Applicant's Open Record Response
Cottrell Pond SEC-wr Permit Appeal
Case File T2-2025-0067

The applicant provides the following response to the document submitted on behalf of the Cottrell Community Planning Organization ("CCPO") and to the document submitted on behalf of the Roberts Family Trust ("Roberts") during the initial open record period for the appeal filed to challenge the approval of the SEC-wr permit for a stream restoration project proposed on property located at 8344 Cottrel Road (the "Cottrell Pond Property"). Each comment submitted is included in italics followed by the applicant's response in plain text. [1]

Response to the Cottrell Community Planning Organization

CCPO 1 - Existing Environmental Conditions Have Not Been Fully Characterized

> *The application appears to evaluate the project primarily using current site conditions while giving little consideration to reasonably foreseeable changes occurring immediately upstream.*
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> *The project is located downstream of the Bull Run Filtration Facility, a major infrastructure project expected to continue through several additional years of construction before entering long-term operation. Construction activities and permanent site improvements have the potential to influence hydrology, groundwater interactions, sediment transport, riparian vegetation, channel stability, stream temperature, and other watershed processes that may directly affect conditions within the proposed restoration reach. This bears directly on the County's obligation under MCC 39.5590(D)(2)(b)(iv) to consider the cumulative adverse effects of past and ongoing activities on the Riparian Area, and on the baseline site analysis required under (B)(2) through (B)(4).*
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> *The applicant may argue that (D)(2)(b)(iv) is a discretionary factor that only applies if the applicant is seeking an exception to the mitigation sequence under (D)(2)(a), and that no exception is needed here because the project is "self-mitigating." That argument assumes the very conclusion at issue. Whether the project is genuinely self-mitigating —*

[1] This document was prepared and reviewed by the Cottrell pond project team, including the project experts identified in case Exhibