact on farming operations on high-value farmland.

(Emphasis added.)

ORS 215.275(5) provides that when approving a utility facility necessary for public service, the local government is required to impose “clear and objective standards” to mitigate and minimize the “impacts of the proposed facility, if any, on surrounding lands devoted to farm use to prevent a significant change in accepted farming practices or a significant increase in the cost of farm practices on the surrounding farmlands.” ORS 215.276(2).

The requirement to minimize construction-related impacts (“constructing ... in a manner that minimizes”), applies *after* the local government has approved the facility and *after* it has imposed the “clear and objective” conditions to mitigate impacts to farm practices. Because construction related impacts to farm practices are considered *after* the imposition of “clear and objective” standards, they cannot also be evaluated during the initial approval stage, because then ORS 215.276(2) would serve no purpose. *Crystal Communications, Inc. v. Dept. of Rev.*, 353 Or 300, 311, 297 P3d 1256 (2013) (“As a general rule, we construe a statute in a manner that gives effect, if possible, to all its provisions.”). Where the legislature has required an evaluation of construction impacts, it has imposed that requirement directly, required the evaluation to take place after the facility has been approved and after the imposition of “clear and objective” standards designed to minimize and mitigate impacts to farm practices.

*a. Any Construction Impacts Are Temporary, Which Must Be Calculated into the Determination of Significance*

In *Stop the Dump*, the Oregon Supreme Court notes that “the legislature understood that adverse changes in farm practices or the costs of those practices could well lead to later **reductions in the supply of operating, productive agricultural land over time**, as it becomes more onerous for owners to continue their agricultural use of EFU land **due to nearby nonfarm uses.**” 364 Or at 455.

Construction is not a nearby nonfarm use that will permanently impact the supply of productive agricultural land over time. Instead, the time impact is inherently temporary. While farmers may be inconvenienced during construction, or even annoyed, the threshold of “significance” for the Farm Impacts Test must take into consideration that temporary disruptions will not cause reductions in the supply of agricultural land in the Surrounding Lands. *See also Mission Bottom Association Inc. v. Marion County*, 29 Or LUBA 281, 294 (1995) (“Thus, any impact [of aggregate extraction] will be temporary. A potential, temporary impact on farm ... practices ... would [not] ‘unreasonably’ restrict or regulate farm structures or practices[.]”).



b. *Requested Findings on Farm Impacts Test Related to Construction*

The applicant asks that the Hearings Officer determine both that (1) construction is not part of the use to be evaluated under the County code in MCC 39.7515(C); and (2), regardless and in the alternative, the inherently temporary construction of this project does not exceed the threshold of significance for the Farm Impacts Test.

4. The Study Area Complies with Guidance for Defining “Surrounding Lands” Under the Statute

Neither County Code related to MCC 39.7515(C) nor state statutes related to ORS 215.296(1) provide a definition or precise method of determining what the “surrounding lands” are relevant to this analysis. Caselaw related to the statute provide guidance that:

... study area must be based on evidence of the likely impacts of the *proposed conditional use* on farm practices on surrounding [] lands that are close enough to be subject to those impacts. ... Stated differently, “surrounding lands” ... are those lands in such proximity to the proposed ... conditional use that the **externalities or sensitivities of the proposed use** could potentially cause significant changes in or significantly increase the cost of accepted farm practices on nearby lands.

*Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314, slip op. at 7 (2013) (italics in original; bolding added).

This is precisely the analysis used to define the Surrounding Lands for the project. See Exhibit A.33 (Operations Report), Sections 4-6. Most relevantly, Exhibit A.33 (Operations Report), pages 19-20 explains:

The Surrounding Lands – which is the same area referred to as the “study area” in the land use application narratives – were defined to be sufficiently large to encompass all potential impacts that the proposed filtration facility and the pipelines (including the Finished Water Intertie) might have on accepted farm practices or on the costs of accepted farm practices. The potential impacts from the filtration facility and the pipelines on accepted farm practices relate to the potential “externalities” of the filtration facility and pipelines. The potential externalities identified are noise, vibration, odor, light/glare, dust, mud, litter, vector control, air emissions, water quality/quantity, radio transmission, security, traffic, and chemicals used at the filtration facility. There is also the potential for impacts to emanate from any “sensitivities” of the proposed use, and how any sensitivity interacts with farmers who follow accepted farm practices in the Surrounding Lands. The potential sensitivities of the proposed use relate to agricultural chemicals and farm traffic in the Surrounding Lands. Both potential types of impacts (related to externalities and sensitivities of the proposed use) are more likely to occur for accepted farm practices on lands located adjacent to the filtration facility or the pipelines than farm practices at more distant locations.

A local government has significant discretion in determining the scope of surrounding lands.<sup>74</sup> *Hood River Valley PRD*, 67 Or LUBA at slip. op. page 6. That “study area must be based on evidence of the likely impacts of the proposed conditional use on farm practices on surrounding agricultural lands that are close enough to be subject to those impacts. *Id.* at slip op. page 7 (emphasis in original). Note that the proposed conditional use is not construction. The study area should be based on the potential for operational impacts.

Again, LUBA’s direction is to include in the study area those “lands in such proximity to the proposed ... conditional use that the externalities or sensitivities of the proposed use could potentially cause significant changes in or significantly increase the cost of accepted farm practices on nearby lands[.]” Traffic externalities have the largest potential area of impact (compared to impacts such as noise, for example) – as traffic inherently moves outward and then disperses on the public road network. Even for the highest potential traffic impact – during peak construction – “all study intersections perform at acceptable levels of service with minimal delay except for SE Carpenter Lane / SE Cottrell Road for all scenarios and SE Dodge Park Boulevard / SE Altman Road[.]” Exhibit A.230 (Construction TIA) page 13. Both Carpenter Lane and Cottrell and Dodge Park and Altman are well within the proposed Surrounding Lands. With the requirement for Transportation Demand Management (TDM), including the bussing of workers that would otherwise commute to the site, all intersections will meet level of service standards. Exhibit I.86 (One-Access Update to Construction TIA), page 1. That is, the Project TIA and Construction TIA show that there are no “externalities ... of the proposed use [which] could potentially cause” significant farm impacts inside of the study area, and so there is no reason to believe that there would be outside the study area, as traffic continues to disperse. Overall, given that construction is not the use, is inherently temporary, and that the TDM plan will ensure that all study area intersections meet or exceed County requirements, it cannot be said that the proposed Surrounding Lands do not capture all potential externalities or sensitivities of the proposed use.

Moreover, County Transportation has reviewed and approved the study area – providing a neutral, third party opinion that, indeed, it represents lands in such proximity that the externalities of the proposed construction could potentially have impacts. *See Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261, 277 (2006) (a local decision maker may assign additional significance to the testimony of city or state engineers based on their neutrality regarding the development proposal), Exhibit J.87 (Global Transportation 2ndORP Response), page 4, explains:

PWB has worked with County Transportation to define the limits of where significant impacts to the transportation system could be possible. These limits were validated by the Construction TIA, showing that there are no intersections of concern in the study area with Transportation Demand Management measures in place. ... The County followed the process commonly used by local municipalities to develop study areas. The methodology accounts for the fact that the

---

<sup>74</sup> The applicant proposed the Surrounding Lands area as part of the pre-application conference, but land use planning staff declined to determine the scope of the study area for land use purposes. Exhibit A.159, page 20. County Transportation, however, reviewed the proposed area for analysis and agreed that it was sufficient to analyze the potential impacts from both project operation and construction traffic. Exhibit J.44 (County Transportation) page 7 (“‘impact area’ agreed at pre-ap stage (Exhibits B.13 and B.16 [page 17])”); Exhibit A.230 (Construction TIA) page 2 (indicating that Multnomah County Transportation approved the scope of the construction TIA).

further from the project vehicles travel, the more dispersed project related traffic becomes, lessening the impacts on the traffic network outside of the study area. Through coordination and discussion with the County and considering study intersections defined by the project, intersections of relevance in the County TSP, and locations further requested to be added to the study by the County, the current study area was defined and approved.

Opponents try to attack the definition of the Surrounding Lands by pointing out that some nurseries are very large companies with fields both inside and outside of the Surrounding Lands or cooperate with nurseries outside of the Surrounding Lands. This is irrelevant. These comments have been responded to on Exhibit I.80 (Globalwise 1stORP Response) and Exhibit J.86 (Globalwise 2ndORP Response). Overall, the agricultural expert concluded that:

The Surrounding Lands as presented in the Operations Report was selected after extensive study of agriculture around the filtration facility and the pipelines route. The criteria used by Globalwise to define the Surrounding Lands uses six factors to determine the Surrounding Lands (page 20 of Exhibit A.33). The Surrounding Lands were mapped after six months of study. The criteria were selected after discussions with farmers to understand what types of nurseries and other farms are in the area. The first criterion is including an area covered predominantly by current, active “farm use.” The other five criteria are: 1) zoning, 2) agriculture in character, 3) consideration of natural barriers, 4) transportation, and 5) other impacts which includes lands close to the pipelines to include both externalities and sensitivities.

The potential area of impact to transportation of farm crops was a factor in the selection of the Surrounding Lands and was evaluated based on operational and, later, construction traffic evaluations from Global Transportation Engineering. The proposed Surrounding Lands were also proposed to Multnomah County Land Use Planning in the pre-application process for their input before finalization.

The fact that some nursery loads are filled by two or more nurseries, some of which might be long distances from the Water Bureau projects, does not require a study area larger than is defined in the Water Bureau reports. Both for operations and construction traffic, Global Transportation Engineering evaluated key intersections in the Surrounding Lands and concluded that, with TDM strategies, impacts to intersection and roadway operations due to construction or operations traffic from the Project will be minimal even under conservative analysis assumptions that take into consideration roadway closures due to pipeline construction. In preparing this response, the transportation engineer at Global Transportation Engineering, Dana Beckwith, confirmed via email that there are no significant impacts shown by his analysis in the Surrounding Lands study area and that traffic will tend to disperse and have less impact as it moves further away from the filtration facility and pipelines. Given that response, the Surrounding Lands as selected and analyzed is fully adequate.

Exhibit I.80 (Globalwise 1stORP Response), pages 52—53; *see also* Exhibit I.84 (Global Transportation 1stORP Response), page 24.

And:

It is impractical and unworkable to use the two criteria Mr. Johnson suggests for defining

Surrounding Lands. With regard to the “cooperating nature” of the nursery industry, the example used is nurseries sharing truckloads for customer shipments. Not only do several larger nurseries in close proximity to the filtration facility and pipelines rarely follow that load-sharing practice, an effort to define the study area based on nursery load sharing would be amorphous with hard to specify boundaries because there are many different combinations of nurseries who could share loads, the roads traveled will vary due to the order for loading, and so the nature of the area is constantly changing with each unique truck load. It is understandable that Mr. Johnson provides no clear transportation rationale for his suggested study area.

It is also impractical and fraught with impossible line drawing to use the second basis offered – “critical mass to support agriculture” – for defining the suitable surrounding lands for study. For example, what area size is satisfactory for the purchase of tractors? What about the appropriate area necessary for two to four fertilizer distributors or several suppliers of greenhouse suppliers?

Most importantly, both of these vague proposed criteria are based on the fundamental argument that there will be impacts to the transportation network that impact farmers’ ability to move on the public road network in the area. However, both for operations and construction traffic, Global Transportation Engineering evaluated key intersections in the Surrounding Lands and concluded that, with TDM strategies, impacts to intersection and roadway operations due to construction or operations traffic from the Project will be minimal even under conservative analysis assumptions that take into consideration roadway closures due to pipeline construction. In preparing this response, the transportation engineer confirmed via email that there are no significant impacts shown by his analysis in the Surrounding Lands study area and that traffic will tend to disperse and have less impact as it moves further away from the filtration facility and pipelines. Given that response, the Surrounding Lands as selected and analyzed is fully adequate.

Exhibit I.80 (Globalwise 1stORP Response), pages 73-74. Beyond being unworkable and not based on any actual impacts from externalities of the project, Mr. Johnson’s suggestions would lead to a study area that includes over 36 square miles of land. This massive of a “surrounding lands” area is contrary to the farm-by-farm, farm-practice-by-farm-practice approach required by caselaw. *See Hood River PRD v. Hood River County*, 67 Or LUBA 314, slip op at 6-8 (2013) (noting that the 45 square mile surrounding lands “would render it extremely difficult to approve a conditional use in the EFU zone, given the evidentiary burden such a county-wide analysis would impose on the applicant, of identifying the farm practices on potentially hundreds of farms, some many miles distant, and analyzing whether the proposed conditional use will cause significant change to farm practices, or significantly increase the cost of farm practices, on those farms.”).

Again, Exhibit A.33 (Operations Report), Sections 4-6 provides a detailed explanation of how the Surrounding Lands was identified and defined. However, it need not even be so precisely defined. *Hood River Valley PRD*, 67 Or LUBA at slip op. page 6, provides that the Farm Impacts Test “does not require that the precise extent or outer boundaries of the study area be defined, if the surrounding agricultural area is homogenous, and the record reflects that there are not significant impacts to farm practices on adjacent or more proximate parcels.” Here, more proximate intersections will not exceed level of service standards, there are not significant impacts to farm practices on adjacent or more proximate parcels, and the agricultural area is homogenous. Therefore, there is no evidence to suggest that the study area

needs to be revised.

There is no evidence in the record that the Surrounding Lands are not homogenous. This conclusion was explained in Exhibit A.33 (Operations Report), Section 6.0 in October of last year, and no testimony has challenged that conclusion. In fact, as explained in Exhibit J.86 (Globalwise 2ndORP Response), page 56-57, evidence from opponents actually supports the extension of that conclusion outside of the Surrounding Lands:

The procedures and careful delineation of the Surrounding Lands I have used was described in the Operations Report, Exhibit A.33 on pages 20-24 and further explained in response to comments by James Johnson in Farm Use Response in Open Record Period 1, Exhibit I.80 on pages 73-74. OAN Maps #1 and #2 show a generally uniform and homogenous area of farmland throughout the large area of east Multnomah and Clackamas counties. Both inside and outside of the Surrounding Lands, the areas are closely related in terms of the potential for susceptibility to impacts from the filtration facility or pipelines, such as potential based on the mixture of farm types and sizes and scope of activities. These maps are consistent with my understanding that the area, both inside and outside of the Surrounding lands, shares key characteristics and similarities, such as that: the topography, climate, and soils are homogenous throughout the areas; the same nursery crops predominate; nurseries range in size from small to large with some nursery operators traveling several miles to farm separate fields; farm headquarters are located in each; there is also a small amount of non-nursery farm use, such as hay, pasture, livestock and food crops; farms rely on groundwater wells for irrigation; and farms operate with a similar pattern of close proximity to dispersed residential properties and other community uses. The conclusion to be drawn is that there is great uniformity in the location of nurseries and other farmland in this area that extends beyond the boundary of the Surrounding Lands. These facts, along with the visualization provided in Map #1 and Map #2, show that the Surrounding Lands as defined and my Operations Report in Exhibit A.33, fully captures the potential for farm use impacts because potential impacts (both related to externalities and sensitivities of the proposed use) are more likely to occur for accepted farm practices on lands located closer to the filtration facility or the pipelines than farm practices at more distant locations.

Additional testimony submitted by opponents in the second open record period (in Exhibit J) do not change the conclusions above. For example, Exhibit J.8 (Park's Nursery) objects that the "nursery community does, not may, extend beyond the study area" and that therefore "the study area was flawed by not recognizing the impacts of construction and potential operations extend well beyond construction of the water plant and pipelines." Whether or not the nursery community extends beyond the study area is not the question. The question is whether the study area appropriately captured the potential impacts caused by externalities and sensitivities of the proposed use. As discussed above, the Surrounding Lands was appropriately defined, to the extent that the precise extent or outer boundaries of the study area even needed to be defined under *Hood River Valley PRD*, 67 Or LUBA at \*11.

The Surrounding Lands study area was based on the area that could be impacted by the externalities or sensitivities of the proposed use. The largest area of potential impact related to traffic externalities, and the scope of that impact area for study was proposed by a traffic engineer and reviewed and validated by County Transportation. The Surrounding Lands area was properly defined.

**5. The “Surrounding Lands” Do Not Include the Filtration Facility Site nor the Easement Areas (the Subject Properties)**

The Filtration Facility site itself and pipeline and access road easement areas are not “surrounding lands” for purposes of the Farm Impacts Test. LUBA has clearly held **that neither statute nor caselaw “requires the applicant for a conditional use ... to address impacts of the proposed use on farm practices on the subject property, or to demonstrate that the proposed use will not irrevocably commit the subject property to non-agricultural use.”** *Hood River Valley PRD*, 67 Or LUBA slip op. page 11. In *Hood River Valley PRD*, a parks district sought a Conditional Use Permit to develop a 31-acre parcel in EFU land with, unsurprisingly, a public park. The County Board denied the CUP in part because it “fail[ed] to apply the significant change/increase standard to evaluate the impacts of the proposed park on farm practices on the subject property itself. The board concluded that the proposed cut and fill would prevent the property from ever being used again as high-value farmland and thus would commit the property to non-agricultural use.” *Id.*

LUBA reversed, noting that the **Impacts Test “is not particularly concerned with the fate of the soils occupied by a conditional use on EFU land”** because many of the uses allowed on EFU land “are uses that effectively result in the permanent or semipermanent conversion of some acreage of land from farm use to non-farm use.” *Id.* at slip op. page 7. Instead, the “study area cannot be based on the mere fact that farm soil occupied by the conditional use is taken out of agricultural production.” *Id.* LUBA noted that:

“[S]everal of the non-farm conditional uses allowed in the EFU zone ...--for example, mining and solid waste disposal facilities--involve removal or loss of topsoil on the property in a manner that could easily render property incapable of future agricultural use. Interpreting ORS 215.296(1) to require that the applicant demonstrate that the property can be returned to agricultural use if the conditional use is ever removed would effectively prohibit uses otherwise allowed under ORS 215.283(2) and implementing county regulations. We decline to interpret ORS 215.296(1) in that manner.”

*Id.* slip op at page 12. For this reason, LUBA held that the County had erred in requiring the parks district to perform an analysis of impacts on the subject property itself

This application is the same as *Hood River Valley PRD*. There, the public entity (parks district) had purchased the subject land in 2007 and allowed a commercial orchard to use the land until 2011, shortly before the application to develop the park in 2012. *Id.* slip op at page 2. Here, the public entity (Water Bureau) purchased the subject land for the filtration facility in 1975 and has allowed commercial nursery uses to use the land until recently. Exhibit I.80 (Globalwise 1stORP Response), pages 11-12. Just as in *Hood River Valley PRD*, no analysis is required for impacts caused by the conversation of the subject property itself to a non-farm use. The alternative reading of the statutory test would lead to the absurd result that many uses allowed in the EFU zone are actually not allowed in the EFU zone. *State v. Baty*,

243 Or App 77, 259 P3d 98 (2011) ("We presume that the legislature would not have intended such an absurd result.").<sup>75</sup>

a. *The Same Analysis Applies to Easement Areas*

Ms. Richter argues that a different analysis should apply to the "the pipeline and emergency access road" easements, citing to *Wetherell v. Douglas County*, 51 OR LUBA 699 (2006). Exhibit J.35 (Richter), page 6, n.5. Ms. Richter conveniently ignores *Hood River Valley PRD*, which explicitly declined to extend the logic of *Wetherell* as she suggests. *Wetherell* related to a statutory test for nonfarm dwellings that required an analysis of impacts on farm uses on "nearby lands". In *Hood River Valley PRD*, LUBA held that "nearby lands" is different than the "surrounding lands" test in ORS 215.296(1) that was applicable to the public park in that case (and at issue here). Accordingly, LUBA directly held that "neither ORS 215.296(1) nor *Wetherell* requires the applicant for a conditional use in the EFU zone to address impacts of the proposed use on farm practices on the subject property[.]" *Hood River Valley PRD*, 67 Or LUBA at slip op. page 11 (emphasis added).

The logic of *Hood River Valley PRD* – that requiring an analysis of impacts on the subject property would "effectively prohibit uses otherwise allowed" on EFU lands – does not depend on whether the property rights to construct on the subject property are held in fee title or in an easement. The underlying legal form of ownership is irrelevant to whether it is the "subject property" on which the "use otherwise allowed" is proposed.

Indeed, in *Tilla-Bay Farms, Inc. et al v. Tillamook County*, 79 Or LUBA 235 (2019) affirmed 298 Or App 376 (2019), LUBA explicitly held that impacts within an easement are not relevant to whether there are significant impacts. *Id.* slip op. at 23-24. There, an electric utility sought to construct an aboveground transmission line through forest lands protected by a test analogous to the Farm Impacts Test.<sup>76</sup> Even though the transmission lines would remove 36 acres from commercial forest production, the county was correct to hold that the project did not violate the "significant change/increase" test in forest zones. The logic in *Tilla-Bay Farms* is the same as in *Hood River Valley PRD* – namely that the state law "contemplates approval of limited non-forest uses". *Id.* slip op. at 25. Overall, LUBA held, and the Court of Appeals affirmed, that "[t]he county properly limited its forest impacts analysis to those forested areas outside of the transmission line right of way." *Id.* slip op at. page 24.

*Tilla-Bay Farms* points to the similar case of *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015), which further supports this analysis. In *Oregon Pipeline Company*, "the 50-foot permanent easement [and] the 50-foot temporary construction easement" would require removal of trees in that area for 1.59 miles, but LUBA held the County was wrong to conclude there was any significant change

---

<sup>75</sup> Note that this is why it is also not legally relevant that Surface used to lease part of the filtration facility site and travel over roads on that property. See Exhibit J.46 ('Laners), page 3 (making this argument); Exhibit J.44 (video making same argument). The Water Bureau is under no obligation to lease its land to anyone. Requiring that analysis would be contrary to *Hood River Valley PRD* and the plain language of the statute. It is not a change or increase cost in accepted farm practices to lose a lease of a property, nor is it the surrounding lands.

<sup>76</sup> The test in *Tilla-Bay Farms, Inc.* is that the project "will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands." *Id.* slip op. at 20.

to forest practices because there was no evidence that the 50-foot permanent easement or the 50-foot temporary construction easement were “excessive [or] could be reduced in size.” *Id.* at slip op at page 17; Exhibit H.3, Attachment 6 (Globalwise Pre-Hearing Response) (“The pipeline construction design team has also held the permanent and temporary easement areas to the minimum area necessary for construction activity.”).

Therefore, the Farm Impact Analysis is properly limited to impacts on “surrounding lands” – meaning those lands devoted to farm use outside of the subject properties: the filtration facility site and the easement areas.<sup>77</sup>

*b. Despite Not Being Part of the Surrounding Lands, the Water Bureau has Reduced Any Impacts Below the Level of Significance*

Regardless of the fact that impacts inside of the easement areas are not “on surrounding lands” for purposes of the Farm Impacts Test, the Water Bureau has gone to extraordinary lengths to minimize impacts to farmland below the level of significance even where it is inside of easement areas. As summarized in Exhibit A.33 (Operations Report), pages 126 and 139, for each farm property that the pipelines will cross:

Nevertheless, the Water Bureau has designed the proposed pipeline system to reduce any impacts to the farm unit composed of property “R1” and “R2” [along the raw water pipelines] below the level of significance by: (1) improving and following the footprint of existing farm roads to the maximum extent possible; (2) keeping the existing farm building and the pond unimpacted within the easement; (3) agreeing to provisions in the easement documents

---

<sup>77</sup> The condemnation proceedings are also somewhat relevant to this point – as any impact on farmers from the condemnation itself is not at issue in this proceeding. The just compensation for the condemnation includes consideration of the impact on the remainder parcel. As explained in Exhibit J.86 (Globalwise 2ndORP Response), pages 4 and 11:

The Water Bureau will fairly compensate Mr. Ekstrom for the loss of trees and loss of land due to the pipeline. If Mr. Ekstrom disputes the compensation offered, the condemnation process in front of a court will provide a venue for a judge to decide what a fair compensation will be. The land in the pipeline area itself is not part of the “Surrounding Lands” for the impact test for land use. Nor is a loss of income an increase in costs for the impact test for land use.

....

These actions are all effects of the condemnation of the easement, which is not at issue in this proceeding because it is the subject property – not the Surrounding Lands. The condemnation is, in effect, as if Surface sold a strip of their land, and adjusted their remaining land accordingly. The only difference is that the sale of the easement is by eminent domain rather than on the open market. The impact on the remainder parcel is taken into consideration in the condemnation proceedings. Stated another way, these impacts are not changes in farm practices or the costs of those practices. After the emergency access road is built, Surface Nursery will continue to farm all remaining land in the fields F6, F8, and F10 as they did before the emergency access road – including use of the emergency access road where on their property – with the same accepted farm practices and no increased cost of those practices.



themselves that will allow continued use of cropland area in the permanent easement area where possible; and (4) engaging a soils expert to prepare a best-practices plan for restoring that continued-use cropland area back to pre-construction productivity, and implementing that plan. The pipelines on properties "R1" and "R2" will be buried to a depth with at least 7 feet of soil cover over the top of the pipelines, which will allow livestock grazing and most other farming over the pipelines.

....

Nevertheless, the Water Bureau has designed the proposed pipeline system to reduce any impacts to the farm unit of property "F11" [the Ekstrom property along the finished water pipeline] (and other parts of the pipeline system) below the level of significance by, among other things: (1) using existing ROW, farm roads, or non-cropland areas wherever possible instead of taking a more direct route through cropland; (2) disrupting as little cropland as possible by reducing the easement areas to the smallest area practical to accommodate the Water Bureau use;<sup>78</sup> (3) agreeing to provisions in the easement documents themselves that will allow continued use of cropland area in the permanent easements where possible, such as along the edge of the pipelines on property "F11;" and (4) engaging a soils expert to prepare a best-practices plan for restoring that continued-use cropland area back to pre-construction productivity, and implementing that plan. The pipelines on property "F11" will be buried to a depth with at least 7 feet of soil cover to the top of the pipelines, which will not restrict accepted farm practices within the cropland area.

Furthermore, as described below, the question is not whether there are impacts to farmland, but rather whether the use will force a significant change in or significantly increase the cost of "accepted farm practices." It is not clear how soil remediation that the Water Bureau contractor will perform relates to accepted farm practices performed by the farmer. Indeed, even where farmers will be allowed to use cropland after construction, the Water Bureau's use "will not restrict accepted farm practices within the cropland area." *Id.*

These accommodations to farmers reduce the potential for impact on farmland to be below the level of significance – and, more importantly, for there to be no forced change in or increased cost of "accepted farm practices." Nevertheless, the applicant proposes a number of conditions of approval to incorporate these accommodations into the land use decision:

---

<sup>78</sup> Based on interviews with Ken Ackerman and Brad Phelps.

Water Bureau Proposed Conditions of Approval:

9. Water Bureau shall implement the "Agricultural Soil Restoration Plan" as described in Exhibit A.35, and further described in Exhibit I.81 and Exhibit J.77.
10. After construction, Water Bureau shall allow continued use of cropland area in the permanent pipeline easements where possible considering necessary protections of the pipelines.
11. Water Bureau shall design and construct the roads in the easement areas with appropriate grades along the road edges in order to allow all farm-related vehicle and pedestrian uses necessary and convenient for accepted farm practices.
12. After construction, Water Bureau shall provide written consent to each Grantee under each pipeline or road easement to utilize the roads in the "easement area" (as defined in the easement) for farm equipment, defined as all farm-related vehicle and pedestrian uses necessary and convenient for accepted farm practices.

For the emergency access road in Clackamas County, subject to any required landowner approval, the written consent shall extend to established crossing areas between the Grantee's property and adjacent fields.

13. Water Bureau shall maintain the roads in the easements, including the repair of road damage caused by accepted farm practices, to the extent determined by the Water Bureau to be needed for access to Water Bureau facilities, except for the emergency access road which shall be maintained to meet emergency access standards.

Again, areas within the easements are not part of the Surrounding Lands for the Farm Impacts Test. Nor are impacts to land the same as impacts to accepted farm practices. Nor are consequences of condemnation relevant here. However, the Water Bureau felt it was important to reduce impacts within the easement areas even if not legally required to do so. With these conditions of approval, there is no need for any farmer to construct a parallel farm road adjacent to the road the Water Bureau will improve as part of the project. Instead, each farmer will benefit from an upgraded gravel road.

The Water Bureau already regularly maintains its gravel roads on other properties in the region where Water Bureau facilities are located. The Water Bureau will additionally maintain the easement roads, including to repair any damage caused by tracked vehicles or other accepted farm practices, to the extent needed to maintain the road to provide access to Water Bureau facilities. This certainly will be an additional cost for the Water Bureau, but one that will prevent farmers from having to take land to build a new farm road or pull out trees for that farm road. Instead, each farmer will have the benefit of both an

upgraded road and Water Bureau maintenance to the extent needed to provide access to Water Bureau facilities. Exhibit J.86 (Globalwise 2ndORP Response), page 10.<sup>79</sup>

An issue specific to Surface Nursery in Clackamas County is crossing the emergency access road to access farm fields to the west of the emergency road. Exhibit J.35 (Richter), page 7. This is addressed by the condition of approval that requires “the written consent shall extend to established crossing areas between the Grantee’s property and adjacent fields.”<sup>80</sup> This is further discussed in Exhibit J.86, page 10.

The above proposed conditions of approval also require the implementation of the Soil Restoration Plan. As explained by Dr. Denny Mengel, Certified Professional Soil Scientist, in Exhibit I.81:

Restoration of soil to a nearly as possible pre-construction condition will be applied to the land area required for temporary easement access and to the land area within the permanent easement that the farmer can use for crop production. The native topsoil will be kept separate from other sub-soil and returned over the pipeline construction zone where nursery plants can again be grown. The Water Bureau will restore agricultural land damaged or disturbed following the best science and soil restoration practices. These best practices are described in the Agricultural Soil Restoration Plan and have been incorporated into the specifications the contractors must follow to restore soil resources.

....

Much of the 100 ft wide construction easement will be used for storage of topsoil and subsoil, materials, and machine access – activities which will not require any digging, removal of topsoil, nor create any risk of soil mixing. These areas of temporary construction impacts will be exposed to compaction and will be ripped and plowed to restore soil tilth and infiltration capacity as part of the site remediation. The pipeline trenching itself will occur predominantly in an area that is currently, and will continue to be, a farm road. This further reduces the potential for significant impacts on yield, as the road area is not farmed.

Monitoring and additional remediation for two years will allow remediating any locations that show significant impact including tillage as agreed by the farmer and addition of fertilizer, mulch, or organic matter if needed. The area of the pipe trench and backfill will have topsoil preserved

---

<sup>79</sup> Note that the prior discussion related specifically to Surface Nursery concerns about having to construct a parallel farm road. The proposed conditions here extend the Water Bureau’s commitment to include the other farm roads at Bissell and Ekstrom where pipelines follow the farm road and the road will be used for future access and maintenance to those pipelines.

<sup>80</sup> Another issue specific to Surface Nursery in Clackamas County is an old easement over a property they lease. Exhibit J.43 (Surface), page 18. Unfortunately, in prior submittals, Mr. Nerison did not give enough specifics about the property he was referencing for it to be property identified (as Surface Nursery farms a very large number of properties in the area). In response in Exhibit J.43, he identifies it as the Hart property. The easement on the Hart property is quite old, signed in 1985, and will not be used for this project. It was contemplated for a project in Clackamas County that did not go forward. See Exhibit I.80 (Globalwise 1stORP Response), pages 50-60.

and replaced and will also have a 2-year period of additional remediation as needed to minimize the impacts of construction.

One of the opponents concerns about this plan is that “[t]he crews who do the removal are careless or worse, and certainly do not use ‘soft hands’ in doing this type of work.” Exhibit J.4 (Hart), page 6. This has been taken into consideration, however. The Soil Restoration Plan requires that there is direct “monitoring and oversight of the construction activities” by “an agricultural specialist and inspectors.” Exhibit A.35, page 1. “Specific Plan elements include ... oversight of construction[.]” *Id.*

**6. The Emergency Access Road is in Clackamas County’s Jurisdiction, and Subject to a Different Legal Standard**

The emergency access road in Clackamas County crosses EFU zoned land following an existing farm road and an existing solar utility road. The farm road relates to Surface Nursery. There is an ongoing land use process in Clackamas County that subjects the emergency access road to the requirements of the EFU zone. The Clackamas County staff’s decision of approval is in the record at Exhibit I.2. As noted above, a different standard applies in the EFU zone because the use is classified as a utility facility necessary for public service. See ORS 215.275 (providing standard for utility facilities in EFU).

A county may not generally exercise authority outside its corporate limits, except where clearly granted that authority by the other jurisdiction. *City of Eugene v. Nalven*, 152 Or App 720, 724, 955 P2d 263, *rev den* 327 Or 431 (1998). This concept applies equally in the area of land use. A local government may not “exercise land use planning authority over property that is outside the [local government’s] jurisdiction[.]” *Hoffman v. City of Seaside*, 24 Or LUBA 183, 186 (1992) (city could not rezone property outside its corporate limits). Applying the Multnomah County approval criteria for MUA-20 land to the emergency access road in EFU in Clackamas County would be nonsensical. Just as the EFU test cannot be applied to the MUA-10 areas (as discussed above in Section I.E) the MUA-20 test cannot be applied to areas in EFU.

Nevertheless, the applicant has provided extensive responses in the record to issues that Surface Nursery claims will arise from the emergency access road (in addition to responses related to the filtration facility itself).

**7. “Accepted Farm Practices” Is Not Broadly Anything Associated with Farming; a Change or Increased Cost of Practices is Not Broadly Any Impact**

The Farm Impacts Test is not a broad test asking whether there are any “significant impacts” on anything related to farming. Instead, the language of the statute and the MCC is narrowly tailored to ask whether the use will “force a significant change in accepted farm ... practices” or “significantly increase the cost of accepted farm ... practices[.]” This is clear from the text of the statute and code.

Why? The legislative history of the statute explains that it was to increase the usability of the test and to focus on farmers’ specific concerns: “Richard Benner, the 1000 Friends of Oregon representative, explained that the interference criteria in the bill focused on what farmers were concerned about: changes in practices and increases in costs. The bill reduced the factors to only those two, he explained,

to simplify and to increase the usability of the test.” *Stop the Dump Coal. v. Yamhill Cty.*, 364 Or 432, 452, 435 P3d 698 (2019).

For this reason, LUBA has reversed decisions where a county improperly converted an analogue to the Farm Impacts Test “into a simpler and broader ‘significant impacts’ standard that appears to be divorced from ‘costs’ or ‘changes in’” accepted practices, making it more broad than the text, context, and legislative history allow. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246, slip op at 16 (2015).

First, “accepted farm practices” does not mean all things involved in “farm use.”

[T]he separate definitions in ORS 215.203(2) describe **“farm use” and “accepted farming practice” as substantively distinct**, albeit related, concepts. In particular, an “accepted farming practice” is a “mode of operation” that, inter alia, is “customarily utilized in conjunction with farm use.” ....

[“Accepted farm practice” means] **“a mode of operation** that is common to farms of a similar nature, necessary for the operation of such farms to obtain a profit in money, and customarily utilized in conjunction with farm use.”

*Eugene Sand & Gravel v. Lane County*, 189 Or App 21, 33-34, 74 P3d 1085 (2003) (emphasis added).

Second, it is not just any “impact” that counts, it must be a “change in” or “increase [in] the cost of” accepted farm practices. This means that, for example, arguments regarding loss of profits from crops in a condemned area (which are already irrelevant because they are not part of the Surrounding Lands and are compensated in the condemnation process) are not considered under the Farm Impacts Test, because “revenue loss ... is not the proper factor because cost is the element for consideration for the impact test.” Exhibit I.80 (Globalwise 1stORP Response), Page 41. Loss of revenue is forgone gross income and an increase of cost is an increase in the costs of production. Ms. Richter, for example, argues that “profits will no longer be able to invest back into the business, having the effect of increasing the cost of farming.” Exhibit J.35, page 6. That argument ignores the actual words the legislature used. “Cost” is relevantly defined as “an item of outlay incurred in the operation of a business enterprise (as for the purchase of raw materials, labor, services, supplies)[.]” “Cost.” Merriam-Webster's Unabridged Dictionary, Merriam-Webster, <https://unabridged.merriam-webster.com/unabridged/cost>. Accessed 24 Sep. 2023. A decrease in profit does not increase the outlay, even if it decreases gross revenue.

Overall, in reviewing the analysis of particular asserted “impacts” below, it is important to keep in mind this fundamental understanding that the legislature very intentionally “reduced the factors to only those two... to simplify and to increase the usability of the test.” *Stop the Dump*, 364 Or at 452. The scope of the Farm Impacts Test only covers forced changes in the practices (modes of operation) of farms or increases in the costs of those practices.

**8. There is Extensive Analysis of Farm Impacts In the Record, Including Cumulative Impacts**

We will not attempt to summarize here the farm by farm, farm practice by farm practice analysis performed by Mr. Bruce Prenguber at Globalwise. Reference is made to the extensive analysis provided in the following documents in the record, and the documents from other experts that they reference:

- Exhibit A.33 (Operations Report)
- Exhibit J.84 (resubmission of Exhibit H.3, Attachment 5) (Farm Traffic Report)
- Exhibit H.3, Attachment 6 (Pre-Hearing Response to Comments)
- Exhibit I.80 (Globalwise 1stORP Response)
- Exhibit J.86 (Globalwise 2ndORP Response)
- Exhibit J.88 (Cumulative Impacts Analysis)

A good amount of the caselaw interpreting the Farm Impacts Test under state law remands a decision because they simply did not do the work to try to fully identify and analyze the potential impacts on accepted farm practices in the surrounding lands. *See, e.g., DLCD v. Klamath County*, 25 Or LUBA 355, 366 (1993) (only description of forest practices of “logging” and “salvage logging” not adequate); *Hearne v. Baker County*, 34 Or LUBA 176, 180 (1998) (findings failed to identify which properties were devoted to each farm use and what practices were involved in that farm use). In contrast to that minimalist approach, the Water Bureau chose to hire a farm expert early in their planning process in order to inform the design of the project and the manner of construction in order to minimize any impacts on accepted farm practices below the level of significance. The Globalwise reports listed above and the analysis of potential farm impacts therein are based on over two years of reviewing farm conditions in the Surrounding Lands, 17 trips to the Surrounding Lands for interviews with more than 60 farmers in the area, and interviews and discussions with private businesses serving farms, government officials, and farm-industry organizations both in Multnomah and Clackamas counties as well as state-level organizations. Exhibit I.84 (Farm Traffic Report), page 3; Exhibit A.33 (Operations Report), pages 17-18. Together they provide nearly 400 pages of analysis.

Accepted farm practices in the Surrounding Lands are extensively described in Exhibit A.33 (Operations Report) in Section 10, starting on page 32 and continuing through page 89. The 57 pages of described accepted farm practices in Exhibit A.33 – including 8 pages on nursery practices alone – have not been subject to criticism from opponents. Globalwise’s careful study and detailing of the accepted farm practices in the Surrounding Lands forms the foundation of all of their analysis.

Globalwise took that background information and worked with project designers to make changes to the project to ensure there would be no significant impacts on accepted farm practices. “Knowledge of accepted farm practices learned by Globalwise was shared and evaluated in regular meetings and individual discussions with the filtration facility and pipeline decisionmakers and designers in the Water Bureau and project consulting team members. This knowledge helped shape the project and determine Water Bureau actions and design decisions which eliminate or avoid significant impacts on farmers in the Surrounding Lands.” Exhibit A.33 (Operations Report) page 17.

The following sections provide additional caselaw and analysis related to the major categories of impacts asserted by opponents. Other externalities and sensitivities have been evaluated by Globalwise

is the reports referenced above. There is notably almost no assertion that the ongoing operations of the project will force any change in or increase the cost of accepted farm practices.

*a. Traffic Impacts*

Farmers assert various potential impacts because of the increased traffic that will accompany the temporary construction period (and to a very minor extent, operations). The general background on traffic as an externality of the project is discussed above in Section I.B of this memorandum. Please refer to that section for additional information.

*i. Operations*

The overwhelming majority of opposition testimony focuses on construction traffic. This is understandable, given that there is no credible evidence that traffic from operations will force any change in, or increased cost of, accepted farm practices in the surrounding lands.

As has been explained in Section I.B.1 of this memorandum, the County's Level of Service and related standards are designed to capture driver perception of the quality of flow in the transportation network. Exhibit A.31 (Project TIA), which was validated by the transportation planning experts in County Transportation, concludes that in 2040 (so, including the growth in background traffic in addition to the small amount of project traffic), all of the roads will operate at a level of service "B" or above. County Transportation classifies LOS A and B as "good". Exhibit J.44, page 5. That is, the roads in the project area can accommodate the proposed traffic for the project without dropping "the road user's perception of the quality of the flow" below good levels, even considering background traffic growth between now and 2040. This is true even considering extremely conservative assumptions that all 26 employees would be at the facility at the same time (instead of, in reality, in shifts of a maximum of 10) and that the five trucks a day would enter and exit during peak hours (instead of, in reality, over the course of the day when traffic is lower).

Note that several of the non-farm conditional uses allowed in the EFU zone under ORS 215.283(2) involve large amounts of heavy truck traffic, such as mining and solid waste disposal facilities. *See Davis v. Polk County*, 58 Or LUBA 1, 7 (2008) (county findings denying a CUP for a race track due to a lack of harmony with other uses because the race track would be unable to prevent any dust from leaving the property were inadequate where numerous listed conditional uses would necessarily generate dust). This would apply to construction traffic as well.

In total, "The filtration facility will be staffed by an estimated 26 full-time employees, with a maximum of 10 employees working any individual shift. ... The filtration facility will see a maximum of 16 chemical delivery trucks entering and exiting the site during a 5-day work week and a maximum of 9 solids haul-off trucks entering and exiting the site during a 5-day work week. Combined, this amounts to 25 trips per week" with an average of five trucks per working day. Exhibit A.31 (Project TIA), page 11.

Thus, this utility use will be similar to or smaller than existing businesses in the area, such as the large nurseries. As shown in Table 1, page 10 of Exhibit A.4 (Section 1.A: Filtration Facility – Conditional Use Application Narrative), nurseries in the area had up to 245 employees (J. Frank Schmidt). Surface Nursery has 35 and R&H has 8. Particularly given that there is no night shift for nursery operations, the filtration facility, with 10 on the largest shift, is similar to a mid- or small scale nursery like R&H. Given

that farm uses in the area are accustomed to and already share the public road network with this size of user, there is no credible evidence that traffic from operations will force any change in, or increased cost of, accepted farm practices in the Surrounding Lands.

The employee numbers at the filtration facility are already captured in proposed Condition 12.a (“the water filtration facility shall have a maximum of 26 full-time employees, with a maximum of 10 on the largest shift, and no more than 30 visitors per day”). If the Hearings Officer feels it is needed, a condition for signage similar to that described below could be imposed on the permanent use as well. (See the discussion of *Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291 (2012).)

ii. Construction Generally

Opponents argue that farmers will be impacted by the increase in traffic during the temporary construction period, even though the County’s standards for levels of service will not be exceeded – which means that there will be **only an average of three seconds of delay at area intersections**, with the worst intersection, and only during peak construction, at about 15 and a half seconds of delay. This is discussed in Section I.B.2.a above. Even if a farmer traveled long distances through many intersections, the delay during the temporary construction period will be in the order of less than half a minute.<sup>81</sup>

The analysis must take into consideration that this is fundamentally about the use of a shared resource, public roads, that will continue to operate within the County’s standards for levels of service with the TDM plan in place. “Delay on the roads is also fundamentally part of the use of the public road network, due to various activities such as when farmers move through a school zone around the time of pick-up or drop-off. This is due to the existing land use patterns of farmland interspersed with the semi-urban population in the Surrounding Lands.” Exhibit J.88 (Cumulative Impacts Analysis), page 7.

Note that the applicant does not argue that the fact that all county level of service standards are met, standing alone, is dispositive of a conclusion that the Farm Impacts Test is also met. In addition to meeting the standard, it is the actual *quantity* of seconds of delay and the *quality* of movement on the public roads that the level of service and other county standards reflect. That quantitative and qualitative information is clear, objective evidence that the volume of construction traffic – even taking into consideration road closures – will not materially degrade farmers’ “perception of the quality of flow” or “driver satisfaction.” Multnomah County Design and Construction Manual, Section 1.1.5.

---

<sup>81</sup> Furthermore, there is evidence in the record that farmers do not normally travel through multiple intersections regularly. Exhibit H.26.a (Martin) (“Often, I run into tractors on the road pulling loads of potted plants, but I never worry because I know their trips are short, just from one driveway to another, never holding me up for long.”).



**iii. Caselaw Provides a High Bar for Significance for Use of Shared Public Roads**

Even if the increase in traffic were part of the permanent use rather than temporary, the Water Bureau's proposed extraordinary lengths to accommodate farmers are not required to reduce impact below the level of significance. This is made clear in *Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291 (2012). There, the proposed use was **30 years of gravel mining** on an island that had only "a few public roads that generally circle the island, and ... is connected to the rest of the county by a single bridge." *Id.* at 293. Just as they have about the Water Bureau project, opponents:

... argued that truck traffic generated by the mining operation would significantly increase the cost of agricultural practices due to conflicts between the gravel transport trucks and other traffic using the public road in conjunction with customary agricultural practices, including travel by oversized and/or slow moving farm equipment and passenger and bus traffic visiting farms and farm stands.

*Id.* at 299.

Yet, despite the extremely constrained local road network with a single bridge to the island, and despite the three decades of increased traffic from large gravel transport trucks, LUBA affirmed the County's approval of the project based on two simple conditions – road widening and an onsite sign notifying truck drivers to yield to farm traffic:

Turning to the county's findings under ORS 215.296, the county concluded that ORS 215.296 is met, because **Condition 12 requires that portions of the affected public roads be widened**, and because Condition 14 requires **intervenor to post on-site signs that notify truck drivers that they are required to yield to farm machinery, school buses and pedestrians**. The county concluded that the conditions are sufficient to minimize conflicts with traffic generated by agricultural practices on the island, including traffic from farm equipment and farm stand visitors in buses and passenger vehicles to the point that they **are not "significant" under ORS 215.296**. 2012 Record 114-16. In the reply brief, petitioner argues that Condition 14 is inadequate because it does not directly require intervenor or its truck drivers to yield to farm machinery and other farm traffic, but merely requires intervenor to post a sign notifying its drivers of the requirement. However, we do not see that the requirement to post a sign that notifies truck drivers regarding the operation's rules is significantly different from or has any less of an effect on the behavior of the truck drivers than a direct condition imposed on intervenor. We think that, notwithstanding the findings at 2012 Record 94, when all of the relevant findings are taken into account, the county properly understood its obligation under ORS 215.296 and analyzed the evidence regarding impacts to farm practices, and concluded that the impacts to agricultural traffic will be minimized through Conditions 12 and 14.

*Id.* at 300-301.

The Water Bureau proposes to do much more than road widening and an onsite sign to accommodate farm traffic – as detailed in the following proposed conditions of approval.

Applicant Proposed Conditions of Approval:

[Signage]

- c. Post on-site signs that notify truck drivers and commuters that they are required to yield to farm traffic, horses, school buses, bicyclists, and pedestrians.
- d. Mark primary and detour haul routes with arrow signs for truck drivers for the project to follow.
- e. Water Bureau is required to post speed limits on Carpenter Lane east of Cottrell, along with driver speed feedback signs.
- f. When construction impacts the public right-of-way in front of a business, post "business open" signs typical of roadway construction projects in any area where road construction and/or pipeline installation is occurring and where business would anticipate visitors.

[Driver Education and Visor Cards]

- g. Require all truck drivers to display visor cards mapping the allowed haul routes, indicating that staying on the haul routes is required, and reminding drivers that they are required to yield to farm traffic, horses, school buses, bicyclists, and pedestrians.
- h. Require truck drivers for the project to attend a safe driver training that includes, without limitation: (a) safety related to farm vehicles and slow moving vehicles such as tractors that are on the roads; (b) the requirement to yield to farm traffic, school buses, bicyclists, and pedestrians; (c) the requirement to comply at all time with speed limits; and (d) allowed haul routes. Water Bureau shall require truck drivers to follow this training at all times.

"Allowed haul routes" includes both the concept of which specific routes are allowed and routes that are not allowed, including Carpenter Lane west of Cottrell and routes that are not allowed in order to avoid schools as explained in Applicant's Proposed Condition 1.p.

[Accountability]

- i. Perform random "spot checks" of key intersections in the study area to confirm truck drivers are staying on the designated haul routes, staying off of Carpenter Lane west of Cottrell, and complying with rules regarding avoidance of schools.

- j. Implement an accountability plan to penalize trucks if they are seen off the route or in prohibited areas. This can include being removed from the job for multiple violations.

[Carpenter West of Cottrell]

- k. Provide "local access only" signage restricting access to Carpenter Lane west of Cottrell Road, as well as including the prohibition on use in the safe driver training.

[Vegetation at Intersections]

- l. Remove vegetation in the public right of way in sight distance triangles at study area intersections along primary and detour haul routes.
- m. Remove vegetation in the public right of way obscuring intersection regulatory signage (e.g. stop, yield, do not enter, no right turn, lane use control, etc.) at study area intersections along primary and detour haul routes.

[Communications]

- n. Continue as needed to provide project communications (e-newsletters, webpage updates, etc.), and an onsite Water Bureau liaison during work activities.
- o. Provide road closure updates through ODOT's TripCheck system.

2. The Water Bureau may not include Carpenter Lane west of Cottrell as a detour option in traffic control plans for signage during construction.

County Transportation Conditions of Approval (revised):

- 3. Complete and record right of way (ROW) dedications to meet the share of the 60 feet ROW width standard for Rural Local roads (MCRR 6.100A; MCDCM Table 2.2.5):
  - a. 15 feet on the northern (SE Carpenter Ln) frontage of the subject property for the Filtration site (ref R994220980);
  - b. 15 feet on the southern frontage of 35227 SE Carpenter Ln (R994220850);

- c. The above dedications can be included in any re-plat of the property or by contacting Pat Hinds, County ROW Specialist, Pat Hinds (patrick.j.hinds@multco.us), to complete the ROW dedication process.
4. Pursuant to MCRR 6.100D, Water Bureau is required to comply with, [and submit to County Transportation for review and approval prior to commencing construction](#), a revised Transportation Demand Management (TDM) Plan which, at a minimum, must:
    - o. Address construction truck and commuter traffic management based on access to the filtration facility construction site via SE Carpenter Ln.
    - p. Incorporate the revised peak hour capacity limit for SE Carpenter Ln of 296 vehicles (which maintains LOS 'C'), as detailed in the Water Bureau's One-Access Analysis (Exhibit I.86).
    - q. Water Bureau will use tube trip counters at SE Carpenter Ln and SE Cottrell Rd intersection to take counts of trips to ensure the LOS C threshold (see b above) is met.
      - i. Water Bureau must also collect trip numbers to account for peak hour turning capacity monitoring in addition to total trips in order to allow for LOS monitoring based on real conditions not just the forecasted model (Exhibit I.86)
    - r. Identify TDM strategies and how they can quantifiably reduce trip demand at the Peak Hr(s) at the SE Carpenter Ln/SE Cottrell Rd intersection. TDM Strategies will:
      - i. Specify the priority of strategy implementation, based on the expected management of traffic demand.
      - ii. Specify when and how the strategy can be combined with other strategies to help mitigate traffic demand, as appropriate.
      - iii. In the event of selecting and implementing shuttle buses as a TDM strategy, Applicant must:
        - G. Specify criteria for selection of shuttle bus pickup and drop-off locations.
        - H. Ensure that pickup location(s) are on private property and do not involve parking vehicles on public streets, that the locations have sufficient parking capacity for the number of commuter vehicles that would need to be reduced at peak construction to meet the revised peak hour capacity limit, and that the locations are outside of the project study area set out in Exhibit A.31.
        - I. Demonstrate that all necessary contracts, agreements, permits for commuter vehicle parking can be obtained prior to selection as a TDM strategy.
    - s. Based on long term and one-month forecasting, take a proactive approach to ensure an appropriate TDM strategy is in place and available 2 weeks before they are anticipated to be needed, and implemented in time, to reduce traffic volume to LOS C (see b above).

- t. Water Bureau will provide regular monthly reports to County Transportation demonstrating that Peak Hour trips and Peak Hour turn capacity at the SE Carpenter Ln/SE Cottrell Rd intersection remains within LOS C and the threshold set out in criterion b above.
            - i. Report will show how the TDM strategies implemented have reduced demand from the actual trip counts and forecasted demand.
          - u. Reports will be required for as long as Peak Hr intersection demand remains at levels above LOS C (see b above).
4. Prior to construction in the Right of Way (ROW), obtain Construction permit (MCRR9.200, 18.200) for:
  - a. All frontage/ road improvements of SE Carpenter Ln and SE Cottrell Rd consistent with the preliminary Civil Plan set, Exhibit A.16, A.17 *as updated in Exhibits A.205 thru A.208 and in Exhibit J.89* (MCRR 6.100B;MCRR 8.000)
    - i. Applicant must ensure that all geologic hazard and environmental overlaypermits from County Land Use have also been obtained, if applicable.
  - b. All roads requiring full or partial road work due to pipeline installation:
    - i. SE Dodge Park Blvd from east of SE Cottrell Rd to east of SE Altman Rd.
    - ii. SE Altman Rd from SE Lusted Rd to SE Oxbow Dr.
    - iii. SE Cottrell Rd from SE Dodge Park Blvd to SE Lusted Rd.
    - iv. SE Lusted Rd from the Intertie Site to SE Altman Rd.
    - v. SE Lusted Rd just north of Clackamas County line/adjacent to SE corner and existing driveway of 36910 SE Lusted Rd.
  - c. All roads requiring preliminary or ongoing maintenance due to projected use:
    - i. SE Altman Rd from SE Oxbow Dr to Dodge Park Blvd.
    - ii. SE Cottrell Rd from SE Lusted Rd to SE Dodge Park Blvd.
    - iii. SE Lusted Rd from SE Pleasant Home Rd to SE Cottrell Rd.
    - iv. SE Hosner Rd from SE Lusted Road to SE Oxbow Dr.
5. Pursuant to MCRR 6.100 and MCRR 8.100 road improvements will be required to ensure that the transportation network maintains a condition that is safe, does not create a safety hazard for the traveling public, nor creates an on-going maintenance problem, for the roads listed in Condition 5.c. Accordingly, the applicant is required to enter into aProject Agreement (pursuant to MCRR 9.500), that requires the applicant to perform thefollowing work at the following times:
  - a. For SE Hosner Rd from SE Lusted Rd to SE Oxbow Dr: Full depth reclamation,or other approved pavement replacement methods, prior to use as primary or detour through truck haul route.

- b. For SE Altman Rd from Multnomah County Line to SE Lusted Rd: Full depth reclamation, or other approved pavement replacement methods, prior to use as primary or detour through truck haul route.
- c. For SE Lusted Rd from SE Cottrell Rd to SE Hosner Rd: Full depth reclamation, or other approved pavement replacement methods, prior to use as primary or detour through truck haul route.
- d. For SE Lusted Rd from the Beaver Creek culvert to SE Hosner: Full depth reclamation, or other approved pavement replacement methods, prior to use as primary or detour through truck haul route.
- e. For SE Lusted Rd from SE Altman to the Beaver Creek culvert: At any time when using as a primary or detour through truck haul route, maintain in a serviceable condition. After completion of installation of pipelines in this section of road, replace roadway surface.
- f. For SE Altman from SE Lusted Road to SE Oxbow Drive: At any time when using as a primary or detour through truck haul route, maintain in a serviceable condition. After completion of installation of pipelines in this section of road, replace roadway surface.
- g. For SE Cottrell Rd from SE Lusted Road to SE Dodge Park Blvd: At any time when using as a primary or detour through truck haul route, maintain in a serviceable condition. After completion of installation of pipelines in this section of road, replace roadway surface.
- h. For SE Dodge Park Blvd. from east of SE Cottrell Rd to west of SE Altman Rd (where pipeline work will occur): At any time when using as a primary or detour through truck haul route, maintain in a serviceable condition. After completion of installation of pipelines in this section of road, replace roadway surface.
- i. If not already accomplished through the work described in a. - h. above, for any roads used as a primary or detour through truck haul route, the applicant will: (a) maintain the route in a serviceable condition at any time when being used as a primary or detour through truck haul route; and (b) at the end of applicant's use of the route, return the road used as a primary or detour through truck haul route to as good or better condition (PCI) than it was in on the date of the County's most recent PCI score prior to the applicant's use.

A "**primary or detour through truck haul route**" is one identified in the Construction TIA in Exhibit A.230 as modified by the One-Access Analysis in Exhibit 1.84, and any additional truck route incidentally used by the project, which incidental use must follow county designated freight routes. However, a

"primary or detour through truck haul route" is not one that is being used to directly access a construction site, such as when pipelines are being installed in Lusted and Altman Roads or for improvements to the roadway itself.

"**Serviceable condition**" means the roadway is safely usable for the purpose for which it was constructed (i.e., potholes are repaired timely, striping can be seen, etc.).

6. Temporary road closures, partial or complete, in relation to the construction of the Pipelines and facilities that form this land use application, requires prior review and approval by County Transportation (MCRR 13.000). Applications will need to be submitted to row.permits@multco.us for review and approval by the County Engineer(MCRR 18.250). Application requirements and documents can be found at the following webpage: <https://www.multco.us/roads/road-and-bridge-permit-applications>.
  - a. Traffic Control Plan (TCP) shall be submitted during the Construction Permitting process that shows detours and road closures (MCRR 13.200.A). Any deviation to the approved TCP during construction shall require a resubmittal of the TCP for approval.
  - b. Except for those roads where specific work will be required by the Project Agreement described in Condition 6, rural roads with a Pavement Condition Index (PCI) rating below 50 must not be used as detour routes in the Traffic Control Plan unless the applicant submits construction plans to mitigate impacts and improve the PCI. The Construction Permit process (see condition 5 above) will be used to review TCP and confirm appropriate detour routes.
  
7. Pursuant to MCRR 15.000 and ORS 810.040, the applicant is required to obtain Over-Dimension Permits for all truck movements through Multnomah County which exceed the legal limit and weight specified by Oregon Department of Transportation (ODOT): {h <https://www.oregon.gov/odot/mct/pages/over-dimension.aspx>}.
  - a. Pursuant to MCRR 15.200 and 15.300, the County may restrict truck movements as authorized under State and Federal law on all roads established as arterials and collectors, and also restrict through truck movements on other road classifications, bridges, culverts, overpasses and underpasses, which may not accommodate larger vehicles.
  - b. County restrictions within the project vicinity include, but are not limited to:
    - i. No through trucks on SE Carpenter Ln from SE 327th Ave to the Filtration Plant site.

- ii. No through trucks on SE Miller Rd from SE Bluff Rd to SE 327th Ave.
- iii. No through trucks on SE Homan Rd.
- iv. No through trucks on SE Oxbow Parkway.
- v. No through trucks on SE Stone Rd and SE Short Rd between US26 and SE Dodge Park Blvd.
- vi. S Buxton Rd and S Troutdale Rd are limited to trucks 40ft overall length.

These extensive conditions of approval “are sufficient to minimize conflicts with traffic generated by agricultural practices..., including traffic from farm equipment and farm stand visitors in buses and passenger vehicles to the point that they are not ‘significant’ under ORS 215.296.” *Id.* at 300-301.

Considering the extraordinary lengths the Water Bureau proposed to accommodate farm users of the public road network, which vastly exceed the road widening and signage conditions that were sufficient in *Protect Grand Island Farms*, even if construction traffic is evaluated under the MCC 39.7515(C) standard, the temporary construction traffic will not force a significant change in accepted farm practices, nor significantly increase the cost of those practices. *See also Comden v. Coos County*, 56 Or LUBA 214, 216, 219, 224n5 (2008) (upholding approval of a mining operation directly adjacent to an organic farm that would generate 67,000 truck trips per year for twenty years, despite arguments that the truck traffic on public roads would have impacts on farming uses, including horse breeding).

Again, this is inherently use of a shared public resource, and accommodation of others using that shared public resource is part of the accepted farm practice. An average of three seconds of accommodation during the temporary construction period cannot possibly rise to the level of significance.

**iv. Mr. Kleinman Ignores the Facts of *Van Dyke*, and the Extensive Evidence in This Application**

Mr. Kleinman argues that *Van Dyke v. Yamhill County*, 80 Or LUBA 348, 384-86 (2019) was remanded because of “evidence of likely interference with farm equipment and vehicles on local roads and a state highway resulting from parking of trail users’ vehicles.” Exhibit H.2, page 5. In his oral testimony, he said “LUBA held that that manifestation of interference with farm traffic *was* significant.” Minute 01:22:38. Again, Mr. Kleinman misrepresents the holding in this case.

Instead of LUBA holding that the significance threshold had been exceeded, LUBA faulted the application for having no evidence that there would not be interference. The county refused to do a traffic or parking study, and instead “presumed that most users will not use a vehicle to reach the Trail” based on no evidence whatsoever. *Id.* at 385. Because of their “conclusory” approach, where the record “apparently includes no parking demand information of any kind,” LUBA remanded.



This application is quite distinct. There are extensive evaluations of traffic<sup>82</sup> and parking<sup>83</sup> in the record, rebuttal of those evaluations from opponents' traffic engineer, and -- after review of that criticism -- validation of the applicant's approach from the county's experts in County Transportation. See Section I.B above in this memorandum.

**v. Haul Routes**

Mr. Kleinman provides a transcript of a Neighbor Update meeting, although it is unclear what his argument about farm impacts is. Exhibit H.2, pages 5-7. The concern appears to be that drivers will not use designated haul routes, but he does not point to any reason that, even if they did, that would create impacts on farms.

The transcript itself doesn't indicate that drivers would deviate from haul routes. Indeed, Michelle Cheek says "I am not sure why they would." Regardless, the applicant has proposed a number of conditions of approval that address this concern (even if it is not clear what the concern is). These are feasible, both because of the accountability conditions, as well as because the "Project contractors are experienced with the requirement of only operating on restricted routes and the need for strict adherence." Exhibit J.86 (Globalwise 2ndORP Response), page 38.

Water Bureau Proposed Conditions of Approval:

During construction, the Water Bureau or its representative shall:

[Signage]

- c. Post on-site signs that notify truck drivers and commuters that they are required to yield to farm traffic, horses, school buses, bicyclists, and pedestrians.
- d. Mark primary and detour haul routes with arrow signs for truck drivers for the project to follow.
- e. Water Bureau is required to post speed limits on Carpenter Lane east of Cottrell, along with driver speed feedback signs.

---

<sup>82</sup> See Section I.B of this memorandum above.

<sup>83</sup> The Project TIA includes a parking study. Exhibit A.31 (Project TIA), pages 18-21. During construction, the contractor has confirmed that there will be areas for parking so that eastbound traffic will not queue on Carpenter Lane. Exhibit I.80 (Globalwise 1stORP Response), page 37. Pipelines construction parking will be within the work zone or shuttled from the filtration facility site, and these trips were accounted for in the Construction TIA. Exhibit I.84 (Global Transportation 1stORP Response), page 8.

- f. When construction impacts the public right-of-way in front of a business, post “business open” signs typical of roadway construction projects in any area where road construction and/or pipeline installation is occurring and where business would anticipate visitors.

[Driver Education and Visor Cards]

- g. Require all truck drivers to display visor cards mapping the allowed haul routes, indicating that staying on the haul routes is required, and reminding drivers that they are required to yield to farm traffic, horses, school buses, bicyclists, and pedestrians.
- h. Require truck drivers for the project to attend a safe driver training that includes, without limitation: (a) safety related to farm vehicles and slow moving vehicles such as tractors that are on the roads; (b) the requirement to yield to farm traffic, school buses, bicyclists, and pedestrians; (c) the requirement to comply at all time with speed limits; and (d) allowed haul routes. Water Bureau shall require truck drivers to follow this training at all times.

“Allowed haul routes” includes both the concept of which specific routes are allowed and routes that are not allowed, including Carpenter Lane west of Cottrell and routes that are not allowed in order to avoid schools as explained in Applicant’s Proposed Condition 1.p.

[Accountability]

- i. Perform random “spot checks” of key intersections in the study area to confirm truck drivers are staying on the designated haul routes, staying off of Carpenter Lane west of Cottrell, and complying with rules regarding avoidance of schools.
- j. Implement an accountability plan to penalize trucks if they are seen off the route or in prohibited areas. This can include being removed from the job for multiple violations.

**vi. Road Safety & Sharing the Road**

Farmers are concerned that construction traffic will be dangerous when passing or fail to properly share the road. However, “construction vehicle drivers can be expected to behave similarly to current drivers, including truck drivers, that currently encounter the obstructions in the travel lane: passing if safe and there is room to do so or by waiting until the obstruction in the travel lane clears.” Exhibit J.87 (Global Transportation 2ndORP Response), page 19. If anything construction vehicle drivers can be expected to

perform better than the general public, as “Construction activity will be performed by licensed contractors whose drivers and other workers receive safety training that is updated regularly.” Exhibit J.86 (Globalwise 2ndORP Response), page 18. That safety training specifically includes farm traffic:

It is speculative and unfounded to argue that drivers of vehicles contracted to the Water Bureau would pass farm vehicles unsafely. All construction trucks will be operated by trained, licensed drivers that receive comprehensive safe driver training and are directed to follow this training at all times. This training will include safety related to slow moving vehicles such as tractors that are on the roads. Mr. Nerison also points to nursery shipping truck drivers for their operations who “are not from this area and are not familiar with our community’s network of rural roads.” Page 4 [of Exhibit E.36]. It is disingenuous to be concerned about Water Bureau drivers but not the truck drivers that service his and other nursery operations.

Exhibit I.80 (Globalwise 1stORP Response), page 17.

Although clearly staged, the opposition videos generally show that the roads currently can accommodate truck traffic and farm traffic successfully. For example, take the videos in Exhibit J.54 and Exhibit J.28 -- two clearly staged videos of the exact same sequence being followed by a drone. Opponents claim that this sequence "shows the impact of even one truck on Cottrell Rd." Exhibit J.31 (Waugh), page 2. However, the staging is poor. The tractor driver clearly has room before the mailbox to pull over to the side where there are no barriers, as shown in the clips below. This area continues to be within the right-of-way, as shown by the utility poles. Note that this lack of barriers along the road surface is common in the Surrounding Lands. See Exhibit J.31, page 4 (“CURBS! There are no curbs within *many miles* of this area.” (emphasis in original)); Exhibit J.84 (Farm Traffic Report), page 9 (noting that farmers often “off-road” to access fields as there are not roadside physical impediments to serve as barriers for field entry by tractors); Exhibit J.86 (Globalwise 2ndORP Response) (noting many field edges are not blocked).



Clip of Exhibit J.28 at minute 00:33. This clip shows that the tractor driver and truck driver can see each other in plenty of time to accommodate one another before the mailbox (that the video claims forces the truck to back up). Instead, the tractor is driving in the middle of the road. Realistically, farm traffic and construction traffic can accommodate one another, even with the occasional mailbox. Even for a 16 foot wide tractor, Surface indicates that “local farm traffic will yield as soon as they safely can,” and “slow-moving farm equipment .... [find] a place where the tractor could have safely pulled over and allowed the car to pass.” Exhibit J.43 (Surface), page 16. This accommodation is actually shown in Exhibit J.49, where, amazingly, the same truck and the same tractor find each other on a different road. The tractor uses the graveled shoulder of the right of way to pull slightly to the side, and life goes on.

This is what will happen with construction traffic as well: “Construction trucks (driven by professional licensed drivers) and commuters will stop and travel behind those farm vehicles just as traffic currently does. The same is true for vehicles traveling towards a large farm vehicle, each will adjust to accommodate passing.” Exhibit I.84 (Global Transportation 1stORP Response), pages 18-19 Moreover, as explained below, these interactions with very wide equipment are expected to be infrequent, and certainly nothing in that video shows a hazardous interaction.

Moreover, multiple conditions of approval require construction traffic to yield to farm traffic:

Water Bureau Proposed Conditions of Approval:

1. During construction, the Water Bureau or its representative shall:

[Signage]

- c. Post on-site signs that notify truck drivers and commuters that they are required to **yield to farm traffic**, horses, school buses, bicyclists, and pedestrians.

[Driver Education and Visor Cards]

- g. Require all truck drivers to display visor cards mapping the allowed haul routes, indicating that staying on the haul routes is required, and reminding drivers that they are required to **yield to farm traffic**, horses, school buses, bicyclists, and pedestrians.
- h. Require truck drivers for the project to attend a safe driver training that includes, without limitation: (a) safety related to farm vehicles and slow moving vehicles such as tractors that are on the roads; (b) the requirement to **yield to farm traffic**, school buses, bicyclists, and pedestrians; (c) the requirement to comply at all time with speed limits; and (d) allowed haul routes. Water Bureau shall require truck drivers to follow this training at all times.

“Allowed haul routes” includes both the concept of which specific routes are allowed and routes that are not allowed, including Carpenter Lane west of Cottrell and routes that are not allowed in order to avoid schools as explained in Applicant’s Proposed Condition 1.p.

Moreover, the kind of farm implement in Exhibit J.28 shown above (approximately 16 feet wide) is infrequently used by nurseries, and therefore will not commonly be on public roads and require accommodation. Exhibit J.86 (Globalwise 2ndORP Response), page 46 ("movement of wide farm implements is infrequent"); Exhibit I.31 (Surface) ("The tractors used for regular field work are small compact tractors designed to fit between rows." (Emphasis added.)). The tractors "regular[ly]" used are shown in the adjacent clip from Exhibit J.59. This video shows the small compact tractor with a voiceover calling it "this little guy" and indicating it is the "average size of tractor that does row work". Tractors of this size – smaller than a passenger car – will not have issues being accommodated.



Overall, it is not credible for farmers to claim that their movement of farm equipment will be substantially interfered with by construction traffic.

The videos also show that that area roads will be greatly improved by the applicant's "fix-it-first" approach to conduct extensive repair and replacement of area roads. This will improve road safety and flow for all users. See Exhibit J.28, at minute 00:43 (video noting a large pothole on Cottrell).

Various conditions of approval address this concern:

Water Bureau Proposed Conditions of Approval:

1. During construction, the Water Bureau or its representative shall:

[Signage]

- c. Post on-site signs that notify truck drivers and commuters that they are required to yield to farm traffic, horses, school buses, bicyclists, and pedestrians.
- d. Mark primary and detour haul routes with arrow signs for truck drivers for the project to follow.

- e. Water Bureau is required to post speed limits on Carpenter Lane east of Cottrell, along with driver speed feedback signs.
- f. When construction impacts the public right-of-way in front of a business, post “business open” signs typical of roadway construction projects in any area where road construction and/or pipeline installation is occurring and where business would anticipate visitors.

[Driver Education and Visor Cards]

- g. Require all truck drivers to display visor cards mapping the allowed haul routes, indicating that staying on the haul routes is required, and reminding drivers that they are required to yield to farm traffic, horses, school buses, bicyclists, and pedestrians.
- h. Require truck drivers for the project to attend a safe driver training that includes, without limitation: (a) safety related to farm vehicles and slow moving vehicles such as tractors that are on the roads; (b) the requirement to yield to farm traffic, school buses, bicyclists, and pedestrians; (c) the requirement to comply at all time with speed limits; and (d) allowed haul routes. Water Bureau shall require truck drivers to follow this training at all times.

“Allowed haul routes” includes both the concept of which specific routes are allowed and routes that are not allowed, including Carpenter Lane west of Cottrell and routes that are not allowed in order to avoid schools as explained in Applicant’s Proposed Condition 1.p.

**vii. Access to R&H Nursery Will be Specifically Protected During Construction:**

A more specific concern about the traffic from construction is related to the access to R&H Nursery located on Carpenter Lane between Cottrell and the filtration facility site. This is discussed in detail in Exhibit I.80 (Globalwise 1stORP Response), pages 37-39; and Exhibit J.86 (Globalwise 2ndORP Response), pages 26-31. The key portion of this analysis is found at Exhibit I.80, page 38:

For the driveway at the loading dock, the potential for conflict with traffic from the project on Carpenter Lane would only arise if traffic is queued on the roadway, preventing or delaying access to the loading dock driveway. Other than the potential for queuing, project traffic will move at normal roadway speeds and access will not be significantly delayed. The driveway is located on the south side of Carpenter Lane, which dead ends after the project site to the east. According to Dana Beckwith, Global Transportation Engineering, the transportation engineer for the project, the filtration facility site will have sufficient storage onsite to allow for staging of trucks delivering and hauling materials. For this reason, no eastbound traffic would be queued directly in front of the driveway to impact entering R&H traffic. Mr. Beckwith indicated that

westbound traffic could potentially queue on Carpenter Lane ahead of the intersection with Cottrell Road during peak construction traffic. While queuing on a public road would not prevent access to the loading dock or other driveways, it could make it less convenient or cause some delay for an exiting R&H vehicle. For this reason, the Water Bureau will include in the project's Traffic Control Plan a requirement that accommodation be made to ensure driveway access to R&H's loading dock and nursery plant holding area is not unreasonably delayed. That traffic control accommodation can be in the form of stop control or a flagger or other measures that would create a gap in traffic to allow R&H nursery traffic to exit the site. Mr. Beckwith indicated that these types of traffic control measures can be used for temporary traffic control to facilitate traffic movements and create gaps in traffic at the loading dock access. With extremely low existing traffic volumes, these types of measures are feasibly implemented.

A condition of approval to document this commitment is appropriate:

Proposed addition to County Transportation Condition 7:

7.g. The Water Bureau shall include in the Traffic Control Plan an accommodation to ensure that driveway access to R&H Nursery's loading dock on Carpenter Lane is not unreasonably delayed, in the form of stop control, flagger, or other measures that would create a gap in traffic to allow R&H nursery traffic to exit the site promptly when needed.

*b. Construction in the Public Right of Way (Pipelines and Road Improvements)*

It is notable that, if this facility were in EFU land, rather than MUA-20 for most of the length of the pipelines, the installation of the pipelines and fixing the roads within the public right-of-way would be an outright allowed use.<sup>84</sup> The ORS 215.296(1) state statutory Farm Impacts Test would not apply at all. Interpreting MCC 39.7515(C) to prohibit the installation of utilities in the public right-of-way – one of the primary purposes of a right-of-way – would violate the Multnomah County Comprehensive Plan's direction that in "Multiple Use Agriculture Land" the policies to "minimize conflicts between farm and non-farm uses" are intended to be "**less stringent than policies in Exclusive Farm Use zones.**" Comp. Plan, page 3-11. Ultimately, it cannot be the case that fixing the crumbling roads and installing utilities

---

<sup>84</sup> ORS 215.283(1)(i) provides that "Reconstruction or modification of public roads and highways, including the placement of utility facilities overhead and in the subsurface of public roads and highways along the public right of way" is an outright allowed use in EFU zones. *Save Our Rural Or. v. Energy Facility Siting Council*, 339 Or 353, 383, 121 P3d 1141 (2005) ("In enacting ORS 215.283, the legislature intended that the uses delineated in ORS 215.283(1) be uses 'as of right,' which may not be subjected to additional local criteria") (internal quotation marks omitted).



in the public right of way is prohibited. That simply cannot be what the County intended with pulling the language of this state law test into their code. *Bowerman v. Lane Cty.*, 287 Or App 383, 392, 403 P3d 512 (2017) (“we apply the ordinary principles of statutory construction and determine the county's intent in enacting the pertinent code provisions by examining the text, context and any helpful enactment history”).

Even under the MUA-20 code, transportation facility improvements contemplated by the County's planning are outright allowed uses.<sup>85</sup> Therefore, only the installation of the pipelines should be subject to the County's version of the Farm Impacts Test.

Regardless, Exhibit J.84 (Farm Traffic Report) explains Globalwise's review of the project and accepted farm practices related to use of the shared public right of way in the Surrounding Lands, including “a comprehensive description of the farm travel network for each road segment in the Surrounding Lands. Appendix A contains the detailed assessment of the farm-by-farm traffic analysis.” Exhibit J.84 (Farm Traffic Report), page 5. That report explains the 11 constraints on pipeline construction that the Water Bureau has already self-imposed outside of the land use process in order to ensure that no impact on accepted farm practices – even if from construction and not legally relevant – would rise to the level of significance. Exhibit J.84 (Farm Traffic Report), page 6.

These self-imposed constraints would be appropriate as conditions of approval and are detailed below. Minor edits to better describe -- but not change the substance of -- the constraints are provided in blue. The commitment made in the Farm Traffic Report to provide emergency vehicle access and access for local residents and farmers at all times during construction has been expanded and incorporated into the broader County Transportation Condition 7.d:

Water Bureau's Proposed Additions to County Transportation's Condition 7:

7. ...
- d. The TCP must provide for access through construction zones as follows:
  - i. Where no detour is available, such as to access Lusted Flats via Dodge Park Boulevard or to access the only access to a farm field, the applicant shall (1) ensure that work zones allowing a single lane of traffic to pass are wide enough to accommodate farm traffic up to 16 feet wide; and (2) flag farm traffic, service providers, and local residents (within the closure) through otherwise closed work zones.
  - ii. The Water Bureau shall (1) ensure that work zones allowing a

---

<sup>85</sup> MCC 39.4310(J) (“ALLOWED USES” includes “Transportation facilities and improvements that ... are part of the adopted Multnomah County Functional Classification of Trafficways plan....”).

single lane of traffic to pass are wide enough to accommodate emergency vehicles; and (2) flag emergency vehicles through otherwise closed work zones. Access for emergency vehicles shall be provided at all times.

- iii. The Water Bureau shall require the contractor to take measures to ensure they can accommodate this traffic through a work zone regardless of the stage of construction. For example, if pipeline construction obstructs a road that cannot be detoured around, the contractor will have on-hand the materials needed to plate the excavation or otherwise allow this traffic to proceed through the work zone.

....

e. Applicant shall comply with the following constraints for pipeline construction.

- i. No work shall be performed simultaneously on two County roads at the same time<sup>[86]</sup> with the exception that:
  - A. S.E. Dodge Park Boulevard and Altman Road work is allowed to be performed concurrently; and
  - B. S.E. Lusted Road (between Finished Water Intertie and S.E. Altman Road) and S.E. Cottrell Road work is allowed to be performed concurrently.
- ii. The segment of Dodge Park Blvd east of the intersection of S.E. Cottrell Road and S.E. Dodge Park Boulevard can only be constructed during the time frame of August through October.
- iii. The intersection of S.E. Cottrell Road/S.E. Dodge Park Boulevard can only be closed in the month of October.
- iv. The closing of S.E. Dodge Park Boulevard to cross the road onto the private property at the west end of the Finished Water Pipes can only be closed in the month of October.
- v. S.E. Cottrell Road cannot be closed or limited to traffic while work is being accomplished on S.E. Dodge Park Boulevard limiting traffic.
- vi. Pipeline installation across the private property is recommended to only be conducted during the summertime (non-wet periods).
- vii. A minimum single lane of traffic flow is required at all times along S.E. Dodge Park Boulevard while work is being accomplished, and the traffic limitations shall only be restricted by the rolling lane closure (with the exception of the closures noted in iii. and iv., but only in compliance with those two constraints).

---

<sup>86</sup> "The chosen road segments allow farmers to reach fields using alternative routes and reduce the total construction time needed." Exhibit J.84 (Farm Traffic Report), page 5.

- viii. Closure of S.E. Lusted Road between the Finished Water Intertie to S.E. Altman Road is allowed with the following limitations:
  - ~~A.—Emergency vehicle access and access for local residents and farmers shall be provided at all times during construction.~~
  - [Intentionally Omitted, incorporated into Condition 7.c above.]
  - B. A farm direct and u-pick peach orchard located approximately 900 feet east of S.E. Altman Road shall be provided with unimpeded access for their customers during the month of August.
- ix. The completion of the C4FWP pipeline from the stop sign ~~referenced above on S.E. Altman Road at S.E. Oxbow Drive~~ into S.E. Oxbow Drive for connection to the existing Conduit 4 can only occur during the months of June/July or October/mid-November to not impede farmers' shipping traffic at other periods of the year.
- x. ~~The finished water~~ S.E. Lusted Road closure cannot be done simultaneously with the closure of S.E. Altman Road.
- xi. The C4FWP pipeline ~~in Oxbow Drive~~ and connection in Oxbow Drive cannot be constructed simultaneous with the work on finished water pipes in S.E. Lusted Road.

Please see the full report in Exhibit J.84 (Farm Traffic Report). Note that no opponent has attacked the specifics of these conditions (which have been in the record since the hearing) – the only attack has been on the general concept that conditions could be helpful.

This was not a *post hoc* evaluation – the agricultural expert has been part of this project for years and his close coordination with the contractors and designers has guided the team to ensure that neither construction activities nor ongoing operations of the project will have significant impacts on accepted farm practices. In particular, Exhibit J.84 (Farm Traffic Report) explains:

Consideration of farmer use of the public road system has been a primary element of project planning by the Water Bureau. This focus was reinforced by farmer comments during interviews Globalwise conducted with farm operators over the last two years. ... [M]ajor attention has been devoted to assessing how the Water Bureau project construction activity could potentially impact farmers that use the road system within the Surrounding Lands and ways to minimize any impact. [Page 4]

The Water Bureau's design team considered many factors for final selection of the pipeline alignment. Among them was remaining in the road Right-of-Way and avoiding EFU zoned property. Both criteria support maintaining land in farming. After selection of the pipeline routes, constraints on pipeline construction were made to further reduce temporary impacts for farm use of the road system in the Surrounding Lands. These constraints are [the proposed conditions above.] [Page 5]

The Exhibit J.84 (Farm Traffic Report) was subject to much criticism by farmers, as they fear the road work will prevent their farm operations from continuing. These have been responded to in Exhibit I.80 (Globalwise 1stORP Response) and Exhibit J.867 (Globalwise 2ndORP Response), in addition to the Farm Traffic Report. Some key themes are discussed below.

First, the **Water Bureau has gone to great lengths to accommodate farmers** where work is being performed, as shown by the self-imposed constraints proposed above as conditions of approval. In particular, Exhibit J.84 (Farm Traffic Report) explains the relevance of these conditions:

On Dodge Park Boulevard when one lane is closed, a flagger will allow traffic, including farm traffic, to move through the construction zone if they choose to stay on that road segment. Farmers may also choose to take detour routes. Where no detour is available, farm traffic will be treated similar to emergency vehicles and will be flagged through otherwise closed work zones. Because the active construction work zone is limited and moves approximately 30 to 50 feet per day,<sup>[87]</sup> even roads that are closed to through traffic will still provide access to field entry points that are outside of the work zone. The presence of active construction zones directly adjacent to field access points is a short duration impact that will be mitigated by coordination with farm operators well in advance.

The Water Bureau has carefully determined where pipeline construction can be conducted simultaneously in two road segments to reduce the total time that pipeline construction will take place. This will help remove some minor hindrance to farm travel while construction continues at the filtration facility.

There are additional situations where farmers have unique travel requirements where an alternative route may not be available. In those cases, the Water Bureau intends to provide special accommodations. An example is farm vehicle travel safety on public roads. Some farmers' safety protocol limits their travel to Dodge Park Boulevard east of Cottrell Road to reach their fields in the lower section of Lusted Road. To accommodate this unique travel limitation, construction activity in Dodge Park Boulevard will be restricted to months when farm vehicle traffic is at its lowest and one lane of flagger-controlled traffic through the work zone will be maintained.

Exhibit J.84 (Farm Traffic Report), page 7. Thus, the vast majority of construction will be a rolling single-lane closure for a short stretch of the road. Full road closures are rare, but even where necessary: "full

---

<sup>87</sup> This statement has been criticized in Exhibit J.6 (Rickman), page 1, asserting that it is in conflict with the construction schedule. This is not the case. Construction schedules are not as simple as dividing the pipeline length by the number of feet per day excavated. As per Attachment 4 of Exhibit H.3, the high-level schedule includes intertie connections, commissioning startup, connections to existing pipelines. They also take into account time not worked such as holidays and weekends. Impacts to individual properties are temporary and can be managed. The proposed construction activities and phasing are accurate for the level of detail provided in Attachment 4 of Exhibit H.3. That does not mean that there will be a single lane closure for the entirety of the time that anything relevant to that pipeline segment is ongoing.

road closure does not mean local traffic cannot pass through a construction zone. Where no detour is available, farm traffic will be treated similarly to emergency vehicles and will be flagged through otherwise closed work zones. ... [T]he construction specifications require the contractor to “**maintain 24-hour access to all businesses and residences** adjacent to the areas of work for the project and along haul routes, **do not block driveways** or sidewalks, and maintain safe pedestrian accesses.” Exhibit J.87 (Global Transportation 2ndORP Response), page 11.

Second, **farmers in the Surrounding Lands already have accepted farm practices that allow them to be flexible in responding to conditions on the public roads** that cause them to modify routes.

While farmers prefer to use the shortest or fastest route for road travel, there are circumstances that modify this preference. Conditions that cause farmers to modify their routes include county road and utility work, traffic accidents, school-related traffic congestion, hazardous road conditions related to ice or snow, downed trees on roads, and changes in traffic congestion patterns. [88] Since farmers share the public roads with other road users, they must adapt to changing road conditions and at times use alternative travel routes on public roads to reach their destinations.

The analysis in the appendix shows that farmers often have more than one access point they use to enter and exit their fields. It is therefore an accepted farm practice to evaluate changing road conditions and utilize alternative routes to their fields.

There are additional accepted farm practices that may in some cases be temporary adjustments farmers make to mitigate anticipated changes in road travel and field access. First, interviews with farmers show that equipment is at times left in fields overnight instead of returning daily to headquarters. This temporary response reduces road travel. Second, farmers may temporarily utilize direct “off-road” access where ditches or other roadside physical impediments are not barriers for field entry by tractors, trucks, or other farm equipment. Third, farmers may adjust their field travel route on a given day by changing the order in which they arrive at fields to avoid a construction zone at a particular time of day or at a specific location in a road segment.

Exhibit J.84 (Farm Traffic Report), pages 4, 7.

Farmers also use accepted farm practices to reach fields and improve their mobility. These include: 1) maximizing use of private farm roads 2) tracking road conditions and using alternative routes as indicated, 3) re-positioning farm equipment in fields at the end of the day for the next day's field activity, 4) entering fields at alternative access points or any point with minimal barriers to access such as shallow ditches, 5) using early start times seasonally when

---

<sup>88</sup> Note that Exhibit J.42 (Bruley), page 2, agrees that the “delays that easily come to mind have been weather-related (downed trees & power lines, hazardous road conditions from ice and snow), or traffic related (accidents). These are expected in this area ...”

there is early morning daylight, and 6) adding Saturdays for workdays when seasonal work requires it. Farmers that need to move equipment longer distances often use trucks pulling trailers, pickups, or crew buses to reach their destinations. These vehicles travel at the normal, posted traffic speed.

Exhibit I.84 (Global Transportation 1stORP Response), pages 17-18.

i. Detours

For most farmers, the analysis in the Farm Traffic Report shows that farm trucks and other farm vehicles that can travel at the posted speed limit on roads have an available detour of less than two miles farther in nearly all cases -- a matter of a few additional minutes of travel time. "This is therefore not a disastrous delay as indicated in several comments by farmers. Combined with the temporary nature of construction and the many constraints placed on pipeline construction discussed in the Farm Traffic Report, construction traffic and pipeline construction will not force a significant change in, nor significantly increase the cost of, product shipment accepted farm practices in the Surrounding Lands." Exhibit I.80 (Globalwise 1stORP Response), page 11. The appendix of the Farm Traffic Report in Exhibit J.84 details alternative routes that are available to each farmer.

Farmers argue that there is never any work in the roads, as evidenced by the deteriorated and potholed road surfaces, so, they conclude, they never have to use alternative routes. However, that is contradicted by not only common sense (there is road work on all parts of the transportation network sometimes, including past work performed by the Water Bureau to install its many pipelines that already exist in this area), but also by the opponent's own evidence. Opponent videos show a closed lane and large farm traffic successfully and quickly passing through a single lane closure for construction. Exhibit J.60 (Farm traffic Dodge Park). Hans Nelson & Sons Nursery describes how they use flaggers to cross roads, and how road closures nearby force detours through this area, increasing traffic on detour routes. Exhibit J.13. Amailia Bruley, who works for an unnamed nursery on Lusted Road (likely Surface), notes that, while not expected, she can remember impacts of the availability of roads that were "weather-related (downed trees & power lines, hazardous road conditions from ice and snow), [and] traffic related (accidents)." Exhibit J.42, page 2.

Perhaps most on point, Surface Nursery explains that "it's imperative I have multiple, open route options to ensure the safety of my employees and efficient mobility of my equipment. The attached maps demonstrate the most common routes to our off-site field locations that are part of our normal farming operations, but again, these routes may change as needed due to many factors[.]" Exhibit I.31 (Nerison), page 3. That is, farmers do have "multiple ... route options" they can choose to use "as needed due to many factors" as an accepted farm practice, as much as they did not want to admit it in this proceeding. One of those factors, even if rarely, is road and other utility work. Certainly, during the temporary construction period, farmers will use these accepted farm practices of modifying routes more often than they have in the past. **But the question is whether that temporary increase in the use of an accepted farm practice rises to the level of significance, not annoyance.** We submit that it does not, particularly given the ability to pass through otherwise closed work areas if needed to access a property or a preferred route for safety. Even if it takes an extra 15 minutes to get to a field a few times during

the temporary construction period, the field will still be there, and the accepted farm practices will all continue without any change. A slight delay is not a significant change.<sup>89</sup>

In addition, in order to ensure that farmers know what to anticipate, the Water Bureau has committed to:

communicating early about what to expect, providing timely notice of work activities and traffic considerations, and dedicating the needed resources to respond to questions and resolve concerns quickly.

Current project-specific outreach includes a project email and comment form, regular project e-newsletters, project and construction webpage updates, neighbor information sessions, community group briefings, individual property owner meetings, direct mailings, doorhangers, traffic reader boards, project area signage, and an onsite Water Bureau liaison during work activities. All these outreach methods will be opportunities for farm operators and other interested parties to stay up to date about construction timelines and activities, including lane closures and other traffic considerations. While this outreach is not needed to avoid a significant change in farm practices or to avoid a significant increase in the cost of farm practices on surrounding lands, the Water Bureau is committed to these communication pathways as an accommodation to farms and farmers in the Surrounding Lands.

Exhibit J.84 (Farm Traffic Report), page 8. Additionally:

In considering additional ways to alleviate these concerns, the Water Bureau proposes to supplement the communications strategies in Section 7.0 of the Farm Traffic Report by providing road closure updates through ODOT's TripCheck system. TripCheck is ODOT's one-stop shop for information on traveling near the project and throughout Oregon. People accessing ODOT's TripCheck system can see near real-time traffic congestion information, incidents, continuous winter travel updates, and other valuable tips. The road closure updates will also populate to commonly used commercial mapping and traffic programs and apps, such as Apple, Mapquest, Waze, and TomTom. Checking ODOT TripCheck or other online sources for traffic and road closure information is an accepted farm practice, as farmers share the public roads with other road users and must adapt to changing road conditions and at times use alternative travel routes on public roads to reach their destinations.

---

<sup>89</sup> In Exhibit J.42 (Bruley), a person who works at an unnamed nursery on Lusted Rd (likely Surface) claims that "The industry norm entails paying per mile making detours a costly affair." Even if they pay per mile, the amount per mile must be small because they are shipping incredible distances. Jeff Stone, of the Oregon Association of Nurseries says: "In nearly 75% of the nursery struck grown in our state leaves our borders - over half reaching markets east of the Mississippi River." Exhibit I.13, page 1. Assume shipment of 1,800 miles to a Midwest location, such as Kansas City, Kansas which is west of the Mississippi River. It clearly would be an insignificant increase in total cost per mile that would be added to the transportation cost for an extra 2 miles of driving if a detour was taken a few times during the temporary construction period.

Exhibit I.80 (Globalwise 1stORP Response), page 10. Dispatched truck drivers who haul products to customers can similarly determine the best routes for travel using easily available online information and apps to monitor traffic conditions. Exhibit I.84 (Global Transportation 1stORP Response), pages 17-18. Conditions of approval can be included for these communications strategies:

Water Bureau Proposed Conditions:

1. During construction, the Water bureau shall:

[Communications]

- n. Continue as needed to provide project communications (e-newsletters, webpage updates, etc.), and an onsite Water Bureau liaison during work activities.
- o. Applicant shall provide road closure updates through ODOT's TripCheck system.

Farmers are also concerned that traffic detoured by road closures will overwhelm other, not-closed roads. *See, e.g.*, Exhibit J.43 (Surface), page 7 (“Delays often come in the amount of vehicles being offloaded to other roads because of delays or detours.”); Exhibit J.8 (Park), page 2 (“As the primary routes become blocked by construction, traffic will detour through farmlands on SECONDARY PUBLIC roads[.]”). However, Exhibit A.230 (Construction TIA), page 14 explains that the analysis of road closures accounts for both “construction vehicles and non-local vehicles” -- meaning vehicles that are not for “local residences, local agricultural [or] other businesses, [or] emergency vehicles [which] will still be allowed local access during full closures.” Therefore, the Construction TIA – which shows an average of approximately three seconds of delay at area intersections – takes into consideration the detouring of both construction and non-construction traffic and this concern is not supported by evidence in the record.

ii. Concerns About No Alternate Route & Peak Seasons in Farm Traffic Report

Various farmers misinterpreted statements in Appendix A of Exhibit J.84 (Farm Traffic Report) relating to alternate routes. For example, for Farm Operator F, when traveling from headquarters to Lusted Flats, the report states stating that “**Alternate Farm Traffic Route:** None due to safety issues, the route of travel is only on Dodge Park.” The implication is not, as the opposition took it, that farmers with notes like this will not be able to access their fields during construction of that segment of road. Instead, these notes that detail the travel patterns of farmers were used to inform the development of the 11 self-imposed constraints proposed above as conditions of approval. Exhibit J.84 (Farm Traffic Report), page 9 (“The purpose of this farmer information is...”). For the example of Farm Operator F, various constraints ensure that Dodge Park will be available for use, particularly during the peak season of public road use:



- The segment east of the intersection of S.E. Cottrell Road and S.E. Dodge Park Boulevard can only be constructed during the time frame of August through October.
- The intersection of S.E. Cottrell Road/S.E. Dodge Park Boulevard can only be closed in the month of October.
- A minimum single lane of traffic flow is required at all times along S.E. Dodge Park Boulevard while work is being accomplished, and the traffic limitations shall only be restricted by the rolling lane closure.

These 11 constraints are very specifically designed to accommodate the needs of all of the farmers in the Surrounding Lands. This is why Exhibit J.84 (Farm Traffic Report) contains so much detail about each farmer, their fields, and available routes. For example, Surface Nursery complains that during a dual closure of Cottrell and Lusted roads, “the proposed alternate routes will undoubtedly have substantial repercussions on our farm operations.” Exhibit I.51, page 11. However, as Mr. Prenguber explained:

When Surface Nursery references the closure of Lusted Road simultaneously with Cottrell Road, they omit an important fact: Lusted Road is only closed to the west of Surface Nursery’s headquarters, not in front of their headquarters nor to the east on Lusted Road. Closure of these two roads has the goal of facilitating more rapid completion of pipeline construction, a decision that was made after consulting farmers who agreed that this was preferred over a one-road-at-a-time construction schedule. In recommending the joint closure of these roads, **it was explicitly considered how service providers, employees, and outbound trucks hauling Surface Nursery trees to customers would access their headquarters.** A suitable route to Surface Nursery, from the west or northwest including Gresham, Portland, or Troutdale, is Oxbow Drive, then to Hosner Road, and onto Lusted Road. From Boring or Sandy, that is, from the south or southeast, the route could include Altman Road to intersection with Oxbow Drive and onward. This adds only 1.5 miles or less to their route compared to arriving from Altman Road and going east on Lusted Road. Alternatively, employees or service providers that arrive at Surface Nursery from Sandy can exit Bluff Road at Proctor Road or Hudson Road, and then take Lusted north and west to arrive at Surface Nursery. This added distance is negligible, particularly taking into consideration that it is only during the temporary period where closures impact the preferred route.

None of these temporary alternate travel routes are a significant change that would result in a measurable impact for Surface Nursery. For example, there would not be a loss of services from a vendor that delivers sanitary stations for Surface Nursery workers. It is highly speculative to claim otherwise. This does not rise to the level of a change in accepted farm practices or a significant increase in the cost of accepted farm practices.

Exhibit J.86 (Globalwise 2ndORP Response), page 22 (emphasis added).

Various farmers also attack the identification of the peak and low season of public road use. The peak and low seasons were used as part of this constraints identification process, which was informed by Appendix A of Exhibit J.84 and Exhibit A.33 (Operations Report), pages 32-89. The farmers interpreted the statement about lower seasonal use to mean they were largely or entirely off of the public roads.

That was not what was stated. The tables in Appendix A of Exhibit J.84 identify the “Lowest Use Season” for each road segment, and the “Lowest Traffic Volume Months” for each farmer within that segment. “Lowest” clearly does not mean “none” or even “little.” It is comparative. Indeed, Mr. Kleinman validates that “the prime agricultural season for these crops, prime traffic season is spring through fall” - that is, Mr. Kleinman admits that there is a low season and a prime season for farm use of the roads. Kleinman Oral testimony, minute 01:17:26.

The purpose of identifying lower periods of farm traffic was to utilize times of the year when activity such as pipeline construction in certain road segments would be least disruptive to farmer movement. Mr. Prenguber did a detailed analysis of each farmer in the Surrounding Lands that uses the public roads as part of their accepted farm practices, including when the low and peak seasons of that use occurs. Appendix A of the farm traffic report builds on the dozens of interviews with farmers and analysis of accepted farm practices in Exhibit A.33 (Operations Report). Exhibit A.33 (Operations Report), pages 32-89 detail accepted farm practices for each farm use, with tables explaining the “Typical Time Period” of each practice. Therefore, it is far from true that Mr. Prenguber simply makes an “assumption” about lower volume months. Exhibit J.43 (Surface), page 11. As Surface Nursery explains, in the time period identified by Mr. Prenguber (August through October) “those months can be slower for outbound shipments and they are prior to our busier ‘digging season’[.]” Given that one practice is “slower” and it is “prior” to when another practice is “busier”, it appears Mr. Prenguber was correct in his assessment of when the low volume months occur and he correctly advised the applicant on when road closures should be done in order to have the least disruption for accepted farm practices using public roads.

### iii. Wide Equipment and One-Lane or Flagged Passage Through Construction Zones

Farmers are concerned that road work and pipeline installation will prevent them from accessing fields – either by closing roads that are needed to have a safe route to that field, by having a one-lane of passage work zone that is not wide enough for farm implements, or by blocking the actual driveway to a field. *See, e.g.*, Exhibit J.13 (Nelson) (“A one lane road is not wide enough to move soil preparation equipment needed for fall planting.”); Exhibit I.46 (Ard), pages 5-6 (“Putting 16-foot-wide implements on narrow roads with blind curves is a bad idea. Multiple pieces of farm equipment are 16 feet wide, including the equipment used to work soil. ... Road closures will force farmers to use alternate travel routes to access fields. However, some of the required alternative travel routes are not viable for large-scale equipment travel due to narrow roadway widths, roadside obstacles which further limit the usable roadway width, sharp curves which restrict sight lines and impact safety, and roadway grades on hills.”).

When roads have one-lane closed, farmers will be able to pass through that work zone with other traffic. This includes passage for large equipment, which farmers have indicated can be 16 feet wide. This is most important on Dodge Park Boulevard east of Cottrell Road, as that road provides safe access to the Lusted Flats area and many farmers indicated that other options (Lusted Road, Proctor Road, or possibly Hudson Road) are too unsafe to use for farm equipment traffic. The applicant’s contractors confirmed that “that tractors pulling implements as wide as 16 feet can be transited through the work zone in Dodge Park Boulevard. This movement of wide farm implements is infrequent. However, the Water Bureau will accommodate the wider farm equipment transit through the construction area from the Cottrell Road intersection and east on Dodge Park Boulevard.” Exhibit J.86 (Globalwise 2ndORP Response), page 46. The opponent’s own video shows that this is feasible, as there is a closed lane on

Dodge Park for construction and large farm traffic successfully and quickly passes through the single lane closure. Exhibit J.60 (Farm traffic Dodge Park). This supports the statement of Mr. Prenguber in Exhibit J.86 (Globalwise 2ndORP Response), page 15, that “Proposing flaggers and a lane of passage is suitable mitigation to enhance the movement of farm traffic along with other vehicles on area roadways during the temporary construction period.” It also demonstrates that flagging and one lane passage is considered safe road construction practice for all vehicles including farm vehicles on public roads in Multnomah County. For most farmers, the analysis in the Farm Traffic Report shows that farm trucks and other farm vehicles that can travel at the posted speed limit on roads have an available detour of less than two miles farther in nearly all cases -- a matter of a few additional minutes of travel time. “This is therefore not a disastrous delay as indicated in several comments by farmers.” Exhibit I.80 (Globalwise 1stORP Response), page 11.<sup>90</sup>

As explained above, it is an accepted farm practice to modify routes. The question is not merely whether this accepted farm practice is used more frequently during the temporary construction period, but instead **whether that temporary increase in the use of an accepted farm practice rises to the level of significance, not annoyance.** Even if it takes an extra 15 minutes to get to a field a few times during the temporary construction period, the field will still be there, and the accepted farm practices will all continue without any change.

Furthermore, as noted above, where no detour is available farm equipment will be treated similarly to emergency vehicles and will be flagged through otherwise closed work zones. This has been stated many times. *See, e.g.*, Exhibit J.87 (Global Transportation 2ndORP Response), page 11; Exhibit J.86 (Globalwise 2ndORP Response), page 46 (“For the short period where the actual intersection of Cottrell and Dodge Park is otherwise closed, farm traffic will be flagged through as needed to reach Lusted Flats.”).

This is feasible because it is common practice to allow large emergency vehicles through work zones – extending this to include large farm vehicles will be inconvenient for the Water Bureau, but easily feasible. “By contract, the contractor is required to ... allow emergency responders access through otherwise closed-to-through-traffic work zones. This is common practice on roadway construction projects. The Water Bureau’s contractors are very familiar with these standard requirements and how to apply them. [T]he contractors will take measures to ensure they can accommodate emergency vehicles through a work zone regardless of the stage of construction. For example, if a pipeline obstructs a cross street, the contractor will have on-hand the materials needed to plate the excavation.” Exhibit J.87 (Global Transportation 2ndORP Response), page 8. In addition to these standard practices for accommodating large emergency vehicles, the Water Bureau has planned construction zones to accommodate wide farm implements, as shown by the statements of the contractor to Mr. Prenguber in Exhibit J.86 (Globalwise 2ndORP Response), page 46.

---

<sup>90</sup> Because farm vehicles that appear to be regular traffic, such as pickup trucks or employee vans, can travel at the posted speed limit and on roads that would be unsafe for farm equipment, there will not be an issue for the construction contractor in identifying the farm traffic that needs to be flagged through otherwise closed work zones.

A condition of approval can memorialize this commitment:

Water Bureau's Proposed Additions to County Transportation's Condition 7:

7. ...
  - d. The TCP must provide for access through construction zones as follows:
    - i. Where no detour is available, such as to access Lusted Flats via Dodge Park Boulevard or to access the only access to a farm field, the applicant shall (1) ensure that work zones allowing a single lane of traffic to pass are wide enough to accommodate farm traffic up to 16 feet wide; and (2) flag farm traffic, service providers, and local residents (within the closure) through otherwise closed work zones.
    - ii. The Water Bureau shall (1) ensure that work zones allowing a single lane of traffic to pass are wide enough to accommodate emergency vehicles; and (2) flag emergency vehicles through otherwise closed work zones. Access for emergency vehicles shall be provided at all times.
    - iii. The Water Bureau shall require the contractor to take measures to ensure they can accommodate this traffic through a work zone regardless of the stage of construction. For example, if pipeline construction obstructs a road that cannot be detoured around, the contractor will have on-hand the materials needed to plate the excavation or otherwise allow this traffic to proceed through the work zone.

**iv. Product Shipping**

Farmers are concerned that they will face major disruptions in shipping because the semi-trucks will be disrupted by the amount of pipeline construction in the roads and the large number of construction vehicles that will be added to the local road system in the Surrounding Lands. At an extreme, farmers fear drivers will cancel loads "rather than dealing with lane closures and delays." Exhibit J.22 (Carson), page 1.<sup>91</sup> Mr. Prenguber has responded to this concern in Exhibit I.80 (Globalwise 1stORP Response),

---

<sup>91</sup> Note that Mr. Carson claims in Exhibit J.22 that "my farm was not included" and that "the nursery across the street ... was also not included." This is incorrect, but likely is a misunderstanding because "[f]or business confidentiality, farm information is presented using codes and symbols" in Exhibit J.84 (Farm Traffic Report). Mr. Carson's farm is presented with the code "Farm Operator M" – as shown by his maps in Exhibit J.22 and the Exhibit

pages 10-11. Given that the objective evidence shows that there will not be extreme delays for shipping, impacts to nursery operations -- such as drivers refusing to come to the area -- are speculative. *See Van Dyke*, 80 Or LUBA 348, slip op at 53 (county was correct to not address “speculative” assertions about potential impacts on farm uses); Exhibit J.86 (Globalwise 2ndORP Response), page 47 (“speculative, slippery slope argument that does not logically follow from small delays that do not exceed county level of service standards on the roads.”).

*c. Dust And Particulates*

**i. Operations**

There is no evidence that the operation of the project will produce material amounts of dust, particularly when compared with the farm use of the filtration facility site. *See* Exhibit I.24 (opponent remarking that there is a “tremendous amount of seasonal dust from tractors”).

As explained by Globalwise in Exhibit A.33 (Operations Report), section 12.5:

The filtration facility will have permanent landscaping, buildings, and impervious surfaces that will not generate dust.<sup>92</sup> In general, non-impervious surface areas of the filtration facility will be landscaped with plants that will retain rainfall and help hold dust to a minimum. Because the landscaping of the filtration facility is designed to prevent dust (such as through mulch or plants to avoid exposed dirt areas), the filtration facility will generate less dust than surrounding farm uses, which inherently have exposed soil as part of crop areas and frequently use dirt roads.

In contrast to the lack of dust created at the filtration facility, farm fields do create dust. Consequently, farms are not sensitive to dust from off-site sources at the level a neighboring farm use might produce.

For these reasons, dust from the filtration facility will not force any change in accepted farm practices and there will not be any increase in the cost of accepted farm practices in the Surrounding Lands.

The pipelines “do not have any potential to generate dust” as they are underground or, in the case of the intertie, finished with permanent landscaping, buildings, or impervious surfaces. *Id.* at Section 17.14. The pipelines at the intertie are encased in vault below ground. Because there is no evidence that a material amount of dust will be generated by operations, there is no evidence that such dust would force a change in any accepted dust control or protection practices or the cost of those practices after construction.

---

J.84 appendix maps. Similarly, the farm he references across the street is identified in the Exhibit J.84 appendix as “Farm Operator N.” This is best seen on the map on page 12 of the Farm Traffic Report.

<sup>92</sup> Technical Memorandum, Potential Local Impacts of Facility Operation: Air Quality, Dust, Noise, and Vibration, August 2022, by Stantec. Available as Appendix E.4 of the land use application package. [Staff’s Exhibit A.51]

No opposition comments have disputed the conclusion that the project when operational will not meaningfully generate dust.

ii. Construction

As noted above, accepted farm practices are generally not sensitive to dust because farm use generates so much dust already. See Exhibit I.24 (Bennington) (opponent remarking that there is a “tremendous amount of seasonal dust from tractors”). This is why farmers already have dust control accepted farm practices. “[T]he accepted farm practices are that rain and irrigation sprinklers wash the dust off the plants, which is aided by wind moving the dust off of the plants. Irrigation applies water for plant growth in dry weather, which is also when dust blows.” Exhibit I.80 (Globalwise 1stORP Response), page 7. The question is whether dust from construction will be so extreme that these existing practices would need to be supplemented in some way – and the answer is no.

First, **dust from construction can be effectively controlled**, to the level where it will not be materially disproportionate with the amount of dust produced by farming practices themselves and already managed by these accepted farm practices. As explained by Globalwise in Exhibit I.80, pages 5 – 6:

Dust from the filtration facility site is not even a remote threat to neighboring farms for much of the year because of the high rainfall pattern and surface soil moisture. Dust generation therefore will not occur for about two-thirds of the year.

In those times when dust could be generated, the Water Bureau construction contractors have the needed expertise and measures planned to eliminate or contain dust throughout the filtration facility site. The Applicant's Pre-Hearing Statement (Exhibit H.3), Attachment 8 (the “Dust Control Plans”) explains the dust control plans for operation and construction of the filtration facility. The following dust control measures are planned for mitigation of dust generation and dispersal during the dry season:

- 1) Construction vehicle speeds limited to 10 mph within the filtration facility will reduce dust on temporary paved or gravel road surfaces at the site.
- 2) Water trucks will operate continuously through the dry season wetting all on-site gravel roads.
- 3) Water truck passes will be conducted in a manner that applies enough water to control dust but not to an excess that will cause runoff or erosion.
- 4) Two on-site filling stations will be used for water trucks. Both filling locations will be temporarily paved or stabilized to provide adequate erosion prevention.
- 5) Limited use of water absorbing (hygroscopic) or lignin products per manufacturers recommendation will decrease the frequency of watering trafficked areas.
- 6) Wheel wash facilities will be installed and utilized as necessary to control track-out which could otherwise contribute to dust in the surrounding area.
- 7) Use of cover or other acceptable means (e.g., watering as needed) to retain soils on stockpiles and prevent fugitive dust releases.
- 8) While loading trucks from stockpile or excavation areas, when practical, conduct loading and unloading activities on the downwind side of the pile.
- 9) Addition of moisture as needed during the loading operation to minimize the release of dust during loading and or hauling.

- 10) While loading trucks from stockpile or excavation areas, minimize drop heights and transfer points whenever practical.

Regarding dust generation within pipeline construction zones, the contractors will also follow similar best-practices dust management procedures, which include:

- 1) The contractor will use on-site water trucks to provide dust control. The on-site water trucks will keep the work area wetted down as necessary to prevent dust from leaving the work area.
- 2) Temporary aggregate access roads will be used to reduce operation of equipment on bare ground.
- 3) Paved roads at or near the construction zones will be regularly swept.
- 4) While loading trucks from stockpile areas, where practical, conduct loading and unloading activities on the downwind side.
- 5) While loading trucks from stockpile and excavation areas, minimize drop heights and transfer points.
- 6) Wheel wash facilities will be installed and used as necessary to control track-out on roadways

Compliance with Multnomah County erosion and sediment control permits and compliance with DEQ 1200-CA permit requirements will address the issue some farmers raised of mud, created by dust control practices, leaving the filtration site and pipeline work sites. As part of the 1200-CA permit, for example, DEQ requires that the contractors implement “track-out controls as necessary to ensure that sediment removal occurs prior to vehicle exit (e.g., wheel and tire washing, rumble strips, and rattle plates).” When applying water to reduce dirt generation, the construction contractors will only apply the amount needed for dust mitigation, in order to avoid erosion or mud problems. The proper allocation of water will not create “massive amounts of mud” as alleged in one comment, but there will be sufficient application of water to control dust. The contractors have experience with striking this balance successfully.

The greatly reduced seasonal time periods when dust could be an issue has to be considered for why there is minimal concern for dust generation causing a significant change in accepted farm practices or increased costs of those practices during construction. Farmers have commented that dust is a “serious and significant impact”<sup>93</sup>, and “the massive amount of dirt and topsoil to be excavated and hauled off will generate quantities of dust and diesel particulate in the air that far exceed what is expected in accepted farm practices.”<sup>94</sup> With the above-described dust control best practices in place, even during the limited season when dust can be an issue, dust will be managed and fugitive release of dust to adjoining properties will be held at a minimal level. There is no reason to expect that dust generation from the project will be significant to the point that adjoining farmers would need to implement extraordinary dust control measures or have protective equipment for their employees.

---

<sup>93</sup> Surface Nursery statement in June 29, 2023 email to Multnomah County.

<sup>94</sup> Ibid.

The Dust Control Plans are not just arbitrary plans. They are “industry-standard dust suppression ... because they **have proven effective for dust suppression at construction sites.**” Exhibit J.81 (Dust Management Supplemental Information), page 1.<sup>95</sup> Accordingly, the following condition of approval would be appropriate:

Water Bureau Proposed Condition of Approval:

14. Applicant shall implement Dust Control Plans consistent with the descriptions at Exhibit H3, Attachment 8, and Exhibit I.80, pages 5-6.

Second, **farms are not generally sensitive to dust** because the use already produces so much dust. This is actually baked into Multnomah County Code, at MCC.5415 related to aggregate and mineral mining uses: “farm uses are not dust sensitive uses unless determined through Goal 5 process.” Note that those mining uses are also subject to the Farm Impacts Test as an approval criterion where in EFU or CFU lands. MCC 39.7315(F)-(G).

Farmers in the area produce so much dust that the Multnomah County Farm Bureau actually argued that the Filtration Facility would be sensitive to that dust:<sup>96</sup> “Any farmer can attest of the fact that mowing, tilling, disking, plowing, and the like, all generate dust. Any farmer can also attest to the fact that this dust travels long distances.” Exhibit H.21, page 2; Exhibit I.24 (Bennington) (opponent remarking that there is a “tremendous amount of seasonal dust from tractors”). The incredible generation of dust from just one pickup truck going slowly (10 MPH) on a farm road is illustrated in the video at Exhibit I.82.

As explained by Mr. Prenguber in Exhibit I.80, page 7:

Furthermore, farms themselves can create excessive dust, and for this reason farms are generally not sensitive to dust from off-site sources. Farm vehicles frequently travel and

---

<sup>95</sup> Note that the author of this document qualifies as an expert, as shown by his licensure as a certified erosion and sediment control inspector and 32 years of overseeing building projects, including work on Water Bureau and Oregon Department of Transportation projects with dust control requirements.

<sup>96</sup> Note that the Filtration Facility is not sensitive to dust. As explained in Exhibit A.41 (Pesticides and Finished Water Quality), the only open water areas would be the process basins, which could “theoretically introduce [dust] into the water being treated,” or the overflow basins, but that water is then “pumped back to the head of the Facility” to be treated. Pages 15, 17. Given that the whole point of the filtration facility is to filter out sediment, dust that can travel the 130+ feet to the open water basins will be easily filtered out by the process. Dust from farmers is not a concern because the facility is designed to filter out much greater amounts of suspended sediment, such as from a volcanic event or a landslide: The “filtration treatment process will help address turbidity (suspended sediment in water) and other potential water quality impacts to the Bull Run from a fire, landslide, large storm, volcanic event, or other natural disaster.” Exhibit A.5 (1.B Filtration Facility Design Review Application Narrative), page 17. Moreover, given that there are not buffer requirements for dust generation as there are for use of pesticides, it is not clear how this would impact accepted farm practices.



perform work on dirt roads and through dirt fields. Farms often have dirt roads that run through the middle of fields and are traversed many times per day. Trees and their leaves next to these roads receive large quantities of dust kicked up from these activities. A video provided into the record [at Exhibit I.82] illustrates the quantity of dust from a single truck going slowly (10 MPH) on a farm road. Yet, farmers do not manually wash the leaves next to these roads. Instead, the accepted farm practices are that rain and irrigation sprinklers wash the dust off the plants, which is aided by wind moving the dust off of the plants. Irrigation applies water for plant growth in dry weather, which is also when dust blows. Farms would already supply protective equipment for their employees if it is needed. There is no reason to expect that construction activity operating with the dust control plans will result in the problems described by farmers.

Controlling for dust – both through dust reduction as well as mitigation – is an accepted farm practice. Farmers in the Surrounding Lands control dust in numerous ways. Exposure of bare soil in fields is avoided and this can be accomplished by planting vegetation between rows of trees or other harvested crops, use of minimum tillage practices, and adding mulch to soil surfaces. As mentioned above, sprinkler irrigation has the secondary purpose of removing dust from plants and is used to purposely “irrigate” dirt or gravel roads in the same way the Water Bureau will use water truck passes to control dust on the filtration facility site. Slower vehicle speed in fields, and performing field work at optimum soil moisture levels (not too dry) is another practice, as is spraying for dust mites. Wind may also be monitored to determine if it is providing adequate dust control on plants. The minimal additional dust added by the project will not force farmers to do anything more than they normally would do for dust mitigation.

For the reasons stated above, dust generated by the Water Bureau Project at either filtration facility site or at pipeline construction zones will not force a significant change in accepted farm practices and will not cause a significant increase in the costs of accepted farm practices.

Again, it is important to keep in mind the fundamental understanding that the legislature very intentionally “reduced the factors to only those two... to simplify and to increase the usability of the test.” *Stop the Dump*, 364 Or at 452. The scope of the Farm Impacts Test only covers forced changes in the practices of farms or increases in the costs of those practices. So, the question is not whether construction will produce any dust, but whether dust from construction will be so extreme that the existing dust-related accepted farm practices would need to be supplemented in some way – and the answer is no. “The minimal additional dust added by the project will not force farmers to do anything more than they normally would do for dust mitigation.” *Id.* Creation of large amounts of dust, and methods to mitigate for that dust, are already accepted farm practices that will not change or increase in cost because of the managed level of dust generation from project construction.

Notably, no opponent disputed the actual dust accepted farm practices detailed in Exhibit I.80 by Mr. Prenguber. *See, e.g.,* Exhibit J.43 (Surface), page 4 (responding to detailed farm practices related to dust simply by saying “dust generated by normal farming activities is manageable”).

Opponents also argue that particulates from emissions will impact farm uses in a similar way to their arguments about dust. This has been responded to in Exhibit I.80, page 11. *See also Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291, 301 n.10 (2012) (LUBA upholding finding that “homes and crops exist on roads used by gravel trucks and every manner of vehicle all over the state, without any significant impact to any of them”).

d. Noise

i. Operations

The operation of the project will not produce noise that would impact accepted farm practices. As explained by Mr. Prenguber in Exhibit A.33 (Operations Report), section 12.1:

Farming operations, which themselves can generate substantial noise, typically are not sensitive to noise from off-site sources. Additionally, the design of the filtration facility has various noise-limiting design measures to help reduce off-site sound impacts. A Noise Analysis at the site has determined that operation of the filtration facility will meet the applicable Multnomah County and Clackamas County noise standards.<sup>97</sup> Other Oregon water treatment facilities clearly demonstrate that water processing is quiet.<sup>98</sup> Actions the Water Bureau has taken to accomplish this are: 1) designing pumps, equipment, and filtration facility processes to mitigate potential off-site noise impacts; 2) utilizing landforms and landscaping where possible to block sounds; and 3) designing the filtration facility to meet the code limit of 60 decibels during daytime and 50 decibels at night, as measured by the applicable county standards.

The noise levels generated at the filtration facility are lower than the noise levels generated by farms. During field operations, tractors generate noise in the range of 80 to 100 decibels or more<sup>99</sup> and are operated immediately adjacent to property lines in order to turn farm equipment at the edges of farmed areas, as described above. An irrigation pump generates an estimated 100 decibels of noise. Power tools, chicken coops, and conveyors also generate noise above 60 decibels.<sup>100</sup> These levels are higher than the operating noise level of the proposed filtration facility.

The insignificant amount of sound generated by the filtration facility will remain within county standards and is also below background levels already created by farming operations in the area.

For these reasons, noise generated by the filtration facility will not force any change in accepted farm practices and there will not be any increase in the cost of accepted farm practices in the Surrounding Lands.

The pipelines and intertie area are similarly very quiet and will not impact accepted farm practices. As explained by Globalwise in Exhibit A.33 (Operations Report), section 17.5:

---

<sup>97</sup> Technical Memorandum, Exterior Noise Analysis, August 2022, by Stantec. Available as Appendix E.3 of the land use application package. [Staff's Exhibit A.49]

<sup>98</sup> Oregon's Water Treatment Plant Operations, by Barney & Worth, July 2022. Available as Appendix E.1 of the land use application package. [Staff's Exhibit A.45]

<sup>99</sup> Source: <https://gpcah.public-health.uiowa.edu/fact-sheets/hearing-loss/>.

<sup>100</sup> Source: <https://nwdistrict.ifas.ufl.edu/phag/2018/01/26/farming-is-noisy-business-dont-let-it-steal-your-hearing/>.

The operating, pressurized pipelines are silent. A slight noise could occasionally be heard at air release valves, but this noise is infrequent and either imperceptible or at minimal noise levels.

The Finished Water Intertie will create some noise. However, the valves are underground, encased in a concrete vault and lid with air vents. Periodically a diesel generator will be started for testing. This noise will be equivalent to a diesel tractor. Noise modeling indicates that under normal operations the predicted noise level at the nearest residence will be less than 50 dBA, below the noise code limit for Multnomah County.<sup>101</sup> It is also a factor that farming is not sensitive to noise, since tractors, pumps, and other farm equipment often generate significant noise.

For these reasons, the noise created by pipelines will not force a change in accepted farm practices and there will not be any increase in the cost of accepted farm practices in Surrounding Lands.

Because there is no evidence that a material amount of noise will be generated by operations, there is no evidence that noise would force a change in any accepted dust control or protection practices or the cost of those practices after construction.

**ii. Construction and Workers**

As noted above, accepted farm practices are generally not sensitive to noise because farm use itself is quite noisy.<sup>102</sup> As with dust, this means that farmers already have accepted farm practices relating to protection from noise. As explained on page 6 of Exhibit J.88 (Cumulative Impacts):

**Noise Protection Practices** (from filtration facility construction, pipelines construction, or construction vehicles – no meaningful noise from operations) – While noise from construction may be annoying, farmers will not significantly change any practices or have significantly

---

<sup>101</sup> Technical Memorandum by Mark Bastasch, P.E., Jacobs, August 2022. Available as Appendix F.2 of the land use application package.

<sup>102</sup> Some farmers assert that they have noise sensitive animals. Most notably, Lauren Courter is concerned about her goats. Mr. Prenguber responded to this concern at Exhibit I.80 (Globalwise 1stORP Response), page 46: "goats, as well as other farm animals, acclimate to noise. For this reason, construction noise would not have a significant impact on the goats or other farm animals[.]" Mr. Prenguber also suggests that an appropriate accommodation for this concern could be the placement of hay bales to deaden noise. Contrary to Exhibit J.38 (Courter), page 2, the large, round hay bales would not be needed in a large quantity and would only be needed between the goats and the source of the noise. Placement of hay bales is an effective and accepted farm practice for relief for noise. Exhibit I.80 (Globalwise 1stORP Response), page 46. However, a noise wall on the filtration facility site or along the emergency access road inside the easement is also a possibility. See Exhibit J.82, pages 3-4 (showing that sound walls are highly effective at controlling construction noise). Other farmers are concerned about road noise, as they are more distant from the filtration facility site, but along public roads where construction traffic may travel. "Existing vehicle travel ... ha[s] the same noise type and volume as the trucks which will be hauling construction materials." Because each of these farms is already in the proximity of the road, the "farm animals are accustomed to the existing traffic-generated noise[.]" "Noise from

increased costs because of it. Farmers assert that they will have to buy expensive Bluetooth, noise canceling headsets because of construction noise. This is not credible. Farmers already must provide hearing protection for workers because of the noise generated by farm equipment. This can come in the form of earplugs or earmuffs, for example, that are worn when in proximity to those farm noise sources. It is possible that more of the time workers will need to use earplugs or earmuffs. This would be limited to the time when those workers are in very close proximity to the boundary of an active construction area. However, there is not a significant change in practices to use existing hearing protection slightly more often for the small amount of time when working in fields that are directly adjacent to construction noise during the temporary construction period.

**Farmers themselves admit that they do provide protection from noise** generated by tractors and other farm equipment, although “[n]ot at this magnitude.” Exhibit J.43 (Surface), page 5.<sup>103</sup>

The fact that farmers already provide noise protection, because they are already generating substantial noise, is actually baked into Multnomah County Code, at MCC.5415 related to aggregate and mineral mining uses: “farm uses are not noise sensitive uses unless determined through Goal 5 process.” Note that those mining uses are also subject to the Farm Impacts Test as an approval criterion where in EFU or CFU lands. MCC 39.7315(F)-(G).

The question is whether using existing hearing protection accepted farm practices slightly more often for the small amount of time when working in fields that are directly adjacent to construction noise during the temporary construction period rises to the level of a “significant” change. It cannot be that it does. If it did, nothing subject to the Farm Impacts Test could be constructed.

Additionally, noise from construction will be mitigated in order to not produce a material amount of off-site noise. As explained by Globalwise in Exhibit I.80, pages 7 - 8:

Farming operations, which themselves can generate substantial noise, typically are not sensitive to noise from off-site sources. Additionally, noise will be mitigated by site conditions and noise mitigating measures. First, within the 93-acre site, construction activity is concentrated toward the center and slightly west. From this main construction area, there is significant distance from where the main excavation will occur and the boundaries of the Water Bureau property before noise can reach nearby farm use property. This provides an initial source of noise reduction to the properties. As construction continues, berms at the property edges will provide additional noise attenuation.

Second, the construction of the main water treatment facilities involves excavation that descends into the ground. As excavation progresses, sound will be directed upward, not outward from the area of construction. This will limit the noise from excavation that could

---

<sup>103</sup> Additionally, no opponent has disputed the farm noise levels presented in the application, which show tractors and irrigation pumps produce 100 decibels of noise. Exhibit A.33 (Operations Report), pages 98-99.

potentially reach neighboring sites. As construction continues, berms built up from excavated material will be placed at the property edges and will provide additional noise attenuation.

Third, the contractors have developed and will implement a Noise Pollution Control Plan (NPCP) during construction.<sup>[104]</sup> The contractors will use a sound level meter to check for sound level verification. Among other noise control best practices, that plan requires that: no equipment will be used that has unmuffled exhausts and all equipment will comply with pertinent standards of the U.S. Environmental Protection Agency (EPA); stationary equipment will be located as far from nearby private properties as possible; practices pertaining to dump trucks will limit avoidable practices that generate excess noise such as compression brakes; and the contractor will construct temporary or portable acoustic barriers around stationary construction noise sources if required (for example, such barriers are planned near the raw water tunnel portal in the raw water pipelines easement and could be used around generators or other stationary equipment when located close to the property boundary).

The noise created by tractors and other farm equipment may already require that farmers provide protection for their employees from noise generated in their fields as an accepted farm practice. Because noise will be managed and mitigated at the filtration facility site, farmers will not need to add noise cancelling headsets for their employees working in nearby fields. Farmers will not need to alter any other accepted farm practices as a result of this construction activity.

Regarding noise generated by pipeline construction, in addition to following good construction management practices similar to those described above, this activity moves as the work progresses, so any noise generated is even more temporary than the noise at the filtration facility site.

For the reasons stated above, noise generated by the Project at either filtration facility site or at pipeline construction zones will not force a significant change in farm practices and will not cause a significant increase in the costs of accepted farm practices.

Globalwise's analysis of this issue incorporates the concept that the contractor will minimize the impact of noise using a Noise Pollution Control Plan that includes the use of temporary or portable acoustic barriers around appropriate stationary construction noise sources. The most notable potential stationary noise source are generators needed before permanent power infrastructure is installed. Exhibit J.82 demonstrates that those noise barriers are effective at materially reducing the conveyance of sound. Given the reference to the Noise Pollution Control Plan in Globalwise's analysis, the following condition of approval would be appropriate:

---

<sup>104</sup> Mr. Nerison argues that "[n]one of these things are logical for a project of this magnitude." Exhibit J.43, page 5. However, Mr. Nerison does not indicate he has any experience in construction, let alone in larger-scale construction. Instead, the Noise Pollution Control Plan was developed by the Water Bureau's professional contractors with experience in this area and validated by their engineers. Exhibit J.82.

Water Bureau Proposed Condition of Approval:

15. Applicant shall implement a Noise Pollution Control Plan (NPCP) during construction consistent with the description at Exhibit I.80, page 8. The NPCP shall require use of a sound level meter to check for sound level verification.

Again, it is important to keep in mind the fundamental understanding that the legislature very intentionally “reduced the factors to only those two... to simplify and to increase the usability of the test.” *Stop the Dump*, 364 Or at 452. The scope of the Farm Impacts Test only covers forced changes in the practices of farms or increases in the costs of those practices. So, the question is not whether construction will produce any noise, but whether noise from construction will be so extreme that the small increase in the use of noise protection accepted farm practices when working directly abutting a construction area, during the temporary construction period, rises to the level of significance.

Construction and Animals:

Some farmers assert that they have noise sensitive animals. Most notably, Lauren Courter is concerned about her goats. Mr. Prenguber responded to this concern at Exhibit I.80 (Globalwise 1stORP Response), page 46: “goats, as well as other farm animals, acclimate to noise. For this reason, construction noise would not have a significant impact on the goats or other farm animals[.]” Mr. Prenguber also suggests that an appropriate accommodation for this concern could be the placement of hay bales to deaden noise. Contrary to Exhibit J.38 (Courter), page 2, the large, round hay bales would not be needed in a large quantity and would only be needed between the goats and the source of the noise. Placement of hay bales is an effective and accepted farm practice for relief for noise. Exhibit I.80 (Globalwise 1stORP Response), page 46. However, a noise wall on the filtration facility site or along the emergency access road inside the easement is also a possibility. See Exhibit J.82, pages 3-4 (showing that sound walls are highly effective at controlling construction noise).

Other farmers are concerned about road noise, as they are more distant from the filtration facility site, but along public roads where construction traffic may travel. As explained in Exhibit I.80 (Globalwise 1stORP Response), page 55: “Existing vehicle travel [has] the same noise type and volume as the trucks which will be hauling construction materials.” Because each of these farms is already in the proximity of the road, the “farm animals are accustomed to the existing traffic-generated noise[.]” “Noise from the construction activity will be more frequent for the temporary construction period, but not louder than existing truck traffic. ... farm animals adapt to general traffic noise of the type which the construction vehicles produce, which the ... animals [living close to roads] are already accustomed to hearing.”

*e. Use of Farm Chemicals and Spraying Practices*

Opponents are concerned that the use of farm chemicals will be curtailed by the project. However, the project was designed with appropriate setbacks on the subject property itself in order to ensure it would not force any change in nor increase the cost of farmers’ accepted farm practices related to chemical use in the Surrounding Lands. That is, the required buffers or setbacks for chemical uses already are

designed into the filtration facility, and adjoining farmers will not need to add additional buffers or setbacks on their properties.

Note that "... applying pesticides in a manner that causes **overspray or drift** onto adjoining properties is **not an accepted farming practice**, for purposes of ORS 215.296(1)." *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019) (slip op at 26); Exhibit A.33 (Operations Report) ("For all these reasons, overspray and drift of pesticides and other agricultural chemicals are not accepted farm practices."). Similarly, in *Taber v. Multnomah County*, 11 Or LUBA 127, 132 (1984), LUBA analyzed arguments against a conditional use permit for a golf course, a community service use, on Sauvie Island. A neighboring farmer, Mr. Getz, testified that he was worried that if he sprayed a field with pesticides, that would result in lawsuits if the chemicals "trespass" onto adjacent non-farm properties. *Id.* at 131. LUBA rejected a substantial evidence challenge to the county decision issuing the conditional use permit, noting that:

"We also believe it important to note that Mr. Getz appears to be speaking of potential lawsuits from the improper use of farm chemicals. That is, there is **no assertion that legitimate farming practices result in drifting sprays** or other events which might cause annoyance or damage to the farmers' neighbors. We do not believe that Oregon's land use laws furnish a shield against suits or legal action for wrongful or tortious farming practices. Oregon has a "right to farm" law which provides a shield to protect farmers from suits based on a nuisance theory. ORS 30.930. However, the law does not protect the farmer from claims based on other theories of wrongful conduct such as negligence or trespass. ORS 30.935(3)(a). We decline to adopt a view holding that "conflict" within the meaning of MCC 11.15.7015(C) exists between a golf course and wrongful operation of a farm."

*Van Dyke* goes on to explain that "the labels for some pesticides and herbicides ... effectively require a setback of an undefined width from certain sensitive uses .... Regardless of whether drift occurs or not. ... [S]ome pesticides ... specify a minimum setback of up to 100 feet from sensitive uses such as residential and recreational areas." 80 Or LUBA at slip op at 26. In *Van Dyke*, the proposed recreational trail did not include a buffer within the right of way and farmers argued they would "have to supply the appropriate setback on their own lands" although it was not clear exactly what that buffer or setback should be. *Id.* at slip op page 27-32. LUBA remanded to the county to "to make **specific factual findings about specific setbacks required by particular chemicals** on particular farming operations on surrounding farmlands, and whether operation of each setback would force a significant change in farm practices." *Id.* at slip op page 32.

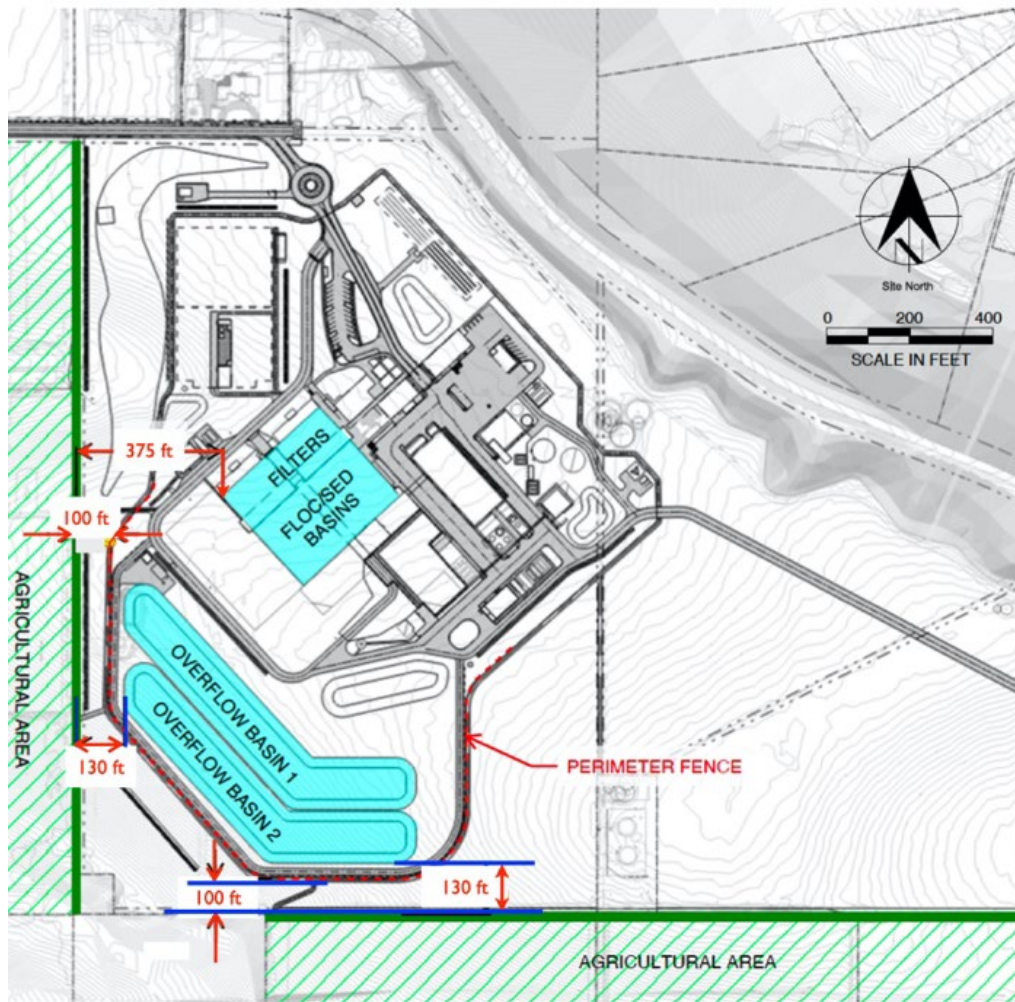
Consistent with *Van Dyke*, Mr. Jim Johnson for the Department of Agriculture stated that: "[p]esticide regulation is best described as the requirements that are found on the label of each subject pesticide. For example, some pesticide labels require buffers or setbacks. ... The requirements on the label must be complied with by the applicator regardless." Exhibit J.1 (Johnson) (emphasis added). Mr. Johnson points to *Van Dyke* ("a recent land use case in Yamhill County where a trail was proposed") and the determination that "this new land use would require, pursuant to the pesticide label requirements, that a setback distance be maintained[.]" Dr. Felsot agrees that pesticide<sup>105</sup> labels are the key to this analysis:

---

<sup>105</sup> Note that Dr. Felsot uses "pesticide" as a defined term to broadly refer to all farm chemicals, including insecticides, herbicides, and fungicides. Exhibit A.39 (Pesticides Report), page 2, 6.

“Pesticide product formulation labels have the force of federal law and define the legally permitted uses, restrictions, and accepted practices. Therefore, pesticide product labels were reviewed for accepted farm and forest practices.” Exhibit A.39 (Pesticides Report), page 2.

Mr. Johnson, however, does not explain how this project (rather than the Yamhill County trail case) will interfere with the use of chemicals by farmers in the Surrounding Lands. As explained above, based on Dr. Felsot’s study of label restrictions, the design of the filtration facility intentionally pulled back the perimeter fence and open water basins (the overflow basins) to be at least 100 feet away from the property line where chemical-use accepted farm practices could occur. “The 100-ft distance is approximately the minimum distance between an adjacent property line and the perimeter fence of the Filtration Facility. To ensure a conservative analysis, the 100-ft distance is well below the mapped 130 ft distance from the adjacent property line to the nearest open basins at the Filtration Facility (Figure 1).” Exhibit A.39 (Pesticides Report), page 32.



“Figure 1. Map of Filtration Facility in relationship to the closest farm or forest land identified by land use.” [Close up of figure from Exhibit A.39 (Pesticides Report), page 14]



Given that built-in buffer at the filtration facility site, and based on a review of the labels for chemicals used in the Surrounding Lands, Dr. Felsot concludes that farmers using accepted farm chemical practices in the Surrounding Lands will not have to change those practices. "Scrutiny of the product label mandated [spray buffers] was necessary to ensure that pesticide users would not have to change their practices to accommodate the Filtration Facility. The size of the [spray buffers] applicable to the accepted pest management practices on the surrounding lands ranged from 10 ft (e.g., permethrin) to 75 ft (e.g., fludioxonil). Any product label with a [spray buffer] less than 100 feet will not force a change in accepted pest management practices because at least 100 feet will exist between a spraying operation and the open water basins. ... Thus, in consideration of the distance from a pesticide spraying operation and the water basins, as well as the type of application equipment used, this analysis concludes that the AEZ mandates will not force a significant change in or significantly increase the cost of accepted farm and forest practices in the surrounding lands of the Filtration Facility." Exhibit A.39 (Pesticides Report), page 36. The portions of the project not on the filtration facility site also "will not force a change in, nor increase the cost of, accepted farm or forest practices related to chemical use because buffer zone requirements (also referred to in opponent comments as "spray buffer" or "no-spray zone" requirements) do not require that the use of pesticides or other agricultural chemicals be set back from these proposed types of development (such as roads, pipelines and associated appurtenances, or intertie facilities). As explained in [Exhibit A.39 (Pesticides Report)], product labels for all of the identified active ingredients for pesticides used in the surrounding lands were reviewed for mandates creating buffer zone prohibitions on applying pesticides within a certain area of a sensitive site. See [Exhibit A.39 (Pesticides Report)], Appendix A4, Tables A4-3 through A4-3 ... Thus, no-spray zones are mandated specifically on product labels and do not apply to roads, pipelines, appurtenances, or facilities like the intertie. This is logical: If buffer zone requirements or practices did require setbacks from these types of development, huge areas of farmland across the country would be unusable, because roads (public and private), pipelines, appurtenances, and other utility infrastructure are common in farmland." Exhibit I.83 (Felsot 1stORP Response), pages 1-2.

Dr. Felsot's work also shows that the project is not sensitive to pesticides used in the Surrounding Lands. "Potential for drifting pesticide residues to reach open water basins was analyzed using the most conservative assumptions as possible for the analysis to ensure that neither Safe Drinking Water [Act] enforceable standards nor unenforceable guidelines would be violated. ... Without considering that any drifting pesticide residue that landed on the surface of the water basins would be diluted by the volume and inflow and outflow of water, none of the pesticides exceeded any drinking water quality standards or guidelines within 100 feet of a spraying operation (discussed in [Exhibit A.41 (Pesticides and Finished Water Quality)]). Therefore, from the perspective of protecting drinking water quality, the Filtration Facility would not affect pest management practices in the surrounding lands." Exhibit A.39 (Pesticides Report), page 44; Exhibit A.41 (Pesticides and Finished Water Quality) ("Because the scenarios evaluated used conservative assumptions to represent the highest-risk scenarios, this evaluation concludes that pesticide application in the surrounding lands of the Facility does not pose a human health risk or risk of violating drinking water regulations or exceeding advisory levels or benchmarks.")

Opposition comments in the record related to pesticides use have been addressed by Dr. Felsot in Exhibit I.83 (Felsot 1stORP Response) and Exhibit J.78 (Felsot 2ndORP Response). See also Exhibit I.80 (Globalwise 1stORP Response), page 74 (Mr. Johnson's prior testimony quoted in Exhibit J.1). The only

comments in the Second Open Record Period (Exhibit J) related to chemical use accepted farm practices were Mr. Johnson's testimony, discussed above,<sup>106</sup> and Exhibit J.40 (Ekstrom), page 1.

The Ekstrom testimony agrees that "a buffer zone is not required" but asserts that there are a number of other issues. Exhibit J.40, page 1. First, the Ekstroms say that spraying near the Intertie will require them to "coordinate with PWB on application days and re-entry times when chemicals are applied" with "added time and planning and will add cost to our operation." The "re-entry times" reference appears to refer to the same "no entry" period discussed by Dr. Felsot in Exhibit J.78 (Felsot 2ndORP Response), pages 1-2. Additionally, Dr. Felsot explains that "[a]pplication of chemicals without regard to weather conditions or the expected degree of drift onto adjacent properties is not an accepted farm practice. When off-site spray drift is anticipated, it is an accepted farm practice to call or otherwise inform neighboring uses to advise them of the spraying activity. Therefore, informing the neighboring Water Bureau [workers] of a situation when off-site spray drift is anticipated would not force a significant change in the accepted farm practices of preventing spray drift in the first place and, second, of informing a neighbor when drift conditions exist." Exhibit J.78 (Felsot 2ndORP Response), page 2. Second, the Ekstroms assert that the Intertie location "causes added stress and anxiety to pesticide applicators." This is not credible. Water Bureau pipelines and appurtenances, as well as other utilities, already have similar facilities in the Surrounding Lands. Indeed, opponents point to the "several fields in the area" where there are "pipes through fields". Exhibit E.1 (Hart), page 2. Given that existing water infrastructure similar to the proposed pipelines and intertie are common in the area,<sup>107</sup> it is not credible that workers would have anxiety working near it. Additionally, it is not clear what accepted farm practice would be changed or increased in cost by any anxiety. Third and finally, the Ekstroms assert that an "issue that has not been addressed is the Nursery's need for fumigation. Every year our practice is to fumigate ground for disease control in areas we plant and grow Japanese Maple grafts. When fumigation is done it requires a buffer zone. This will limit what we can do with our farmland and what we can grow on it." Although a bit buried in Dr. Felsot's report, fumigation was addressed. Exhibit A.39 (Pesticides Report), pages 14-15 provides: "Fumigants are applied directly to soil by deep incorporation below the soil surface and often immediately covered with a tarp to prevent gaseous emissions beyond the area of application. When tarps are not used the soil must be immediately sealed and accepted practices generally include the use of a combination applicator and sealer implement. Thus, fumigant pesticides are not of concern for drift owing to the types of application equipment used for soil incorporation and sealing the soil."

---

<sup>106</sup> Mr. Johnson additionally continues to be concerned that the Water Bureau is relying on "Right to Farm" (RTF) laws in this analysis. As explained at Exhibit I.80 (Globalwise 1stORP Response), page 74, this is not the case. The specific interpretation of the RTF laws is irrelevant because Dr. Felsot's work relied exclusively on the requirements of pesticide product labels to guide his analysis. RTF laws, and the recorded covenants in the deed records, were only referenced as additional, if unneeded, protections.

<sup>107</sup> "The pipelines and intertie are similar in design and function to the existing water utility facilities in the area. Water Bureau pipelines and appurtenances have existed in road ROW and public utility easements across private property in the study area for over 100 years. ... There are over 10 miles of existing Water Bureau pipelines in the study area. There are also 176 existing Water Bureau pipeline appurtenances in the study area[.]" Exhibit A.8 (2.A Pipelines Conditional Use Application Narrative), page 5.

f. *Wells*

Opponents argue that there will be impacts to farmers' wells in the area from construction (there is no assertion that there will be vibrations that move beyond the site during operations). These concerns are addressed in Exhibit I.80 (Globalwise 1stORP Response) at pages 23-25. In particular, Globalwise notes that "wells in the area are already drilled into deeper aquifers and the Water Bureau's engineers have determined that there is no meaningful risk of damage to area wells from construction-related vibration or from the project generally. This is further explained in the geotechnical memoranda submitted into the land use record concurrently with this document." The geotechnical memoranda referenced are Exhibit I.63 (which relates to the filtration facility site); Exhibit I.64 (which relates to the raw water pipelines); and Exhibit I.65 (which relates to the finished water pipelines).

g. *Loss of Customers / Reputational Harm*

i. Operations

There is no evidence or reason to believe that the operation of the project will cause a loss of customers or reputational harm.

ii. Construction

Farmers in the area claim that a series of events related to project construction traffic will occur, leading to reputational harm and loss of customers, up to and including the closing of a business. *See, e.g.*, Exhibit I.34 (Parker) ("the enormous increase in traffic on the surrounding road system will impede my clients' access to my farm, delaying travel and encouraging them to move their horses elsewhere ... eliminating much of the farm income on which I depend or possibly forcing me to close my business").

As explained above, the gridlock feared by farmers is not supported by the Construction TIA – which includes a consideration of the impacts of road closures – nor by County Transportation's review and approval of the Construction TIA. Instead, this is a speculative assertion that is not supported by evidence in the record. In *Van Dyke*, LUBA upheld the county's decision to not address "speculative" assertions about potential impacts on farm uses. *Van Dyke*, \_\_\_ Or LUBA at \_\_\_ (slip op at 53). Neighboring farmers argued that the trail would increase complaints to the Oregon Department of Agriculture, which results in an onerous complaint investigation process. LUBA upheld the county's decision because "it is possible that the Trail *might* lead to more complaints to the ODA, but it might not. It is possible that some unidentified farmers *might* respond to an increased number of complaints that *might* occur by changing unidentified farm practices, but they might not. Petitioners' arguments and evidence on this point are too unfocused and speculative for the county to meaningfully address in findings." *Id.* at 54 (italics in original).<sup>108</sup>

---

<sup>108</sup> Similarly, in *Taber v. Multnomah County*, 11 Or LUBA 127, 132 (1984), a neighboring farmer, Mr. Getz, testified that he was worried that if he sprayed a field with pesticides, that would result in lawsuits if the chemicals "trespass" onto adjacent non-farm properties. *Id.* at 131. LUBA rejected the argument, noting that: "Mr. Getz's testimony expresses only a fear of litigation based on a hypothetical set of facts. There

The chains of logic that lead to reputational harm or lost customers in the Surrounding Lands are similarly based on a long series of “*might*” happens – generally starting from the incorrect factual basis that construction traffic will cause gridlock. Instead, the Construction TIA – which was reviewed and accepted by the county’s transportation experts – shows that the road network has a high level of available capacity and can accommodate construction with minimal delays. Other premises that form the starting points for a series of “*might*” happens are similarly unfounded. Exhibit J.86 (Globalwise 2ndORP Response), pages 37-38 (Hawk Haven).

Again, it is important to keep in mind the fundamental understanding that the legislature very intentionally “reduced the factors to only those two... to simplify and to increase the usability of the test.” *Stop the Dump*, 364 Or at 452. The scope of the Farm Impacts Test only covers forced changes in the practices of farms or increases in the costs of those practices. It is not clear what the change in accepted farm practices or increased cost of those practices opponents are asserting related to loss of customers or reputational harm. Indeed, LUBA has held that “in themselves the possibility of lost sales or reduced prices due [to a project] do not constitute changed farm practices or the increased costs of farm practices.” *Stop the Dump v. Yamhill County*, 74 Or LUBA 1, 34-35, (2016) *reversed on other grounds* 364 Or 432 (2019) (*Stop the Dump II*).

*h. Security*

Similar to reputational harm, the assertions about security issues rely on a long chain of “*might*” happens. *See, e.g.*, Exhibit J.43 (Nerison), page 21 (“any out-of-the-area ‘traffic’ poses a risk [to] security” because employees during operation of filtration facility will mistake a wholesale nursery for a retail nursery, then they will come back on a weekend, then they will wander into the nursery headquarters or holding yards, then there will be no employees there, and then there will be theft or injuries).

Also similar to reputational harm, it is not clear what the change in accepted farm practices or increased cost of those practices opponents are asserting related to loss of customers or reputational harm. *Tilla-Bay Farms, Inc. et al v. Tillamook County*, 79 Or LUBA 235, slip op at 22, 25 (2019) *affirmed* 298 Or App 376 (2019) (LUBA upheld county’s finding that “concerns about trespass, vandalism, and theft ‘are speculative’ and not related to any identified forest practices”).

*i. Cumulative Impacts*

Globalwise has performed a comprehensive assessment of cumulative impacts in Exhibit J.88 – (Cumulative Impacts Analysis).

**9. Mr. Prenguber Qualifies as an Expert**

A number of opposition comments are *ad hominem* attacks against Mr. Prenguber at Globalwise and other experts related to evaluation of accepted farm practices.

---

is no indication of the likelihood of these facts coming into existence. ...We find Mr. Getz's testimony recites a fear and does not force the conclusion that the county lacked substantial evidence to support the conclusion that no foreseeable conflicts with farm use existed. ...”

As explained above in Section I.F, Mr. Prenguber is “qualified by education or experience” to render an expert opinion. *See Concerned Citizens*, 33 Or LUBA at 101. Mr. Prenguber’s resume is in Exhibit A.155. His experience specifically includes a past analysis of transportation of nursery products for the Oregon Association of Nurseries. Exhibit A.155, Page 10.

As Mr. Prenguber explains in Exhibit J.87, page 26:

As far as having no knowledge of the Oregon nursery industry, I have talked to as many of the farmers in the Surrounding Lands as I could identify and reach for discussions. Since many of the farmers in the Surrounding Lands are nurseries, especially those close to the filtration facility and pipeline construction areas, I emphasized study and understanding of their operations. Many of my conversations were in person and were lengthy. Farmers were willing to share extensive knowledge which I gained in this process. Additionally, I have spoken to agronomists, crop scientists, extension specialists in agriculture, and other experts with specific expertise in nursery plant production.

Furthermore, I have been a consulting agricultural economist my entire career and I have an extensive practical knowledge of farming which started in my youth with a farm upbringing. This knowledge has been supplemented by nearly three years of study of the nursery industry. I am qualified to analyze and provide my professional opinion on the Oregon ornamental nursery industry, particularly in the area of the Surrounding Lands.

As further evidence of my understanding of the nursery industry, I would point out that [no farmer] has [] objected to any of the accepted farm practices I stated in detail in my Operations Report.

It is quite notable that the 57 pages of described accepted farm practices in Exhibit A.33 have not been subject to criticism from opponents. In particular, the 8 pages of Nursery Related Accepted Farm Practices in Section 10.1 have not been subject to criticism. It is clear that Mr. Prenguber has the education and experience to speak as an expert on impacts to the accepted farm practices in the Surrounding Lands.

## **10. Forest Use also Addressed in Exhibit A.37**

Although not the subject of any opposition testimony, MCC 39.7515(C) also looks to determine that the use will not force a significant change in or significantly increase the cost of accepted forest practices on surrounding lands devoted to forest use. Exhibit A.37 (D.3 Forestry Compatibility Study) extensively addresses this topic. Discussion of farm impacts related to construction would also apply to forest uses, although they are too far away to be subject to any such impacts.

## **11. Conclusion**

The Farm Impacts Test from state law does not apply directly to any part of the project. Even where in EFU, a less onerous standard applies – in part undoubtedly to ensure that regionally important utility facilities like this one can be sited near the source of water or other resource in rural areas where EFU zoning is applied. In the MUA-20 zone, the Comprehensive Plan dictates that the standard should be

“less stringent than policies in” EFU. Comp. Plan, page 3-11. Given that “cases interpreting the statute do not control how the county interprets and applies the code” – because the state law does not apply in MUA-20 – this dictate from the Comprehensive Plan, and the less onerous standard that applies in EFU to utility facilities, provide an interpretative light in which the project must be considered. In particular, the state law that would apply to a utility facility asks whether conditions “mitigate and minimize” any potential impacts.

There are a few cases applying the Farm Impacts Test where construction impacts have been mentioned. Each fails to do any interpretation of the statute, and the discussion of construction is auxiliary to the holdings – such as that impacts cannot be disregarded “simply because those impacts and costs occurred prior to approval of the disputed decision” when it was remanded. *Von Lubken VII*, 28 Or LUBA at 369. Regardless, construction is not a “nearby nonfarm use” that will permanently impact “the supply of operating, productive agricultural land over time” that the legislature sought to protect in enacting the Farm Impacts Test. *See Stop the Dump*, 364 Or at 455. The disruptions of construction are inherently temporary, and that must be taken into consideration in this analysis.

Nevertheless, this section has summarized cases interpreting the statute and explained how the project meets even the higher bar of the state law Farm Impacts Test and even if construction were interpreted under *PGE/Gains* to be subject to the permanent use approval criterion.

Opponents are not interested in anything short of a full denial of this project. Despite objecting that the farming expert did not intend to “cooperatively identify solutions to our concerns”, farmers proceed to object that impacts are “unmitigable” and that the project must therefore be denied – rather than cooperating on solutions. Exhibit I.43 (Nerison), page 11. Globalwise nevertheless proceeded to use their extensive study of the Surrounding Lands and accepted farm practices to craft requirements that the Water Bureau has self-imposed, particularly on construction, in order to reduce any potential impact below the level of significance.

The standard requires that there be no “significant” changes to or increased costs of accepted farm practices – not that farmers are never inconvenienced or annoyed. Opposition Exhibit J.51 at minute 5:40 provides a great example of a Water Bureau facility in the study area integrating into the background: as the narrator passes the Lusted Hill facility, they describe it as “not noticeable at all”. The opponents’ own testimony from a neighbor shows that the Water Bureau is and has been a good neighbor, with no significant impacts on accepted farm practices, just half a mile from the proposed filtration facility. There is no reason to think that the project will be any different.

#### **D. MCC 39.7515(D) Will not require public services other than those existing or programmed for the area;**

Consistent with this criterion, the record establishes that all public services that could be required for the project, including fire response and specialty emergency response, currently exist in the project area. Other references to the public services standards either misconstrue the criterion or identify “public services” that are not subject to the criterion.

## 1. Emergency Services that Could be Required Exist in the Area

### a. *Fire Protection Services*

The record clearly establishes that fire protection services that could be required by the project exist in the area. Specifically, the project is located with Rural Fire Protection District 10 (RFPD10) boundaries. The City of Gresham and RFPD10 have entered into an Intergovernmental Agreement for Fire Services (IGA). Exhibit I.89 (IGA). The IGA requires Gresham Fire and Emergency Services (GFES) to staff Station 76, a fire station in RFPD10's service area located approximately 2.6 miles from the filtration facility site. GFES completed a Fire Service Agency Review Form (Exhibit A.130) that identified items needed to comply with fire code and those items were incorporated into the facility design including meeting requirements for fire flow.

The RFPD10 Board<sup>109</sup> adopted a resolution in opposition to the project and outlined a series of findings related to the resolution that related to fire response capabilities as well as transportation and road issues.<sup>110</sup> Exhibit D.1. Performance Based Fire Protection Engineering (Performance Based) reviewed RFPD's resolution and findings, as well as a 2022 Community Risk Assessment and Standards of Coverage document prepared for GFES provided at Exhibit I.103. Performance Based prepared a Fire Protection & Life Safety Third-Party Consulting Review Report (Fire Protection Report)<sup>111</sup> for the filtration facility project that addressed the RFPD10 findings related to emergency response and hazardous materials, and evaluated the emergency response burden at two analogous waste water treatment facilities in Gresham and Portland.

---

<sup>109</sup> Pursuant to ORS 478.221 to 478.240, the directors that serve on the RFPD10 Board of Directors are elected by electors within the RFPD10 district area. Exhibit I.90 depicts the RFPD10 district boundaries.

<sup>110</sup> Note that GFES has not objected to the project. The Gresham Fire Chief submitted two clarifying letters into the record at Exhibit D.16, Exhibit I.9. The Water Bureau has responded to the issues identified in both letters. Exhibit I.91, Exhibit J.79.

<sup>111</sup> Several project opponents pointed out that the author of the Fire Protection Report, David Stacy, had a pending application for a license from the Oregon State Board of Examiners for Engineering and Land Surveying (OSBOEELS). See, Exhibit J.15. This is a fact that Mr. Stacy himself pointed out in the resume included as Appendix H of the Fire Protection Report. Mr. Stacy did not provide services to the Water Bureau that would have required an engineering license in his report. Instead, he used his extensive expertise in fire services to respond to the RFPD10 findings and to review the safety of the filtration facility. The fact that Mr. Stacey was not licensed as an engineer in the state at the time he drafted the initial report does not in any way diminish the extensive expertise identified in his resume. Moreover, as indicated in the documents submitted by the opponents and confirmed in the Performance Based response to additional testimony at Exhibit J.79, Mr. Stacey had received a temporary permit from OSBEELS prior to the additional testimony with final Board action to formally approve his license on September 12, 2023. Therefore, while not necessary for the reasons stated above, there is evidence in the record that Mr. Stacey had an Oregon engineering license prior to the close of the record.

While the Fire Protection Report includes a comprehensive response to RFPD10 findings related to fire protection services, the following responses clearly support the conclusion that fire protection services that could be required by the project currently exist in the area.

In response to RFPD10 Finding #3 - *RFPD10 is able to staff 1 engine with 3 firefighters 24/7. Back up support for serious incidents or overlapping calls comes from GFES or Clackamas Fire stations. Distance from these stations competing calls increases response times* – the Fire Protection Report states:

In accordance with the City of Gresham 2022 Community Risk Assessment and Standards of Coverage Report, prepared by Fitch & Associates (hereon called Standard of Coverage document), Station 76 not only has the lowest call volume, but also the lowest probability of overlapped calls (8.5% compared to the next lowest of 21.1% for Station 31, up to 46.2% for Station 72). In addition, Station 76 has the highest Station Demand Zone Reliability of 90%; the authors of this report indicate that the 90th percentile is “considered best practice and the most reliable measure to perform.”

In conclusion, Station 76 is able to appropriately handle its current call volume at the highest percentage of all stations within GFES. The anticipated call volume of this new proposed facility would be expected to track similarly, if not reduced, from that of the existing wastewater treatment plant within the city limits; this facility averages 4.5 calls for service per year. Exhibit I.91, pg. 7.

In response to RFPD10 finding #6 - *Because of the large area (approx. 14 sq. mi.) serviced by Station 76, RFPD10 is unable to meet response time standards established by the NFPA* – the Fire Protection Report states:

If response times are already exceeded, the new proposed facility does not have an impact on this metric. In review of the Standard of Coverage document, an ERF Depth Chart heat map indicates that nearly 50% of Station 76's district currently results in an ERF of 0-2 personnel at 8 minutes; since Station 76 is staffed with 3 personnel, this means that a significant portion of the district cannot be accessed within 8 minutes. The proposed Bull Run Facility will sit right at the threshold of the 8-minute response, with an expected arrival time between 7 to 8 minutes for Station 76 (considering time from dispatch to on scene), however over 50% of their district results in response times much greater than 8 minutes. These areas are more remote than the proposed Bull Run facility, indicating that other occupancies are at higher risk for less effective response forces than the proposed Bull Run Facility. In addition, when reviewing response data, Station 76 has responded to incidents in these more remote areas (i.e., greater than 8-minute responses), including response to hazardous materials incidents. The argument about response times seems to be unfounded considering the current response and staffing arrangement of this district. The Bull Run facility is approximately 2.6 miles from Station 76 based on road travel, and therefore provides a greater ERF than the majority of the remaining rural area, which is already under the district of RFPD10/GFES Station 76. Exhibit I.91, pg. 9.



In its response to the Fire Protection Report, RFPD10 does not refute the information provided above, but claims that it did not raise the NFPA response time issue specific to the proposed filtration facility. J.37, pg. 13 (RFPD10). While it is at best debatable whether RFPD10 raised the response time issue or the Station 76 capacity issue specific to the facility in its lengthy submittals, in either case, the record clearly establishes, and RFPD10 effectively concedes in its response, that fire protection services that could be required by this filtration facility project currently exist. To the extent RFPD10 only raised the NFPA response times to support its arguments related to the hazardous conditions criterion at MCC 39.7515(E) as claimed, those issues are addressed below.

*b. Specialty Emergency Services*

The fire station closest to the project site, Station 76, does not include a Regional Hazmat Response team. However, in response to RFPD10 Finding #4 - *Firefighters at Station 76 are not trained or equipped to deal with specialty rescue and response services including (but not limited to) hazardous materials, and confined space rescue. These services must be dispatched from various Gresham fire stations which increases response times* - the Fire Protection Report describes the area hazmat response capabilities<sup>112</sup>:

The training and equipment provided at the first due station is not applicable to an argument on response time. NFPA 1710, as will be noted in the following section of this report, does not require the complete hazardous materials or technical rescue response force to be readily available and on-scene within any response time metric. Rather, initial responders to a hazardous materials incident are expected to respond, arrive, identify the emergency, and operate in an NFPA 472 defined "Operations" role. NFPA 1710 allows outside resources to be identified and utilized to support special operational needs, provided processes are established to request these resources. This process is established by the State of Oregon and available to all State of Oregon fire departments and districts. In addition, it is identified within GFES Standard Operating Guideline 2.6.4, HM-3 Operations (Appendix F of this report). Regional Hazmat Response teams are available, including Response Team #3 which responds out of Gresham Station 72, approximately 16 minutes from the proposed project site. Exhibit I.91, pg. 8.

The Fire Protection Report also identifies confined space and other technical rescue responses available in the area, noting that although the state disbanded the regional technical rescue team in 2013, the teams are scheduled to be reintroduced and most of the departments that previously had teams,

---

<sup>112</sup> The Fire Protection Report provides evidence that there is currently no plan to disband Hazmat teams, but that even if that were to occur at some point in the future, Regional Team #4 would be available and is approximately 35 minutes from the site. Exhibit I.98, pg. 8.

including GFES, still have and maintain the rescue equipment. Exhibit I.91, pg. 8.<sup>113</sup> In the rare event that the Water Bureau requires a planned permit required confined space entry, the Water Bureau currently hires a rescue agency to perform the work, reducing the need for an outside response. Exhibit I.91, pg. 9. Per the condition proposed below, the Water Bureau agrees to either continue to hire a certified rescue agency for permit entry or have certified rescue personnel on staff to support the work.

Water Bureau Proposed Condition of Approval:

16. In the event the applicant conducts a planned, permit required confined space entry, the applicant will ensure certified rescue personnel are on site to support the work.

In a response to the Fire Protection Report, RFPD10 seemingly claims that the fact that Station 76 does not have a hazardous materials response or specialized rescue capabilities means that those emergency services do not exist for the area and thus this criterion is not met. Exhibit J.37, pg. 12. However, there is nothing in the public services criterion that suggests that every possible emergency service must be available at the closest fire station, only that it exists in the area. As explained in the Fire Safety Report:

Section 5.4 of NFPA 1710, *Special Operations Response*, discusses that response to special operations incidents shall be organized to ensure that the fire department's special operations capability includes members, equipment, and resources to deploy the initial arriving company and additional alarm assignments providing such services. The very next sub section allows for the fire department to use established automatic aid or mutual aid agreements to comply with the requirements of Section 5.4. In addition to this, Section 5.4.6 states that *"If a higher level of emergency response is needed beyond the capability of the fire department for special operations, the fire department shall determine the availability of outside resources that deploy these capabilities and the procedures for initiating their response."* And Section 5.4.7, *"The fire department shall limit its activities to only those specific special operations functions for which its members have been trained and are correctly equipped"*.

---

<sup>113</sup> Note that in 2019, the Water Bureau expanded the Lusted Hill Treatment Facility to add a 60-foot long cylindrical liquid carbon dioxide storage tank, two 54-foot tall , 14-foot diameter cylindrical soda ash storage silos, a 1,200 square foot chemical building with chemical pumping and mixing equipment, new electrical generators and new underground vaults and pipes. In other words, the project included new confined spaces and increased areas for chemical storage and processing. In the finding related to Comprehensive Plan 11.17 which encourages fire service review states, "the Gresham Fire Department has determined the proposed site plan requires no changes for fire service." Exhibit I.72, pg. 29 (Lusted Hill Decision)

RFPD10, via GFES, has established procedures and policies for when a higher level of response is required. This would apply to incidents such as large-scale hazardous materials incidents, technical rescue incidents, or large fires. It is not the intent of NFPA 1710 to dictate that all resources need to be within the first-due response company's area of expertise, or within any dedicated or required response times. As can be seen through various repetitive sections of NFPA 1710, it is very clear that when the magnitude of an incident exceeds the capabilities of a response district or first-arriving units, additional support is allowed to be utilized to respond to these incidents. The GFES staffs and operates the regional hazardous materials response team out of Station 72. However, the hazardous materials unit can also operate as a local resource, outside of the state response system, when requested by other first-due GFES units upon identification of a hazardous material incident. If the incident exceeds the capabilities of the GFES hazardous materials personnel or equipment, the policy for activating additional resources from the State is well documented.

The conclusion that hazardous material responses exist in the area is further supported by the fact that 1) the coverage area for the Regional Hazmat Response teams in the state is larger than the coverage area for individual stations, and 2) NFPA 1710 does not include a defined time threshold for specialty responses. Finally, the IGA between the City of Gresham and RFPD10 clearly establishes that within the RFPD10 district boundaries the City of Gresham will "provide fire suppression, advanced life support, emergency medical rescue, and Level A hazardous Material response to all alarms dispatched." Exhibit I.89, pg. 2 (IGA).

The Fire Protection Report and the record clearly indicate that specialized response services exist in the area.

## **2. The Criterion Only Applies to Public Services that Could be Required By This Project**

### *a. Schools*

In testimony related to bus route issues, the Gresham Barlow School District (GBSD) incorrectly state that in order to comply with this approval criterion the Water Bureau is "required to avoid impacts on public services." Exhibit J.9, pg. 4 (GBSD). Instead, the criterion only requires a finding that this project "will not require public services other than those existing or planned for the area." The filtration facility project will not require services from schools.

First Student, the entity that provides school bus services for GBSD, claims that the Water Bureau's offer to coordinate with them through the construction period to minimize disruption to bus service would require "public services beyond those currently provided or planned for the future." Exhibit J.6, pg. 2. The quoted language is closer to the actual language of the criterion, but the fact remains that the project does not require the bus service. While it is the case that the Water Bureau has gone to great lengths to limit impacts on schools and school bus operations and is committed to continuing to work

with those entities through the construction period, it is not required to do so to comply with this criterion.

*b. 1000 Friends*

The attorney for 1000 Friends, Mr. Mulkey, identifies a list of “public facilities” he claims are not existing or programed for the area. Exhibit H.11, pg. 3. However, his list does not include actual public services that are subject to the conditional use approval criterion at MCC 39.7515(D). His list includes the project pipelines, roadway closures, roadway improvements, and the filtration facility itself. Each item in the list is either not a public service or is not a public service required by the proposed project.

First, the pipelines and the filtration facility are the proposed project. They cannot also be public services required by the project. The Water Bureau has requested land use approval from Multnomah County for a Community Service use to construct the filtration facility to filter and treat drinking water that will be conveyed to the City of Portland and to wholesale customers. While the reference to Statewide Planning Goal 11 is not clear, to the extent Mr. Mulkey is trying to say that the filtration facility needs to be identified in a Multnomah County facility plan under Goal 11, he is incorrect. Goal 11 requires local governments to provide utility planning to support the uses in their respective jurisdictions. Therefore, it is not necessary under Goal 11 for Multnomah County to include the City of Portland’s water facility in a county facility plan.

In terms of the reference to roadway improvements, it is not clear if he is referencing the emergency access road referenced earlier or road improvements to actual public rights-of-way. If it is the former, we first note that the emergency access road is located entirely within Clackamas County. More importantly, the access road is not itself a public service. It will be a private road along an easement on private land. The fact that the road will provide access to emergency vehicles does not make the road itself a public service. To the extent he is referring to roadway improvements proposed by the Water Bureau on surrounding public streets, those road improvements will exist as a result of the project. Furthermore, all of the roadway improvements have been reviewed by the County Transportation Department and have been incorporated into the County’s proposed conditions. All road way improvements will be consistent with County roadway standards contained in the County TSP. Evaluation of the additional plans referenced in the 1000 Friend’s letter are not relevant for purpose of compliance with this public services criterion.

**E. MCC 39.7515(E) located outside big game winter habitat area;**

In Exhibit E.9 and J.7, a project opponent (Ciecko) claims the Water Bureau misrepresents information in its Conditional Use application (Exhibit A.4) from ODFW (Exhibit A.59, ODFW Communication). As made clear in the application (Exhibit A.4, pages 85-86), the ODFW communication is specifically directed at the Conditional Use big game winter habitat criterion (MCC 39.7015(A)(5)). Mr. Ciecko misinterprets the relevance of ODFW’s response. ODFW confirms what the Multnomah County Comprehensive Plan Habitat Map shows: that the project is located outside big game winter habitat area.

## F. MCC 39.7515(F) Will not create hazardous conditions;

As a public agency, the Portland Water Bureau is committed to the operation of a filtration facility that is safe for its staff, safe for the surrounding community, and safe for all that rely on its water. To fulfill that mission, the project is a modern facility designed to safely and effectively filter and treat drinking water, with robust and redundant safety design features and monitoring systems. Water Bureau facility operators are trained to use safety procedures, engineering controls, and personal protective measures to mitigate possible hazardous situations. Additionally, as discussed below, the record demonstrates that the surrounding road system will safely accommodate operational traffic generated at the filtration facility.

In its application, the Water Bureau identified several potential hazards that could arise during facility operation. See Exhibit I.59 (Hazardous Materials Management Plan). Project opponents raised other potential hazards they claim could occur as a result of the facility operation. As discussed below, in each instance, the record demonstrates that through facility and roadway design, safety procedures and training, and adherence to state and federal safety regulations, the project will not create a hazardous condition.

Project opponents argue that if there is *any* possibility that a hazardous or dangerous event could occur, at any point, as either a direct or indirect result of facility operation, the request for conditional use approval must be denied for failure to comply with the hazardous conditions criterion. See e.g. Exhibit J.37 (RFPD10). Such an extreme interpretation of this criterion is inconsistent with the plain language of the code, is inconsistent with previous Multnomah County interpretations of the standard, and would lead to an absurd result that effectively precludes approval of virtually every conditional use subject to the criterion, including most Community Service uses.

### 1. The Project Will Not Create a Hazardous Condition When Considering the Plain Language of the Code

Project opponents primarily focus on the “hazardous” element of the approval criterion to propose an interpretation that would require an applicant to demonstrate that there is no possibility whatsoever that a hazardous situation could arise. However, that focus ignores the remainder of the criterion in violation of *PGE/Gains* rules for code interpretation.

First, the term “condition” cannot be ignored or read out of the criterion. ORS 174.010 (code interpretation cannot “insert what has been omitted or omit what has been inserted.”) The relevant definition of “condition” is “a mode or state of being.”<sup>114</sup> Therefore, the most reasonable interpretation of the term “hazardous condition” is something that is continually in the state of being hazardous, not

---

<sup>114</sup> “Condition.” Merriam-Webster's Unabridged Dictionary, Merriam-Webster, <https://unabridged.merriam-webster.com/unabridged/condition>. Accessed 22 Sep. 2023.

the risk that a hazardous situation could arise at any point in the future, as broadly suggested by RFPD10 and other project opponents.

Another key element of the criterion that cannot be disregarded in a plain reading of the code language is that the proposed conditional use will not “create” a hazardous condition. As discussed below, several of the risks identified by project opponents already exist on the site or in the surrounding area. In those cases, even if those risks could be considered a hazardous condition, the project will not “create” those conditions.

## 2. Past County Interpretations Provide a Reasonable Interpretation of the Criterion

RFPD10 is urging the Hearing Officer to adopt an interpretation of the hazardous condition criterion that has not been applied in past conditional use decisions. Multnomah County decision makers have never interpreted the hazardous conditions standard to require a finding that there is no possibility that a hazardous situation could occur as a result of the proposed conditional use. The following provides two examples of recent decisions near the filtration facility where, despite the risk that the use could create a hazardous situation, mitigation and safety measures were evaluated to conclude that the criterion was met.

### PGE Substation

In 2017, Multnomah County approved a community service conditional use permit for an expansion of an existing Portland General Electric (PGE) substation in the MUA-20 zone. Exhibit I.70 (T3-2017-9259). The substation is located at 7509 SE Altman Road at the southwest corner of SE Dodge Park Boulevard and SE Altman Road (Exhibit I.70, pg 5), which is within the project study area (Exhibit A.2, Figure 1) and within the RFPD10 boundary (Exhibit I.90).<sup>115</sup> The County concluded that the requested expansion met all conditional use approval criteria, including finding that the project “will not create hazardous conditions.” Exhibit I.70, pg. 5. (PGE Decision).

As explained in the decision, PGE identified four hazardous conditions that can occur at a power substation: 1) release of mineral oil, 2) an electrical explosion called an arc flash, 3) a catastrophic failure where the electrical transformer fails and the mineral oil is ignited, and 4) potential for trespass. The County identified both monitoring systems and facility design elements as mitigation for the potentially hazardous situation caused by first potential hazard, the release of oil, specifically identifying an automatic monitoring system to notify PGE 24 hours a day of an oil release and the addition of an oil catch basin to the newly designed substation to allow the oil to be cleaned up. For the second potential hazard, the decision referenced protective equipment in the form of an electrical ground grid to intercept arc flashes. Third, the County identified facility design elements to address potential transformer ignition created by a catastrophic failure. Finally, the County found that the substation would upgrade security measures to preclude trespass. Ultimately in finding that the approval criterion

---

<sup>115</sup> The PGE substation is visible in the video in Exhibit J.66 at minute 2:32. The video depicts the size of substation and provides context for its proximity to the filtration facility site.

was met, the County concluded, “[t]he applicant has considered the hazardous conditions that can be created by the proposed facility and has designed the substation to limit or prevent hazardous conditions that could affect the surrounding property owners.” Exhibit I.70, pg. 14. In reaching the conclusion that the approval criterion was met, the County relied on facility design, protective equipment, monitoring systems, and security measures to bring the risk below the hazardous conditions threshold.

### Lusted Hill

As noted above, in 2019 the County issued conditional use approval for expansion of the Water Bureau’s Lusted Hill Treatment Facility to add a 60-foot long cylindrical liquid carbon dioxide storage tank, two 54-foot tall, 14-foot diameter cylindrical soda ash storage silos, a 1,200 square foot chemical building with chemical pumping and mixing equipment, standby generator equipment, and new underground vaults and pipes. In reaching the conclusion that the MCC 39.7515(F) “will not create hazardous conditions” criterion was met, the County found:

The existing use and proposed expansion of the water treatment facility by its nature uses hazardous chemicals. The City of Portland Water Bureau serves the City of Portland and several other suburban cities for drinking water. As a result of their responsibility to their citizens and employees, the city has policies and procedures in place to ensure compliance with federal and state requirements regarding the transport, handling, and use of hazardous chemicals. Exhibit I.72, pg. 27 (Lusted Hill Decision).

The decision also evaluated traffic and vehicle maneuvering and noted that the site has shown a history of operating without incident, before concluding, “[a]s described by the applicant and reviewed by staff, the proposed buildings and emergency generator will not create a hazardous condition because adequate licensing and handling procedures through local, state and Federal agencies will help mitigate possible hazardous conditions that the storage and use of these chemicals will create.” Exhibit I.72, pgs. 27-28.

These cases demonstrate that the County has not previously interpreted the hazardous conditions criterion to require an applicant to demonstrate that there is no possibility that a hazardous situation could occur. Instead, the applicants have identified the potential hazardous situations that could arise because of equipment, materials, or activities related to use and identified the mitigation and safety measures in place so that the use does not create a hazardous condition.

### **3. The Interpretation Proposed by Project Opponents Leads to an Absurd and Untenable Result**

RFPD10 urges the County to make an extreme and untenable interpretation of this criterion that would require the Water Bureau to demonstrate that there is no possibility that a hazardous situation could occur, stating:

Applicant asserts that all of the proposed engineering, best management practices, staff training, adherence to applicable state and federal codes will reduce or minimize the

risk for an accident (i.e. involving the many hazardous materials that will be utilized and stored in large quantities on site or accidents related to the other identified hazards) satisfies MCC 39.7515 Approval Criterion "(F) Will Not Create Hazardous Conditions." This criterion is clearly stated and unequivocal. No exceptions are provided in the Code.

The hazardous conditions that will be created by operation of the proposed plant are acknowledged by the applicant, significant, un-refuted and cannot be remediated through any design feature, training, HMMP or condition of approval. Exhibit J.37, pg. 2 (RFPD10).

The interpretation that RFPD10 encourages the County to adopt cannot be what the drafters of the criterion intended and leads to an absurd result. It would be impossible for virtually any Community Service use or other type of conditional use to meet an approval criterion that requires an applicant to demonstrate that there is no possibility that the proposed use will create a hazardous situation or result in harm either on the site or off the site.<sup>116</sup> A few of those uses clearly illustrate the absurdity of RFPD10's position. For example, it is impossible to **eliminate the possibility** that:

- an oxygen tank at a hospital or in a fire station will explode,
- a fire truck leaving a fire station will have an accident with another vehicle in route to an emergency,
- a fire will occur at a rural school,
- a fuel tanker will overturn in route to a gas station in the CFU zone or that the tanker will spill gasoline while filling a station tank,
- an accident involving heavy machinery will occur at a forest products processing facility, or
- an electrical substation would have an arc flash resulting in an electrical explosion.

In each case, the risk that one of these events will occur is reduced by best management practices, staff and driver training, and adherence to applicable state and federal codes. In other words, the very list RFPD10 claims the filtration facility cannot rely on to demonstrate compliance with the approval criterion. As a result, if the County were to interpret the criterion in the way suggested by RFPD10, it would make virtually every use subject to the standard a prohibited use, including fire stations, hospitals, schools, and energy facilities. That is an absurd result.

The RFPD10 interpretation is also based upon the fundamental flaw repeated in their testimony that mitigation cannot be considered for purposes of compliance with the conditional use criteria. Of course, levels of risk vary across uses. However, that cannot mean that mitigation and risk minimization cannot be considered in meeting this criterion. Instead, it requires a use specific inquiry and requires that the mitigation and safety measures implemented must be commensurate with the risk. In this case, the record demonstrates that the extensive safety considerations in both facility design and operation of the filtration facility are commensurate with the risks.

Finally, the notion put forth by RFPD10 that identifying potential risks at the facility is an acknowledgement by the Water Bureau that the project cannot meet the criterion is also without merit.

---

<sup>116</sup> Other uses subject to the "hazardous condition" standard is addressed in Section II.3.



Effective hazard mitigation requires that the potential hazards or risks are identified so that they can be effectively addressed.<sup>117</sup>

#### **4. Filtration Facility Operations Will Not Create a Hazardous Condition**

##### *a. The Use of Chemicals*

The Water Bureau is charged with delivering clean, safe, and reliable water to nearly 1 million people. To complete that mission and comply with federal and state drinking water regulations it is necessary to treat the water that comes from the Bull Run Reservoirs with chemicals that provide disinfection and corrosion control. As clearly established in the record, that is a job that the Water has been doing in east Multnomah County for decades first at the Headworks Facility at the reservoirs and since 1992 at the Lusted Hill Treatment Facility located approximately a half a mile from the proposed filtration facility.

As explained in the operations history provided in the Filtration Facility Operations Supplement, Portland began adding chlorine to Bull Run water in 1929 to disinfect against waterborne bacteria and viruses, and ammonia in 1957 to help the disinfectant last. Corrosion control treatment was added using sodium hydroxide in 1997 and now soda ash and carbon dioxide since 2022 to adapt to changing science and regulations to further reduce lead leaching from some home plumbing. Exhibit I.74, pg. 1 (Operations Supplement). The Headworks located facility currently uses gaseous chlorine for disinfection, and has safely done so for more than 95 years.<sup>118</sup> Id. The Water Bureau explained the impact of the filtration facility on the Headwaters and Lusted Hill facilities:

The Water Bureau has made decisions to use inherently safer technologies for drinking water treatment. Once the filtration facility is operating, the disinfection and corrosion control treatment steps at the existing treatment facilities in the project area will be integrated into the treatment process at the filtration facility. The associated deliveries of soda ash and carbon dioxide that currently go to Lusted Hill will go to the filtration facility instead.

Although gaseous chlorine has been safely used for disinfection at Headworks for more than 95 years, the filtration facility will instead use onsite generation of hypochlorite, which is an inherently safer technology. The typical process will be to have salt delivered to the filtration facility site where the hypochlorite (dilute bleach) will be made and stored until use in the treatment process. Once the filtration facility is online and operational, the Water Bureau will no longer need chlorine gas for the treatment process. Exhibit I.74, pg. 2. (Operations Supplement).

---

<sup>117</sup> For example, Occupation Health and Safety Administration regulations for emergency planning at CFR 1910.39(c)(1) require that fire prevention plans include “**A list of all major fire hazards**, proper handling and storage procedures for hazardous materials, potential ignition sources and their control, and the type of fire protection equipment necessary to control each major hazard[.]” (emphasis added.)

There is considerable testimony in the record from project opponents related to the use and presence of chemicals at the filtration facility site. The comments generally fall into two categories, 1) the risk of a spill or other incident at the facility, and 2) the risk of an accident or other incident while trucks are transporting chemicals to the facility. The two categories are addressed separately below.

The evidence in the record relevant to chemical use and safety includes:

- Exhibit H.3, Attachment 7 - Filtration Facility Fire Protection Strategy
- Exhibit I.58 HMMP Supplement
- Exhibit I.59 Revised HMMP
- Exhibit I.91 Performance Based Fire Protection Report
- Exhibit J.79 Performance Based Response

i. Filtration Facility Use of Chemicals

The chemicals to be used at the filtration facility site are identified in the facility Hazard Materials Management Plan (HMMP).<sup>119</sup> The Water Bureau submitted an HMMP with the original application narrative. Exhibit A.55. Performance Based Fire Protection Engineering reviewed the HMMP and the Hazardous Materials Inventory Statement (HMIS) which is included as Attachment C to the plan, and provided a list of suggested changes. Exhibit I.91, Appendix D (Fire Safety Report). The identified items were incorporated into a revised HMMP submitted into the record as Exhibit I.59 (Revised HMMP).<sup>120</sup>

The HMMP includes a Hazardous Materials Operation Plan that identifies 1) the hazardous material storage areas and compliance with separation and containment; 2) details regarding the facility design and protocols to be used during chemical deliveries to minimize the risk of spills and safely contain and clean spills if they were to occur; 3) description of the chemical storage areas and the containment and piping features to prevent chemical release; and 4) special safety features and standards related to the facility's ozone system.<sup>121</sup> *Id.* pgs. 5-11. The HMMP also includes a Hazardous Materials Emergency

---

<sup>119</sup> Mr. Ciecko provides testimony that indicates that Carollo, the company that was involved in preparation of the HMMP, was named in a lawsuit related to an accident at a water treatment plant. E9, pg. 26 (Ciecko). As explained in a response from legal counsel for Carollo, Carollo was dismissed from the insurance carrier generated lawsuit without any payment or settlement. Exhibit J.78.

<sup>120</sup> The Fire Safety Report noted that four of the materials identified in the original HMMP as corrosive do not meet the definition of corrosive under the Oregon Structural Specialty Code definition and can be downgraded to irritants (a non-regulated category). I. 91, pg. 6 (Fire Safety Report). The Water Bureau elected to leave the conservative classifications in place in the HMIS as a safety measure.

<sup>121</sup> The Operation Supplement correctly states that "at the concentrations and storage volumes that will be used at the facility, no chemicals are considered "highly hazardous chemicals" according to the Occupational Safety and Health Administrations Standard 1910.119 Appendix A List of Highly Hazardous Chemicals, Toxics and Reactives." Exhibit I.74. RFPD10 challenges that statement and points out that ozone is included on OSHA's list of highly

Response Plan that details recordkeeping requirements, including routine inspections, as well as operator requirements during or following an emergency. Finally, the HMMP includes additional facility and contact information as attachments along with the HMIS.<sup>122</sup> As explained in a supplemental information memo related to the HMMP, the HMMP complies with the International Building Code (IBC) and the International Fire Code (IFC) and is intended to cover operations post-construction.

One of the more notable features of the HMMP is the chemicals and chemical concentrations it does not include. Project opponents repeatedly claim that chlorine gas and a 15% solution of hypochlorite will be used at the facility. *See e.g.* Exhibit I.5a (Riehl). As clearly established in the HMMP and throughout the record neither of those claims are accurate. Instead, as described in the HMMP and in the Fire Safety Plan, the facility will make a 0.8% solution of Sodium Hypochlorite on site. As explained further in the Operations Supplement:

Although gaseous chlorine has been safely used for disinfection at Headworks for more than 95 years, the filtration facility will instead use onsite generation of hypochlorite, which is an inherently safer technology. The typical process will be to have salt delivered to the filtration facility site where the hypochlorite (dilute bleach) will be made and stored until use in the treatment process. Once the filtration facility is online and operational, the Water Bureau will no longer need chlorine gas for the treatment process. Exhibit I.74, pg. 2 (Operations Supplement).

The 0.8% solution made on-site is much more dilute than household bleach, which by comparison is typically approximately a 5% to 6% sodium hypochlorite solution. Exhibit J.71, pg. 3 (Odor Supplement).

The HMMP appropriately identifies potential risks, identifies facility design that minimizes the likelihood of a spill or incident and provides surplus containment in the unlikely event of a spill, identifies chemical-specific requirements, monitoring, and protective redundancies, and includes an emergency response plan. Rather than commenting on or providing suggested changes to the HMMP, RFPD10 instead

---

hazardous chemicals. Exhibit J.37, pg. 4 (RFPD10). RFPD10 goes on to provide that the threshold quantity under the OSHA standard for ozone is 100 lbs, and that Table 5 of the HMMP indicates that the quantity of ozone is 900 lbs. per day. However, as the footnote in the table clarifies ozone is generated on site and it is used immediately. Therefore, the OSHA storage limit of 100 lbs. is not exceeded and the statement related to storage volumes at the facility is entirely accurate. However, irrespective of classification, the generation and use of ozone at facility does not mean that the facility will create a hazardous condition as RFPD10 contends. Instead, it means that the facility design and management practices must be commensurate with the hazard level of the chemical. The specific building design for the ozone process and the specialized safety protocols identified in the HMMP demonstrate that the Water Bureau has met that burden. Exhibit I.59, pgs. 9-11 (Revised HMMP).

<sup>122</sup> There was a great deal of testimony entered into the record by project opponents that related to chemical or hazardous material related incidents at water treatment and other facilities. *See eg,* Exhibit E.9 It is impossible to discern critical details about any accident from a news article. However, in most of the examples provided the water facility involved used chemicals or concentrations that will not be used at the proposed facility. *See* Exhibit I.87 (Chemical Safety Supplement). Additional testimony included news stories about accidents that involved chemicals that will not be used at the filtration facility including chlorine gas, fluoride, and ferric sulfite. Exhibit J.21, Appendix B (Cottrell CPO).

highlights sections of the HMMP that identify potential risks at the facility<sup>123</sup>, and resolutely adheres to the claim that the need for an HMMP inherently supports the conclusion that the facility will create hazardous conditions.<sup>124</sup> Exhibit J.37. For the collective reasons set forth above, RFPD's position is grounded in an extreme and untenable interpretation that should not be adopted for the first time by the County in this case. Instead, in this case, the existence an substance of the HMMP supports the appropriate conclusion that the project will not create a hazardous condition.

As explained in the HMMP Supplement, to satisfy its function, the HMMP is a living document that must be maintained and updated by operation staff as on-site materials or procedures change. If the HMMP were forced to remain a stagnant document that could not be updated to reflect changes in materials or emerging and improved safety protocols, it would be ineffective as a risk management and mitigation tool. The condition proposed below ensures that the final HMMP is consistent with applicable codes, fully implemented during facility operation, appropriately updated, and distributed to the County and emergency responders. Recognizing that the intent to the filtration facility is to move to an inherently safer system the Water Bureau further agrees to a specific condition that it will not use chlorine gas at the filtration facility in the future.

Water Bureau Proposed Conditions of Approval:

3. Prior to issuance of Certificate of Occupancy, the Portland Water Bureau shall submit to the County and Gresham Fire and Emergency Services a final Hazardous Materials Management Plan (HMMP) that is in substantial compliance with the format and contents of the plan at Exhibit I.59 and in compliance with the International Building Code (IBC) and the International Fire Code (IFC).

---

<sup>123</sup> RFPD10 also calls specific attention to Table 6 of the HMIS and claim that it documents that 9 additional hazardous materials will be determined following construction. However, the comment identifies select language that distorts the purpose of Table 6. Table 6 includes a list of 9 named materials expected to be needed at the filtration facility. The list includes items such as hydraulic oil, waste oil, paint thinner, and oxygen. As explained in the Supplemental Information memo for the HMMP, the purpose of Table 6 is to identify a list of materials that may or may not be needed by operations staff following construction. Exhibit I.58 (HMMP Supplement). The note at the end of the table related to other potential chemicals states, "anticipated hazardous material changes or additions depend on future equipment selection and maintenance products as well as future operations of equipment." The examples included in the note are equipment specific lubricants and paints and coatings for equipment maintenance. Table 6 reflects the fact that at his time, it is not possible to identify every hazardous material that might be needed for final operation. However, the unknowable materials and quantities are not primary treatment chemicals. Rather than leave table 6 completely blank, the HMMP authors identified nine materials that are likely to be needed and provided examples of others.

<sup>124</sup> Charles Ciecko, a director on the RFPD Board, makes the same argument on his own behalf, along with other arguments that are similar to RFPD10's testimony. Exhibit E.9, pg. 25.

- a) The Portland Water Bureau will comply with the HMMP during facility operation.
- b) The Portland Water Bureau will review and update the HMMP annually, or more frequently as needed to document on-site material or procedural changes.
- c) All updated HMMPs will be provided to the County and Gresham Fire and Emergency Services.

4. Use of chlorine gas at the filtration facility is prohibited.

**ii. Filtration Facility Design**

As discussed above, safety has been a top priority for the Water Bureau in designing the filtration facility. Several documents in the record identify the elements of the building and site design that prioritize safety, including the Bull Run Filtration Facility Fire Protection Strategy at Exhibit H.3, Attachment 7 which explains:

The design of chemical delivery, storage and dosing systems follows IBC building codes, NFPA fire codes, and industry best practices. Throughout the design process, consultant and PWB staff engaged in focused efforts on improving the safety of construction, operations and maintenance, using safety as a primary criterion in decision-making processes. These efforts included formal Hazard and Operability (HAZOP) review workshops with PWB operations and safety staff following Occupational Safety Health Administration (OSHA) guidelines for process safety management.

Chemical deliveries to the site will follow routes through the site which do not require trucks to back up. Separate delivery zones are provided for acidic and basic chemicals to reduce the risk that chemicals that react with each other could come into contact. Loading areas are covered and are provided with separate catchment and containment areas. Within the Chemical Building, six separate containment areas are provided for chemical storage tanks and feed equipment. These containment areas are designed to hold the volume of the single largest tank in the containment area plus twenty minutes of sprinkler flow, while allowing two inches of freeboard. Exhibit H.3, Attachment 7, pg. 2 (Protection Strategy).

The HMMP also describes the redundant safety features inherent in the design of 1) the unloading bays at the chemical building and ozone generation building, 2) the chemical storage area, and 3) the chemical pipes. Exhibit I.59, pgs. 7-8 (Revised HMMP). The HMMP also describes the monitoring protocol and frequencies for each of the hazardous materials used at the site, which include, but are not limited to visual inspections, alarms, concertation sensors, and containment sumps. Exhibit I.59, Table 2 (Revised HMMP).

Once again, rather than providing comments on or even being critical of the specific design and monitoring features of the building, RFPD10 simply dismisses them as irrelevant because they do not eliminate risk or need for a timely response from an emergency agency. See eg, Exhibit I.10, pg. 7 (RFPD10). We strongly disagree with the notion that they are irrelevant. Instead, these redundant design features specifically tailored to each building and operation are critical components of the safe operation of the facility and continue to the conclusion that the project will not create a hazardous condition.

**iii. Staff Training**

Portland Water Bureau facilities are staffed by highly trained and dedicated facility operators.<sup>125</sup> As explained in the Operations Supplement:

Water Bureau operators are trained to use safety procedures, engineering controls, and personal protective measures to minimize risk of any incident requiring emergency response. These measures include standard safety and emergency response training in First Aid, Incident Command System, confined space entry, and Hazardous Waste Operations and Emergency Response (HAZWOPER). Operators use appropriate personal protective equipment (gloves, eye protection, etc.) and the facility is designed with eyewashes, safety showers, and other features for worker safety.

As part of current Water Bureau practices, operators take a 24-hour OSHA HAZWOPER training when hired and then an 8-hour refresher course annually. Operators receive training at the HAZWOPER “technician” level which prepares individuals to respond to releases or potential releases for the purpose of stopping the release. The courses include exercises based on potential realistic scenarios that could be encountered at the facility.

Water Bureau operators are trained annually on confined space entry. There are two types of confined spaces, as defined by OSHA: permit required confined space which has a rescue training requirement and alternate entry confined space which does not have a rescue training requirement. Most of the filtration facility’s confined spaces will be alternate entry confined spaces. The Water Bureau hires trained rescue personnel to support work in any permit required confined space. Exhibit I.74, pg. 4 (Operation Supplement).

In response, RFPD10, acknowledges that these are best management practices and that the HAZWOPER training is required by OSHA, and that compliance with OSHA requirements may reduce or mitigate hazards associated with the operation of the facility. Exhibit I.37, pg. 5 (RFPD10). Of course, RFPD next contends that the mitigating measures do not eliminate hazardous conditions. *Id.* For the reasons set

---

<sup>125</sup> The General Manager of West Slope Water District, Mike Grimm, testified at the hearing that water treatment plant operators are highly trained water professionals, and further stating that, “in addition to their knowledge of water treatment and water treatment processes, treatment plant engineers are designed to be trained in emergency response management, plant mechanics, and critical thinking.” Mike Grimm, Hearing Testimony at 1:05:50. Mr. Grimm further indicated that “water treatment operators take safety and following standard operating procedures very seriously, and they regularly conduct drills and tabletop exercises to test their knowledge and response.” *Id.*

forth above, we strongly disagree with the conclusion. Staff training and capabilities work in combination with facility design to avoid the creation of a hazardous condition.

If you were to only read the one-sided spin provided by RFPD10 and inaccurate information about the nature of the chemicals that will be used at the filtration facility provided in other opposition testimony, you would think that the proposed project is an extraordinarily dangerous facility. The record, however, reveals that 1) the filtration facility uses a chemicals that are inherently safer than chemicals used at existing facilities in the area, 2) ozone is generated on the site in a specialized building with redundant engineering and design controls, 3) other building design, engineering, and monitoring features address risks associated with other regulated and nonregulated chemicals, and 4) staff will receive federally mandated training and engage in best management practices implemented for facility and personnel safety. Each of these factors work collectively to reduce the risk of a hazardous situation to the point where the project will not create a hazardous condition. To find otherwise, you would have to agree with RFPD's extreme and untenable interpretation of the hazardous conditions criterion.

#### **iv. Transport of Chemicals**

There is considerable testimony in the record from project opponents, including school districts, that raises concerns about the transport of chemicals to the filtration facility on roads surrounding the facility. As provided in the Project TIA, "the filtration facility will see a maximum of 16 chemical delivery trucks entering and exiting the site during a 5-day work week." Exhibit A.31 (Project TIA). As provided in the Operations Supplement, nearly half of the deliveries will be dry products, salt and soda ash. As noted, some of the materials that will be used have a hazardous materials classification for transport purposes. However, as provided above, the only chemical to be used at the filtration facility that could be identified an OSHA's highly hazardous chemicals, toxics, or reactivities list is ozone, which will be made at the site. Exhibit I.59 (HMMP). Therefore, no chemicals identified by OSHA as highly hazardous will be delivered to the filtration facility site.

The Operations Supplement addresses transport safety and provides:

Trucks transporting chemicals to the filtration facility will be subject to applicable DOT, ODOT, Pipeline and Hazardous Materials Safety Administration, U.S. Environmental Protection Agency, Federal Motor Carriers Safety Administration, and other federal, state, and local codes and regulations for safe transportation of chemical products. Chemical delivery truck drivers are trained and follow strict industry standards to ensure safe and effective transfer of chemical year-round. In addition, the Water Bureau's typical chemical vendor contracts include site-specific driver safety training requirements related to safe handling, delivery, unloading operations, and spill prevention. Exhibit I.74, pg. 2 (Operation Supplement).

Therefore, state and federal regulations apply to all transports of chemicals identified as hazardous, and the Water Bureau has policies and procedures in place to ensure compliance with the state and federal requirements.<sup>126</sup>

Project opponents raise specific concerns about the transport of chemicals to the facility during inclement weather.<sup>127</sup> See *e.g.* Exhibit J.21. As explained in the Operation Supplement:

Certified operators will manage scheduled deliveries and onsite storage of treatment chemicals needed for filtration facility operation. Operators use industry standards and best practices to optimize treatment for seasonal changes in water quality and water demands as well as adjust to external factors such as supply chain considerations or inclement weather that may affect deliveries to the facility.

For example, facility operators monitor weather forecasts and may schedule a top off delivery of a particular chemical prior to or following a winter storm to avoid deliveries in inclement weather. In addition, average system demands in winter are generally lower (approximately 85 million gallons per day compared to the design capacity of 135 million gallons per day), which typically means less overall chemicals are used and onsite storage can serve the facility for longer stretches of time.

The Water Bureau currently operates two treatment facilities in locations subject to inclement weather and staff routinely monitor weather forecasts and make adjustments as needed to maintain safe operations. In the case of Headworks, Water Bureau staff clear snow and maintain the forest roads in the Bull Run Watershed to provide winter access for deliveries and operational needs. Exhibit I.74, pg. 3 (Operation Supplement).

As indicated, chemical deliveries to Water Bureau facilities have occurred during winter months for decades. All delivery drivers are specifically trained and must adhere to state and federal regulations that apply to all drivers.

Finally, as discussed above, the approval criterion at MCC 39.7515(F) require a finding that the project will not create hazardous conditions. For the reasons set forth above, the transport of chemicals on roads that are designated truck routes and through roads and intersections designed to County standards, is not a hazardous condition. However, even if the transport of chemicals could be considered a hazardous condition, this project will not “create” the condition because that condition already exists on the roadways surrounding the filtration facility site and on nearby roadways in rural East Multnomah County. As established above, deliveries of treatment chemicals, including soda ash and carbon dioxide already travel on roads surrounding the filtration facility site. Additionally, chlorine gas is delivered to the Headworks facility further east. As detailed above, the treatment steps at those

---

<sup>126</sup> Note this is the exact finding the County made in the Lusted Hill expansion approval for a similar set of chemicals. Exhibit I.72 (Lusted Hill Decision)

<sup>127</sup> Project opponents also raised concerns about road conditions creating safety issues for chemical deliveries. Road conditions are addressed below.



two facilities will be consolidated at the filtration facility and eliminate the need for the transportation of chlorine gas.

*b. Facility Operation Traffic*

As detailed in the record, the filtration facility will generate a limited number of vehicle trips and those trips are well within the capacity of the surrounding transportation system. As provided in Section II.B above, Exhibit A.31 (Project TIA) explains that even using extremely conservative assumptions – such as that all 26 full-time employees would be there at the same time (which is not true, the maximum will be 10 employees on any given shift), and that all of the delivery / haul-off trucks for operation will be “entering and exiting the site during each of the peak hours[,]” (instead of more realistically delivered across the daytime hours) – all intersections “continue to operate at a Level of Service B or better, well exceeding the standards established by their corresponding jurisdictions under the 2040 total Traffic (Buildout) conditions.”<sup>128</sup>

While the record clearly establishes that the filtration facility trip numbers will be limited and well within the County’s level of service standards, project opponents have identified safety concerns related to new staff and truck trips in the area generally and specially on Carpenter Lane. For the reasons set forth below, the traffic generated by facility operations will not create a hazardous condition for the residents of Carpenter Lane or the surrounding area.

**i. Planned Roadway Improvements**

As detailed in Section II.B, the Water Bureau has agreed to provide extensive off-site roadway improvements through a “fix-it first” approach applied prior to use of identified roadways for construction purposes. This approach will be implemented through conditions of approval proposed by County Transportation. Exhibit J.44 (County Transportation Memo). Condition 6 of County Transportation’s proposed conditions provides that in addition to specific work on specific routes identified in the earlier conditions, the Water Bureau must maintain the route in a serviceable condition while being used for construction, and “at the end of the applicant’s use of the route, return the road used as a primary or detour through truck haul route to as good or better condition (PCI) than it was on the date of the County’s most recent PCI score prior to the applicant’s use.” In other words, following construction, the Water Bureau must leave the roads used as primary or detour truck routes in as good or better condition as they were prior to construction.

In its initial testimony, RFPD10 identified several roads with a PCI of less than 50 in the study area and provided a definition that indicated that roads with a PCI of less than 50 were “failed roads” that do not

---

<sup>128</sup> Staff’s revised condition 12.a, and the requested modifications of that condition below, limit the employees to 26 per day and 10 employees on any given shift. The condition also set a limit of 30 visitors per day. However, the purpose of the condition is to set a maximum number of visitors that the total number of people at the site at any given time cannot exceed the capacity of the sanitary system per MCC 39.4325(G). It is not anticipated that there would be 30 visitors very day, only that is the absolute maximum the sanitary system could accommodate taking into consideration the number of employees. Also, visitors include anyone who is not an employee, so the truck drivers would be included in that category.

provide an adequate roadway. Exhibit D.1, pg. 10-11. (RFPD10). RFPD cited County budget constraints that prevented actions such as pothole repair and resurfacing, and raised further concerns that the filtration facility construction vehicles would further deteriorate these hazardous roads and contribute to increased emergency response times. Id., pgs, 9-11, 23. In response to this input from RFPD10 and County Transportation, the Water Bureau developed the fix-it first approach which, as detailed above, requires both initial improvements to road surfaces with a PCI of less than 50, but also an on-going obligation to maintain the roadway in a serviceable condition, and return the road surface to as good or better condition than it was prior to construction.

RFPD responded to the fix-it first approach by arguing that the fix-it first proposal creates additional heavy truck traffic, road closures, detours, and delays. Exhibit I.10, pg. 4 (RFPD10). It is difficult to understand how RFPD10 could object to the Water Bureau's plan to improve the condition of the exact same roads that they claimed in earlier testimony are currently hazardous and increase emergency response times. If it were the County, rather than the Water Bureau, improving the same roads, in the same way, on the same timeline as the fix-it first approach, it is hard to imagine that RFPD10 would object to the safety improvements created by that work because of temporary impacts on roadway circulation necessary for the work. In any case, County Transportation supports the fix-it first approach and has specifically refuted the RFPD10 positions related to the fix-it first condition. Exhibit J.44 (County Transportation Memo).

## ii. Carpenter Lane

SE Carpenter Lane is the sole frontage for the filtration facility site. The segment of Carpenter Lane that is located east of SE Cottrell Road currently provides access for a number of single-family homes and R&H Nursery. As established in testimony provided by R&H Nursery, their primary loading dock is located along Carpenter Lane. Exhibit H.22, pg. 4 (R&H). Therefore, Carpenter Lane is currently used by a combination of personal vehicles and trucks used for nurse stock shipping.

Carpenter Lane is classified by the Multnomah County Transportation System Plan as a local road, but does not currently meet local road design standards for width, and as well established in the record, the road surface is in poor condition. As explained in Section II.B above, Carpenter Lane will be widened and resurfaced to meet Multnomah County standards for a local road. The County road standards for rural roads do not include sidewalks. See, Rural Arterial/Collector/Local Cross Section in Section II.B above. Therefore, during facility operation bicyclists and pedestrians on Carpenter Lane will continue to share the road with the cars and trucks traveling on the road as they do now. The difference will be that the wider road width and shoulders will provide more room to safely accommodate vehicle and pedestrian travel, and both will benefit from the improved road surface.

**iii. Intersection Improvements**

Project opponents submitted testimony that questioned the truck turning movements at Cottrell / Dodge Park and Carpenter / Cottrell. Exhibit I.56 (Leathers).<sup>129</sup> As discussed in Section II.B above, the Water Bureau will make improvements to the Dodge Park/Cottrell and Carpenter Cottrell intersections that meet and exceed County standards. With the widening of Carpenter Lane and improvements to the Carpenter Lane / Cottrell Road and Cottrell Road / Dodge Park Boulevard intersections, truck turning paths will be accommodated. Detailed evidence on this point is provided in Exhibit J.89 (Truck Turning Paths). As explained in that memorandum from the technical experts, the intersections will accommodate “the largest truck that will be used for the project during or after construction without special oversized load procedures, such as flaggers.” *Id.*, pg. 2.

Project opponents raised specific safety concerns about the installation of retaining walls on the southern corners of the Dodge Park/Cottrell intersection improvements, and have argued that the wall will create a hazardous condition. See, Exhibit I.28 (Hart). The Water Bureau’s transportation expert provided the following response:

The accident data from June 2023 is not currently available. However, in accident data from past years, including 2022 where numerous accidents were reported, the predominant pattern at the intersection is from southbound vehicles not stopping and impacting westbound vehicles. A retaining wall will have no impact on whether drivers disregard the stop sign coming into the intersection southbound on Cottrell Road. Ms. Hart concludes a concrete wall would have killed the occupants of both vehicles presumably based on information seen in the “aftermath” of the accident. Unless the accident was observed and all aspects such as direction of travel, driver at fault, vehicle speeds, vehicle trajectory, etc. and, with all respect, evaluated by a professional trained in evaluating traffic incidents, this is an inappropriately drawn conclusion.

Furthermore, the retaining wall is a necessary element of intersection improvements that will enlarge the intersection and make it inherently safer for all vehicles using the intersection, including trucks from construction and ongoing operations of the project, as well as the large vehicles and trucks of local farmers. Pipeline work will also include removal of trees and shrubs in the public right-of-way along the south side of this intersection, which will improve sight distance and safety for all users. Exhibit J.87, pg 19 (Global).

As further detailed, in Section II.B above, video testimony entered into the record by project opponents indicates that the specific accident in question was likely caused by stop sign visibility issues on the north side of the intersection.

---

<sup>129</sup> The comment was primarily directed at construction trips. However, because the intersection improvements will remain in place and benefit operation trips as well, it is addressed here.

**iv. County Transportation Conclusion on Safety**

The Water Bureau's transportation expert concluded that "[t]he roadway improvements will reduce risks to all roadway users." Exhibit J.87, pg. 48 (Global). Additionally, County Transportation is the authority on whether the proposed mitigation is sufficient to keep the County's roads both safe and within county standards, given the potential impacts in the Construction TIA and Project TIA. See Multnomah County Road Rules 8.100.B (off-site improvement requirements are "based upon the additional traffic generated by the development that result in conditions that exceed the design capacity of the facility, create a safety hazard or create an on-going maintenance problem.") As Shown in Exhibit J.44, County Transportation has determined that, with the extensive required off-site improvements, the project will not create a safety hazard or create an on-going maintenance problem.

Even absent the roadway improvement described above, the relatively minimal traffic generated by facility operation would not create a hazardous condition. However, when taking into consideration the roadway improvements to the surrounding roadway system that will be in place following construction, it is abundantly clear that the traffic generated by operation of the filtration facility will not result in a hazardous condition.

**c. Emergency Vehicle Access**

As explained in the record, the Water Bureau prioritized placement of the pipelines within the right-of-way where possible to preserve surrounding farmland and natural resources where feasible. Placing utilities in the right-of-way is also consistent with the Multnomah County Comprehensive Plan policies. However, the result of right-of-way placement is temporary impacts to travel. However, the Water Bureau has committed to facilitating emergency vehicles through construction zones and coordinating with emergency responders to keep them informed of construction details on a regular basis.

As explained by the project transportation consultant:

By contract, the contractor is required to prioritize emergency response access through all work zones and to allow emergency responders access through otherwise closed-to-through-traffic work zones. This is common practice on roadway construction projects. PWB's contractors are very familiar with these standard requirements and how to apply them. While it is not possible to predict when an emergency occurs, the contractors will take measures to ensure they can accommodate emergency vehicles through a work zone regardless of the stage of construction. For example, if a pipeline obstructs a cross street, the contractor will have on-hand the materials needed to plate the excavation. PWB's contractors will prepare emergency coordination plans so that the contractors and emergency responders are prepared to facilitate emergency vehicle access without delay. PWB's fire expert, David Stacey of Performance Based Fire Protection Engineering, provides more information on the elements to be included in these plans in his *Responses to Submitted Additional Testimony* document submitted concurrently with this memorandum.

In addition, see Exhibit I.75, pages 4-5, for additional information on accommodating emergency vehicles. As explained in Exhibit I.75, page 5, the construction specifications require the contractor to **"allow emergency vehicles, incident response units, and transit vehicles immediate passage at all times, maintain 24-hour access to all businesses and residences**

adjacent to the areas of work for the project and along haul routes, do not block driveways or sidewalks, and maintain safe pedestrian accesses.” Exhibit J.87, pg 8 (Global).

As provided above, the Water Bureau is proposing a condition of approval that requires emergency access through construction zones. Specifically, County Transportation Supplementary Condition 7.d.ii is part of a set of requirements for access through construction zones and provides:

Proposed addition to County Transportation Condition 7:

d. ...

.ii. The Water Bureau shall (1) ensure that work zones allowing a single lane of traffic to pass are wide enough to accommodate emergency vehicles; and (2) flag emergency vehicles through otherwise closed work zones. Access for emergency vehicles shall be provided at all times.

As provided in the transportation section above, the Water Bureau is also proposing a second condition as part of the Transportation Control Plan (TCP) condition that requires the TCP to include an emergency coordination section that includes a minimum set of information.<sup>130</sup>

Water Bureau Proposed Addition to County Transportation Condition 7:

c. The TCP must include an emergency coordination section that at minimum includes the following requirements:

- i. Satisfy the minimum requirements of the Manual on Uniform Traffic Control Devices for Streets and Highways;
- ii. Provide construction update reports to emergency responders that include, at a minimum, the following information:
  - H. Dates and times of closure/partial closure
  - I. Name of contractor and emergency contacts (required on-site contact)
  - J. Purpose of closure

---

<sup>130</sup> The minimum contents of the emergency coordination section in the condition were developed and recommended for the project by Mr. Stacy of Performance Based.

- K. Location of closure and number of lanes
- L. Work hours and times of road closures
- M. Traffic control layout plan
- N. Legend
  - North arrow
  - Street names within a certain distance of the site
  - Physical features such as medians, shoulders, etc.
  - Identified method for passage of emergency response vehicles (including temporary conditions/detour plan)
  - Location of significant construction items such as dumpsters and heavy equipment
- iii. The construction update reports must be provided at least weekly unless an alternative frequency is requested by an emergency responder.

An emergency coordination plan requires input and cooperation from the emergency responders. The Water Bureau will request input from GFES, police and sheriff's department, and emergency medical services on the final emergency coordination, and ultimately it will require approval from County Transportation.

RFPD dismissed the concept of communication between emergency response teams and construction crews so that the construction crew would have some advanced notice when there is a call for emergency assistance in the area of the construction activity.<sup>131</sup> RFPD also criticized the Water Bureau for not having a final TCP.<sup>132</sup> Even if it is not feasible for emergency responders to notify crews of their access needs for every call, under the emergency coordination condition, the emergency responders will

---

<sup>131</sup> Specifically, RFPD quoted GFES Chief, Scott Lewis, who reportedly said he had never encountered "emergency responders calling ahead." Exhibit J.37, pg. 7 (RFPD10) That, however, does not mean that it is not feasible. RFPD board members apparently opined that it is not feasible and will not work. However, pursuant to the IGA, GFES is responsible for emergency response in the district.

<sup>132</sup> In response to this comment, County Transportation cites MCRR 13.500 requires that to the extent feasible temporary road closures must maintain access for emergency services, and notes, "[i]t is therefore expected that the provisions of MCRR 13.000 enable sufficient notice to emergency services – and other local stakeholders – to allow for operations planning similar to any other construction on County roads." Exhibit J.44, pg. 9 (County Transportation).

have information available to inform their route. However, emergency response coordination requires the cooperation from the emergency responders, and element that has been lacking to date. In the event that the emergency response entities refused to coordinate with the Water Bureau, who is also a critical public service provider, on a final plan or refused to consider options for communication with Water Bureau construction crews, it would be those entities creating a potentially hazardous situation rather than the Water Bureau.

*d. Geotechnical*

True North Geotechnical submitted a technical memorandum into the record prior to the hearing that raised several issues. Exhibit E.21 (True North). While acknowledging that they may not have reviewed all of the relevant reports, they identified two issues that related to potential geotechnical hazards.

First, True North noted that “fat clay” had been observed by others on the property and suggested further soil testing. In response, the Water Bureau provided memo from the project geotechnical experts for the raw water pipeline, the finished water pipelines, and the filtration facility that addressed the presence or absence of fat clay in those respective areas. Exhibit I.65 (FWP Geotechnical); Exhibit I.66 (FFS Geotechnical); and Exhibit I.67 (RWP Geotechnical). Each memo detailed why additional testing was not needed for that element of the project. There was no rebuttal testimony from True North or any other testimony related to the geotechnical responses from the Water Bureau on the fat clay issue.<sup>133</sup>

Second, True North question the location of the septic in relation to the Geologic Hazard Overlay Zone. The filtration facility site geotechnical memo prepared by Delve Underground on behalf of the Water Bureau explain that based upon site specific geotechnical analysis near the drain field area, the risk for deep seated landslides is low and the drain field is located 70 to 80 feet from the geo hazard area. Exhibit I.66 (FFS Geotechnical). The memo concluded that at that distance and with the soil composition the drain field was not expected to affect slope stability. There was no expert testimony or other testimony provided in response to the Delve’s memo on the stability of the septic drain field.

Based upon the expert and unrefuted testimony, the record clearly establishes that the geotechnical issues raised by True North on behalf of the Cottrell CPO will not create a hazardous condition.

---

<sup>133</sup> Mr. Willis raised general concerns about geology and soil on the site in written testimony submitted at the hearing. Exhibit H.12, pg. 7 (Willis). Mr. Willis’s concerns were based upon the raw water pipeline tunneling and location of the Geologic Hazard overlay. Mr. Willis did not specifically acknowledge or challenge the conclusions in the raw water pipeline or facility geotechnical reports, nor did he provide any specific evidence to support his concerns. The expert geologic testimony in the record clear establishes that the project, including tunneling, will not create a hazardous condition. See Exhibit A.81 (Raw Water Pipelines Geotechnical Summary); Exhibit I.64 (Raw Water Pipeline and Tunnels); Exhibit A.81 (Filtration Facility Geotechnical Summary).

*e. Crime*

Several public comments speculated on potential criminal activity at the filtration facility site. The Operations Supplement explained:

The Water Bureau's operation of current and future facilities prioritizes safety and security of critical infrastructure. The filtration facility will be accessible only to authorized personnel and is designed with safety and security monitoring systems. The facility will have 24/7 onsite operations staffing, security fencing, 24/7 offsite security personnel, remote monitoring, infrared cameras, and patrols.

Like other community water systems serving more than 3,300 persons, the Water Bureau complies with EPA America's Water Infrastructure Act requirements related to conducting risk and resilience assessments and developing emergency response plans that incorporate findings of that assessment. This process considers both potential malevolent acts and natural hazards as well as means to improve resilience of the system through physical and cybersecurity measures and monitoring practices. Exhibit I.74, pg. 4 (Operation Supplement).

The level of security is appropriate for the facility and the setting.

For the reasons set forth above and in compliance with MCC 39.7515(F), facility operation will not cause a hazardous condition.

## **G. MCC 39.7515(G) Will satisfy the applicable policies of the Comprehensive Plan.**

### **1. Comprehensive Plan Structure**

The Multnomah County Comprehensive Plan has over 200 pages of policy for guiding growth and development in the County. The Comprehensive Plan is organized into chapters that relate to specific topics. Each chapter includes a broad goal related to the topic addressed in that chapter. Each chapter also includes policies and strategies. Pursuant to the Introduction and Citizen Involvement section of the Comprehensive Plan, a policy is a commitment to a general course of action designed to guide decisions and a strategy is a specific course of action for implementing a particular policy. MCCP 1-6. MCC 39.7515(G) only requires a conditional use to satisfy applicable policies of the Comprehensive Plan, as opposed to strategies. The strategies, however, provide relevant context for each broadly worded policy proceeding the strategy because it provides the specific action to implement a policy, and thus helps identify the intended scope or objective of each policy. *See Friends of the Hood River Waterfront v. City of Hood River*, 263 Or App 80, 88, 326 P3d 1229 (2014) (*PGE/Gaines* methodology applies to interpretation of a comprehensive plan).



## 2. “Applicable Policies” Does Not Mean All Policies

In order to determine which polices are “applicable,” the County must examine the text and context of potentially applicable comprehensive plan requirements to “establish both:

- (1) that the plan requirement is mandatory (rather than hortatory or aspirational) and
- (2) that the mandate must be applied directly as a permit approval standard.”

*Friends of the Hood River Waterfront*, 68 Or LUBA 459, slip op. pg. 9 (2013) *rev'd on other grounds*, 263 Or App 80 (2014) (formatting added).

First, as to whether a policy is mandatory, as discussed above, in general only policies (not goals or strategies) in the Comprehensive Plan are mandatory plan requirements, although the goals and strategies provide relevant context for interpretation of the policies. Each policy of the Comprehensive Plan then must be evaluated to determine if it is mandatory. The words “will” and “shall” are mandatory, whereas words like “should,” “encourage,” “promote,” “strive to,” “enable” and “desirable” indicate that a policy is not an approval criterion.<sup>134</sup>

“The second qualification is necessary, because a mandatory comprehensive plan policy may have been incorporated into implementing land use regulations, thereby fully implementing the plan policy and making direct application of the policy duplicative and unnecessary.” *Friends of the Hood River Waterfront*, 68 Or LUBA at slip op pg. 9. Policies which are considered approval criteria must be “fairly specific and mandatory direction” to the local government, whereas “plan policies that plainly direct the city to undertake planning efforts do not operate as decisional standards that apply on a case-by-case basis when approving individual development proposals.” *Northgreen Property LLC v. City of Eugene*, 65 Or. LUBA 83, 87 (2012). Where there is a similar provision in the local government code that is “sufficiently similar to the language” in the policy, the local code incorporates the standard and the comprehensive plan policy is not directly applicable. *Id.* at 89.

For example, where the County had already amended the zoning code to implement a Comprehensive Plan policy related to EFU lands, a non-farm golf course use that was consistent with the provisions of the zoning code was also consistent with the comprehensive plan. *Taber v. Multnomah County*, 11 Or LUBA 127, 134 (1984).

The following sections will address any comprehensive plan language raised by opponents and evaluate whether, based on the text, viewed in context, those provisions are mandatory approval criteria and how the project, including the pipelines, is consistent with any mandatory approval criteria.

## 3. Introductory Chapters

Exhibit J.11 (Martin) provides block quotes of Comprehensive Plan text from chapters 1 and 2 without explaining how the project violates them. All of these statements in the “Introduction” and general

---

<sup>134</sup> See OSB Land Use, Section 14-83 (2010 Edition).

"Land Use" section are "hortatory or aspirational" statements of policy, and do not apply directly as approval criteria.

#### 4. Exclusive Farm Use (EFU) Zones

##### *Exclusive Farm Use (EFU) Zones – Policies 3.6 to 3.12*

Project opponents identified the EFU Comprehensive Plan policies, Policies 3.6 to 3.12, as applicable Comprehensive Plan policies. Exhibit E.1 (Hart). However, the testimony fails to explain why those policies are applicable under this conditional use approval criterion MCC 39.7515(G), which is applicable only in the MUA-20 zone where the Project is a conditional use. As explained above in Section II.C.1, in EFU this utility facility is subject to state statutory approval criteria, not to the local conditional use approval criteria. Therefore, Policies 3.6 to 3.12 are not applicable policies of the Comprehensive Plan.

#### 5. Multiple Use Agricultural Land

*County policies for these areas promote agricultural activities and minimize conflicts between farm and non-farm uses but are less stringent than policies in Exclusive Farm Use zones.*

*Policy 3.14 Restrict uses of agricultural land to those that are compatible with exclusive farm areas in recognition of the necessity to protect adjacent exclusive farm use areas.*

*Policy 3.15 Protect farm land from adverse impacts of residential and other non-farm uses.*

*Strategy 3.15-1: Ensure that new, replacement, or expanding uses on MUA zoned lands minimize impacts to farm land and forest land by requiring recordation of a covenant that recognizes the rights of adjacent farm managers and foresters to farm and practice forestry on their land.*

*Strategy 3.15-2: Amend the Multiple Use Agriculture zone to include deed restrictions protecting surrounding agricultural and forestry practices as a requirement for approval of new and replacement dwellings and additions to existing dwellings.*

First, these policies are not applicable, because they direct planning efforts. Policies which are considered approval criteria must be "fairly specific and mandatory direction" to the local government. *Northgreen Property LLC v. City of Eugene*, 65 Or. LUBA 83, 87 (2012). These do not provide specific enough direction to apply on a case by case basis – what does protect mean? All farm land? Protecting all farm land – including the subject property – would prohibit any non-farm use of land. The comprehensive plan "cannot be interpreted so broadly that it renders [local code provisions], which specifically authorize ... conditional uses[,] ... nullities." *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246, slip op at 18 (2015). Thus, these policies are not specific enough to be applied directly.

Moreover, the policies must be read in light of their context (under *PGE/Gains*), which includes the strategies. Here, Strategy 3.15-2 clearly directs planning efforts, providing context that Policy 3.15 provides an overarching goal for staff – not a directly applicable approval criterion. Similarly, in Policy 3.14, staff are directed to “restrict uses” -- which they have done through the detailed list of allowed and conditional uses in the MUA-20 zone.

These standards have also been implemented in the zoning code, both through the Farm Impacts Test as well as the requirement for uses to show “compatibility” as through approval criterion A. To the extent that these are applicable policies, the analysis under those approval criteria show that they are met.

Staff confusingly state that “[a]rguments by an applicant that protection of agricultural lands in the MUA-20 zone do not need to be the same level as those in EFU zoned areas is inconsistent with the protections provided to MUA-20 agricultural lands.” Staff Report, page 129. This is confusing because it is directly under the quoted language of the comprehensive plan that, in the MUA-20 zone, policies to “promote agricultural activities and minimize conflicts between farm and non-farm uses ... are less stringent than policies in Exclusive Farm Use Zones.” *Id.* Staff’s interpretation of the comprehensive plan – that protection in MUA-20 is at “the same level” as in EFU – is directly contrary to the language of the comprehensive plan itself that it be “less stringent”.

*Policy 3.16<sup>[135]</sup> New non-agricultural businesses should be limited in scale and type to serve the needs of the local rural area.*

*Strategy 3.16-1: Review the appropriateness of review uses, conditional uses and community service uses in the MUA-20 zone through a public process that involves community stakeholders prior to amending the Zoning Code.*

Policy 3.16, clearly in its own text, only applies to “businesses”. The Water Bureau is part of the City of Portland and is not a business.<sup>136</sup> This explains why the zoning code – adopted through Strategy 3.16-1’s public planning process – provides that the approval criterion that implements this policy does not apply to the proposed project. See MCC 7520(A)(6); MCC 39.7515(I). Consistent with Strategy 3.16-1, the County has “review[ed] the appropriateness of ... community service uses in the MUA-20 zone” and amended the Zoning Code accordingly. A utility is fundamentally different from a business in that the primary objective of a business is to generate profit for its owners or shareholders. In contrast, a utility’s primary goal is to provide essential services, such as water, to the community efficiently and reliably.

Nor is it true that the Water Bureau is “new” to the area, given the Bureau’s extensive existing infrastructure in the area, including the Lusted Hill treatment facility.

---

<sup>135</sup> Ms. Richter points out that Policy 2.8 related to Rural Residential areas is identical. Exhibit H.4, page 7. The same analysis applies.

<sup>136</sup> Exhibit A.3, page 1 (identifying the applicant as “City of Portland | Portland Water Bureau”); Portland City Code (“PCC”) 21.04.010.AA (“Portland Water Bureau’ means the organization charged with the responsibility for the finance, operation, maintenance and improvement of the City’s water distribution system.”)

More fundamentally, Policy 3.16 is not “applicable” because MCC 39.7515(I) already incorporates the standard for those uses to which the County determined it should apply in the legislative process. See *Northgreen Property LLC*, 65 Or LUBA at 89 (2012) (a zoning code standard that is “sufficiently similar to the language” in the policy means that the comprehensive plan policy is not directly applicable).

Staff agree that Policy 3.16 is not applicable. Exhibit I.45, pages 2-3.

## **6. Natural Resources**

*Policy 5.2      Protect natural areas from incompatible development and specifically limit those uses which would significantly damage the natural area values of the site.*

*Policy 5.27     Protect significant native fish and wildlife habitat and wildlife corridors and specifically limit conflicting uses within these habitats and sensitive big game winter habitat areas.*

The Cottrell CPO attorney, Ms. Richter, cites Policy 5.2 and Policy 5.27 to support her position that the conditional use natural resource standard applies outside of the mapped Goal 5 SEC zones. Those issues are addressed in detail above. However, it is important to note here that both policies fail to support Mr. Richter’s interpretation, and in fact do the opposite. Both policies call for limiting conflicting uses, which is consistent with Goal 5. Policy 5.27 also more specifically calls on the County to protect **significant habitat**, which it does through its Goal 5 SEC mapping. Policy 5.2 only calls for limiting, rather prohibiting uses, and only limiting those uses which would significantly damage natural area values. None of those provisions align with Ms. Richter’s assertion that the conditional use standard at MCC 39.7515(B) requires a finding of no impact outside of mapped SEC areas.

The policies are also both directive to the County that have been implemented through the SEC overlay zone. Therefore, they are not applicable policies of the Comprehensive Plan that must be satisfied under MCC 39.7515(G).

## **7. Historic and Cultural Resources**

*Policy 6.2      Protect cultural areas and archeological resources and prevent conflicting uses from disrupting the educational and scientific value of known sites.*

*Strategy 6.2-1: Maintain information on file regarding the location of known archeological sites, to the extent permissible by law. Although not made available to the general public, this information will be*

*used to ensure the sites are not degraded through incompatible land use actions.*

*Strategy 6.2-2: Coordinate with the State Historic Preservation Office regarding the identification and recognition of significant archeological resources.*

*Strategy 6.2-3: Encourage landowners to notify state authorities upon discovering artifacts or other evidence of past cultures on their property*

*Policy 6.5 Where development is proposed on areas of cultural significance, require evaluation of alternative sites or designs that reduce or eliminate impacts to the resource.*

*a. Evidence in the Record does Not Support Additional Archeological Discovery Methods Prior to Construction*

Project opponents submitted testimony intended to support a claim that there are pre-contact archeological sites at both the filtration facility site and along a segment of the finished water pipeline route and that as a result, the above-referenced Comprehensive Plan policies are not met. Specifically, the attorney for the Cottrell CPO, Ms. Richter, submitted a statement that indicates it was prepared based upon an interview of Arden Meyer, the son of a former owner of a 40-acre portion of the Filtration Facility Site. Exhibit H.32.a (Meyer Interview). The document is neither a sworn affidavit nor a transcript from an interview that identifies the questions posed in an interview format. Instead, it consists of a statement that references attached photographs of a hand drawn map, a typed inventory with conflicting information about the location of discovery, and photographs of what appears to be private collection of archeological resources. Some of the items in the photos of the archeological resource collection are numbered and some are not. While the document is not in interview format, the heading indicates that an interview was conducted by Lauren Courter and Paul Willis and was attended by Doug and Pat Meyer. Both the identified interviewers and the identified attendees are individuals who have submitted both written and oral testimony in general opposition to the Project. See, Exhibit H.12 (Willis) and Exhibit H.22 (Willis); Exhibit E.17 (Courter), Exhibit H.23.j (Courter), Exhibit I.55 (Courter), and Exhibit J-19 (Courters); and Exhibit H.26 (Meyer) and Exhibit I.37 (Meyer).

Ms. Richter also submitted a separate statement that indicates it was prepared based upon an interview of Annell Carlson. Exhibit H.32.b (Carlson Interview). According to the statement, Ms. Carlson's family has owned property adjacent to the alignment of the finished water pipeline since 1905. The statement refers to photographs of three separate frames of what appear to a private collection of archeological resources, and indicates that the objects were found on the 40-acre family farm between 1905 and 1960. Similar to the Arden Meyers document, the Annell Carlson statement is neither a sworn affidavit nor in interview format, and once again, the interviewer, Patricia Fiedler, submitted separate testimony in general opposition to the Project. See, Exhibit H.24.g (Fiedler) and Exhibit I.19(Fiedler).

Finally, Ms. Richter submitted a memo prepared by Paul Solimano an archeologist at Willamette Cultural Resource Associates that references the two statements. It does not appear that Mr. Solimano was involved in the interviews of Mr. Meyer or Ms. Carlson. His memo refers to the interview statements, but also includes information that is not present in the statement or the photos. For example, neither the Carlson statement nor the photos indicate that “many of the artifacts were collected from near the house” as Mr. Solimano suggests in his memo. Mr. Solimano also indicates that he reviewed photographs of the artifacts, but it appears that he did not review the collections in person. Mr. Solimano suggests that additional evaluation of the Project area that includes subsurface investigations is needed based upon his review of the photos and the interview statements.

Several project opponents also suggested, without providing evidence, that the filtration facility site could have been the site of a Native American village based upon its proximity of the Johnson Creek headwaters. See, Exhibit I.19 (Fiedler) and Exhibit I.25 (Cottrell CPO). A written statement from Ken Smith, was read during oral testimony and his written statement was later entered into the record. Exhibit I.20 (Smith). Mr. Smith testified that he is a Wasco medicine man, but clarified that “he cannot officially represent the Warm Springs Indian Reservation.” He did state that he forwarded all information to the Department of Natural Resources on the Warm Springs Indian Reservation. There is no statement from an official representative of the Warm Springs tribe, or any other Native American tribe in the land use record requesting additional evaluation, or otherwise opposing the project.<sup>137</sup>

The Water Bureau’s archeological experts, Heritage Research Associates, Inc. (“Heritage”) thoroughly reviewed the statements and photos submitted into the record by project opponents. The Heritage archeologists have provided archeological support for the Project since the early planning phases and conducted three separate phases of archeological surface surveys. Exhibit I.98, Attachment A (Heritage Report). Heritage also prepared the Inadvertent Discovery Plan for the Project included in the application at Exhibit A.71, and has been involved in the Project’s National Historical Preservation Act Section 106 compliance. Exhibit I.98, Attachment A (Heritage Report). Heritage reviewed the interview documents as well as Mr. Solimano’s memo and disagrees with Mr. Solimano’s conclusions. Exhibit I.98, pg. 7-8 (Heritage Report). The Heritage Report provides four specific points of disagreement with Solimano’s earlier review: (1) second-hand reports of artifact finds without clear locational data are not sufficient evidence of a site in a specific location; (2) the landowner artifact find claims do not make an entire project area a high

---

<sup>137</sup> The Cottrell CPO entered a letter into the record during the rebuttal period from Geovision, a for-profit enterprise wholly owned and operated by the Confederated Tribes of the Warm Springs in Oregon (CTWSRO) that identifies cultural resource evaluation actions that Geovision can provide. Exhibit J.18. However, in the letter Geovision clearly establishes that while it is tribally owned, “it does not speak for, nor represent, the CTWSRO Tribal Government.” *Id.*, pg. 3. The author of the letter indicates that to his knowledge three specific tasks were not included in the original scope of work for the project. Critically, the author of the letter does not indicate that he evaluated any of documents in the record prepared by the Portland Water Bureau’s archeological experts, Heritage Research Associates, that explain why those activities were not warranted for the project site. The letter indicates that the additional cultural resource identification efforts align with Geovision’s values but provides absolutely no indication that the activities are either required or otherwise warranted for the project site.

probability area; (3) these reports conflict with the negative results of a professional intensive archaeological surface survey conducted in good field conditions; and (4) given the shallow soils and past disturbance from forest clearing, probing (i.e., digging lots of small holes) is unlikely to be an effective strategy for discovering archaeological remains for this project.

Heritage also reviewed the village related testimony and provided an additional memo that explains why it is unlikely that a Native American village would have been located on the filtration facility development area, based upon location of the filtration facility, historic agricultural activities at the site, and the make-up of the artifacts identified in the collections brought forth by project opponents. Exhibit J.76 (Heritage Memo).

Despite disagreeing with Mr. Solimano's suggestions that additional site evaluation is needed prior to land use approval or beginning project construction, Heritage acknowledges that the statements and associated collections are of interest archaeologically and has incorporated the Carlson and Meyer statements and the photos into documents included in the ongoing Section 106 process and in construction monitoring documents. Specifically, Heritage updated the Portland Water Bureau Bull Run Water Treatment Plant Project: Supplemental Archeological Investigations and Project Update ("Archeological Investigations and Update") to include the information entered into the land use record by adding a new Appendix B to the document that 1) identifies and addresses the property owner collections in the vicinity of the project, and 2) includes both the full Meyer and Carlson statements and photos. Exhibit I.98, Attachment A (Heritage Report). As stated in the Archeological Investigations and Update Appendix B, close monitoring of initial ground clearing in the eastern parcel formerly belonging to Arden Meyer's father has been added to the monitoring plan for the filtration project. The Draft Archeological Monitoring Plan for Construction of the Portland Water Bureau Bull Run Filtration Project ("Archeological Monitoring Plan") specifically references Ms. Carlson and Mr. Meyer's statements and the artifacts and identifies the areas of the reported artifact finds. Exhibit I.98, Attachment B, pg. 5 and pg. 9 (Heritage Report). As noted in the Heritage memo, the Archeological Monitoring Plan is presented in draft form pending review by the Oregon State Historic Preservation Office (SHPO) and consultation with other parties under the Section 106 compliance process.

Mr. Solimano submitted a second memo responding to the Heritage Report acknowledging he did not disagree with most of the Heritage Report. Exhibit J.34 (Solimano). In the response, Mr. Solimano appears to ignore the specific information about the project site, long-ago findings by locals, geomorphic limitations, and appropriateness of various archaeological discovery methodologies addressed in detail in the Heritage Report. Instead, Mr. Solimano makes three limited points. First, he explains how archeological identification works and the resulting recommendations. *Id.*, pg 2. The process he describes is consistent with the process that Heritage undertook as explained in Exhibit I.98, Attachment A (Heritage Memo). He further describes the range of recommendations following an inventory survey range. In this case, Heritage's original recommendation was for no additional survey work, an available conclusion according to Mr. Solimano's response. Mr. Solimano further suggests that the recommendation must change with new information. As detailed above and in the record, Heritage responded appropriately to the new information by documenting the discoveries in an updated survey report and monitoring plan. Next, Mr. Solimano states that if archeological materials are found during the survey avoidance is almost always the first management recommendation. In this case, Heritage did

not find artifacts during its survey and made a clear case for why the artifact collections submitted into the land use record do not support additional discovery methodologies. The appropriateness of discovery methodologies hinges directly upon the specifics of the characteristics of the Water Bureau's proposed project. Finally, Mr. Solimano contends that monitoring and discovery plans should only occur when other identification efforts have been exhausted, an argument that was fully addressed and dismissed in the Heritage Report, explaining why monitoring is a legitimate and valuable part of the archeologist's tool kit. I.98, pg. 8 (Heritage Report).

Finally, in considering the evidence in the record it is important to keep in mind that the record demonstrates that the Water Bureau has been engaged in outreach efforts with the surrounding community for years during the project planning phase. Neither the existence of the collections nor claims about the location of discovery were brought to the Water Bureau's attention until submitted in the record on the day of the land use hearing. While that does not in and of itself diminish the reliability of the evidence, it sheds considerable light on the motives of those documenting the claimed locations of discovery.

*b. To the Extent Applicable, the Project Complies with Policy 6.2 and Policy 6.5*

Ms. Richter claims that Policy 6.2 and 6.5 are not met, and that therefore the application must be denied. Neither Policy 6.2 nor Policy 6.5 were identified by County staff as applicable Comprehensive Plan policies. Exhibit H.4, pg. 8. Ms. Richter fails to provide an explanation of why the cited plan policies are applicable to this land use review; nor does she explain how the artifact statements and photos submitted into the record result in a failure to meet either policy if they were to apply.

Policy 6.2 calls for the protecting cultural resources and archeological sites and preventing conflicting land uses from disrupting known sites. Therefore, the policy is not directly applicable to this review because it directs the County to take action to provide protection and prevent conflicting uses. The County complied with the directive by adopting MCC 39.5510(B) which requires an SEC permit for the removal or excavation of materials of archaeological, historical, pre-contact, or anthropological nature. The directive to the County is further clarified when you consider the strategies for implementing Policy 6.2 provide above. The strategies specifically call for maintaining information in property files, coordinating with SHPO, and encouraging landowners to take action to notify the state of discoveries. Each of those activities must be undertaken by the County rather than individual landowners.

Even if Policy 6.2 were applicable and functioned as an approval criterion, the policy is, or can be satisfied in this case, through conditions of approval. First, as described above, the record establishes a low likelihood that there are cultural or archeological resources within the project area, and nothing in the record establishes the project site as a "known" site. Furthermore, the Portland Water Bureau agrees to the condition of approval provided below that requires compliance with an Inadvertent Discovery Plan for Cultural Resources. The plan requires a work stoppage if identified artifacts or features are encountered, describes protocols for coordination in the event of a discovery or remains or artifacts, and establishes the requirements for proceeding with construction. Those collective elements effectively protect artifacts discovered during construction. In addition, and as discussed above, the Portland Water Bureau will also actively monitor for artifacts in compliance with an archeological



monitoring plan that 1) identifies areas of archeological concern, including the areas of reported artifact finds submitted into the land use record, 2) describes the monitoring process, the required qualifications of the on-site monitor, communication and reporting requirements, and general monitoring guidelines. The combined compliance with and inadvertent discovery plan and an archeological monitoring plan ensures protection of any archeological artifacts within the area disturbed by project construction activities.

Policy 6.5 is a clear direction to the County to undertake a planning effort. Namely, to require an evaluation of alternative sites where development is proposed in areas of cultural significance, and Policy 6.5 is not applicable to this land use review. Even if it were applicable, the project area has not been identified by the County, the state, or the federal government as an area of cultural significance. Exhibit I.98, Attachment A, pg. 6 (Heritage). Additionally, there is no testimony from a Native American tribe in the land use record claiming that the project area has cultural significance or otherwise opposing the project. Finally, for the reasons described above, the record does not support a conclusion that the project area is an area of cultural significance. Nonetheless, the Portland Water Bureau agrees to follow an inadvertent discovery plan and monitoring plan so that close scrutiny of newly exposed soil is performed by qualified monitors during construction and appropriate steps are taken in the event of a discovery of artifacts or archeological features. Those collective actions satisfy the general intent of Policy 6.5 to eliminate or reduce impacts to cultural resources.

In a memo dated September 6, 2023 (Exhibit J.45), Land Use Planning staff referenced the SEC permit provision at MCC 39.5510 and recommended a condition related to the SEC permit as well as additional conditions that address halting construction, notification, and evaluation. The Portland Water Bureau appreciates staff's suggestion and agrees that the issue can be addressed through conditions of approval. However, the specific actions identified in the staff proposed conditions do not appear to be required by the MCC and leave room for multiple interpretations and resulting confusion.<sup>138</sup> As discussed above, the IDP and monitoring plan in the record provide detailed and specific requirements for halting construction, notification, and further evaluation that are consistent with SHPO requirements and regulations. Referencing those more detailed plans in the record to address the specific requirements for halting construction, notification, and evaluation is consistent with the Comprehensive Plan policies and strategies identified above and provides more certainty and consistency for the Portland Water Bureau and the County while ensuring that the County remain informed. For those collective reasons, we request the following conditions of approval in place of the cultural resource conditions proposed by staff in Exhibit J.45.

---

<sup>138</sup> For example, proposed condition 1 states that construction activities shall cease if resources are discovered, but there is not clear indication of when construction may resume. Proposed condition 2 states that the Planning Director will provide a list of tribal government contacts and those governments must be contacted within 24 hours. However, tribal government consultation requirements can be complex and vary based upon a number of site-specific factors. It is not clear how the Planning Director would develop a list in the event of a discovery.

Water Bureau Proposed Modified Conditions From Exhibit J.45:

- (1) Prior to beginning ground disturbing activities at the project site, the applicant will provide to the Planning Director a final Archeological Monitoring Plan for Construction of the Portland Water Bureau Bull Run Filtration Project (Archeological Monitoring Plan) that is generally consistent with Exhibit I.98 and includes any changes required by the Oregon State Historic Preservation Office. The applicant will implement and comply with the Archeological Monitoring Plan at the commencement of ground disturbing activities at the project site. The Archeological Monitoring Plan may be reviewed and updated if needed to adjust for findings at the project site during the construction period. If updated, the revised version of the plan will be provided to the Planning Director.
- (2) Prior to beginning ground disturbing activities at the project site, the applicant will provide to the Planning Director a final Inadvertent Discovery Plan for Cultural Resources that is generally consistent with Exhibit A.71 and includes any changes required by the Oregon State Historic Preservation Office. If after commencement of ground disturbing activities and/or construction improvements, the applicant or its consultants encounter cultural materials, the applicant will implement and comply with the Inadvertent Discovery Plan.
- (3) If cultural resources are encountered during construction, the results of evaluations and/or consultations required by the Inadvertent Discovery Plan for Cultural Resources will be provided to the Planning Director. Following evaluation, the applicant will apply for an SEC permit for additional excavation or removal if required for compliance with MCC 39.5510(B).

## 8. Public Facilities

*Policy 11.1 Taking the following factors into consideration, plan and ensure a timely and efficient arrangement of public facilities and services to serve as a framework for appropriate levels of development of land within the County's jurisdiction.*

1. *The health, safety, and general welfare of County residents;*
2. *The level of services required, based upon the needs and uses permitted in urban, rural, and natural resource areas;*
3. *Environmental, social, and economic impacts.*

*Policy 11.2 Develop and implement public services and facilities plans and capital improvements programs that will result in the following:*

1. *Coordination of land use planning and provision of appropriate types and levels of public facilities.*
2. *Coordination of a full range of public facilities and services among all agencies responsible for providing them.*
3. *Provision of adequate facilities and services for existing uses.*
4. *Protection of natural resource and rural areas.*

1000 Friends of Oregon attorney sites isolated portions of Policies 11.1 and 11.2 and takes them out of context to argue that the project fails to satisfy the policies. Exhibit I.45, pgs. 4-5. County staff reviewed the testimony and provided the following response:

Policy 11.1 and 11.2 are directions to Land Use Planning when preparing long range planning projects to ensure coordination with the independent service providers so that appropriate levels of development will result. These policies are not applicable to the PWB application. Exhibit I.45, pg. 3 (Staff Memo).

We agree with staff's conclusion.

*Policy 11.3 Support the siting and development of public facilities and services appropriate to the needs of rural areas while avoiding adverse impacts on farm and forest practices, wildlife, and natural and environmental resources including views of important natural landscape features.*

Once again, the attorney for 1000 Friends cites isolated language within the policy to argue that the Policy is not met. Specifically, he claims that the project is not appropriate to the needs of the rural area. Once again staff reviewed the testimony and provided a response at Exhibit I.45 pointed out that staff found that the policy was met in the original staff report at Exhibit C.7. Staff further notes that both the Lusted Water District and the Pleasant Home Water District currently obtain water via the Water Bureau's Bull Run water system, and those district serve the West of Sandy River area. The policy directs the County to support the siting and development of public facilities appropriate to the needs of the rural areas. As noted by staff, it does not provide direction to exclude or not support public facilities that serve the needs of rural areas in addition to urban areas. We agree with staff's conclusions.

As for the second half of the policy, staff notes that the impacts identified have been specifically addressed by the conditional use approval criterion applicable to the application, including MCC 39.7515(A), (B), and (C) and the SEC-h standards. Exhibit I.45 (Staff Memo). Once again we agree with staff that the second half of the policy has been implemented through the zoning code, and therefore, for the reason set forth above, the Policy is not applicable to this land use review.

*Policy 11.10 Except as otherwise provided by law, new electrical substations and water system storage tanks or reservoirs intended to solely serve uses within the urban growth boundary shall not be located outside the urban growth boundary unless it can be demonstrated that there is no practical alternative site within the urban growth boundary that can reasonably accommodate the use.*

To create an argument that the project does not meet the policy, the 1000 Friends attorney yet again cites isolated phrases from the policy. Exhibit H.11, pg. 5 (1000 Friends). The critical language that he omits from his argument is that the policy only applies to “new electrical substations and water system storage tanks.” The Water Bureau’s filtration facility is neither. As described by staff in its response at Exhibit I.45 and as clearly established in the record, the purpose and function of the filtration facility is to filter and treat water coming from the Bull Run reservoirs. The facility neither is nor includes a water system storage tank. Staff’s response at Exhibit I.45 notes that there is a Finish Water Clearwell located below grade at the filtration facility site. Staff concludes that it does not view the clearwell as a water system storage tank subject to the Policy. Exhibit I.45, pg. 4 (Staff Memo). Additionally, the record includes a communication from an attorney representing the Water Bureau that clarifies that all water-retaining structures at the filtration facility support the treatment and conveyance purposes, and specifically describes the treatment and conveyance purpose of the clearwell. Exhibit I.14 (Powers). There is no evidence in the record contradicting the nature and purpose of the clearwell. As a result, Policy 11.10 is not applicable to the clearwell, the filtration facility, or this review.

*Policy 11.11 For development that will be served by a power utility company, the utility company must be willing and able to provide the power needs of the development.*

The Staff Report identifies but does not address Policy 11.11. Staff Report, pg. 130. Policy 11.11 was addressed in the application narrative, and the response confirmed that as documented in Appendix L.5.a, Portland General Electric (PGE) reviewed the proposed project and confirmed that PGE can meet the power needs of the filtration facility. Exhibit A.4, pg 100. No testimony on Policy 11.11 was submitted into the record. Therefore, we request that the Hearing Officer confirm that the policy is met.

*Policy 11.17 As appropriate, include school districts, police and fire protection, and emergency response service providers in the land use process by requiring review of land use applications from these agencies regarding the agency’s ability to provide the acceptable level of service with respect to the land use proposal.*

*Strategy 11.17-2: Encourage police, fire protection, and emergency response service providers to review land use proposals for, among other factors as determined by the agency, sufficiency of site access and vehicular circulation and, for fire protection purposes, the availability of adequate water supply, pressure, and flow, whether provided on-site or delivered from off-site.*

As a fire protection district whose boundaries include the project, RFPD10 has a legitimate role in review of the land use application. Consistent with the strategy RFPD10 reviewed this land use proposals and provided extensive testimony on multiple factors. However, RFPD10 does not decide whether a proposed use satisfies applicable approval standards set forth in the MCC and none of the approval criteria cited by RFPD10 provide a basis for denial of this application.

## 9. Transportation – Transportation System Plan

Multnomah County Transportation responded to the RFPD10 arguments related to the TSP policies identified below, and responded, “the policies and goals within the TSP are written as directives for the County’s transportation division and do not provide criteria for evaluating land use proposals.” Exhibit B.16, pg 29. County Transportation further confirms that policies of the TSP have been implemented through the County’s Road Rules and Design and Construction Manual and that County Transportation has reviewed the land use application for impacts on the transportation network consistent with the manual.

We concur with County Transportation that none of the policies cited by RFPD10 and included below are applicable policies that must be met to satisfy MCC 39.7515(G). Nonetheless, a brief response is provided for each below.

### *Policy 1: Overall Transportation System*

*Maintain and improve the transportation system for all modes of travel with the following goals: reducing vehicle miles travelled, minimizing carbon emissions, reducing conflict between travel modes, and improving the natural environment by minimizing stormwater runoff and facilitating wildlife movement. Ensure that the transportation system reflects the community’s rural character while ensuring efficiency and local connectivity.*

- Strategies:*
- a) Explore implementing measures for traffic calming, traffic diversion, and speed enforcement.*
  - b) Address climate change impacts and the Climate Action Plan’s recommended actions when planning transportation investments and service delivery strategies.*

This policy is not a mandatory policy. Instead, it is a broad aspirational policy for the entirety of the transportation system, that is reflected in later TSP policies, and which have in turn been incorporated into the County’s Road Rules. Therefore, it is not an applicable policy for this review. While not applicable, we do note that the transportation system reflects the rural character by applying road design standards consistent with the rural area. As discussed above, all road improvements proposed by the Water Bureau are consistent with the rural road design standards in the TSP.

### *Policy 3: Overall Transportation System*

*Promote a transportation system that prioritizes and supports the efficient and safe movement of farm and forest vehicles and equipment.*

This policy is not mandatory, but instead an aspirational statement for the County. As a result, it is not an applicable policy for this land sue decision. Nonetheless, as extensively documented in the farm

impact section above, the Water Bureau has gone to extraordinary lengths to prioritize the efficient and safe movement of farm vehicles through the surrounding roads during temporary construction.<sup>139</sup>

*Policy 12: Mobility and Freight*

*Discourage through traffic on trafficways with a functional classification of rural local road or rural collector.*

Once again, this is an aspirational policy directed at the County and not a mandatory policy. Therefore, it is not an applicable policy for this review. However, we do note that the policy is implemented through a County Transportation condition of approval that prohibits through trucks on specific roads and specific road segments that have a rural local or a rural collector classification.

Additionally, policy is directed at through traffic not traffic, including truck transport, traveling out of or into a rural district. As a result, the County has designated several of the collector and local roads that will be used by filtration facility traffic as truck routes in the M CCP, including SE Altman Road, SE Oxbow Drive, SE Dodge Park Boulevard, and SE Cottrell. Exhibit A.230, Table 1 (Construction TIA).

*Policy 18: Safety*

*Provide a transportation system that functions at appropriate safety levels for all motorized and non- motorized traffic.*

This is an aspirational directive to the County that has been implemented through the County Road Rules, and not an applicable policy for this for this land use review. Furthermore, as Shown in Exhibit J.44, County Transportation has determined that, with the extensive required off-site improvements, the project will not "create a safety hazard or create an on-going maintenance problem."

*Policy 22: Transportation Health*

*Ensure that the transportation system is designed to minimize negative health impacts and promote healthy behaviors and environments by:*

*A. Improving safety for all modes.*

---

<sup>139</sup> TSP Policy 4 states:

*Coordinate with public service providers and private utility suppliers to maximize the efficient delivery of both public and private utilities and facilities in County Right of way.*

Not surprisingly, this was not a policy cited by RFPD10. While not a policy that the Water Bureau must meet for this land use review, the project is consistent with the goal of providing utility services in the right-of-way where possible. This policy also highlights that a Comprehensive Plan often includes potentially conflicting policies that must be resolved through the zoning code and land use standards.

- B. Increasing opportunities for physical activity by promoting active transportation modes (walking, bicycling, transit, and equestrian) and multimodal access to parks, trails, open space, and other recreational facilities and employment centers.*
- C. Ensuring multimodal access to health supportive resources such as healthy food retail, employment, affordable housing, and parks and recreation facilities.*
- D. Reducing exposure to air, light, and noise pollutants.*
- E. Working with Multnomah County Health Department staff to ensure that the TSP and related planning documents incorporate the findings and recommendations from the most recent versions of their Community Health Assessment and Community Health Improvement Plan.*

The first part of this policy is a directive to the County, that is implemented through exclusively aspirational statements that are not applicable to this land use review. Additionally, the record describes the accommodations provided to bicyclists and pedestrians through the construction phase, as well as the benefit of the roadway improvements to all transportation modes.

## **10. West of the Sandy River Plan**

A number of opponents assert that the project is inconsistent with the West of Sandy River Plan adopted in 2002. *See, e.g.*, Exhibit D.14 (Pleasant Home Community Association). However, this plan was explicitly “repealed” as “part of the adoption of [the current] Comprehensive Plan.” Multnomah County Comprehensive Plan, Page 1-22.

### **H. MCC 39.7515(H) Will satisfy such other applicable approval criteria as are stated in this Section.**

Other applicable approval criteria have been addressed fully in the initial application narratives and appendices as well as in the Staff Report, which is supplemented with additional details in Section IV below.

### **I. MCC 39.7515(I) In the West of Sandy River Rural Planning Area, the use is limited in type and scale to primarily serve the needs of the rural area.**

This criterion does not apply because the proposed filtration facility is a “utility facility” subject only to conditional use criteria A through H. This is made explicit in MCC 39.7520(A)(6):

“(6) Utility facilities, including power substation or other public utility buildings or uses, subject to the approval criteria in **MCC 39.7515(A) through (H)**.” (Emphasis added).

As discussed under Policy 3.16 above, because this is a utility facility – and not a business – the comprehensive plan directed that sub (6) utility facilities should not be subject to the MCC 39.7515(I) approval criterion.

### III. Other Code Sections Not Fully Addressed by Staff

In review of the Staff Report, the applicant has identified a few areas where staff's analysis did not fully cover the topic or come to conclusion explicitly in the text of the Staff Report. For these sections, although there has been no opposition testimony, notes for revised findings are provided below for the consideration of the Hearings Officer.

#### A. Multiple Use Agriculture (MUA-20) (Staff Report Section 5.0)

##### 5.3 MCC 39.4325 Dimensional Requirements and Development Standards

*All development proposed in this base zone shall comply with the applicable provisions of this section.*

*(G) On-site sewage disposal, storm water/drainage control, water systems unless these services are provided by public or community source, required parking, and yard areas shall be provided on the lot.*

*(1) Sewage and stormwater disposal systems for existing development may be off-site in easement areas reserved for that purpose.*

*(2) Stormwater/drainage control systems are required for new impervious surfaces. The system shall be adequate to ensure that the rate of runoff from the lot for the 10 year 24-hour storm event is no greater than that before the development.*

**Response:** The Staff Report findings for the Filtration Facility / Communication Tower Site state: *"The Sanitarian has placed specific restrictions on the use of the site for the septic system on the site. Land Use Planning recommends a condition of approval for the Water Filtration Facility to encompass these restrictions."*

The proposed condition (12.a) was modified by staff in Exhibit I.45, page 2. Staff was responding to a requested edit to the original condition the Water Bureau suggested in its pre-hearing statement to allow the sanitarian to approve additional employees. Exhibit H.3, pg. 2. The Water Bureau appreciates staff's work to develop a condition that would allow additional employees through installation of an alternative treatment technology system. However, given the timing of the newly proposed condition, the Water Bureau requests the opportunity to select either the original system or an alternative technology system prior to obtaining a building permit. Therefore, the Water Bureau requests Condition 12.a, include the language below which is essentially a hybrid of staff's two recommended conditions. If the Hearings Officer declines to impose the requested Condition 12.a language, the Water Bureau will accept the revised condition language most recently suggested by staff.



The filtration facility geotechnical expert did confirm that his original conclusion that the septic drain field is not anticipated to have a negative effect on the slope stability remains unchanged provided the drain field for an alternative treatment technology system is in the same location and is equal in size to or small than the original drain field design. Exhibit J.67. As conditioned, the standards of MCC 39.4325(G) are met.

**Staff's Original Condition 12.a:** The Water Filtration Facility shall have ten maximum employees per day, and not more than 30 visitors per day. Wastes including those associated with the drinking water quality analysis laboratory must be containerized and not enter the septic system. Only domestic strength wastewater is allowed. [MCC 39.4325(G)]

**Staff's Revised Condition 12.a:** The Water Filtration Facility shall have a maximum of 26 full-time employees, with 10 on the largest shift and no more than 30 visitors per day. Waste including those associated with the drinking water quality analysis laboratory must be containerized and not enter the septic system. Only domestic strength wastewater is allowed. The on-site sewage disposal system shall be sized to handle the above number of employees and visitors and shall be an alternative treatment technology system. If the County Sanitarian finds that the site even with the alternative treatment technology system cannot handle the above number of employees and visitors, the Sanitarian may limit the maximum number of full-time employees and the maximum number of visitors to the site per day. At no time may the number of employees or visitors exceed the above limitations even if the Sanitarian finds that the on-site sewage system can handle the amount of effluent that could be generated. [MCC 39.4325(G), MCC 39.7505(A) and Policy 11.13]

**Applicant's Requested Condition 12.a:**

- If the applicant provides the septic system identified in the application, the water filtration facility shall have a maximum of 10 full-time employees per day and no more than 30 visitors per day.
- If the applicant provides an alternative treatment technology system, the water filtration facility shall have a maximum of 26 full-time employees, with a maximum of 10 on the largest shift, and no more than 30 visitors per day. The alternative treatment technology system must be sized to handle the increased number of employees and visitors and the drain field must be the same size or smaller and in the same location as the drain field identified on Exhibit A.212.3e, 00-LU-303. If the County Sanitarian finds that the site with the alternative treatment technology system provided cannot handle the larger number of employees and visitors, the Sanitarian may limit the maximum number of full-time employees and the maximum number of visitors allowed at the site per day. At no time may the number of employees or visitors exceed the above limitations, even if the Sanitarian finds that the on-site sewage system can accommodate the amount of effluent that would be generated.

- Under either type of septic system, wastes, including those associated with the drinking water quality analysis laboratory, must be containerized and not enter the septic system; only domestic strength wastewater is allowed.

## B. Rural Residential (Staff Report Section 6.0)

6.3 MCC 39.4375(C)(1)

*(C) Minimum Yard Dimensions – Feet*

Front	Side	Street Side	Rear
30	10	30	30

*Maximum Structure Height – 35 feet*

*Minimum Front Lot Line Length – 50 feet.*

*(1) Notwithstanding the Minimum Yard Dimensions, but subject to all other applicable Code provisions, a fence or retaining wall may be located in a Yard, provided that a fence or retaining wall over six feet in height shall be setback from all Lot Lines a distance at least equal to the height of such fence or retaining wall.*

**Response:** The Staff Report states: “A condition of approval has been included requiring that Exhibit A.214, Sheet LU-200 be modified to show the location of the utility cabinet to comply with MCC 39.4375(C) and MCC 39.7525(A)(2), if the Hearing Officer finds it applicable as discussed below in Section 9.” Page 37.

The referenced condition is Condition 8.a. See discussion of MCC 39.7525(A)(2), below. The Water Bureau believes that MCC 39.7525(A)(2) is not applicable to this proposal, as described in response to MCC 39.7525, below. The Water Bureau otherwise supports the proposed condition and believes that, as conditioned, the standards of MCC 39.4375(C) are met.

## C. Exclusive Farm Use Approval Criteria (Staff Report Section 7.0)

7.3 MCC 39.4225 REVIEW USES.

*(A) Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating power for public use by sale or transmission towers over 200 feet in height provided:*

\* \* \*

(3) All other utility facilities and/or transmission towers 200 feet and under in height subject to the following:

(a) The facility satisfies the requirements of ORS 215.275, "Utility facilities necessary for public service; criteria; mitigating impact of facility"; and

**Response:** The Staff Report (p. 41) states: "Staff has recommended a condition of approval that for any unanticipated disturbance, the PWB will be required to restore, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the pipeline."

The referenced condition is Condition 12.b. Staff concludes: "The criteria in ORS 215.275 have been met." The Water Bureau supports the condition and agrees that, as conditioned, the standards of MCC 39.4225 are met.

#### **D. Commercial Forest Use Approval Criteria (Staff Report Section 8.0)**

##### **8.4 MCC 39.4105 BUILDING HEIGHT REQUIREMENTS.**

(A) Maximum structure height – 35 feet.

(B) Structures such as barns, silos, windmills, antennae, chimneys, or similar structures may exceed the height requirements.

**Response:** Although staff did not include a conclusion that the standard is met, staff confirms that no structures will be above ground, which complies with the standard. The Water Bureau believes the standard is met.

##### **8.5 MCC 39.4110 FOREST PRACTICES SETBACKS AND FIRE SAFETY ZONES.**

The Forest Practice Setbacks and applicability of the Fire Safety Zones is based upon existing conditions, deviations are allowed through the exception process and the nature and location of the proposed use. The following requirements apply to all structures as specified:

\* \* \*

**Response:** As with the prior standard, staff did not include a conclusion that the standard is met; however, staff confirms that no structures will be above ground, which complies with the standard. The Water Bureau believes the standard is met.

#### **E. Utility Facilities Community Service Conditional Use Approval Criteria (Staff Report Section 9.0)**

##### **9.4 MCC 39.7525 RESTRICTIONS.**

A building or use approved under MCC 39.7520 through 39.7650 shall meet the following requirements:

(A) Minimum yards in EFU, CFU (Note – not applicable to CFU-1 through CFU-5), MUA-20, RR, BRC, OCI, OR and PH-RC, UF-20, LR-10, UF-20, MUF, SRC, and RC base zones:

(1) Front yards shall be 30 feet.

(2) Side yards for one-story buildings shall be 20 feet; for two-story buildings, 25 feet.

(3) Rear yards shall be as required in the base zone.

**Response:** In the review of pipelines (Staff Report pages 58-59), staff raises the question of whether the proposed cathodic protection rectifier (CPR) cabinet is a “building” and would therefore need to comply with the above side yard standards for “one-story buildings.” From Staff Report: “MCC 39.2000 Definitions defines a “Building” as “Any structure used or intended for supporting or sheltering any use or occupancy.” The Hearings Officer will need to decide if the cabinet is supporting or sheltering a use. If so, it will need to be set 20-ft from the south property line on tax lot 1S4E23C-01400.”

The Water Bureau believes that MCC 39.7525(A)(2) is not applicable to this proposal because the cabinet in question is a utility cabinet, not a one- or two-story building. It is a cabinet with dimensions (noted in Staff Report) that are approximately the size of two side by side refrigerators. The utility cabinet is not big enough for someone to enter -- it has no occupancy rating because it cannot be occupied or inhabited. For comparison of how it will be used, this enclosure is no different than an electrical transformer: it is a metal enclosure inside of which is electrical equipment. The utility cabinet also does not require a building permit.

As discussed above, staff proposes Condition 8.a to address MCC 39.4375(C)(1), which requires a 10 foot side yard. The Water Bureau believes that the additional side yard restrictions of MCC 39.7525(A)(2) are not applicable to this proposal and would serve no practical purpose, other than to push the cabinet into the middle of the property owner’s driveway.

## **F. Radio Transmission Towers Community Service Conditional Use Approval Criteria (Staff Report Section 10.0)**

### **10.3 MCC 39.7565 Approval Criteria for New Transmission Towers.**

*New transmission towers base zone permitted under MCC 39.7520 (A) (8) (a) or (b) may be allowed, based on findings by the approval authority that the following criteria are met.*

*(H) For a proposed tower in the EFU, CFU and MUA-20 base zones, the following restrictions on accessory uses shall be met:*

*(1) Accessory uses shall include only such buildings and facilities necessary for transmission function and satellite ground stations associated with them, but shall not include broadcast studios, offices, vehicle storage areas, nor other similar uses not necessary for the transmission function.*

*(2) Accessory uses may include studio facilities for emergency broadcast purposes or for other special, limited purposes found by the approval authority not to create significant additional impacts nor to require construction of additional buildings or facilities exceeding 25 percent of the floor area of other permitted buildings.*

**Response:** At Staff Report, page 65, staff concludes: *“A condition of approval has been recommended restricting the use of the tower accessory building.”*

This is proposed as Condition 12.f. The Water Bureau supports the proposed condition and believes that, as conditioned, the standards of MCC 39.7565(H) are met.

10.5 MCC 39.7575 Radiation Standards.

*Non-ionizing electromagnetic radiation standards.*

*(A) No source of non-ionizing electromagnetic radiation shall hereinafter be operating, which causes the general population to be exposed to radiation levels exceeding the mean squared electric (E<sup>2</sup>) or mean squared magnetic (H<sup>2</sup>) field strengths, or their equivalent plan wave free space power density, as specified in Table 1.*

*(4) Similarly, the latest revision of ANSI's American National Standards Institute's American National Standard C95.3, Techniques and Instrumentation for the Measurement of Potentially Hazardous Electromagnetic Radiation at Microwave Frequencies, is incorporated here by reference as one source of acceptable methods for measuring non-ionizing radiation levels in determining compliance with this standard.*

*(a) For all measurements made to ensure compliance with this section, evidence shall be submitted showing that the instrument or instruments used were calibrated within the manufacturer's suggested periodic calibration interval; that the calibration is by methods traceable to the National Bureau of Standards; a statement that the measurements were made in accordance with good engineering practice; and a statement or statements as to the accuracy of the results of the measurements.*

**Response:** At page 69, staff finds: *“Through the use of computer modeling and good engineering practices the engineer was able to determine that the proposed Communication Tower with its antennas will comply with Table 1. The engineer stamped and certified the NIER report as being accurate.”*

Although staff did not include a conclusion that the standard is met, staff do not indicate any concerns with meeting the standard. No public comments indicated concerns with meeting the standard. Therefore, the Water Bureau believes the standard is met.

*(C) After August 19, 1982, no installation of a new source of non-ionizing electromagnetic radiation or changes in an existing source which in any way causes increases in the NIER or radiation pattern of the NIER source shall occur without first obtaining a Community Service use designation or modification thereof, unless otherwise provided herein.*

**Response:** At page 70, staff finds: “A condition of approval has been recommended to ensure that any change to the tower after it is built that would in any way increase the NIER or radiation pattern of the NIER source shall require a modification of the CS approval.”

This is proposed as Condition 16. The Water Bureau supports the proposed condition and believes that, as conditioned, the standards of MCC 39.7575(C) are met.

## **G. Design Review Criteria (Staff Report Section 11.0)**

### *11.5 MCC 39.8030 Final Design Review Plan.*

*Prior to land use approval for building permit review or commencement of physical development where no additional permits are necessary, the applicant shall revise the plans to show compliance with the land use approvals granted, all conditions of approval and required modifications. Final design review plan shall contain the following, drawn to scale:*

*(A) Site Development and Landscape Plans drawn to scale, indicating the locations and specifications of the items described in MCC 39.8025, as appropriate;*

*(B) Architectural drawings, indicating floor plans, sections, and elevations; and*

*(C) Approved minor exceptions from yard, parking, and sign requirements.*

**Response:** At page 77, staff finds: “Modifications to the plans are necessary to comply with the applicable approval criteria. A condition of approval has been recommended to the Hearings Officer requiring a Final Design Review Plan be submitted to show compliance so that the County has a complete set of plans that shows all necessary improvements on a set of plans. As conditioned, this criterion can be met.”

This is proposed as Condition 8. The Water Bureau supports the proposed condition and concurs with staff that as conditioned, this criterion is met.

### *11.6 MCC 39.8040 Design Review Criteria.*

*(A) Approval of a final design review plan shall be based on the following criteria:*

*(I) Relation of Design Review Plan Elements to Environment.*

*(a) The elements of the design review plan shall relate harmoniously to the natural environment and existing buildings and structures having a visual relationship with the site.*

**Response:** Staff finds that this criterion is met for all aspects of the project (Staff Report pages 77-78), and in one case it is met “through a condition.”

For the raw water pipeline in RR zone, staff states: “The applicant has indicated that the [CPR] cabinet in the RR zoned tax lot will be set back a minimum of 30 feet from the Lusted Road right-of-way. It will also need to be located outside of the 10-ft wide side yard of the property. Staff did not locate its location on

*the Proposed Conditions Plan LU-200 (Exhibit 3.24.23 A.2a Site Plan). A condition of approval has been recommended to the Hearings Officer requiring as part of the Final Design Review Plan the CPR cabinet's location be shown for the Raw Water Pipeline."*

This is proposed as Condition 8.a. The Water Bureau supports the proposed condition and believes that, as conditioned, the criterion of MCC 39.8040(A)(1)(a) is met.

*(c) Each element of the design review plan shall effectively, efficiently, and attractively serve its function. The elements shall be on a human scale, inter related, and shall provide spatial variety and order.*

**Response:** At page 79, staff provides findings showing how the approval criterion is met for pipelines. Although staff did not include a conclusion that the standard is met, staff do not indicate any concerns with meeting the criterion. No public comments indicated concerns with meeting the criterion. Therefore, the Water Bureau believes the criterion is met.

*Off Street Parking and Loading Approval Criteria (Staff Report Section 12.0)*

*12.10 MCC 39.6570 IMPROVEMENTS.*

*(A) Surfacing*

*(1) Except as otherwise provided in this section, all areas used for parking, loading or maneuvering of vehicles, including the driveway, shall be surfaced with at least two inches of blacktop on a four inch crushed rock base or at least six inches of Portland cement, unless a design providing additional load capacity is required by the fire service provider.*

**Response:** In the staff report, staff finds that five roads are gravel and will require a deviation from the standards: *"In order to allow these five gravel roadways, the Hearings Officer must authorize a deviation from the surfacing standard in paragraph (A)(1) as the facility as a whole requires more than four parking spaces and is not exempt from the paving requirement listed in MCC 39.6570(A)(1)."* The Water Bureau response is provided in (A)(2), below.

*(2) The Approval Authority may permit and authorize a deviation from the surfacing standard in paragraph (A)(1) of this section and thereby authorize, alternate surfacing systems that provide a durable dustless surface, including gravel. A deviation under this paragraph may be permitted and authorized only upon finding that each parking area supporting the existing and the proposed development meets the following standards in subparagraphs (a) and (b) and, for parking areas of four or more required parking spaces, also meets the following standards in subparagraphs (c) and (d):*

*(a) The authorized provider of structural fire protection services verifies that the proposed deviation complies with such provider's fire apparatus access standards, or, if there is no such service provider, the building official verifies that the proposed deviation complies with the Oregon Fire Code;*

*(b) The County Engineer verifies that the proposed deviation complies with the County Road Rules and the County Design and Construction Manual Standards. Alternative surfacing can be considered for all areas used for parking, loading and maneuvering, including the driveway; however, approaches to paved public right-of-way shall be paved for a minimum of 21 feet from the fog line, or for a greater distance when required by the County Engineer;*

*(c) Authorization of the proposed deviation would not:*

- 1. be materially detrimental to the public welfare;*
- 2. be injurious to property in the vicinity or in the base zone in which the property is located; or*
- 3. adversely affect the appropriate development of adjoining properties; and*

*(d) Any impacts resulting from the proposed resurfacing are mitigated to the extent practical. Mitigation may include, but is not limited to, such considerations as provision for pervious drainage capability, drainage runoff control and dust control. A dust control plan is required when a dwelling, excluding any dwelling served by the driveway, is located within 200 feet of any portion of the driveway for which gravel or other similar surfacing materials is proposed. Common dust control measures include, but are not limited to, reduced travel speeds, gravel maintenance planning, establishment of windbreaks and use of binder agents.*

**Response:** Staff finds that standards (A)(2)(a) and (A)(2)(b) are met. For (A)(2)(c), staff notes a potential concern around dust that could enter the residential property to the east or adjacent farmland to the south and west. These concerns relate to portions of Emergency Access Road/Road L and Perimeter Road/Road K located near the edges of the property.

Subsequent to issuance of the Staff Report, the Water Bureau submitted dust management plans and methods that are designed to address these concerns. See Exhibits H.3 Attachment 8, I.75, page 1, and J.81.

In response to staff comments under (A)(2)(d), the Water Bureau notes that construction use of the Emergency Access Road to Bluff Road is no longer planned. Thus, use will be limited to a small fraction of the trips initially planned. As shown in Table 23, Exhibit A.33, page 128, planned inspections of the Raw Water Pipeline Cover will be as follows: shaft vault accessway will occur once every 15-20 years. Inspections of air release valve will be once per month with repairs occurring twice per year. This low frequency of trips combined with implementation of the dust control plans cited above will prevent dust impacts along the 420 ft portion of the Emergency Access Road along the east property line referenced by staff.

For Perimeter Road/Road K, the frequency of use of this road is described in Exhibit A.4 (p. 47), which cites Exhibit A.51 (Potential Local Impacts). That exhibit describes the "perimeter road outside of the security fence" (Road K) as a road "typically used less than once per week." Here too, the low frequency



of trips combined with the dust control plans cited above will prevent dust impacts to adjacent farm uses along the south and west property lines.

The Water Bureau believes that the application demonstrates that dust will be effectively controlled, and that the proposed road surfacing deviation from all five gravel roads should be granted. Pursuant to MCC 39.6570(A)(2)(d), the Hearings Officer may require a Dust Control Plan for the use of the gravel roads during the dry season.

*12.12 MCC 39.6580 DESIGN STANDARDS: SETBACKS.*

*(A) Any required yard which abuts upon a street lot line shall not be used for a parking or loading space, vehicle maneuvering area or access drive other than a drive connecting directly to a street perpendicularly.*

**Response:** Exhibit H.3 (Pre-hearing Statement) includes a review of the proposed amended entry drive layout in Attachment 1. These plans were also resubmitted in a more legible format (rather than the scan of the paper copy from the hearing) at Exhibit I.57. Exhibit I.57 also includes plans showing the updated, perpendicular driveway connection to Carpenter Lane. These amended plans meet the proposed staff Condition 8.e.

*12.14 MCC 39.6590 MINIMUM REQUIRED OFF-STREET PARKING SPACES.*

*(F) Unspecified Uses. Any use not specifically listed above shall have the off-street parking space requirements of the listed use or uses deemed most nearly equivalent by the Planning Director.*

**Response:** In the pre-application conference notes (Exhibit A.159, page 19) staff confirmed that the use type is not specifically listed and recommended the Water Bureau conduct a parking study, which it did in Exhibit A.31. The Water Bureau proposed 36 parking spaces<sup>140</sup> and 6 loading spaces which were supported through the parking study. Since this was lower than the 52 parking spaces (plus 2 at communication tower) following the most nearly equivalent use calculations, the Water Bureau proposed an exception, as described under MCC 39.6600, below.

*12.15 MCC 39.6595 MINIMUM REQUIRED OFF-STREET LOADING SPACES.*

*(G) Unspecified Uses. Any use not specifically listed above shall have the loading space requirements of the listed use or uses deemed most nearly equivalent by the Planning Director.*

**Response:** Staff finds the Water Bureau's "methodology and analysis to be acceptable and accepts the proposed six loading spaces as appropriate for the use." (p. 98) Staff proposes a condition (Condition 8.c) to clarify where the loading spaces are located. The Water Bureau accepts this condition.

---

<sup>140</sup> Not counting the 2 spaces required at the communication tower.

*12.16 MCC 39.6600 EXCEPTIONS FROM REQUIRED OFF-STREET PARKING OR LOADING SPACES.*

*(A) The Planning Director may grant an exception with or without conditions for up to 30% of the required number of off-street parking or loading spaces, upon a finding by the Director that there is substantial evidence that the number of spaces required is inappropriate or unneeded for the particular use, based upon:*

*(1) A history of parking or loading use for comparable developments;*

*(2) The age, physical condition, motor vehicle ownership or use characteristics or other circumstances of residents, users or visitors of the use; or*

*(3) The availability of alternative transportation facilities; and*

*(4) That there will be no resultant on-street parking or loading or interruptions or hazards to the movement of traffic, pedestrians or transit vehicles.*

**Response:** The Water Bureau provides a parking study with evidence supporting the reduction of needed parking spaces in Exhibit A.31. Staff findings generally appear to support the request for a parking space exception. However, staff seeks clarification of whether Fleet Parking and the Maintenance Parking Spaces meet the intent of MCC 39.6520(B): “No parking of trucks, equipment, materials, structures or signs or the conducting of any business activity shall be permitted on any required parking space.” The Water Bureau plans to use its fleet and maintenance parking spaces in a manner fully consistent with this standard. Additionally, the Water Bureau accepts proposed Condition 12.h covering MCC 39.6520(A), (B), (C) and (E), which staff recommends “to ensure that the required parking and loading spaces remain available for their intended purposes in the future.” Page 87.

As conditioned, the Water Bureau believes that the proposed parking space exception meets the above standards.

*(C) An exception in excess of 15% of the required number of spaces shall include a condition that a plan shall be filed with the application, showing how the required number of spaces can be provided on the lot in the future.*

**Response:** Staff proposes Condition 11.d to satisfy this standard. In Exhibit H.3 (Pre-hearing Statement), the Water Bureau provides a Parking Lot Expansion Plan (Attachment 2) that shows how the required number of spaces (16 additional spaces) can be provided on the lot in the future.

In Exhibit H.3 (p. 2), the Water Bureau also proposed a clarification to staff proposed Condition 11.d, to address a typo and reference the Parking Lot Expansion Plan:

“Should the Hearings Officer not grant the requested Exception to the required number of parking spaces, the additional spaces will be provided consistent with the Parking Lot Expansion Plan provided during this land use review on the subject Water Filtration Facility parcel. [MCC 39.6600(C)]”

In Exhibit I.75, staff objected to this condition. The Water Bureau accepts not including the reference to the plan in the record in the condition if that is what staff desire. However, the first sentence still

appears to contain a typographical error, as there would be no reason to require a Parking Lot Expansion Plan if the exception is granted. Therefore, the applicant proposes just a minor correction:

Applicant proposed modification to Land Use Planning's Condition 11.d:

Should the Hearings Officer **not** grant the requested Exception to the required number of parking spaces, the additional spaces will be provided consistent with the Parking Lot Expansion Plan provided during this land use review on the subject Water Filtration Facility parcel. [MCC 39.6600(C)]

With the submitted plan and clarified condition, the Water Bureau believes that the parking exception standards are met.

## H. Significant Environmental Concern (Staff Report Section 14.0)

### *MCC 39.5510(A) Uses; SEC Permit Required*

**Response:** Staff findings (page 104) acknowledge this code provision, stating that, provided the underlying uses are approved, an SEC-h permit will be required for the use in the SEC-h overlay.

### *MCC 39.5515 Exceptions –*

*(A) Except as provided in subsection (B) of this Section, an SEC permit shall not be required for the following:*

- (13) Right-of-way widening, new surfacing, and vegetation removal for existing rights-of-way when the additional right-of-way or surfacing or vegetation removal is deemed necessary by the county engineer to meet the needs of the traveling public.*
- (24) The placement of utility infrastructure such as pipes, conduits and wires within an existing right-of-way.*

**Response:** The Water Bureau concurs with staff findings related to SEC-wr permit exemptions.

If the Hearings Officer agrees with the Water Bureau's argument under MCC 39.5860(C)(1), below, then exception MCC 39.5515(A)(8) could be added to the list of applicable exceptions in this finding.

### *MCC 39.5520 Application for SEC Permit*

**Response:** Staff finds that all application requirements are met, which includes both this standard (p. 106) and the supplemental requirements of MCC 39.5860(A) (p. 108).

### *MCC 39.5560 General requirements for approval in the west of Sandy River planning area designed as SEC-WR or SEC-H*

*The requirements in this section shall be satisfied for development in the SEC-wr and SEC-h areas located in the West of Sandy River Planning Area in addition to the provisions of MCC 39.5800 or 39.5860 as applicable.*

*(A) Areas of erosion or potential erosion shall be protected from loss by appropriate means. Appropriate means shall be based on current Best Management Practices and may include restriction on timing of soil disturbing activities.*

**Response:** For both RW Pipeline and Distribution Main staff finds: *“An Erosion and Sediment Control permit will be required for all the ground disturbance work involved with the installation of the Raw Water Pipelines. A condition of approval is recommended to ensure this permit has been issued prior to any work occurring on the project.”* (p. 106)

This reference is to proposed Condition 7. The Water Bureau supports the proposed condition and agrees that, as conditioned, the standard of MCC 39. 5560(A) is met.

*(C) The nuisance plants in MCC 39.5580 Table 1, in addition to the nuisance plants defined in MCC 39.2000, shall not be used as landscape plantings within the SEC-wr and SEC-h Overlay Zone.*

**Response:** At page 108, staff finds that no nuisance plants are proposed and recommends a condition (Condition 12.i) to ensure that nuisance plants are managed on an ongoing basis. The Water Bureau supports the proposed condition and agrees that, as conditioned, the standard of MCC 39. 5560(C) is met.

*39.5860 Criteria for Approval of Sec-H Permit-Wildlife Habitat*

*(B)(2) Development shall occur within 200 feet of public road capable of providing reasonable practical access to the developable portion of the site.*

**Response:** As staff and applicant note, neither the distribution main nor the raw water pipeline (RW pipelines) technically meet this objective development standard. Pursuant to MCC 39.5860, if an applicant does not meet the objective development standards, a Wildlife Conservation Plan and related findings must be prepared to respond to the criteria in MCC 39.5860(C). As required the applicant prepared Wildlife Conservation Plans for both the distribution main (Exhibit A.69) and the RW pipelines (Exhibit A.67).

*(B)(3) The access road/driveway and service corridor serving development shall not exceed 500 feet in length.*

**Response:** As explained in the staff report, the existing driveway to the RW pipeline tunnel portal exceeds 500 feet, and therefore the standard is not met. However, critically neither the driveway nor the portal are located within the SEC-h zone.

The distribution main pipeline will be extended through an existing driveway and service area to a portal that is 645 feet from Cottrell Road, and therefore the standard is not met. As noted above, if an objective standard is not met, an applicant must prepare a Wildlife Conservation Plan and satisfy the requirements of MCC 39.5860(C).

As provided above, the applicant prepared Wildlife Conservation Plans and related findings to respond to the applicable criteria in MCC 39.5860(C).

*(B)(5) Development shall be within 300 feet of a side property line if adjacent property has structures and developed areas within 200 feet of that common side property line.*

**Response:** Staff found that this standard is met for the RW pipelines. Staff found the standard is not met for the distribution main because of the lot configurations. As provided above, the applicant prepared a Wildlife Conservation Plan related findings for the distribution main to respond to the applicable criteria in MCC 39.5860(C).

*(B)(7) The nuisance plants in MCC 39.5580 Table 1 shall not be planted on the subject property and shall be removed and kept removed from cleared areas of the subject property.*

**Response:** For the RW Pipeline staff finds: "A condition of approval is recommended that the applicant utilize a low growing native grass on tax lot 1S4E23C-00800. On Exhibit A.194, Sheet LU-601, the plan indicates native shrub plantings and seeded ground cover." Staff Report, pg. 12. This reference is to proposed Condition 8.j. For the Distribution Main staff finds: "A condition of approval requires that no nuisance plants listed in MCC 39.5580 Table 1 be planted." This reference is to proposed Condition 12.i.

The Water Bureau supports proposed Conditions 8.j and 12.i and agrees that, as conditioned, the standard of MCC 39. 5560(B)(7) is met.

*(C) Wildlife Conservation Plan. An applicant shall propose a wildlife conservation plan if one of two situations exist.*

*(1) The applicant cannot meet the development standards of subsection (B) because of physical characteristics unique to the property. The applicant must show that the wildlife conservation plan results in the minimum departure from the standards required in order to allow the use; or*

**Response:**

#### Raw Water Pipelines

In the discussion of the RW pipelines under criterion MCC 39.5860(C)(1) on page 112, the Staff Report states:

*"It seems they [the applicant] could have extended the boring an additional 535 feet so the access drive would not have needed to exceed 500 feet in length. The Hearings Officer will need to determine if the proposed Wildlife Conservation Plan results in the minimum departure from the standards in order to allow the use..."*

As explained in the application (Exhibit A.11, page 13), "no part of the access drive serving the tunnel portal is within the SEC-h zone." The Water Bureau believes that the limitation on access road length in

MCC 39.5860(B)(3) only applies within the SEC-h zone. This interpretation is supported by several provisions of the SEC section of the MCC.<sup>141</sup>

The intent of the standard is to limit access road incursion into the SEC-h zone to limit habitat impacts. A limitation that applies outside of the SEC-h is inconsistent with the plain text and intent of the code, and would, in this case, create substantially greater impacts within the SEC-h zone. As is evident in Exhibit A.194 (LU-601), access to the tunnel portal *could* be provided from Dodge Park Boulevard at a distance of less than 500 feet, requiring no “departure from the from the standards in order to allow the use.” However, Dodge Park Boulevard is within the SEC-h zone and building a new access road that meets the standard would require substantial clearing of the SEC-h forested area shown in Exhibit A.194. The Water Bureau believes that this standard was not intended to force major clearing through protected SEC-h forested areas when an existing access drive located entirely outside the SEC zone is available. Further, the Water Bureau believes it is unreasonable to require (as the Staff Report suggests) an additional 535 feet of pipeline boring, at significant public expense, to “shorten” an access road that has no impact on protected SEC-h resources.

As explained in Exhibit A.11, the Water Bureau carefully designed the raw water tunnel, portal and access drive so that they entirely avoid disturbance to the SEC-h forested wildlife habitat. The proposed access serves as an alternative conservation measure that will result in a less detrimental impact on forested wildlife habitat than access from Dodge Park Boulevard, consistent with MCC 39.5860(C)(2).

In the discussion of proposed tree removal and associated mitigation under this criterion (pp. 112-113), the staff report states:

*“The WCP [Wildlife Conservation Plan] does not discuss the disturbed SEC-h habitat for the connection of the RW Pipelines to the existing pipeline as shown in Exhibit A.195 on tax lot 1S4E23C-00800. Three trees will be removed from this SEC-h overlay area. To mitigate this encroachment, trees could be added along the perimeter of the SEC-h overlay on tax lot 1S4E23C-01500 and/or*

---

<sup>141</sup> MCC 39.5520: An application for an SEC permit for a use or for the change or alteration of an existing use **on land designated SEC**, shall address the applicable criteria for approval, under MCC 39.5540 through 39.5860. (emphasis added)

MCC 39.5525 Applicable Approval Criteria. (A) The approval criteria that apply to **uses in areas designated SEC-sw, SEC-v, SEC-w, SEC-s, SEC-wr, SEC-h** on Multnomah County zoning maps shall be based on the type of protected resources on the property, as indicated by the subscript letter in the zoning designation, as follows: (emphasis added).

MCC 39.5860 Criteria for approval of SEC-h Permit. (A) In addition to the information required by MCC 39.5520 (A), an application **for development in an area designated SEC-h** shall include an area map... (emphasis added).

1S4E23C-02200. A condition of approval has been recommended to mitigate for the encroachment not covered by the WCP.”

As set forth in the applicant's completeness response (Exhibit A.163, page 9), the Water Bureau believes that improvements at tax lot 1S4E23C-00800 meet the exception from SEC review provided in 39.5515(A)(8)(B). This exception provides as follows:

“§ 39.5515 EXCEPTIONS.

(A) Except as provided in subsection (B) of this Section, an SEC permit shall not be required for the following:

[...]

(8) Change, alteration, or expansion of a lawfully established use or structure provided that:

(A) Within the SEC, SEC-sw, and SEC-v, there is no change to, or alteration, or expansion of, the exterior of the structure;

(B) Within the SEC-h and SEC-s, there is no change to, or alteration or expansion of, the structure's or a driveway's ground coverage in excess of 400 square feet. With respect to expansion, this exception does not apply on a project-by-project basis, but rather applies on a cumulative basis to all expansions occurring after the date above;” (emphasis added)

A portion of the proposed work on the 10-foot-wide tax lot (TL 800) is within the SEC-h zone and is shown on Exhibit A.195. The exhibit describes the proposed work related to the existing Bull Run conduit (“structure”): “Underground conduit connection. No structure proposed at or above grade. Ground coverage: 0 SF.” For this reason, there is no change to, or alteration or expansion of, the structure's [...] ground coverage.

The Water Bureau believes that County staff may have overlooked our discussion of this issue in Exhibit A.163. This would explain the several references in the Staff Report that the application “did not discuss the disturbed SEC-h habitat” at this location.

If the Hearings Officer finds that the exception does not apply or cannot be met, the Water Bureau has provided Sheet LU-601M, Exhibit I.97, showing the proposed mitigation planting of six native trees in the area indicated by the staff report on tax lot 1S4E23C-01500. This mitigation complies with Condition 17.

Whether Condition 17 is required or not, the Water Bureau will meet the requirements of the Erosion and Sediment Control permit prior to commencing any ground disturbance at the subject tax lot. The temporarily disturbed area of the property will be reseeded with low growing native grass in compliance with Condition 8.j.

#### Distribution Main

In the review of SEC Criterion MCC 39.5860(C)(1) and (C)(2), the Staff Report (page 113) describes a possible pipe alignment that could technically meet standards 39.5860(B)(2) and (B)(3) by travelling further in Cottrell and Lusted Road rights of way:

*“The Distribution Main could continue in the SE Cottrell Road right-of-way to the intersection of SE Lusted Road and then travel east within the SE Lusted Rd right-of-way to tax lot 1S4E22BC-00100 to then connect with the pipeline on 1S4E15C-00801.”*

While the approach staff suggests could reduce the degree of departure from the standards, this ROW alignment would place drinking water service to 750 residences at risk. As noted in Exhibit I.93, during project design, the design team reviewed many alternative route options, including use of the ROWs as proposed by staff. This option was eliminated based on several factors, most notably geotechnical concerns about traversing the hillside (located in the geologic hazard zone) which presents higher landslide and seismic risks than the proposed perpendicular path down the slope. Other limiting factors identified in Exhibit I.93 include safety, extended closure of Lusted Road, and cost.

Staff state on page 113 that since there is a theoretical path to meeting development standards, the project must comply with MCC 39.5860(C)(2). In reviewing (C)(2), staff explain that *“(C)(2) requires alternative conservation measures that exceed the standards of subsection (B) which the County understands to mean mitigation.”*

The Water Bureau has prepared a mitigation plan following the guidance outlined under (C)(2) on page 113 of the Staff Report. This plan is provided on Sheet LU-602M in Exhibit I.97. The plan provides 77 native trees and 383 native shrubs and is designed to meet the standards of (C)(5) option 2, identified by staff.

While the Water Bureau is willing to add these plantings to the Lusted Hill site, it is not clear to the applicant what impacts are being mitigated with this action. As documented in Exhibit A.11, pages 17-29, the project: 1) completely avoids any tree removal, 2) keeps all disturbance within areas of existing disturbance (i.e., paved driveway and existing utility corridor), 3) keeps all disturbance within existing cleared areas, and 4) uses trenchless construction methods to avoid habitat impacts and minimize disturbance within the geologic hazard zone. Building a Distribution Main that traverses the hillside, as suggested by staff, presents high geotechnical risks as indicated in Exhibit I.93, and a pipe failure on this steep, forested hillside could adversely impact protected habitat within the SEC-h zone. The Water Bureau believes that its impact avoidance actions are effective alternative conservation measures that will result in fewer potential impacts to protected SEC-h resources than a plan conforming to subsection (B) standards. Therefore, the Water Bureau does not believe the proposed plan necessitates mitigation.

Nevertheless, if the Hearings Officer believes that mitigation is warranted, the Water Bureau's Exhibit I.97 provides a mitigation plan consistent with County staff guidance.

*(2) Applicant can meet development standards of subsection (B), but demonstrates that the alternative conservation measures exceed the standards of Subsection (B) and will result in proposed development having less detrimental impact on forested wildlife habitat than the standards in subsection (B).*

**Response:** As explained in the response to prior criterion, the Water Bureau has proposed alternative conservation measures that it believes exceed the standards of Subsection (B) and will result in proposed development having less detrimental impact on forested wildlife habitat than the standards in subsection (B).



If the Hearings Officer finds that the standards of Subsection (B) cannot be met, the Water Bureau has prepared a mitigation plan that addresses staff's proposed conditions. For the RW Pipelines, Exhibit I.97 shows proposed mitigation planting to address Condition 17. For the Distribution Main, Exhibit I.97 shows proposed mitigation plantings of native trees and shrubs that meet the standards of Subsection (C)(5) option 2, as identified by staff.

*(3) Unless the wildlife conservation plan demonstrates satisfaction of the criteria in subsection (C)(5), wildlife conservation plan must demonstrate the following:*

*(a) That measures are included in order to reduce impacts to forested areas to the minimum necessary to serve the proposed development by restricting amount of clearance and length/width of cleared areas and distributing the least amount of forest canopy cover.*

**Response:** In the discussion of the forest canopy disturbance for the Distribution Main on page 114, staff states:

*"The Distribution Main will be installed through the parking lot to the existing pipeline corridor that was deforested under land use permit T3-2019-11784. The "Retrieval Portal" construction area on tax lot 1S4E15C-00801 appears to show that it will encroach into the existing forested area (Exhibit A.194, Sheet LU-602). The General Sheet Notes on Sheet LU-602 indicates "No proposed tree removal..." Provided no trees are removed in the forested area, this criterion is met."*

The General Sheet Notes on Sheet LU-602 cited by staff are accurate: there is "no proposed tree removal." Sheet LU-602 shows – or was intended to show – that the construction limits at the retrieval portal are outside of the SEC-h zone. The map shows the construction limits immediately adjacent to the SEC-h zone boundary. To clarify that no encroachment will occur, the design team has refined the proposed disturbance area so that it is set more than 25 feet away from the SEC-h zone. This refinement is shown on Sheet LU-602M in Exhibit I.97.

*(b) That any newly cleared area associated with the development is not greater than one acre, excluding from this total the area of the minimum necessary accessway required for fire safety purposes.*

**Response:** At page 114, staff find: *"The Distribution Main will be installed through the parking lot in the SEC-h overlay to the existing pipeline corridor that was deforested under land use permit T3-2019-11784."*

Although staff did not include a conclusion that the criterion is met, staff findings indicate that no new cleared areas are proposed. No public comments indicated concerns with meeting the criterion. Therefore, the Water Bureau believes the criterion is met.

*(c) That no fencing will be built and existing fencing will be removed outside of areas cleared for the site development except for existing cleared areas used for agricultural purposes.*

**Response:** In the Distribution Main findings, staff did not include a conclusion that the standard is met. However, staff do not indicate any concerns with meeting the criterion. No public comments indicated concerns with meeting the criterion. Therefore, the Water Bureau believes the criterion is met.

*(d) That revegetation of existing cleared areas on the property at a 2:1 ratio with newly cleared areas occurs if such cleared areas exist on the property.*

**Response:** In the findings for raw water pipelines, staff reference the three trees to be removed on Tax Lot 800, described under MCC 39.5860(C)(1), above. As indicated in the Water Bureau response to that criterion, if the Hearings Officer believes SEC standards apply to these trees, a mitigation plan is provided in Exhibit I.97 showing a 2:1 tree mitigation consistent with this criterion.

For the Distribution Main, staff find: *“According to the applicant’s narrative in Exhibit A.11, page 28, no newly cleared areas are proposed within the SEC-h resource area.”* This is correct and although staff did not include a conclusion that the criterion is met, staff do not indicate any concerns with meeting the criterion. No public comments indicated concerns with meeting the criterion. Therefore, the Water Bureau believes the standard is met.

*(5) Unless the wildlife conservation plan demonstrates satisfaction of the criteria in subsection (C)(3) of this section, the wildlife conservation plan must demonstrate the following:*

**Response:** At page 118, staff find: *“At present, Land Use Planning finds that the Distribution Main Plan has not complied with (C)(2) as no alternative conservation measures (mitigation) have been proposed. If the Hearing Officer agrees, the PWB would need to revise the Distribution Main’s Plan to meet (C)(5), option 2 in order to comply with (C)(2).”*

As explained in the response to subsection (C)(2), above, the Water Bureau has proposed alternative conservation measures that it believes meet criterion (C)(2). If the Hearings Officer finds that the criterion is not met, the Water Bureau has provided a mitigation plan for the Distribution Main (Exhibit I.97) that meets the standards of Subsection (C)(5) option 2.

## **I. Geologic Hazards Permit (Staff Report Section 15.0)**

Geologic Hazards Permits are primarily focused on ground disturbance – cuts and fills - and vegetation removal, within sloped areas that may lead to slope instability. As noted in the Staff Report repeatedly while addressing MCC 39.5090 Geologic Hazards Permit Standards (Staff Report, pp.124-128):

*“The entire Raw Water Pipelines installation is trenchless with no impact to ground surface disturbance in the Geologic Hazard overlay.”*

A very small portion (approximately 10%) of the Distribution Main pipeline segment within the Geologic Hazards Overlay is trenched. No trees are proposed to be removed within this portion of the project, and erosion control plans, as well as permanent planting plans, were submitted in the application.

Project geologic hazards materials were prepared by Geotechnical engineers.

There is no implication that any standards are not fully met, and staff did not identify any unmet Geologic Hazard standards. Opponent testimony does not address the geologic hazards standards. Opponents’ consulting geologist submitted Exhibit E.21 (True North) but it does not address geohazard standards; a response to evidence in this document is provided elsewhere in this Final Argument.

However, the Staff Report did not provide clear findings for some standards. Clarifying findings are presented below, for those standards with ambiguous staff findings.

Applicable materials are found in the record at:

- Exhibit A.7 Pipelines Overview
- Exhibit A.164 Geologic Hazards Permits Narrative
- Exhibit A.87 Raw Water Pipelines Geologic Hazards Permit Form
- Exhibit A.89 Lusted Road Distribution Main Geologic Hazards Permit Form
- Exhibit A.180 Responses to County Comments on Geologic Hazards Permits
- Exhibit A.25 Significant Environmental Concern Overlay Drawings

*MCC 39.5090(B) Fill shall be composed of earth materials only*

**Response:** As noted in the Staff Report (p. 124), “No regulated fill will be used for the project.” Therefore, this standard is met.

*MCC 39.5090(C) Cut and fill slopes shall not exceed 33 percent grade (3 Horizontal: 1 Vertical) unless a Certified Engineering Geologist or Geotechnical Engineer certifies in writing that a grade in excess of 33 percent is safe (including, but not limited to, not endangering or disturbing adjoining property) and suitable for the proposed development.*

**Response:** As noted in the Staff Report (p. 124), “The applicant has worked closely with a geotechnical engineer and any slopes cut will be filled to the original grade. See Exhibit A.7, page 33; Exhibit A.164, page 2, Question 1; Exhibit A.87, page 6; and Exhibit A.89, pages 6-7.” All geohazard documentation was prepared by a geotechnical engineer. This standard is met.

*MCC 39.5090(D) Unsupported finished cuts and fills greater than 1 foot in height and less than or equal to 4 feet in height at any point shall meet a setback from any property line of a distance at least twice the height of the cut or fill, unless a Certified Engineering Geologist or Geotechnical Engineer certifies in writing that the cuts or fills will not endanger or disturb adjoining property. All unsupported finished cuts and fills greater than 4 feet in height at any point shall require a Certified Engineering Geologist or Geotechnical Engineer to certify in writing that the cuts or fills will not endanger or disturb adjoining property.*

**Response:** As noted in the Staff Report (p. 124), “No unsupported or finished cuts and fills are proposed within GH overlay areas. A geotechnical engineer has reviewed the project. See Exhibit A.7, page 33; Exhibit A.87; and Exhibit A.89, pages 7 and 10.” This standard is clearly met.

*MCC 39.5090(E) Fill shall not encroach on any water body unless an Oregon licensed Professional Engineer certifies in writing that the altered portion of the waterbody will continue to provide equal or greater flood carrying capacity for a storm of 10-year design frequency.*

**Response:** As noted in the Staff Report (p. 125), “There are no mapped streams, water bodies, or wetlands within the project area. See Exhibit A.7, page 33; Exhibit A.87, page 12 (Sheet GH-02); and

Exhibit A.89, page 14 (Sheet GH-04).” No regulated fill is proposed within the Geologic Hazard area, nor are any water bodies disturbed within the Geologic Hazard area. This standard is met.

*MCC 39.5090(H) Stripping of vegetation, ground disturbing activities, or other soil disturbance shall be done in a manner which will minimize soil erosion, stabilize the soil as quickly as practicable, and expose the smallest practical area at any one time during construction.*

**Response:** As noted in the Staff Report (p. 125), “The Raw Water Pipelines are entirely underground within the Geologic Hazard overlay with no impact to vegetation or ground surface disturbance. The Distribution Main segment has plans for vegetation protection and erosion control. See Exhibit A.7, page 34; Exhibit A.164, page 3, Question 8; Exhibit A.180, page 11 (Sheet ESC-004); Exhibit A.87, pages 12-13 (Sheets GH-02, GH-03); Exhibit A.89, pages 14-18 (Sheet GH-04, GH-05, GH-06, ESC-201, ESC-202).” Minimal ground disturbing activities, or soil disturbance are proposed; as referenced in the Staff Report, a small portion of the Distribution Main segment has plans providing for vegetation protection and erosion control, therefore this standard is met.

*MCC 39.5090(I) Development plans shall minimize cut or fill operations and ensure conformity with topography so as to create the least erosion potential and adequately accommodate the volume and velocity of surface runoff.*

**Response:** As noted in the Staff Report (p. 125), “PWB states the two pipeline segments are designed to minimize ground disturbance through the use of trenchless construction. The Raw Water Pipelines segment will require minimal disturbance (~10% of the pipe length). The applicant will obtain an Erosion and Sediment Control (ESC) permit (Type I permit) for the work to be completed outside of the Geologic Hazard overlay zone. The Type I permit will only be issued provided the land use is approved. The ESC permit has erosion control plans, but is not before the Hearings Officer. See Exhibit A.7, page 34; Exhibit A.87; Exhibit A.89, pages 16-18 (Sheets GH-06, ESC-201, ESC-202).” Proposed trenchless construction minimizes cut and fill within the Geologic Hazards overlay, and avoids topographic disturbance. For the minimal area of disturbance related to the Distribution Main, erosion control plans have been provided. Therefore, this standard is met.

*MCC 39.5090(J) Temporary vegetation and/or mulching shall be used to protect exposed critical areas during development.*

**Response:** As noted in the Staff Report (p. 125), “The entire Raw Water Pipelines installation is trenchless with no impact to ground surface disturbance within the GH overlay zone. Approximately 10% of Distribution Main will require erosion control. Temporary erosion control plans have been provided. See Exhibit A.7, Page 34; Exhibit A.87; Exhibit A.89, pages 16-18 (Sheets GH-06, ESC-201, ESC-202); Exhibit A.180, page 11 (Sheet ESC-004).” As noted in the Staff Report, temporary erosion control plans are provided for ground disturbance related to the Distribution Main; these plans provide for temporary vegetation and mulching to protect exposed critical areas during development, therefore this standard is met.

*MCC 39.5090(K)(1) and (2) Natural vegetation shall be retained, protected and supplemented [...]*

**Response:** As noted in the Staff Report (p. 126), “There are no mapped streams, water bodies, or wetlands within the Geologic Hazard overlay areas. See Exhibit A.7, page 35; Exhibit A.87, page 12 (Sheet GH-02); Exhibit A.89, pages 16-18 (Sheet GH-06, ESC-201, ESC-202); Exhibit A.180, page 11 (Sheet ESC-004).” No vegetation is proposed for removal within 100 feet of mapped streams, water bodies, or wetlands. As shown on Exhibit A.180 Sheet GH-06, no trees are proposed for removal within the small ground disturbance area related to the Distribution Main within the Geologic Hazards Overlay; disturbed soil will be replanted with ground cover as shown on Exhibit A.180 Sheet ESC-004. This standard is met.

*MCC 39.5090(L) Permanent plantings and any required structural erosion control and drainage measures shall be installed as soon as practical.*

**Response:** As noted in the Staff Report (p. 126), “The entire Raw Water Pipeline installation in the Geologic Hazard over is trenchless with no impact to ground surface disturbance. Approximately 10% of the Distribution Main will disturb the ground surface. Erosion control plans have been provided. See Exhibit A.7, page 35; Exhibit A.87, pages 12-13 (Sheets GH-02, GH-03); Exhibit A.89, pages 16-18 (Sheets GH-06, ESC-201, ESC-202); Exhibit A.180, page 11 (Sheet ESC-004).” As indicated in Exhibit A.7 permanent ground cover planting over the small untrenched portion of Distribution Main is proposed consistent with Exhibit A.25 Sheet LU-602. This standard is met.

*MCC 39.5090(M) Provision shall be made to effectively accommodate increased run off caused by altered soil and surface conditions during and after development. Rate of surface water runoff shall be structurally retarded where necessary.*

**Response:** As noted in the Staff Report (p. 126), “The entire Raw Water Pipelines installation is trenchless with no impact to ground surface disturbance in the Geologic Hazard overlay. Approximately 10% of the Distribution Main will disturb the ground surface. Erosion control plans have been provided. See Exhibit A.7, page 35; Exhibit A.87, pages 12-13 (Sheets GH-02, GH-03); Exhibit A.89, pages 16-18 (Sheets GH-06, ESC-201, ESC-202); Exhibit A.180, page 11 (Sheet ESC-004).” Proposed erosion control plans were prepared by registered engineers and permanent plantings (Exhibit A.25 Sheet LU-602) were prepared by landscape architects to effectively control erosion and surface water runoff during and after development. This standard is met.

*MCC 39.5090(N) Sediment in the runoff water shall be trapped by use of debris basins, silt traps, or other measures until disturbed area is stabilized.*

**Response:** As noted in the Staff Report (p. 126), “The entire Raw Water Pipelines installation is trenchless with no impact to ground surface disturbance in the Geologic Hazard overlay. Approximately 10% of the Distribution Main will disturb the ground surface. Erosion control plans have been provided. See Exhibit A.7, page 35; Exhibit A.87, pages 12-13 (Sheets GH-02, GH-03); Exhibit A.89, pages 16-18 (Sheets GH-06, ESC-201, ESC-202); Exhibit A.180, page 11 (Sheet ESC-004).” Exhibits identified by staff include numerous detailed erosion control measures, including silt fencing, sediment barriers, and filter inserts to trap sediment until stabilization and replanting. This standard is met.

*MCC 39.5090(O) Provisions shall be made to prevent surface water from damaging the cut face of excavations or sloping surface of fills by installation of temporary or permanent drainage across or above such areas, or by other suitable stabilization measures such as mulching or seeding.*

**Response:** As noted in the Staff Report (p. 127), “The entire Raw Water Pipelines installation is trenchless with no impact to ground surface disturbance in the Geologic Hazard overlay. Approximately 10% of the Distribution Main will disturb the ground surface. Erosion control plans have been provided. See Exhibit A.7, page 35; Exhibit A.87, pages 12-13 (Sheets GH-02, GH-03); Exhibit A.89, pages 16-18 (Sheets GH-06, ESC-201, ESC-202); Exhibit A.180, page 11 (Sheet ESC-004).” The erosion control plans include stabilization measures including mulching and seeding, prepared by a registered engineer as shown on Exhibit A.180 Sheet ESC-004. This standard is met.

*MCC 39.5090(P) All drainage measures shall be designed to prevent erosion and adequately carry existing and potential surface runoff to suitable drainageways such as storm drains, natural water bodies, drainage swales, or an approved drywell system.*

**Response:** As noted in the Staff Report (p. 127), “The entire Raw Water Pipelines installation is trenchless with no impact to ground surface disturbance in the Geologic Hazard overlay. Approximately 10% of the Distribution Main will disturb the ground surface. Erosion control plans have been provided. See Exhibit A.7, page 35; Exhibit A.87, pages 12-13 (Sheets GH-02, GH-03); Exhibit A.89, pages 16-18 (Sheets GH-06, ESC-201, ESC-202); Exhibit A.180, page 11 (Sheet ESC-004).” Proposed erosion control measures were designed by a registered engineer and are sufficient to ensure adequate prevention of erosion, as well as adequate drainage control. This standard is met.

*MCC 39.5090(Q) Where drainage swales are used to divert surface waters, they shall be vegetated or protected as required to minimize potential erosion.*

**Response:** As noted in the Staff Report (p. 127), “The entire Raw Water Pipelines installation is trenchless with no impact to ground surface disturbance in the Geologic Hazard overlay. Approximately 10% of the Distribution Main will disturb the ground surface. Erosion control plans have been provided. See Exhibit A.7, page 35; Exhibit A.87, pages 12-13 (Sheets GH-02, GH-03); Exhibit A.89, pages 16-18 (Sheets GH-06, ESC-201, ESC-202); Exhibit A.180, page 11 (Sheet ESC-004).” No drainage swales are proposed in relation to proposed activities within the Geologic Hazards Overlay. This standard is met.

*MCC 39.5090(R)(1)-(3) Erosion and sediment control measures must be utilized such that no visible or measurable erosion or sediment shall exit the site, enter the public right-of-way or be deposited into any water body or storm drainage system. Control measures which may be required include, but are not limited to:*

- (1) Energy absorbing devices to reduce runoff water velocity;*
- (2) Sedimentation controls such as sediment or debris basins. Any trapped materials shall be removed to an approved disposal site on an approved schedule;*
- (3) Dispersal of water runoff from developed areas over large undisturbed areas.*

**Response:** As noted in the Staff Report (p. 127), “The entire Raw Water Pipelines installation is trenchless with no impact to ground surface disturbance in the Geologic Hazard overlay. Approximately 10% of the Distribution Main will disturb the ground surface. Erosion control plans have been provided. See Exhibit A.7, page 35; Exhibit A.87, pages 12-13 (Sheets GH-02, GH-03); Exhibit A.89, pages 16-18 (Sheets GH-06, ESC-201, ESC-202); Exhibit A.180, page 11 (Sheet ESC-004).” Proposed erosion and sediment control measures were designed by a registered engineer; this standard is met.

*MCC 39.5090(S) Disposed soil material or stockpiled topsoil shall be prevented from eroding into water bodies by applying mulch or other protective covering; or by location at a sufficient distance from water bodies; or by other sediment reduction measures;*

**Response:** As noted in the Staff Report (p. 127), “No disposed soil material or stockpiled topsoil is proposed within the GH overlay area. See Exhibit A.7, page 36; Exhibit A.180, page 3, Question 9.” This standard is met.

*MCC 39.5090(T) Non-erosion pollution associated with construction such as pesticides, fertilizers, petrochemicals, solid wastes, construction chemicals, or wastewaters shall be prevented from leaving the construction site through proper handling, disposal, continuous site monitoring and clean-up activities.*

**Response:** As noted in the Staff Report (p. 127), “The Raw Water Pipelines installation within the GH overlay is trenchless and this criterion is not applicable. The applicant has supplied the appropriate documentation for the project. See Exhibit A.7, page 36; Exhibit A.87. For the Distribution Main, the handling, disposal, site monitoring and clean up are proposed as detailed in Exhibit A.89, Sheet ESC-004, BMP Matrix for Construction Phase. See Exhibit A.7, page 37; Exhibit A.89; Exhibit A.180, page 11 (Sheet ESC-004).” This standard is met.

*MCC 39.5090(W) Total daily number of fill haul truck trips shall not cause transportation impact (as defined in the Multnomah County Road Rules) to the transportation system or fill haul truck travel routes, unless mitigated as approved by the County Transportation Division.*

**Response:** As noted in the Staff Report (p. 128), “No regulated fill is proposed for the project. See Exhibit A.7 page 37; Exhibit A.164, page 3, Question 4-5; Exhibit A.87, pages 6 and 10; Exhibit A.89, Page 6-11.” Therefore, no fill haul trucks are involved in relation to the geohazard permits. This standard is met.

*MCC 39.5090(X) Fill trucks shall be constructed, loaded, covered, or otherwise managed to prevent any of their load from dropping, sifting, leaking, or otherwise escaping from the vehicle. No fill shall be tracked or discharged in any manner onto any public right-of-way.*

**Response:** As noted in the Staff Report (p. 128), “No regulated fill is proposed for the project. See Section 2. Pipeline Overview, Page 37; E.1 Geologic Hazards Permits Narrative, Page 3, Question 4-5; I.3 Raw Water Pipelines Geologic Hazards Permit Form, Page 6, 10; I.4 Luster Road Distribution Main Geologic Hazards Permit Form, Page 6-11.” Therefore, no fill haul trucks are involved in relation to the geohazard permits. This standard is met.

## **J. Dark Sky Lighting Standards (Staff Report Section 17.0)**

*MCC 39.6850(B) The following exterior lighting is exempt from the requirements of paragraph (C) of this section:*

*(2) Lighting used for safe pedestrian passage, installed at ground level (such as along walkways and stairs), provided that individual lights produce no more than 30 lumens.*

**Response:** Under this standard, staff notes that: “The submittal did not document pedestrian lighting specifically. While lighting may meet this exemption, the exemption was not requested in the submittal.”

Pedestrian lighting is documented in the application and meets the standards of MCC 39.6850(C), so the referenced exemption is not necessary. Exhibit A.212.kk provides the lighting schedule showing that all of the pedestrian fixtures (ZPxx and ZEPx series) have BUG ratings showing “U0” (no uplight) and have fixed mounting. These features meet the standard of MCC 39.6850(C)(1). The application Exhibit A.4 describes how all lighting at the site meets standard MCC 39.6850(C)(2). Exhibit J.70 further explains lighting for the facility.

Notwithstanding staff’s comment above, staff has proposed a condition of approval that the proposed lighting meet MCC 39.6850(C), which the Water Bureau accepts.

## **IV. Mitigation of Temporary Construction Impacts**

As explained in Section I.A, temporary construction is not a use that is subject to the approval criteria for a permanent use. Generally, construction details are refined after land use approval. Indeed, many construction details cannot be refined until land use is complete and conditions of approval or other feedback during the land use process are integrated into those details. We are not aware of any project in Multnomah County history that has prepared this extent of documentation and planning related to temporary construction activities during a land use review.

However, from project inception, the Water Bureau has been working to put safety first, both for the community and workers, and to limit community disruption during construction. These extensive efforts include robust and ongoing community outreach, honoring commitments in the Good Neighbor Agreement,<sup>142</sup> identifying planned pipeline routes with community input, early engagement of an agricultural consultant, and extensive traffic analyses.

As documented below, the Water Bureau has worked diligently to address all construction-related concerns, both from the community directly and raised in this record.

A summary of construction activities is provided in Exhibit H.3, Attachment 4.

---

<sup>142</sup> Opponents point out that the neighbors that had collaborated on drafting the Good Neighbor Agreement and giving feedback on ways to limit community disruption refused to sign the document, as, they argue, the project should just be moved somewhere not in their neighborhood. Regardless, the Water Bureau will honor its commitments made under the document and in that public process. Additional information about the extensive public engagement and the text of the Good Neighbor commitments is summarized in Exhibit A.27 and Exhibit A.29.



## **A. Construction Noise**

The has prepared several exhibits related to temporary construction noise and mitigation:

- Exhibit A.172 Acoustic Baseline Measurement
- Exhibit I.75 Construction Supplemental Information, page 1
- Ex J.82 Acoustics and Nighttime Generator Sound Levels

The Water Bureau's noise control best practices will be implemented during construction. For example, "no equipment will be used that has unmuffled exhausts and all equipment will comply with pertinent standards of the U.S. Environmental Protection Agency (EPA); stationary equipment will be located as far from nearby private properties as possible; practices pertaining to dump trucks will limit avoidable practices that generate excess noise such as compression brakes; and the contractor will construct temporary or portable acoustic barriers around stationary construction noise sources if required (for example, such barriers are planned near the raw water tunnel portal in the raw water pipelines easement and could be used around generators or other stationary equipment when located close to the property boundary)." Exhibit I.75 Construction Supplemental Information, page 1. Noise control will be verified with a sound level meter. Exhibit I.75 Construction Supplemental Information, page 1.

Sound barriers will be used at the generators to further reduce the potential for noise. These generators are needed during the beginning of construction before permanent electricity is installed at the site. Exhibit J.39 ("for an estimated 6 months until PGE could get power to the property.") Exhibit J.82 discusses the sound attenuating enclosures for each generator and models the success of those noise mitigation strategies. As shown by the modeling in Exhibit J.82, it is feasible for the contractor to use sound walls or other methods to ensure that the nighttime noise level during construction meets the County's noise ordinance nighttime standard (50 dBa). Moreover, noise control will be verified with a sound level meter. Exhibit I.75 Construction Supplemental Information, page 1.

**Water Bureau Proposed Condition of Approval:**

17. Applicant will require the contractor to use noise mitigation strategies in order to ensure that the nighttime noise level during construction meets the County's noise ordinance nighttime standard (notwithstanding any exemption for construction). Noise control will be periodically verified with a sound level meter to confirm nighttime noise ordinance standards are met.

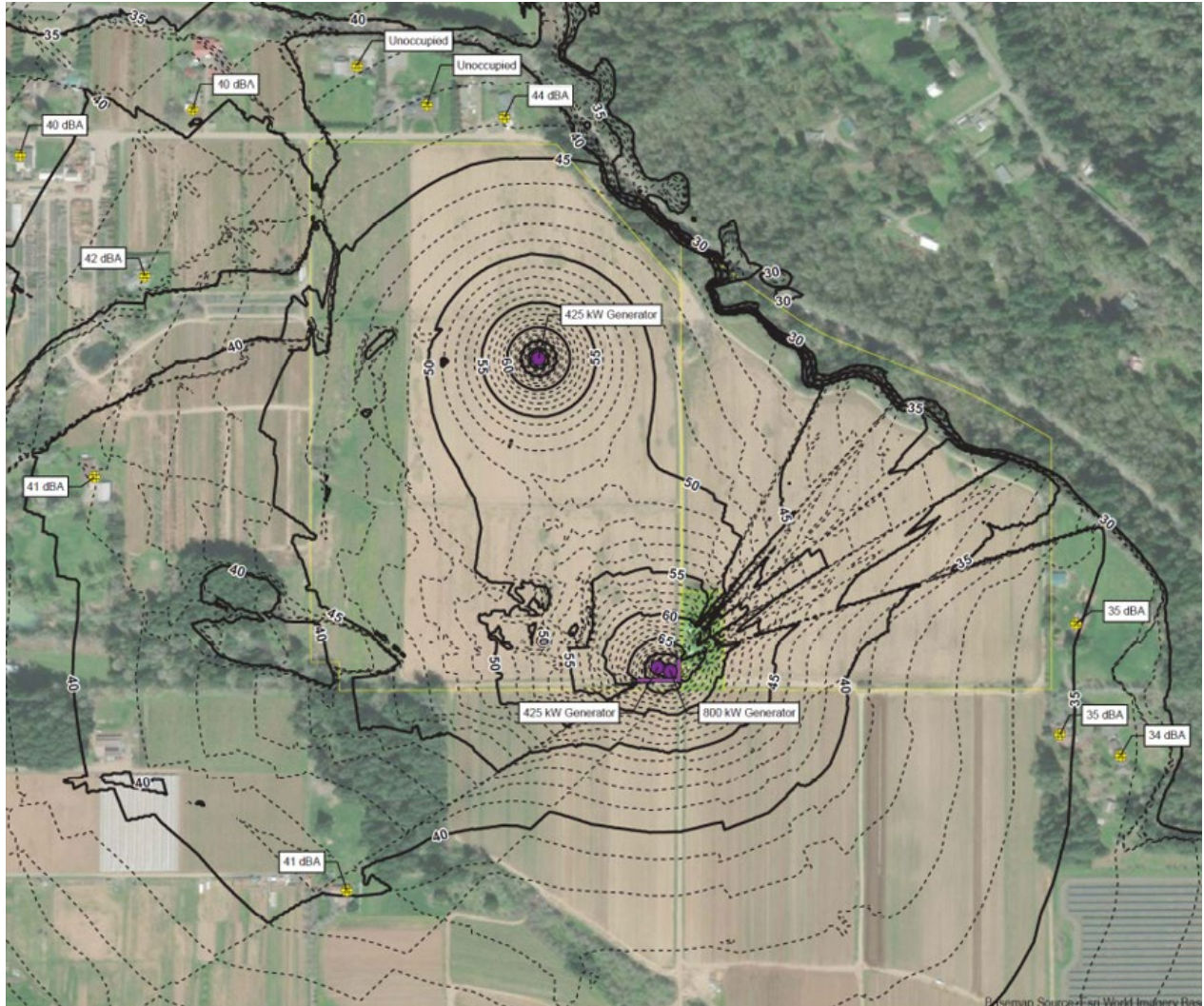
Opponents are concerned that construction noise would disrupt sleep, quoting to a thesis paper stating that the threshold is 52 dBa. Exhibit J.39, page 3. By meeting the County's noise ordinance nighttime standard (50 dBa) nighttime noise from construction will be below the level to disturb sleep.

For reference, 60-70 dBA is normal speech at the source. Exhibit A.4 (1.A Filtration Facility CUP Narrative), page 32.

Opponents are also concerned more generally about construction noise levels, and make statements about how much noise a bulldozer or generator emits, without any information about the distance to

noise sensitive units. Exhibit J39, page 3. By comparison to similar equipment shown in Table 2 of Exhibit A.4 (1.A Filtration Facility CUP Narrative), page 32, it is clear that the CPO's numbers are at the source.

As the figure below demonstrates, the noise level quickly reduces further away from the source:



**Exhibit J.82 (Acoustics and Nighttime Generator Sound Levels), Figure 1**

Moreover, it is not true that two sound sources will double the noise. Instead, “Doubling of the acoustic output of a sound source will increase the sound level by 3 dBA. For example, two 50 dBA sound sources will produce a total sound level of 53 dBA.” Exhibit J.82, page 2.

Note that the CPO also gets some of the physics of how sound works wrong, particularly in their understanding that “Every increase in 10 on the dBA scale is equivalent to a 10x increase in volume or sound level.” Exhibit I.39, page 1. This is incorrect. “As decibels, the fundamental metric used in acoustics, is a logarithmic quantity and the human response to sound is complex, there are multiple opportunities for misunderstanding.” Exhibit J.82, page 2.

A doubling of the sound energy results in a 3 dB increase. However, the human ear does not respond to sound energy in a linear manner. The Oregon Department of Transportation's (ODOT's) noise manual explains:

"People cannot usually detect a 1 dBA increase in sound; a 2-3 dBA increase is typically needed before a change can be perceived. A 10-dBA increase, such as from 50 dBA to 60 dBA, is usually perceived as a doubling of loudness. Doubling of the acoustic output of a sound source will increase the sound level by 3 dBA. For example, two 50 dBA sound sources will produce a total sound level of 53 dBA. Thus, a doubling of traffic volumes on a road will create a change in loudness that is just barely noticeable."

...

Thus, while a 10 dBA increase is a 10-fold increase in energy, it is perceived by humans as only twice as loud rather than ten times as loud when comparing similar sounds. Therefore, the discussion and table of ratios included in the Cottrell CPO memo are incorrect.

## **B. Construction Traffic**

Related Exhibits:

- Exhibit A.230 Construction TIA
- Exhibit I.84 Global Transportation 1stORP Response
- Exhibit I.85 Current Truck and Construction Traffic in Area
- Exhibit I.86 One-Access Analysis
- Exhibit J.85 Updated TDMP
- Exhibit J.87 Global Transportation 2ndORP Response

Construction traffic and the extensive mitigation proposed for construction traffic are addressed above in Section I.B

## **C. Construction in Roadways – Access and Communications**

This topic is addressed in Section I.B.3 above. As explained there, the Traffic Control Plan will follow industry standards and maintain access for emergency responders, pedestrians, vehicles, and commercial activity. The Water Bureau's contract specifications require the contractors to "allow emergency vehicles, incident response units, and transit vehicles immediate passage at all times, maintain 24-hour access to all businesses and residences adjacent to the areas of work for the project and along haul routes, do not block driveways or sidewalks, and maintain safe pedestrian accesses." Exhibit I.75, pages 4-5. Notice will be provided before construction commences in front of a property, as well as to public agency such as fire and police departments. Communication with emergency responders will be regular and include contact information for the site foreman to allow direct communication so that construction workers can adjust work in order to allow emergency vehicles to pass immediately upon arrival. *Id.*

## **D. Construction Emissions**

Considerations related to emissions during construction are summarized in Exhibit I.75 (Construction Supplemental Information), pages 2-3, and provided below:

The City of Portland participates in the Clean Air Construction (CAC) Program which aims to reduce sources of diesel emissions on construction projects by implementing a standard set of requirements.

Contractors working on the Bull Run Filtration Projects will need to certify that all applicable diesel equipment and vehicles are registered and in compliance with the CAC Program or have a valid exemption. Compliant equipment and vehicles will be issued a decal to keep displayed.

Contractors will need to take the following steps to reduce unnecessary diesel equipment idling, unless exempted:

- All nonroad diesel equipment must shut down after five minutes of inactivity, and
- all nonroad diesel equipment shall have decals/prompts visible to the operator to remind them to shut down the equipment after five minutes of inactivity, and
- contractors will post "Five Minute Limit" signs in high foot traffic areas of the job site, visible to workers, and
- contractors will ensure all diesel equipment operators are aware of the policy.

In addition, contractors will need to meet the CAC Program diesel engine requirements unless exempted and pursue engine retrofits or install emission control devices to reduce diesel particulate matter. Qualifying emission control devices must capture diesel particulate matter at a level of 85 percent or greater. These requirements apply to diesel-powered nonroad construction equipment greater than 25 horsepower and to all on-road diesel dump trucks and concrete mixers.

## **E. Construction Dust**

Related Exhibits:

- Exhibits. I.100-I.102 (Full Erosion and Sediment Control Plans)
- Exhibit H.3 (Pre-Hearing Statement), Attachment 8 (Dust Control Plans)
- Exhibit I.75 (Construction Supplemental Information), pages 1-2
- Exhibit J.81 (Dust Management Supplemental Information)

Dust will be effectively controlled during construction. Applicant's Pre-Hearing Statement (Exhibit H.3), Attachment 8 provides the dust control plans for operation and construction of the filtration facility. These plans are also summarized in Exhibit I.75 (Construction Supplemental Information), pages 1-2.

For example, at the filtration facility, speeds will be limited, water trucks will operate continuously through the dry season to wet gravel roads and stockpiles as needed (while not applying so much as to create runoff), wheel wash facilities can control track-out which could otherwise contribute to dust in the surrounding area, stockpiles will be watered or covered to prevent dust releases, and various other strategies. For pipeline construction, the contractors will also follow similar best-practices dust management procedures, which include wetting the work area, temporary aggregate access roads, sweeping paved roads, loading and unloading on the downwind side of stockpile and minimizing drop heights, and wheel wash facilities as needed. Exhibit I.75 (Construction Supplemental Information), pages 1-2.

The Dust Control Plans are not just arbitrary plans. They are “industry-standard dust suppression ... because they **have proven effective for dust suppression at construction sites.**” Exhibit J.81 (Dust Management Supplemental Information), page 1.

## **F. Construction Safety & Security**

Related Exhibits:

- Exhibit I.75 Construction Supplemental Information

There are a number of aspects of safety during construction that the Water Bureau has considered. Safety for both workers and the community is incredibly important to the Water Bureau.

### **1. Site Security**

The site will have secure access requirements and “physical controls such as perimeter barriers or fencing and adequate lighting to secure the work site from unauthorized entry, theft, vandalism, or other security related events.” No firearms of any kind are permitted on the project. Only knives with less than a two-inch blade, suitable for construction will be permitted. Exhibit I.75, page 3.

### **2. Substance Abuse Prevention**

A number of neighbors expressed concerns about drug use among people working in the trades. Contractors have substance abuse prevention programs that include enforcement for prohibited substances, and manufacture, distribution, dispensing, possession, or use of alcohol or controlled substances is prohibited at project sites. A program of substance abuse testing will monitor compliance with the policy. Exhibit I.75, page 4.

### **3. Fire Safety**

For fire safety, the project site will have a temporary fire protection system designed to provide required fire flow during construction. This includes a fire hydrant within 250 feet of the fuel storage. The site access road is also designed to accommodate a 75,000 lb. engine, as required by fire code. Exhibit I.75, page 4.

Plans for this temporary fire system for construction are provided in Exhibit J.83. Water will be provided by Pleasant Home Water District. Exhibit A.128. The system will be installed prior to building being constructed or combustible materials being brought onto the site.

#### **4. Safety Protocols**

As to general safety protocols, requirements and procedures are described in Exhibit I.75, page 3:

Requirements include:

- Prior to the start of work, the contractor will designate in writing at least one competent person for each of the operations being completed to be on site at all times during construction activities. A competent person is an individual who, by way of training, experience, or combination thereof, is knowledgeable of applicable standards, is capable of identifying existing and predictable workplace hazards relating to the specific operation, is designated by the employer, and has authority to take appropriate actions, including stop task authority.
- Regular safety meetings will require participation by all persons working at the project site. Participants at these meetings shall discuss specific work activities for that shift, the Activity Hazard Analysis, the SafeStart card, results from safety inspections, required personal protective equipment, and all other necessary safety precautions.
- All site visitors are required to attend a safety orientation, have the approval of project management to enter the site, and must be escorted at all times.

#### **5. Chemical Management**

Related to hazardous materials management, Exhibit I.75, page 4 explains:

Only materials directly related to construction activities will be permitted on site. These materials will include but not be limited to diesel fuel, equipment lubricants, hydraulic fluids, paint, and other materials specified for incorporation into the filtration facility construction. Use, transport, and storage of all such materials will be in full accordance with applicable regulations. Any material classified with a hazardous rating will be stored and used in full compliance with its respective Safety Data Sheet as required by Occupation Safety and Health Administration.

Fuels, for example, will be stored in a covered, polyethylene-lined containment basin. Next to the basin will be shallow, reinforced concrete depressed slabs to allow for transfer of fuel to and from the fuel tanks. The lube truck will park on this slab overnight to establish further containment during off-hours. During the day, the lube truck will fuel and service construction equipment. Other materials such as oils, grease drums, and waste oil will be stored in container vans and have pans for secondary containment.

After the filtration facility is built, but prior to coming fully online, there will be a startup phase for the treatment process when the treatment chemicals that will be part of operation will be

onsite. These chemicals will be managed with the same procedures for safe handling and storage as during the operations phase.

### G. Ground Water Protection

Related Exhibits:

- Exhibit I.61 (Finished Water Pipelines Use of Concrete)
- Exhibit I.62 (Raw Water Tunnel Use of Concrete)
- Exhibit I.63 (Filtration Facility Wells)
- Exhibit I.64 (Raw Water Pipeline Wells)
- Exhibit I.65 (Finished Water Pipeline Soil and Wells)

Opponents asserted that construction would impact wells and ground water in the area. The project's engineers have examined this concern and concluded that construction will not impact groundwater wells.

- A detailed examination was done of the raw water tunneling work. There, the “predicted vibrations at the wells ... are less than 0.05 inches per second. For comparison, the typical threshold for blasting vibrations to protect sensitive structures with lathe and plaster is 0.5 inches per second, approximately 10 times greater than what is predicted at the closest wells. Furthermore, the wells are constructed with well steel casing, a material that is tolerant to vibration without damage.” Exhibit I.64 (Raw Water Pipeline Wells), page 8.
- Construction of the filtration facility itself “will include excavations of up to depths of 20- to 30-foot below ground surface” whereas “wells are greater than 400 feet below ground surface (bgs) with considerable separation from surface activities related to the Project. Exhibit I.63 (Filtration Facility Wells), page 1. From filtration facility construction itself, the strongest vibrations from the project are predicted at less than 0.004 inches per second, over 100 times less than the sensitive structures threshold. Exhibit I.63 (Filtration Facility Wells), page 2.
- The finished water pipelines have relatively shallow excavations of about 20 feet. Exhibit I.65 (Finished Water Pipeline Soil and Wells), page 3. The closest well is 100 feet away on the surface and there are two that are 300 feet away on the surface. Every other well is substantially further from the alignment. *Id.* pages 2-3. The vibratory compactors, used intermittently, would have the largest vibration from either open cut and trenchless installation. Those would produce about 0.2 inches per second of vibration at about 30-40 feet away, well below the sensitive structures threshold even without taking into consideration the screened intervals being privately 80 to 100 feet below the invert of the pipelines. *Id.* at 4.

Therefore, construction vibrations are not expected to impact the performance of private wells because the distances and depth of the wells is too far from the construction work areas to result in damage. No vibration will come close to the sensitive structures threshold where damage may be possible, and wells are not a sensitive structure -- they are constructed with well steel casing, a material that is tolerant to vibration without damage.

A slightly different concern was expressed that the use of concrete or grout in the pipeline construction process would contaminate or otherwise interfere with ground water. Contractors for both the raw and finished water pipelines confirmed that the materials used to fill the space around the tunnel pipes will

be isolated. Where open cut installation is used, the isolation is similar to a house foundation installation. Where trenchless installation is used, steel casing is installed first, then the water pipe inside of that steel casing, and the space between the two (the “annular space”) is then filled – allowing the steel to completely contain the grout. Exhibit I.61 (Finished Water Pipelines Use of Concrete). For the raw water tunnel, similarly, full perimeter steel sets and timber lagging contain the materials used to fill the annular space. Exhibit I.62 (Raw Water Tunnel Use of Concrete).

## H. Water Quality and Erosion Control

Narrative and evidence submitted relating to water quality and erosion control during construction are listed below, with relevant sections excerpted:

- Exhibit A.41 Potential Impacts of Pesticide Use on Finished Water Quality
- Exhibit A.57 Potential Discharges to Johnson Creek
- Exhibit I.92 Response to Exhibit E.21 concerning Stormwater Runoff to Beaver Creek
- Exhibit I.95 Best Management Practices to Protect Johnson and Beaver Creeks Memo
- Exhibit I.99 Stormwater Evidence Cover Memo, 1200-CA General Permit, Project 1200-CA coverage letter from DEQ
- Exhibit I.100 Erosion Control Plans for Water Filtration Facility and Carpenter Lane
- Exhibit I.101 Erosion and Sediment Control Plans for Pipeline Installations
- Exhibit I.102 Finished Water Pipeline Erosion and Sediment Control Plans for Grids 8-16 Intertie Site

The Portland Water Bureau must obtain two necessary permits for ground disturbing activities during construction. First, the project has obtained an NPDES Construction Discharge Stormwater Permit 1200-CA permit from DEQ. Second, the Portland Water Bureau has also submitted an Erosion and Sediment Control (ESC) Permit to Multnomah County. Multnomah County cannot approve ESC plans prior to land use approval. These permits both ensure that the construction plans and practices will maintain water quality.

DEQ issued a 1200-CA coverage letter to the Water Bureau for the project on June 14, 2023. Exhibit I.99. Notably, the 1200-CA permit requires “Implementation of erosion and sediment control measures at all times to prevent any visibly turbid discharges or sediment from leaving the project site from initial soil disturbance until project completion.” (Section 13.1). The permit has detailed requirements and standards for construction. The 1200-CA permit requires:

- Implementation of any sediment controls prior to construction activities in that portion of the site. (Section 13.1.3)
- Management strategies throughout the project to meet and match the needs of each phase of construction. (Section 13.1.3)
- Recordkeeping showing installation, repair, replacement or removal of stormwater controls. (Section 13.1.4)
- Maintenance of all erosion and sediment controls.(Section 13.1.5)
- Protection of riparian areas, vegetation, trees and associated root zones, and vegetated buffer zones. (Section 13.2.1)
- Prevent discharge of sediment to surface waters or conveyance systems leading to surface waters of the state (Section 13.2.11)



- Prevent soil compaction. (Section 13.2.12)
- Control all stormwater discharges, including peak flowrates and total stormwater volume to prevent channel and streambank erosion. (Section 13.2.16)
- Implement pollution prevention controls (Section 13.3)
- Control discharges to meet all applicable water quality standards (Section 14.1)

To show compliance with these requirements, an applicant submits an Erosion and Sediment Control Plan (ESCP) that must meet the three objectives that include: 1) implementation of "best management practices (BMPs) in accordance with appropriate, recognized, and generally accepted engineering practices to prevent erosion and sedimentation, and to identify, reduce eliminate or prevent contamination of stormwater and water pollution from construction activities; 2) preventing violations of water quality standards and meet technology based effluent limitations; and 3) controlling peak flow rates and velocities of stormwater. (Section 15.2). The site must be monitored by a certified professional to ensure stormwater controls are properly installed, check for visible erosion and sedimentation, and complete any necessary maintenance, corrective actions, or stabilization measures. (Section 17.4). An extensive list of monitoring requirements is provided in Section 17.6.

The Multnomah County ESC permit requirements mirror many of the 1200-CA permit requirements. Notably, the Multnomah County ESC permit requires:

- Stormwater drainage control measurements are designed to perform as described in the most recent edition of the City of Portland Erosion and Sediment Control Manual and the City of Portland Stormwater Management Manual. MCC 39.6225(7)
- Ground disturbing activity shall be done in a manner which will minimize soil erosion, stabilize the soil as quickly as practicable, and expose the smallest practical area at any one time during construction. MCC 39.6225(8)
- Whenever feasible, natural vegetation shall be retained, protected, and supplemented MCC 39.6225(11)
- Provisions shall be made to effectively accommodate increased runoff caused by altered soil and surface conditions during and after development. The rate of surface water runoff shall be structurally retarded where necessary. MCC 39.6225(13)
- Sediment in the runoff water shall be trapped by use of debris basins, silt traps, or other measures until the disturbed area is stabilized. MCC 39.6225(14)
- Erosion and sediment control measures must be utilized such that no visible or measurable erosion or sediment shall exit the site, enter the public right-of-way or be deposited into any water body or storm drainage system. MCC 39.6225(18)
- Disposed spoil material or stockpiled topsoil shall be prevented from eroding into water bodies by applying mulch or other protective covering; or by location at a sufficient distance from water bodies or by other sediment reduction measures. MCC 39.6225(19)  
Such non-erosion pollution associated with construction such as pesticides, fertilizers, petrochemicals, solid wastes, construction chemicals, or wastewaters shall be prevented from leaving the construction site through proper handling, disposal, continuous site monitoring and clean-up activities. MCC 39.6225(20)

The Water Bureau has submitted an application to Multnomah County for an ESC permit, however, as noted earlier, Multnomah County cannot approve ESC plans prior to land use approval. ESCP plan sheets

for both the filtration facility and the pipelines were submitted into the record during the 1<sup>st</sup> open record period. Exhibits 100, 101, and 102.

The plans included ESCP Filtration Facility General Notes at Exhibit I.100, 00-LU-501 that identify the best management practices that will be incorporated during filtration facility construction. The plans submitted also include Pipeline Erosion and Sediment Control Notes at Exhibit I.101, ESC-004 that identify the best management practices that will be incorporated during pipeline installation.

Proposed construction activity shall be done in a manner which will minimize soil erosion, stabilize the soil as quickly as practicable, and expose the smallest practical area at any one time during construction by measures found on ESC-004 and 00-LU-501 such as:

- Sequencing clearing and grading to the maximum extent practical to prevent exposed inactive areas from becoming a source of erosion.
- Applying temporary and/or permanent soil stabilization measures immediately on all disturbed areas as grading progresses.
- Temporarily stabilizing soils with blown straw and a tackifier, loose straw, or an adequate covering of compost mulch at the end of the shift before holidays and weekends, if needed and temporarily stabilizing portions of the site where construction activities cease for 14 days with a covering of blown straw and a tackifier, loose straw, or an adequate covering of compost mulch and applying temporary seeding until work resumes on that portion of the site.
- Stabilizing or covering soil stockpiles at the end of each workday as needed based on weather conditions to prevent discharges to surface waters or conveyance systems leading to surface waters.
- Not removing temporary sediment control practices until permanent vegetation or other cover of exposed areas is established.
- Removing trapped sediment from the sediment fence before it reaches one third of the above ground height and before fence removal. Removing trapped sediment from other sediment barriers such as biobags before it reaches two inches depth above ground height and before BMP removal.
- Cleaning Catch Basins before retention capacity has been reduced by fifty percent. Removing trapped sediments from sediment basins and sediment traps before design capacity has been reduced by fifty percent and at the completion of project.
- Initiating temporary stabilization measures, final vegetation cover, or permanent stabilization measures immediately whenever any land disturbing activities have permanently ceased or will be temporarily inactive on any portion of the site for 14 or more calendar days.

In addition to the general notes containing the best management practices, the plans submitted into the record provide detailed civil sheets that include site wide plans and erosion and flow control detail sheets for the facility. The plan sets for each pipeline grid that include utility work plans depicting construction details that include the limits of disturbance and sediment and tree protection fence locations. Final stabilization and landscape plans are also included.

The design and practices of construction at the filtration facility and pipelines will adhere to DEQ 1200-C permit requirements and MCC 39.6225 ESC standards. Stormwater controls are designed to control stormwater volume, velocity, and peak flow rates to prevent discharges of pollutants and channel and

streambank erosion and scour, stormwater will be discharged from the construction site at pre-development rates. These practices and requirements ensure water quality will be maintained throughout construction.

Staff acknowledged that water quality could be affected if there is inadequate erosion or sediment control and practices during construction and has proposed a condition of approval to obtain all necessary ground disturbing permits from DEQ and Multnomah County Land use planning prior to any ground disturbing activities.

Staff Condition 6 requires the Water Bureau to obtain any necessary permits from the DEQ prior to ground disturbing activities. This would include all DEQ stormwater permits identified under the 1200-CA addressed above. Staff Condition 7 requires the Water Bureau to obtain an Erosion and Sediment Control for activities inside the Geological Hazard Zone. Because an ESCP will be required for the entire project, and not just the portion within the Geological Hazard zone, we recommend an amendment to staff's condition. Note that with the broadened condition, the ESCP would still be needed prior ground disturbing within the Geologic Hazard zone.

Staff Conditions of Approval (revised):

6. Prior to commencement of any ground disturbing activities, the Portland Water Bureau shall demonstrate that they have obtained any necessary permits from the Oregon Department of Environmental Quality required for those activities. [MCC 39.7515(A)]

7. Prior to commencement of any ground disturbing activities inside of the Geologic Hazard overlay zones, [at any work site](#) an the Erosion and Sediment Control permit [from Multnomah County for that work](#), T1-2023-16571 shall be issued. [MCC 39.6225 & MCC 39.5090]

Ms. Richter claimed in her hearing submittal that staff imposing the above conditions deferred a finding of compliance. Exhibit H.4, pg. 10.<sup>143</sup> In response, the Water Bureau provided the above-referenced information into the record so that it was available for public review and comment and could be reviewed by the Hearings Officer to determine compliance with applicable approval criteria. As noted, the information included both a complete list of best management practices for the protection of water quality, and by extension fish habitat, as well as detailed plan sets. Project opponents had a full 30 days to review the information and comment on it, but elected not to directly address any of the information provided in 2<sup>nd</sup> open record period submittals. Based upon the information identified above there is

---

<sup>143</sup> Ms. Richter also references a request by staff for revised stormwater details at page 82 of the staff report. There is no such request on page 82. Instead, in response to approval criterion MCC 39.840(A)(6) related to drainage, staff summarizes the filtration facility stormwater drainage report submitted with the application and concludes that the criterion is met.

sufficient evidence in this record for the hearing officer to conclude applicable approval criteria are met.<sup>144</sup> As a result staff's original recommendations of approval do not amount to improper deferral. Instead, they require the final review and approval by the appropriate reviewing agencies of the information provided.

Additionally, the Courters claimed that project constriction would lead to release of sediment, toxicants, concrete dust, organic pollutants, temperature increases, and flashy flows. Exhibit J.19 (Courtors) As covered extensively in the section addressing MCC 39.7515(B) above, the Courtors do a thorough job of explaining the detriments to water quality and fish habitat that these elements cause if released to a creek or other waterbody, they exclusively rely on unsupported allegations that the project will cause these releases. In the case of construction, the best management practices to eliminate or prevent contamination of stormwater and water pollution from construction activities, to prevent violations of water quality standards, and to control flow rates and velocities identified in the 1200-CA permit are directly responsive to the claims made by the Courtors related to the release of sediment, pollutants, increased flows and violations of water quality standards. However, rather than acknowledge or specifically address the requirements of the 1200-CA general permit, they simply note that the specific plans required under the 1200-CA have not been approved yet. Id pg. 7. The condition provided above requires the Water Bureau to obtain all permits required by the 1200-CA prior to commencement of ground disturbing activities. The Courtors also fail to specifically acknowledge or address the best management practices and detailed County Erosion and Sediment Control plans submitted in the record, choosing instead to assert that it is not possible for stormwater to be controlled on the site during construction.

The only support they provide is photos and video seemingly taken from the Water Bureau property on December 24, 2021 of an excavation area on the western edge of the filtration facility site. Exhibit J.19, pg. 10-11. The Courtors waited until the final rebuttal period to submit the photos and video of the event. As a result, the Portland Water Bureau is unable to provide evidence explaining the circumstances at the time. Nonetheless, given the date of the photos, it is clear that the work was not subject to the detailed construction stormwater management plans for construction of the filtration facility that must be reviewed and approved by DEQ and Multnomah County. Additionally, note that pursuant to MCC 39.6215, test pits or borings excavated for purposes of geotechnical evaluation and exploratory excavations are exempt from County Erosion and Sediment Control permit requirements.

While the Courtors and other project opponents largely chose to ignore the detailed information in the record related to the requirements of both the DEQ construction stormwater permits and the County ESCP, the evidence in the record clearly demonstrates that obtaining the necessary permits prior to

---

<sup>144</sup> Including a finding that the project will not adversely affect natural resources to the extent that the Hearing Officer were to find that construction is part of the use for purposes of the application of the Community Service conditional use criteria.

ground disturbing activities is feasible and will achieve stormwater treatment and controls that avoid adverse effects on Johnson Creek and other water bodies surrounding the project.<sup>145</sup>

## I. Schools

In planning phases of the project, the Water Bureau actively engaged in outreach to the school districts and the school bus provider in the area to answer questions about the project and get feedback from the school representatives. See, Exhibit J.73. Despite these efforts a number of schools and school districts, as well as parents, submitted testimony in opposition to the project based primarily on concerns about increased vehicle trips, and particularly trucks, passing by area schools during construction.<sup>146</sup> Concerns have also been raised about the impacts of project construction on bus routes and student pick-up. These issues are addressed separately below. Detailed responses to specific comments related to schools are also provided in the following exhibits:

- Exhibit I.84 Global Transportation Response to Select Testimony
- Exhibit J.87 Global Transportation Second Open Record Period Response to Select Testimony

## 6. School Avoidance

In order to address early concerns about transportation impacts on schools, the Construction TIA evaluated school pick-up and drop-off location and timing. Based upon that data, the Water Bureau proposed a condition of approval that would require construction traffic to avoid roads in the vicinity of four identified schools 20 minutes before and 20 minutes after school start and end times. Testimony provided both during and after the hearing challenged the adequacy of the evaluation because of late start times at certain schools and claimed that a 40-minute window around start and stop times was not sufficient for student and parent dispersal. The Water Bureau carefully evaluated the concerns and considered options that would both address school concerns and provide a condition that is feasible and enforceable.

Rather than have a generic condition that applies to all identified schools, the Water Bureau has developed the following school-by-school condition:

---

<sup>145</sup> For the reasons set forth above, the Water Bureau maintains that the construction stormwater treatment and management is not part of the use subject to the conditional use approval criteria at MCC 39.7515. Therefore, while the record supports a finding that obtaining the identified DQ and County construction related permits will avoid adverse effects, there is not code based requirement to reach that conclusion.

<sup>146</sup> There was also considerable testimony that identified concerns about chemical trucks driving by schools during facility operations. Chemical transport during operation is discussed above under the Community Service

Water Bureau Proposed Condition of Approval:

1. During construction, the Water Bureau or its representative shall:

p. Instruct filtration project construction drivers to avoid specific road segments that have direct access to identified schools. The specific school, streets, types of construction traffic, and hours to be avoided are listed in the table below. These constraints apply only on days when school is in session.

District	School	Street	Extent	Construction Traffic Type	Avoidance Hours*
Oregon Trail	Oregon Trail Academy	SE Proctor Rd	SE Bluff Rd to SE Dodge Park Blvd	All	All
		SE Bluff Rd	Just east of SE 352 <sup>nd</sup> Ave to SE Bear Creek Ln	Trucks and craft labor commuters	7:15 to 8:15 am 2:15 to 3:15 pm
	Kelso Elementary	SE Kelso Rd	SE Orient Dr to SE Eklund Ave	All	All
Gresham-Barlow	Sam Barlow High	SE Lusted Rd	SE 282 <sup>nd</sup> Ave to SE 302 <sup>nd</sup> Ave	Trucks	All
				Craft labor commuters	7:05 to 9:05 am 2:00 to 3:00 pm
	SE 302 <sup>nd</sup> Ave	SE Lusted Rd to SE Chase Rd	Trucks	All	
			Craft labor commuters	7:05 to 9:05 am 2:00 to 3:00 pm	
	East Orient Elementary	SE 302 <sup>nd</sup> Ave	SE Dodge Park Blvd to SE Bluff Rd	All	All
	West Orient Middle	SE Short Rd	SE Dodge Park Blvd to SE Orient Dr	All	All
		SE Orient Dr/SE Bluff Rd	SE Short Rd to SE 302 <sup>nd</sup> Ave	Trucks	All
			Craft labor commuters	8:35 to 10:35 am 3:05 to 4:05 pm	
Kelly Creek Elementary	SE Baker Way/SE 24 <sup>th</sup> St	SE Williams Dr to SE Chase Rd	All	All	

\*Avoidance hours are based on 30 minutes before and after school start and end times shown on district websites at the time of this decision. Two-hour morning avoidance periods are included for those schools that have regularly scheduled late starts on certain days. The Applicant will update avoidance hours annually prior to the start of each school year, or more frequently if notified by the districts, to reflect any changes made by the districts to start and/or end times. Any resulting updates will be consistent with the 30-minute periods described above.

While the condition may seem somewhat complicated at first glance, the implementation will be straightforward. The condition is described in the memo from Global Transportation at Exhibit J.87:

The condition identifies specific road segments that provide direct access to identified schools within 5 miles of the filtration facility that are not served by sidewalks and dedicated bike lanes. The identification of specific road segments with direct access to the schools provides certainty for both the drivers and the community and provides avoidance in the most critical area for school operation with the surrounding road system. The avoidance times specific to each school also creates certainty for the drivers and the community and accounts for unique schedule issues for certain schools.

The condition further identifies the various types of construction traffic that will be subject to the hours of avoidance at the various locations on days when school is in session. The construction traffic types identified in the condition table include Trucks (construction trucks used for hauling excavated soil and delivering material and equipment), craft labor commuters (the construction work force), and "All" which includes Trucks, craft labor commuters, and the non-craft labor commuters. In a number of instances, *all construction traffic* will avoid the identified segments for the entirety of the day. In all but one instance, as discussed below, *construction Trucks* will avoid the identified segment during the entire day. And on routes needed to safely and efficiently transport the construction workforce to the site, *craft labor* commuters are restricted to hours that avoid overlap with school start and end times.

More specifically, the craft labor commuters will be instructed to avoid the identified segments for two specific periods of time during the day: 1) a typically one-hour window that begins 30 minutes before the school start time and ends 30 minutes after the school start time; and 2) a one-hour window that begins 30 minutes before the school end time and ends 30 minutes after the school start time. West Orient Middle School and Sam Barlow High School have a posted one-hour late start time on Wednesdays. Therefore, rather than alter the avoidance period depending on the day of the week, as provided in the condition table the morning avoidance window for West Orient Middle School and Sam Barlow High School is extended to 2 hours to account for all start times across the week. As shown in the Construction TIA, craft workers comprise approximately 75% of commuter traffic volumes for the project, so this condition will have a meaningful effect on the amount of commuter traffic that would pass the school frontages during the critical avoidance windows. Additionally, those commuters that are not craft labor workers will often access the filtration site outside of the typical commute hours that are relevant for the avoidance windows.

As noted, there is one exception to the limitation of construction Trucks on the identified segment during all hours on days that school is in session. The only exception is the avoidance requirement for the Oregon Trail Academy (OTA), which requires that Trucks will be instructed to avoid Bluff Road only during the two one-hour avoidance periods. However, unlike the other segments included in the condition, OTA does not have direct access onto SE Bluff Road. Instead, the direct access for the school is onto SE Proctor Road, which as provided in the condition will be avoided by all construction traffic at all times. Nonetheless, because of the proximity of the school to the

intersection of SE Bluff Road and SE Proctor and concerns raised about pick-up and drop-off activity at and near the intersection, PWB is providing an additional accommodation to OTA and instructing the Truck and craft labor commuters to avoid a street that does not have direct access to the school during the identified dual one-hour periods.

Sandy High School is located within the 5-mile radius and has some driveways that access Bluff Road. However, the high school is located within the City of Sandy and Bluff Road includes sidewalks and dedicated bike lanes at and near the school. Therefore, the safety concerns identified in testimony related to schools without dedicated pedestrian facilities do not apply to Sandy High School. Exhibit J.87, pgs. 12-13.

A School Locations and Access Overview memorandum was submitted as Exhibit J.72. The locations memo illustrates the location of schools and the related road segments identified in the proposed condition. It further details the restrictions for each school represented in the table and the reason for exclusion from the table in the case of Sandy High School.

The additional detail in the condition creates certainty for the schools, students and parents, and the truck drivers and commuters. Truck drivers know exactly what routes to avoid and, with the exception of Bluff Road, will not have to be concerned about timing. The commuters also know exactly what streets to avoid at what times, will readily become accustomed to those limitations, and can plan their commutes in advance. Finally, parents and students will understand where additional construction traffic may be and where it will not be, and plan accordingly. It also addresses complaints related to schools with late start times on certain days by accommodating that schedule fluctuation on all days. The Water Bureau's traffic engineer concludes that with this condition in place, project traffic will not create safety concerns adjacent to identified schools. J.87, pg. 14. (Global)

Proposed Water Bureau Condition of Approval 1.p contains several requirements relevant to this school avoidance condition. First, the visor card required for each truck driver will include a map of allowed haul roads. As provided for in the condition, "allowed haul routes" exclude those segments that must be avoided under this school condition. Second, truck drivers will be subject to the accountability provisions described in the condition, including spot checks and an accountability plan.

There was considerable testimony specific to the queuing patterns of parents on Dodge Park Boulevard as they wait to pick children up from East Orient Middle School. None of the identified schools front on Dodge Park Boulevard, and therefore, it was not identified as an avoidance segment in the condition. Global Transportation addresses the issue of cars queuing and parking within the travel lanes on Dodge Park Boulevard in Exhibit J.87:

Pursuant to the proposed condition, all construction traffic must avoid SE 302<sup>nd</sup> during all times of day on days when school is in session. Therefore, construction vehicles will not need to make the same turning movement as the queued parent vehicles. Construction drivers will not be instructed to avoid SE Dodge Park Boulevard because neither East Orient Elementary School nor West Orient Middle School have direct access onto SE Dodge Park Boulevard. However, construction vehicles traveling east on SE Dodge Park Boulevard will be traveling within the lane dedicated for travel, not on the shoulder of the road. To the extent that vehicles queuing to turn are obstructing the travel lane, it is those vehicles, rather than the vehicles traveling within the



travel lane, that are creating a potentially hazardous condition. Furthermore, construction vehicle drivers can be expected to behave similarly to current drivers, including truck drivers, that currently encounter the obstructions in the travel lane: passing if safe and there is room to do so or by waiting until the obstruction in the travel lane clears.

The Water Bureau listened to the community through this land use process, carefully evaluated the construction transportation needs of the project in relation to concerns expressed by schools and the community, and developed a proposed condition that 1) addresses many of the concerns of schools and the community, particularly related to truck routes adjacent to schools, 2) creates certainty, and 3) is both feasible and enforceable. The Water Bureau acknowledges that this condition does not address every school related concern raised. However, as established in the record and set forth above, the project will exceed standards for transportation planning during the construction period, and the benefits of the overall package of transportation related conditions and accommodations will also apply to schools and students who use the transportation system to get to and from school.

## 7. School Buses

Additionally, testimony expressed concerns about the impacts of construction road closures and traffic on bus routes. Gresham Barlow School District (GBSD) and First Student, the entity that provides bussing services to GBSD, both provided testimony in opposition to the project. Exhibit I.12 (GBSD), Exhibit J.9 (GBSD), Exhibit E.8 (First Student), Exhibit J.6 (First Student). One of the concerns raised was that construction would require bus route changes and/or delay buses both through construction zones.

School bus delay or route changes during the construction period are not directly related to an applicable approval criterion in this land use review. Nonetheless, the Water Bureau has consistently attempted to work with the school district and First Student to understand bus routes and accommodate bus routes and pick-up/drop-off locations when possible and coordinate on temporary modifications if needed.

However, consultation is a two-way process and thus far neither GBSD nor First Service has been willing to engage in productive coordination efforts. There is also conflicting information in the record regarding the Water Bureau's level of outreach to discuss solutions for bussing issues. In their final rebuttal submittal into the land use record dated September 3, 2023, GBSD claims that there has been no coordination or meetings with them related to bus routes. Exhibit J.9, pg. 4 (GBSD). Yet in a letter submitted into the record **prior** to the hearing, Tammy Rickman the Transportation Manager for First Student, indicates that she has attended several meetings with the Water Bureau. Exhibit E.8 (First Student). GBSD further claims that the Water Bureau does not intend to accommodate bus concerns because it never requested bus routes.<sup>147</sup> Exhibit J.9, pgs. 3-4 (GBSD). Contrary to GBSD's understanding,

---

<sup>147</sup> Specifically, the GBSD letter states, "There has been no discussion with GBSD or First Student regarding any bus routes. No requests have been made for bus routes or to discuss the many concerns we have in order to evaluate the impact on operations or safety of our students and drivers." Exhibit J.9, pg. 3. The letter further states, "PWB did not get the routes because they never asked for them." Id.

the Water Bureau has requested the bus routes from First Student and was told that they would not be provided. As explained in Exhibit J.87:

In an email on November 9, 2022, the Water Bureau was told – by Tammy Rickman of First Student, who subsequently has submitted testimony in opposition to the record – that it would create “a security conflict” to share bus routes with the Water Bureau. Instead, Ms. Rickman indicated that all roads would be problematic. It is difficult to analyze the bus routes, as requested in this comment, when PWB was denied access to those bus routes. Exhibit J.87, pg. 17.

It is possible that First Student did not provide information about those meetings or email communications to GBSD, but the record shows that the Water Bureau has actively engaged with First Student to be able to analyze and coordinate on bus routes for the GBSD students. GBSD correctly makes the point that the Water Bureau cannot compare the bus routes to road closures without the bus routes. Once the requested route information is provided to the Water Bureau, the routes can be evaluated and accommodations made for bus routes and student pick-up and drop-off both initially and as routes change.

Former Transportation Condition 7.c in the Staff Report required consultation/engagement with schools. County Transportation decided in Exhibit J.44 that former condition 7.c was unnecessary because “MCRR 13.250 provides a comprehensive list of methods of notification and communications[.]” Page 12. Regardless, the applicant has proposed a broader requirement regarding required communication, at Water Bureau Proposed Condition of Approval 1.n-o.

## J. Construction Farm Impacts

Because of the unique text, context, and legislative history in which the Farm Impacts Test arises (where it comes from state law, rather than local code), construction has been addressed above related to the Farm Impacts Test.

## V. Conclusion

Applicant requests that the Hearings Officer approve the applications. Overall, the project meets or exceeds the standards in the applicable approval criteria. Given the essential nature of this project for protecting the safety of our water supply and our regional economy, the Water Bureau asks that you take the feedback from the community and convert it into appropriate conditions of approval to the extent you believe necessary to meet approval criteria.

Respectfully Submitted,



RADLER WHITE PARKS & ALEXANDER

## Appendix A – Proposed Conditions of Approval

This appendix gathers together all conditions of approval that have been proposed by staff or by the Water Bureau in this document or elsewhere. Where conditions are different than what was proposed by staff, edits are shown in the redline below, along with an explanation of why the change would be appropriate. Staff proposed conditions and County Transportation proposed conditions have the separate sequential numbers. For ease of review, the original numbers from those separate sources are maintained below. For consistency, Water Bureau proposed conditions have also been assigned separate numbers. However, where proposed conditions are intended to be incorporated into an existing County condition that is noted.

### A. Conditions from the Staff Report

1. Permit Expiration – The Community Service Conditional Use Permit and related Type II permits for the Water Filtration Facility shall expire as follows:
  - a. Within two (2) years of the date of the final decision when construction has not commenced. [MCC 39.1185(B)]
    - i. For the purposes of 1.a, commencement of construction shall mean actual construction of the foundation or frame of at least one of the approved structures of the Water Filtration Facility. Construction entails assembling components of a structure.
    - ii. For purposes of Condition 1.a, notification of commencement of construction shall be given to the Multnomah County Land Use Planning Division a minimum of seven (7) days prior to the date of commencement. Work may commence once notice is completed. Written notification shall reference case file #T3-2022-16220 and be sent to [land.use.planning@multco.us](mailto:land.use.planning@multco.us).
  - b. Within four (4) years of the date of commencement of construction when all buildings/structures have not been completed. [MCC 39.1185(B)]
    - i. For the purposes of 1.b. completion of buildings/structures shall mean completion of the exterior surface(s) of the structure and compliance with all conditions of approval in the land use approval.
    - ii. For purposes of Condition 1.b.i, the Portland Water Bureau shall provide photographic evidence and building permit status in support of completion of exterior surfaces of the structures and demonstrate compliance with all conditions of approval. The written notification and documentation of compliance with the conditions shall be sent to [land.use.planning@multco.us](mailto:land.use.planning@multco.us) and shall reference case file #T3-2022-16220. [MCC 39.1185]

2. Permit Expiration – The Community Service Conditional Use Permit and related Type II permits for the Communication Tower and its related physical improvements shall expire as follows:
  - a. Within two (2) years of the date of the final decision when construction has not commenced. [MCC 39.1185(B)]
    - i. For the purposes of 1.a, commencement of construction shall mean actual construction of the foundation or frame of at least one of the approved structures of the Communication Tower (tower or accessory structure). Construction entails assembling components of a structure.
  - b. For purposes of Condition 1.a, notification of commencement of construction shall be given to the Multnomah County Land Use Planning Division a minimum of seven (7) days prior to the date of commencement. Work may commence once notice is completed. Written notification shall reference case file #T3-2022-16220 and be sent to [land.use.planning@multco.us](mailto:land.use.planning@multco.us).
  - c. Within four (4) years of the date of commencement of construction when all buildings/structures have not been completed. [MCC 39.1185(B)]
    - i. For the purposes of 2.b, completion of buildings/structures shall mean completion of the exterior surface(s) of the structure and compliance with all conditions of approval in the land use approval.
    - ii. For purposes of Condition 2.b.i, the Portland Water Bureau shall provide photographic evidence and building permit status in support of completion of exterior surfaces of the structures and demonstrate compliance with all conditions of approval. The written notification and documentation of compliance with the conditions shall be sent to [land.use.planning@multco.us](mailto:land.use.planning@multco.us) and shall reference case file #T3-2022-16220. [MCC 39.1185]
  
3. Permit Expiration – The Community Service Conditional Use Permit and related Type II permits for the Various Pipelines shall expire as follows:
  - a. Within two (2) years of the date of the final decision when construction has not commenced. [MCC 39.1185(B)]
    - i. For the purposes of 3.a, commencement of construction shall mean actual excavation of trenches for at least one segment of an approved pipeline.
    - ii. For purposes of Condition 3.a, notification of commencement of construction shall be given to the Multnomah County Land Use Planning Division a minimum of seven (7) days prior to the date of commencement. Work may commence once notice is completed. Written notification shall reference case file #T3-2022-16220 and be sent to [land.use.planning@multco.us](mailto:land.use.planning@multco.us).

- b. Within four (4) years of the date of commencement of construction when all pipelines have not been completed. [MCC 39.1185(B)]
  - i. For the purposes of 3.b. completion of the pipelines shall mean completion of the exterior surface(s) of the structure and compliance with all conditions of approval in the land use approval.
  - ii. For purposes of Condition 3.b.i, the Portland Water Bureau shall provide photographic evidence and building permit status in support of completion of exterior surfaces of the pipelines and demonstrate compliance with all conditions of approval. The written notification and documentation of compliance with the conditions shall be sent to [land.use.planning@multco.us](mailto:land.use.planning@multco.us) and shall reference case file #T3-2022-16220. [MCC 39.1185]

Note: The Portland Water Bureau may request to extend the timeframe within which these permits are valid, as provided under MCC 39.1195, as applicable. The request for a permit extension must be submitted prior to the expiration of the approval period.

4. Approval of this land use permit is based on the submitted written narrative(s) and plan(s). No work shall occur under this permit other than that which is specified within these documents. It shall be the responsibility of the property owner(s) to comply with these documents and the limitations of approval described herein. [MCC 39.1170(B)]
5. Prior to commencement of any ground disturbing activities or construction on any private property not owned by the City of Portland, provide written documentation that the necessary easements over the property have been obtained or that the property owners have granted approval for the work to commence on the property.
6. Prior to commencement of any ground disturbing activities, the Portland Water Bureau shall demonstrate that they have obtained any necessary permits from the Oregon Department of Environmental Quality required for these activities. [MCC 39.7515(A)]
7. Prior to commencement of any ground disturbing activities ~~inside of the Geologic Hazard overlay zones, at any work site on~~ the Erosion and Sediment Control permit from Multnomah County for that work, T1-2023-16571 shall be issued. [MCC 39.6225 & MCC 39.5090]

**[Edit requested because ESCP will be needed for all project areas, not just the geohazard zone]**

8. Prior to commencement of any portion of the approved projects, a Final Design Review Plan shall be submitted showing the following modifications: [(MCC 39.8040(A)(1) & (2)).
  - a. The location of the proposed cabinet for the Raw Water Pipeline (Exhibit A.214, Sheet LU-200) in the Rural Residential zone adjacent to the Lusted Road right-of-way. The proposed cabinet shall meet the applicable Yard requirements of MCC 39.4375(C). In

addition, the accessory building located within the 10-ft side yard on Sheet LU-200 shall be labeled to be demolished or moved to meet the 10-ft yard requirement.

- b. The proposed landscaping boulders at the Water Filtration Facility shall be shown on Sheets LU-200 and LU-305.
- c. The Facility Circulation Map (LU-305), Proposed Conditions Site Plan (LU-302), Facility Enlargement 1 & 2 Plans (LU-400 & LU-401) in Exhibit A.212 shall be revised to show the other three loading zones that are shown in the Figure 39 of Exhibit A.5 narrative (MCC 39.6565(C) & 39.6595(G)).
- d. The drawings for the Water Filtration Facility site (Exhibit A.212) shall be amended consistent with the plans provided during the land use review to add curbing to the perimeter of all parking, loading and vehicle maneuvering areas [MCC 39.6570(B)]. Additionally, details of the various designs of the parking spaces, and arrows designating travel direction shall be added to the drawings for all drive aisles indicating one or two-way traffic [MCC 39.6570(C)].

**[Reasons for proposed edit in Water Bureau's Exhibit H.3 Pre-Hearing Statement, page 1; not addressed by staff in their responsive Exhibit I.45. Staff uploaded a scanned, blurry set of the plans referenced in the Pre-Hearing statement rather than the digital copy provided before the hearing. The identical plans were provided again in PDF at Exhibit I.57 (Water Bureau's Pre-Hearing Statement Plan Set)].**

- e. The drawings for the Water Filtration Facility site (Exhibit A.212) shall be amended to show the access drive entering the subject property from the SE Carpenter Lane right-of-way shall be perpendicular as it crosses the 30-foot Front Yard [MCC 39.6580(A)].
- f. The plans for the two directional signs shown on LU-403, Exhibit A.212 shall be modified to come into compliance with the requirements listed in MCC 39.6805 [MCC 39.6745(D)].
- g. The property owner shall either verify that no parking area signs are proposed in the various parking areas of the Water Filtration Facility parking lot, or if proposed that all parking area signs comply with the provisions of MCC 39.6780(G)(2). The location of any signs shall be shown on the Facility Circulation Map (LU-305), Proposed Conditions Site Plan (LU-302), Facility Enlargement 1 & 2 Plans (LU-400 & LU-401) in Exhibit A.212. [MCC 39.6805]
- h. Note the vertical and horizontal vision clearance area (45-foot horizontal triangle and 3 feet vertical to 10 feet above grade) on the landscape plans.
- i. Demonstrate that the proposed trees along the north edge of the Intertie Site on SE Lusted Road, either due to their placement or due to their expected height at maturity, will not interfere with overhead utility lines. [MCC 39.8045 (C)(6)]
- j. The ground disturbance boundaries shown on Exhibit A.195 shall be added to Exhibit A.214, Sheet LU-200. In addition, the disturbed area on tax lot 1S4E23C-00800 shall be

revegetated with a low-growing native grass. A note shall be added to Sheet LU-200 of the type of native grass seed to be used. [MCC 39.5860(B)(7)]

9. Prior to submitting building plans for Zoning Plan Review, the property owners or their representative shall:
  - a. Acknowledge in writing that they have read and understand the conditions of approval and intend to comply with them. The signed acknowledgement shall be sent to Lisa Estrin at [lisa.m.estrin@multco.us](mailto:lisa.m.estrin@multco.us). [MCC 39.1170(A) & (B)]
  - b. Modify the plans to comply with the applicable conditions of approval and the Hearings Officer's Decision. No modifications may occur from the approved plans unless the Hearings Officer has granted those changes through the hearings process.
  - c. Once the plans are approved through Zoning Plan Review, the building plans may be submitted to the City of Gresham for building plan check.
  
10. Prior to and during construction, the property owner or their representative shall ensure that:
  - a. All trees and shrubs that are not authorized to be removed are protected during construction. The Water Bureau shall preserve and protect the one existing small grove of Douglas-fir, bigleaf maple, and walnut trees near the Pleasant Home Water District easement and SE Carpenter Lane both during construction and on an on-going basis [MCC 39.8040(A)(4)].
  
11. Prior to issuance of the Certification of Occupancy, the Portland Water Bureau or their representative shall:
  - a. Complete the lot consolidation of the two existing parcels at the water filtration facility site into a single 95+/- parcel by recording all necessary legal documents as outlined in T1-2023-16600 when it is approved. [MCC 39.4335]
  - b. Mark all required and designated parking spaces shown on the approved plans (Exhibit A.212) as required by MCC 39.6515.
  - c. All required parking and loading areas shall be improved and placed in condition for use before the Building Department grants temporary or permanent Certificate of Occupancy for the operation of the Water Filtration Facility. [MCC 39.6530(B)]
  - d. **[See below under Exhibit I.45]**
  - e. Obtain approval from Clackamas County to utilize the proposed Emergency Access Road to SE Bluff Road, as proposed, before the Building Department grants temporary or permanent Certificate of Occupancy for the operation of the Water Filtration Facility.

1) If access is not granted, the Portland Water Bureau shall redesign their Emergency Access Road to comply with the Oregon Fire Code and any other applicable regulations, and apply to amend the Community Service Conditional Use Permit for the Water Filtration Facility. [MCC 39.7505(A)]

12. The Portland Water Bureau or operator of the various facilities, on an ongoing basis, shall comply with the following conditions:

a. [See below under Exhibit I.45]

- b. The Portland Water Bureau shall restore to its pre-construction condition, the extent possible, any agricultural land and associated improvements on EFU zoned private property that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the pipeline. [MCC 39.4225 and ORS 215.275(4)]
- c. The roughly 4,000 square feet of asphalt surface at the Intertie Site between the Valve and Meter Vault and the Electrical Building shall be maintained as available for vehicle maneuvering and parking and shall not be used for outdoor storage (MCC 39.4340).
- d. Testing of emergency generators and fire pumps shall only be conducted between the hours of 7am to 10pm [MCC 39.7515(A)].
- e. All external lighting shall comply with the County's Dark Sky Lighting Standards of MCC 39.6850 [MCC 39.6850 & 39.7515(A)]. Placement of lighting shall avoid shining it directly into an undeveloped Significant Environmental Concern for water resource or wildlife habitat area. [MCC 39.5560(B)]
- f. The accessory building for the communication tower (Exhibit A.183) shall remain unoccupied and only be used to house equipment required for the tower operations (MCC 39.7565(H)).
- g. All planted areas must be continuously maintained, including provisions for watering planting areas where such care is required. The small grove of Douglas-fir, bigleaf maple, and walnut trees near the Pleasant Home Water District easement and SE Carpenter Lane (Exhibit A.212, Sheet LU-301) shall be protected and maintained on-going basis. Any required landscaping that becomes diseased, dies or is removed, shall be replanted within the next planting season with a similar species and a suitable size after discussion with and determination by the Planning Director [MCC 39.8040(A)(4) and MCC 39.8045(C)(4) & (5)].
- h. Required parking spaces shall be available for the parking of vehicles of customers, occupants, and employees without charge or other consideration [MCC 39.6520(A)]. No storage of trucks, equipment, materials, structures or signs or the conducting of any business activity shall be permitted on any required parking space [MCC 39.6520(B)]. A required loading space shall be available for the loading and unloading



of vehicles concerned with the transportation of goods or services for the use associated with the loading space [MCC 39.6520(C)]. Loading areas shall not be used for any purpose other than loading or unloading and is unlawful to store or accumulate equipment, material or goods in a loading space in a manner which would render such loading space temporarily or permanently incapable of immediate use for loading operations [MCC 39.6520(D) & (E)].

- i. No nuisance plants listed in MCC 39.5580 Table 1 shall be planted on any of the subject properties with SEC-h or SEC-wr overlays within the control of the Portland Water Bureau. The Portland Water Bureau owners shall remove the nuisance plants listed in Table 1 from the cleared areas of the properties and replant with native grasses, ground covers or other approved plantings. The property owners shall maintain the cleared area free of these nuisance plants [MCC 39.5750 (F), MCC 39.5580, MCC 39.5860(B)(7)]

13. This permit does not authorize public tours or other public gatherings (educational or otherwise) on the Water Treatment Facility Site without first obtaining a Community Service Conditional Use Permit for an Accessory Use to a Community Service Use. [MCC 39.7505(A) & MCC 39.5690(F)].

14. The property owner shall complete a noise study within six-months of the Water Filtration Facility becoming fully operational in order to verify noise at property lines does not exceed 50 dBA at all times during normal operations and does not exceed 60 dBA during testing of emergency equipment. The study shall be conducted by a Professional engineer and the results documented in a written report that shall be available for public inspection. The property owner shall notify Multnomah County Land Use Planning if the study determines any of the noise thresholds have been exceeded and what modifications to the Facility are proposed to bring it into compliance.

- a. The noise study and proposed modifications if any shall be submitted to Multnomah County Land Use Planning within 45 days of the six-month anniversary of the Water Filtration Facility becoming fully operational. [MCC 39.7515(A)]
- b. Any modifications to the Water Filtration Facility found to be necessary to mitigate noise, as agreed by Multnomah County Land Use Planning and Portland Water Bureau, shall be completed within six months of the noise study's completion.
- c. After any modifications, a new noise study will be completed within a time period agreed upon by Multnomah County Land Use Planning and the Portland Water Bureau to verify that the modifications were successful.

15. Within six-months of the Water Filtration Facility becoming fully operational, the property owner shall submit a written report to Multnomah County Land Use Planning demonstrating

the transmission tower is in compliance with the radiation standards of MCC 39.7575. The report shall demonstrate that the instrument or instruments used were calibrated within the manufacturer's suggested periodic calibration interval; that the calibration is by methods traceable to the National Bureau of Standards; include a statement that the measurements were made in accordance with good engineering practice; and a statement or statements as to the accuracy of the results of the measurements [MCC 39.7575(A)(4)].

16. Any alteration made to the transmission tower after construction resulting in a substantial increase in the non-ionizing electromagnetic radiation (NIER) or radiation pattern of the NIER source shall require a modification of the Community Service Permit [MCC 39.7575(C)].
  - a. Pursuant to MCC 39.6200 et. seq., obtain and comply with all required permits for erosion and sediment control during and after construction, including, as applicable, the installation of erosion and sediment control best management practices (BMPs) based on an erosion and sediment control plan prepared and stamped by either a Certified Professional in Erosion and Sediment Control, Certified Professional in Stormwater Quality, Oregon Registered Professional Engineer, Oregon Registered Landscape Architect, or Oregon Certified Engineering Geologist. The erosion and sediment control plan shall effectively stabilize the site such that no disturbed ground is visible, and so no visible or measurable erosion or sedimentation occurs.

[Reasons for proposed edit in Water Bureau's Exhibit H.3 Pre-Hearing Statement, page 3; not addressed by staff in their responsive Exhibit I.45]

17. The Wildlife Conservation Plan (WCP) for the Raw Water Pipeline shall be amended to add six native trees on tax lot 1S4E23C-01500 and/or 1S4E23C-02200 as shown on in the graphic on page 111 in the staff report within the SEC-h overlay to mitigate for the removal of trees on tax lot 1S4E23C-00800 and not cover by the WCP. [MCC 39.5860(C)]

## **B. Exhibit I.45 Land Use Planning Post Hearing Memo to Hearings Officer**

Land Use Planning staff responded to two of the edits proposed in Water Bureau's Exhibit H.3 Pre-Hearing Statement:

Condition 11.d: As explained Exhibit H.3, Water Bureau proposed changes to this condition in connection with providing a draft plan (in Attachment 2) showing how the spaces could be provided in the Final Design Review Plan. However, it is fine to not include this in the condition itself. The first sentence still appears to contain a typographical error, as there would be no reason to require a Parking Lot Expansion Plan if the exception is granted. Therefore, the Water Bureau proposes just a minor correction:

Should the Hearings Officer not grant the requested Exception to the required number of parking spaces, in Parking Lot Expansion Plan shall be filed with Land Use Planning showing how the required number of parking spaces can be provided on the subject Water Filtration Facility parcel in the future. [MCC 39.6600(C)]

Condition 12.a: See Section III.A of this final argument for a discussion of this condition of approval.

**Water Bureau's Requested Condition 12.a:**

- If the Water Bureau provides the septic system identified in the application, the water filtration facility shall have a maximum of 10 full-time employees per day and no more than 30 visitors per day.
- If the Water Bureau provides an alternative treatment technology system, the water filtration facility shall have a maximum of 26 full-time employees, with a maximum of 10 on the largest shift, and no more than 30 visitors per day. The alternative treatment technology system must be sized to handle the increased number of employees and visitors and the drain field must be the same size or smaller and in the same location as the drain field identified on Exhibit A.212.3e, 00-LU-303. If the County Sanitarian finds that the site with the alternative treatment technology system provided cannot handle the larger number of employees and visitors, the Sanitarian may limit the maximum number of full-time employees and the maximum number of visitors allowed at the site per day. At no time may the number of employees or visitors exceed the above limitations, even if the Sanitarian finds that the on-site sewage system can accommodate the amount of effluent that would be generated.
- Under either type of septic system, wastes, including those associated with the drinking water quality analysis laboratory, must be containerized and not enter the septic system; only domestic strength wastewater is allowed.

### **C. Exhibit J.45 Memorandum from Multnomah County Land Use Planning to Hearings Officer regarding Cultural Resources**

See Section II.G.7 of this final argument for a discussion of this condition of approval.

- (1) Prior to beginning ground disturbing activities at the project site, the Water Bureau will provide to the Planning Director a final Archeological Monitoring Plan for Construction of the Portland Water Bureau Bull Run Filtration Project (Archeological Monitoring Plan) that is generally consistent with Exhibit I.98 and includes any changes required by the Oregon State Historic Preservation Office. The Water Bureau will implement and comply with the Archeological Monitoring Plan at the commencement of ground disturbing activities at the project site. The Archeological Monitoring Plan may be reviewed and updated if needed to adjust for findings at the project site during the construction period. If updated, the revised version of the plan will be provided to the Planning Director.

- (2) Prior to beginning ground disturbing activities at the project site, the Water Bureau will provide to the Planning Director a final Inadvertent Discovery Plan for Cultural Resources that is generally consistent with Exhibit A.71 and includes any changes required by the Oregon State Historic Preservation Office. If after commencement of ground disturbing activities and/or construction improvements, the Water Bureau or its consultants encounter cultural materials, the Water Bureau will implement and comply with the Inadvertent Discovery Plan.
- (3) If cultural resources are encountered during construction, the results of evaluations and/or consultations required by the Inadvertent Discovery Plan for Cultural Resources will be provided to the Planning Director. Following evaluation, the Water Bureau will apply for an SEC permit for additional excavation or removal if required for compliance with MCC 39.5510(B).

#### **D. County Transportation Proposed Conditions (Full Set In Exhibit J.44)**

1. Pursuant to MCRR 5.200, the County Engineer determination of pro-rata share of improvements will expire twelve months from the date of the County Engineer's determination or after the associated land use permit is granted or closed. If the Water Bureau has not entered into a Project Agreement or Construction Permit(s) within 12 months, a new review and new determination shall be required.
2. Water Bureau is required to permanently close the western access to SE Carpenter Ln, which is shown as 'existing access road with easement' on plan set Exhibit A.212. This second access from the subject property (R994220980) exceeds the one access per property standard (MCRR 4.200) and no Road Rules Variance application (MCRR 16.000) was sought by the Water Bureau.
3. Complete and record right of way (ROW) dedications to meet the share of the 60 feet ROW width standard for Rural Local roads (MCRR 6.100A; MCDCM Table 2.2.5):
  - a. 15 feet on the northern (SE Carpenter Ln) frontage of the subject property for the Filtration site (ref R994220980);
  - b. 15 feet on the southern frontage of 35227 SE Carpenter Ln (R994220850);
  - c. The above dedications can be included in any re-plat of the property or by contacting Pat Hinds, County ROW Specialist, Pat Hinds (patrick.j.hinds@multco.us), to complete the ROW dedication process.
4. Pursuant to MCRR 6.100D, Water Bureau is required to comply with, and submit to County Transportation for review and approval prior to commencing construction, a revised Transportation Demand Management (TDM) Plan-which, at a minimum, must:

**[Edit proposed to provide more County oversight]**

- a. Address construction truck and commuter traffic management based on access to the filtration facility construction site via SE Carpenter Ln.
- b. Incorporate the revised peak hour capacity limit for SE Carpenter Ln of 296 vehicles (which maintains LOS 'C'), as detailed in the Water Bureau's One-Access Analysis (Exhibit 1.86).
- c. Water Bureau will use tube trip counters at SE Carpenter Ln and SE Cottrell Rd intersection to take counts of trips to ensure the LOS C threshold (see b above) is met.
  - i. Water Bureau must also collect trip numbers to account for peak hour turning capacity monitoring in addition to total trips in order to allow for LOS monitoring based on real conditions not just the forecasted model (Exhibit 1.86)
- d. Identify TDM strategies and how they can quantifiably reduce trip demand at the Peak Hr(s) at the SE Carpenter Ln/SE Cottrell Rd intersection. TDM Strategies will:
  - i. Specify the priority of strategy implementation, based on the expected management of traffic demand.
  - ii. Specify when and how the strategy can be combined with other strategies to help mitigate traffic demand, as appropriate.
  - iii. In the event of selecting and implementing shuttle buses as a TDM strategy, Water Bureau must:
    1. specify criteria for selection of shuttle bus pickup and drop-off locations.
    2. Ensure that pickup location(s) are on private property and do not involve parking vehicles on public streets, that the locations have sufficient parking capacity for the number of commuter vehicles that would need to be reduced at peak construction to meet the revised peak hour capacity limit, and that the locations are outside of the project study area set out in Exhibit A.31.
    3. Demonstrate that all necessary contracts, agreements, permits for commuter vehicle parking can be obtained prior to selection as a TDM strategy.
- e. Based on long term and one-month forecasting, take a proactive approach to ensure an appropriate TDM strategy is in place and available 2 weeks before they are anticipated to be needed, and implemented in time, to reduce traffic volume to LOS C (see b above).
- f. Water Bureau will provide regular monthly reports to County Transportation demonstrating that Peak Hour trips and Peak Hour turn capacity at the SE Carpenter

Ln/SE Cottrell Rd intersection remains within LOS C and the threshold set out in criterion b above.

- i. Report will show how the TDM strategies implemented have reduced demand from the actual trip counts and forecasted demand.
  - g. Reports will be required for as long as Peak Hr intersection demand remains at levels above LOS C (see b above).
5. Prior to construction in the Right of Way (ROW), obtain Construction permit (MCRR 9.200, 18.200) for:
- a. All frontage/ road improvements of SE Carpenter Ln and SE Cottrell Rd consistent with the preliminary Civil Plan set, Exhibit A.16, A.17 as updated in Exhibits A. 205 thru A.208 and in Exhibit J.89 (MCRR 6.100B; MCRR 8.000)

**[Edit proposed to reflect updated sheets submitted by Water Bureau into the record]**

- i. Water Bureau must ensure that all geologic hazard and environmental overlay permits from County Land Use have also been obtained, if applicable.
  - b. All roads requiring full or partial road work due to pipeline installation:
    - i. SE Dodge Park Blvd from east of SE Cottrell Rd to east of SE Altman Rd.
    - ii. SE Altman Rd from SE Lusted Rd to SE Oxbow Dr.
    - iii. SE Cottrell Rd from SE Dodge Park Blvd to SE Lusted Rd.
    - iv. SE Lusted Rd from the Intertie Site to SE Altman Rd.
    - v. SE Lusted Rd just north of Clackamas County line/adjacent to SE corner and existing driveway of 36910 SE Lusted Rd.
  - c. All roads requiring preliminary or ongoing maintenance due to projected use:
    - i. SE Altman Rd from SE Oxbow Dr to Dodge Park Blvd.
    - ii. SE Cottrell Rd from SE Lusted Rd to SE Dodge Park Blvd.
    - iii. SE Lusted Rd from SE Pleasant Home Rd to SE Cottrell Rd.
    - iv. SE Hosner Rd from SE Lusted Road to SE Oxbow Dr.
6. Pursuant to MCRR 6.100 and MCRR 8.100 road improvements will be required to ensure that the transportation network maintains a condition that is safe, does not create a safety hazard for the traveling public, nor creates an on-going maintenance problem, for the roads listed in Condition 5.c. Accordingly, the Water Bureau is required to enter into a

Project Agreement (pursuant to MCRR 9.500), that requires the Water Bureau to perform the following work at the following times:

- a. For SE Hosner Rd from SE Lusted Rd to SE Oxbow Dr: Full depth reclamation, or other approved pavement replacement methods, prior to use as primary or detour through truck haul route.
- b. For SE Altman Rd from Multnomah County Line to SE Lusted Rd: Full depth reclamation, or other approved pavement replacement methods, prior to use as primary or detour through truck haul route.
- c. For SE Lusted Rd from SE Cottrell Rd to SE Hosner Rd: Full depth reclamation, or other approved pavement replacement methods, prior to use as primary or detour through truck haul route.
- d. For SE Lusted Rd from the Beaver Creek culvert to SE Hosner: Full depth reclamation, or other approved pavement replacement methods, prior to use as primary or detour through truck haul route.
- e. For SE Lusted Rd from SE Altman to the Beaver Creek culvert: At any time when using as a primary or detour through truck haul route, maintain in a serviceable condition. After completion of installation of pipelines in this section of road, replace roadway surface.
- f. For SE Altman from SE Lusted Road to SE Oxbow Drive: At any time when using as a primary or detour through truck haul route, maintain in a serviceable condition. After completion of installation of pipelines in this section of road, replace roadway surface.
- g. For SE Cottrell Rd from SE Lusted Road to SE Dodge Park Blvd: At any time when using as a primary or detour through truck haul route, maintain in a serviceable condition. After completion of installation of pipelines in this section of road, replace roadway surface.
- h. For SE Dodge Park Blvd. from east of SE Cottrell Rd to west of SE Altman Rd (where pipeline work will occur): At any time when using as a primary or detour through truck haul route, maintain in a serviceable condition. After completion of installation of pipelines in this section of road, replace roadway surface.
- i. If not already accomplished through the work described in a. - h. above, for any roads used as a primary or detour through truck haul route, the Water Bureau will: (a) maintain the route in a serviceable condition at any time when being used as a primary or detour through truck haul route; and (b) at the end of Water Bureau's use of the route, return the road used as a primary or detour through truck haul route to as good or better condition (PCI) than it was in on the date of the County's most recent PCI score prior to the Water Bureau's use.

A “**primary or detour through truck haul route**” is one identified in the Construction TIA in Exhibit A.230 as modified by the One-Access Analysis in Exhibit I.84, and any additional truck route incidentally used by the project, which incidental use must follow

county designated freight routes. However, a "primary or detour through truck haul route" is not one that is being used to directly access a construction site, such as when pipelines are being installed in Lusted and Altman Roads or for improvements to the roadway itself.

**"Serviceable condition"** means the roadway is safely usable for the purpose for which it was constructed (i.e., potholes are repaired timely, striping can be seen, etc.).

7. Temporary road closures, partial or complete, in relation to the construction of the Pipelines and facilities that form this land use application, requires prior review and approval by County Transportation (MCRR 13.000). Applications will need to be submitted to [row.permits@multco.us](mailto:row.permits@multco.us) for review and approval by the County Engineer (MCRR 18.250). Application requirements and documents can be found at the following webpage: <https://www.multco.us/roads/road-and-bridge-permit-applications>.
  - a. Traffic Control Plan (TCP) shall be submitted during the Construction Permitting process that shows detours and road closures (MCRR 13.200.A). Any deviation to the approved TCP during construction shall require a resubmittal of the TCP for approval.
  - b. Except for those roads where specific work will be required by the Project Agreement described in Condition 6, rural roads with a Pavement Condition Index (PCI) rating below 50 must not be used as detour routes in the Traffic Control Plan unless the Water Bureau submits construction plans to mitigate impacts and improve the PCI. The Construction Permit process (see condition 5 above) will be used to review TCP and confirm appropriate detour routes.
  - c. [See below for additional subsections proposed for this Condition 7]
8. Pursuant to MCRR 15.000 and ORS 810.040, the Water Bureau is required to obtain Over-Dimension Permits for all truck movements through Multnomah County which exceed the legal limit and weight specified by Oregon Department of Transportation (ODOT): (<https://www.oregon.gov/odot/mct/pages/over-dimension.aspx>).
  - a. Pursuant to MCRR 15.200 and 15.300, the County may restrict truck movements as authorized under State and Federal law on all roads established as arterials and collectors, and also restrict through truck movements on other road classifications, bridges, culverts, overpasses and underpasses, which may not accommodate larger vehicles.
  - b. County restrictions within the project vicinity include, but are not limited to:
    - i. No through trucks on SE Carpenter Ln from SE 327<sup>th</sup> Ave to the Filtration Plant site.
    - ii. No through trucks on SE Miller Rd from SE Bluff Rd to SE 327<sup>th</sup> Ave.



- iii. No through trucks on SE Homan Rd.
  - iv. No through trucks on SE Oxbow Parkway.
  - v. No through trucks on SE Stone Rd and SE Short Rd between US26 and SE Dodge Park Blvd.
  - vi. S Buxton Rd and S Troutdale Rd are limited to trucks 40ft overall length.
9. Water Bureau is required to submit and obtain an Access/ Encroachment Permit for the following accesses pursuant to MCRR 18.250:
- a. Filtration plant site: Exhibit A.211, A.212 00-LU-302 sheet 4 of 18 proposed condition site plan showing a new reconfigured access onto SE Carpenter Ln, after the 100% plans have been approved by the County as part of the Construction Permit.
    - i. Revised site plan must be submitted showing permanent closure of the as 'existing access road with easement', consistent with Condition 2 above.
    - ii. Revised site plan must show the main site access as perpendicular to SE Carpenter Ln (between 75-90 degrees) where it connects to the paved roadway to ensure consistency Land Use code MCC 39.6580.
  - b. Intertie site (R994210630):
    - i. Water Bureau is required to provide a site plan showing all four subject property accesses (three to SE Lusted Rd and one to SE Dodge Park Blvd), pursuant to approved Land Use Decision and Transportation Planning Review (EP-2016-5112/T2-2016-5020) and MCRR 4.700 (Existing Non-Conforming Access).
    - ii. Water Bureau must provide a copy of easements for PWB access from the subject property to SE Lusted Rd and SE Dodge Park Blvd.
    - iii. Access to the Intertie Facility at 33304 SE Lusted Rd (R994210630) shall be limited to the existing northeast driveway access onto SE Lusted Rd.
    - iv. Post-construction maintenance access to the Pipelines on the property shall use the northeast access as noted in 9(b)iii above. Post-construction maintenance access via SE Dodge Park Blvd is prohibited for PWB use.

[Note that the easements for the intertie property (Ekstrom) were modified after the hearing in response to these conditions of approval. This is discussed in Exhibit I.80 (Globalwise 1stORP Response),

page 41, and the easement areas themselves are provided in Exhibit I.86 (Permanent) and I.89 (Temporary).]

- v. The northeast access to SE Lusted Rd, serving the principal access to the Intertie facility, must have a paved apron 20 feet deep from the existing roadway towards the property line consistent with ODOT standard drawing RD715, to prevent erosion of the existing roadway surface on SE Lusted Road in accordance with MCDCM 2.1.1(4).
- vi. Application forms, and guidance, can be found on the County Transportation website at the following webpage: <https://www.multco.us/roads/road-and-bridge-permit-applications>. Applications should be submitted to [row.permits@multco.us](mailto:row.permits@multco.us)

10. Provide revised drawings and documentation that demonstrate the stormwater details of the following plans, reports and details obtain County Engineer 100% design approval (MCRR 26.000):

- a. SE Carpenter Ln, from SE Cottrell Rd to Filtration Plant site, and SE Cottrell Rd, from the intersection with SE Carpenter Ln to SE Dodge Park Blvd (Exhibits A.206-A.208).
- b. Ensure the discharge from the culvert from the Intertie site under SE Lusted Rd into Beaver Creek will not increase stormwater discharge volume at the outfall or downstream. Though the peak rates are comparable between the pre and the post development, the released discharge is a much greater volume. Ensure that the volume released does not create undue concentration of outflows that may affect downstream properties starting at the release point of any facility such as pipe, culvert and ditch.
- c. County Engineer requires review and approval of any changes to on-site impervious surface areas greater than 500 sq. ft and any proposed stormwater discharge or facilities in the ROW for compliance with MCDCM standards [MCRR 26.000].

## **E. Additional Water Bureau Proposed Conditions**

1. During construction, the Water Bureau or its representative shall:

[Carpenter Lane]

- c. Provide an ADA-compliant paved pedestrian route on Carpenter Lane east of Cottrell Road to the site access. The route will be delineated with pedestrian channelization devices when adjacent to the driving lanes with openings for property access. The paved

pedestrian route will be installed prior to beginning off-hauling of excavated materials from the filtration facility site. After the temporary certificate of occupancy for the filtration facility is issued, the paved area will be removed and returned to County standards.

- d. Post driver feedback radar speed signs in each direction on Carpenter Lane.

[Signage]

- e. Post on-site signs that notify truck drivers and commuters that they are required to yield to farm traffic, horses, school buses, bicyclists, and pedestrians.
- f. Mark primary and detour haul routes with arrow signs for truck drivers for the project to follow.
- g. Water Bureau is required to post speed limits on Carpenter Lane east of Cottrell, along with driver speed feedback signs.
- h. When construction impacts the public right-of-way in front of a business, post “business open” signs typical of roadway construction projects in any area where road construction and/or pipeline installation is occurring and where business would anticipate visitors.

[Driver Education and Visor Cards]

- i. Require all truck drivers to display visor cards mapping the allowed haul routes, indicating that staying on the haul routes is required, and reminding drivers that they are required to yield to farm traffic, horses, school buses, bicyclists, and pedestrians.
- j. Require truck drivers for the project to attend a safe driver training that includes, without limitation: (a) safety related to farm vehicles and slow moving vehicles such as tractors that are on the roads; (b) the requirement to yield to farm traffic, school buses, bicyclists, and pedestrians; (c) the requirement to comply at all time with speed limits; and (d) allowed haul routes. Water Bureau shall require truck drivers to follow this training at all times.

“Allowed haul routes” includes both the concept of which specific routes are allowed and routes that are not allowed, including Carpenter Lane west of Cottrell and routes that are not allowed in order to avoid schools as explained in Applicant’s Proposed Condition 1.p.

[Accountability]

- k. Perform random “spot checks” of key intersections in the study area to confirm truck drivers are staying on the designated haul routes, staying off of Carpenter Lane west of Cottrell, and complying with rules regarding avoidance of schools.

- l. Implement an accountability plan to penalize trucks if they are seen off the route or in prohibited areas. This can include being removed from the job for multiple violations.

[Carpenter West of Cottrell]

- m. Provide “local access only” signage restricting access to Carpenter Lane west of Cottrell Road, as well as including the prohibition on use in the safe driver training.

[Vegetation at Intersections]

- n. Remove vegetation in the public right of way in sight distance triangles at study area intersections along primary and detour haul routes.
- o. Remove vegetation in the public right of way obscuring intersection regulatory signage (e.g. stop, yield, do not enter, no right turn, lane use control, etc.) at study area intersections along primary and detour haul routes.

[Communications]

- p. Continue as needed to provide project communications (e-newsletters, webpage updates, etc.), and an onsite Water Bureau liaison during work activities.
- q. Provide road closure updates through ODOT’s TripCheck system.

[School Avoidance]

- r. Instruct filtration project construction drivers to avoid specific road segments that have direct access to identified schools. The specific school, streets, types of construction traffic, and hours to be avoided are listed in the table below. These constraints apply only on days when school is in session.

District	School	Street	Extent	Construction Traffic Type	Avoidance Hours*
Oregon Trail	Oregon Trail Academy	SE Proctor Rd	SE Bluff Rd to SE Dodge Park Blvd	All	All
		SE Bluff Rd	Just east of SE 352 <sup>nd</sup> Ave to SE Bear Creek Ln	Trucks and craft labor commuters	7:15 to 8:15 am 2:15 to 3:15 pm
	Kelso Elementary	SE Kelso Rd	SE Orient Dr to SE Eklund Ave	All	All
Gresham-Barlow	Sam Barlow High	SE Lusted Rd	SE 282 <sup>nd</sup> Ave to SE 302 <sup>nd</sup> Ave	Trucks	All
		SE 302 <sup>nd</sup> Ave	SE Lusted Rd to SE Chase Rd	Craft labor commuters	7:05 to 9:05 am 2:00 to 3:00 pm
	SE 302 <sup>nd</sup> Ave	SE Lusted Rd to SE Chase Rd	Trucks	All	
	SE 302 <sup>nd</sup> Ave	SE Lusted Rd to SE Chase Rd	Craft labor commuters	7:05 to 9:05 am 2:00 to 3:00 pm	
	East Orient Elementary	SE 302 <sup>nd</sup> Ave	SE Dodge Park Blvd to SE Bluff Rd	All	All
	West Orient Middle	SE Short Rd	SE Dodge Park Blvd to SE Orient Dr	All	All
		SE Orient Dr/SE Bluff Rd	SE Short Rd to SE 302 <sup>nd</sup> Ave	Trucks	All
Kelly Creek Elementary	SE Baker Way/SE 24 <sup>th</sup> St	SE Williams Dr to SE Chase Rd	Craft labor commuters	8:35 to 10:35 am 3:05 to 4:05 pm	
Kelly Creek Elementary	SE Baker Way/SE 24 <sup>th</sup> St	SE Williams Dr to SE Chase Rd	All	All	

\*Avoidance hours are based on 30 minutes before and after school start and end times shown on district websites at the time of this decision. Two-hour morning avoidance periods are included for those schools that have regularly scheduled late starts on certain days. The Applicant will update avoidance hours annually prior to the start of each school year, or more frequently if notified by the districts, to reflect any changes made by the districts to start and/or end times. Any resulting updates will be consistent with the 30-minute periods described above.

2. The Water Bureau may not include Carpenter Lane west of Cottrell as a detour option in traffic control plans for signage during construction.
  
3. Prior to issuance of Certificate of Occupancy, the Portland Water Bureau shall submit to the County and Gresham Fire and Emergency Services a final Hazardous Materials Management Plan (HMMP) that is in substantial compliance with the format and contents of the plan at Exhibit I.59 and in compliance with the International Building Code (IBC) and the International Fire Code (IFC).
  - a) The Portland Water Bureau will comply with the HMMP during facility operation.
  - b) The Portland Water Bureau will review and update the HMMP annually, or more frequently as needed to document on-site material or procedural changes.

- c) All updated HMMPs will be provided to the County and Gresham Fire and Emergency Services.
4. Use of chlorine gas at the filtration facility is prohibited.
5. The Water Bureau will not apply pesticides or herbicides to any vegetation located on the filtration facility site or the intertie site.
6. Stormwater:
  - b. The Water Bureau will construct and implement a filtration facility stormwater treatment and management system that is in substantial compliance with the system identified in the Filtration Facility Stormwater Drainage Report, Exhibit A.73. At least annually, and more frequently as needed for proper function of the system, the applicant will inspect and maintain each element of the stormwater treatment and management system to ensure it continues to function properly.
  - c. The Water Bureau will construct and implement an intertie stormwater treatment and management system that is in substantial compliance with the system identified in the Finished Water Site Intertie Stormwater Drainage Report, Exhibit A.75. At least annually, and more frequently as needed for proper function of the system, the applicant will inspect and maintain each element of the stormwater treatment and management system to ensure it continues to function properly.
7. Water Bureau will comply with all Oregon and federal laws that regulate wetlands. If wetland permits are required under either Oregon or federal laws, the applicant shall provide the County a copy of permit(s) prior to engaging in any removal or fill activity within a jurisdictional wetland.
9. Water Bureau shall implement the “Agricultural Soil Restoration Plan” as described in Exhibit A.35, and further described in Exhibit I.81 and Exhibit J.77.
10. After construction, Water Bureau shall allow continued use of cropland area in the permanent pipeline easements where possible considering necessary protections of the pipelines.
11. Water Bureau shall design and construct the roads in the easement areas with appropriate grades along the road edges in order to allow all farm-related vehicle and pedestrian uses necessary and convenient for accepted farm practices.
12. After construction, Water Bureau shall provide written consent to each Grantee under each pipeline or road easement to utilize the roads in the “easement area” (as defined in the easement) for farm equipment, defined as all farm-related vehicle and pedestrian uses necessary and convenient for accepted farm practices.

For the emergency access road in Clackamas County, subject to any required landowner approval, the written consent shall extend to established crossing areas between the Grantee’s property and adjacent fields.

13. Water Bureau shall maintain the roads in the easements, including the repair of road damage caused by accepted farm practices, to the extent determined by the Water Bureau to be needed for access to Water Bureau facilities, except for the emergency access road which shall be maintained to meet emergency access standards.
14. Applicant shall implement Dust Control Plans consistent with the descriptions at Exhibit H3, Attachment 8, and Exhibit I.80, pages 5-6.
15. Applicant shall implement a Noise Pollution Control Plan (NPCP) during construction consistent with the description at Exhibit I.80, page 8. The NPCP shall require use of a sound level meter to check for sound level verification.
16. In the event the applicant conducts a planned, permit required confined space entry, the applicant will ensure certified rescue personnel are on site to support the work.
17. Applicant will require the contractor to use noise mitigation strategies in order to ensure that the nighttime noise level during construction meets the County's noise ordinance nighttime standard (notwithstanding any exemption for construction). Noise control will be periodically verified with a sound level meter to confirm nighttime noise ordinance standards are met.
18. Following all pipeline construction and road improvement activities, the Water Bureau or their representative shall provide a survey to the County confirming the size, location and species of all trees removed during pipeline construction and road improvement work. If the total number of trees removed outside of an SEC zone exceeds 363, the additional tree removal is only approved if each additional tree is replaced at a ratio of 1.5 to 1 on the filtration facility site. Additional tree removal outside of the right-of-way or project easement areas is prohibited.
19. Prior to issuance of the Certificate of Occupancy, Property owner shall implement the plantings identified in the Mitigation Plan at Exhibit I.96, Attachment A and plant any additional replacement trees identified in Condition 18.

**1. Recommend additions to County Transportation Condition 7**

- c. The TCP must include an emergency coordination section that at minimum includes the following requirements:
  - iv. Satisfy the minimum requirements of the Manual on Uniform Traffic Control Devices for Streets and Highways;
  - v. Provide construction update reports to emergency responders that include, at a minimum, the following information:
    - O. Dates and times of closure/partial closure

- P. Name of contractor and emergency contacts (required on-site contact)
      - Q. Purpose of closure
      - R. Location of closure and number of lanes
      - S. Work hours and times of road closures
      - T. Traffic control layout plan
      - U. Legend
        - North arrow
        - Street names within a certain distance of the site
        - Physical features such as medians, shoulders, etc.
        - Identified method for passage of emergency response vehicles (including temporary conditions/detour plan)
        - Location of significant construction items such as dumpsters and heavy equipment
    - vi. The construction update reports must be provided at least weekly unless an alternative frequency is requested by an emergency responder.
- d. The TCP must provide for access through construction zones as follows:
  - iv. Where no detour is available, such as to access Lusted Flats via Dodge Park Boulevard or to access the only access to a farm field, the applicant shall (1) ensure that work zones allowing a single lane of traffic to pass are wide enough to accommodate farm traffic up to 16 feet wide; and (2) flag farm traffic, service providers, and local residents (within the closure) through otherwise closed work zones.
  - v. The Water Bureau shall (1) ensure that work zones allowing a single lane of traffic to pass are wide enough to accommodate emergency vehicles; and (2) flag emergency vehicles through otherwise closed work zones. Access for emergency vehicles shall be provided at all times.
  - vi. The Water Bureau shall require the contractor to take measures to ensure they can accommodate this traffic through a work zone regardless of the stage of construction. For example, if pipeline construction obstructs a road that cannot be detoured around, the contractor will have on-hand the materials needed to plate the excavation or otherwise allow this traffic to proceed through the work zone.
- e. Water Bureau shall comply with the following constraints for pipeline construction.
  - xii. No work shall be performed simultaneously on two County roads at the same time with the exception that:



- C. S.E. Dodge Park Boulevard and Altman Road work is allowed to be performed concurrently; and
  - D. S.E. Lusted Road (between Finished Water Intertie and S.E. Altman Road) and S.E. Cottrell Road work is allowed to be performed concurrently.
- xiii. The segment of Dodge Park Blvd east of the intersection of S.E. Cottrell Road and S.E. Dodge Park Boulevard can only be constructed during the time frame of August through October.
  - xiv. The intersection of S.E. Cottrell Road/S.E. Dodge Park Boulevard can only be closed in the month of October.
  - xv. The closing of S.E. Dodge Park Boulevard to cross the road onto the private property at the west end of the Finished Water Pipes can only be closed in the month of October.
  - xvi. S.E. Cottrell Road cannot be closed or limited to traffic while work is being accomplished on S.E. Dodge Park Boulevard limiting traffic.
  - xvii. Pipeline installation across the private property is recommended to only be conducted during the summertime (non-wet periods).
  - xviii. A minimum single lane of traffic flow is required at all times along S.E. Dodge Park Boulevard while work is being accomplished, and the traffic limitations shall only be restricted by the rolling lane closure (with the exception of the closures noted in iii. and iv., but only in compliance with those two constraints).
  - xix. Closure of S.E. Lusted Road between the Finished Water Intertie to S.E. Altman Road is allowed with the following limitations:
    - C. [Intentionally Omitted, incorporated into Condition 7.c above.]
    - D. A farm direct and u-pick peach orchard located approximately 900 feet east of S.E. Altman Road shall be provided with unimpeded access for their customers during the month of August.

- xx. The completion of the C4FWP pipeline from the stop sign on S.E. Altman Road at S.E. Oxbow Drive to S.E. Oxbow Drive for connection to the existing Conduit 4 can only occur during the months of June/July or October/mid-November to not impede farmers' shipping traffic at other periods of the year.
    - xxi. The finished water S.E. Lusted Road closure cannot be done simultaneously with the closure of S.E. Altman Road.
    - xxii. The C4FWP pipeline in Oxbow Drive and connection in Oxbow Drive cannot be constructed simultaneous with the work on finished water pipes in S.E. Lusted Road.
- f. Pipeline construction must additionally comply with the following:
  - iv. S.E. Altman Rd between S.E. Lusted Rd and S.E. Pipeline Rd will be allowed full closure for pipeline installation but access must be maintained for (1) farm traffic, service providers, and local residents (within the closure) who have no detour alternative and for (2) emergency vehicles.
  - v. S.E. Altman Rd from S.E. Pipeline Rd to the stop sign at the intersection of S.E. Altman Rd/SE Oxbow Drive can be fully closed for the duration of the pipeline installation but access must be maintained for (1) farm traffic, service providers, and local residents (within the closure) who have no detour alternative and for (2) emergency vehicles.
  - vi. For the pipeline connection work on S.E. Lusted Rd at the Multnomah Connection to each of the existing conduits, daytime road closure is allowed but access for (1) farm traffic, service providers, and local residents (within the closure) who have no detour alternative and for (2) emergency vehicles, must be maintained through the construction zone. Outside of construction work hours, single lane access through the construction zone shall be provided by either flagging or signalization.
- g. The Water Bureau shall include in the Traffic Control Plan an accommodation to ensure that driveway access to R&H Nursery's loading dock on Carpenter Lane is not unreasonably delayed, in the form of stop control, flagger, or other measures that would create a gap in traffic to allow R&H nursery traffic to exit the site promptly when needed.



LUP Comments <lup-comments@multco.us>

**Applicant's Final Written Argument Under ORS 197.763(6)(e) – #T3-2022-16220**

1 message

**Zoe Powers** <zpowers@radlerwhite.com>

Thu, Sep 28, 2023 at 11:04 AM

To: "LUP-comments@multco.us" <LUP-comments@multco.us>

Cc: Renee France <rfrance@radlerwhite.com>, Aubrie Koenig <Aubrie.Koenig@consoreng.com>



**External Sender** - Be Suspicious of Attachments, Links, and Requests for Payment or Login Information.

Please find attached Applicant's Final Written Argument for case #T3-2022-16220.

Thank you,

**Zoe Lynn Powers**

Partner



Direct Telephone: 971.634.0215

E-Mail: [zpowers@radlerwhite.com](mailto:zpowers@radlerwhite.com)

Address: 111 SW Columbia Street, Suite 700, Portland, OR 97201

Website: [www.radlerwhite.com](http://www.radlerwhite.com)

Pronouns: She/her

We advise you that any discussion of federal tax matters in this email is not intended or written to be used, and may not be used by you or any taxpayer, to (a) avoid penalties under the Internal Revenue Code, or (b) promote, market or recommend to any other party any transaction or matter addressed herein. All taxpayers should seek independent tax advice.



**Applicant's Final Written Argument Under ORS 197.763(6)(e) # #T3-2022-16220 (01384183xC624A).PDF**

6090K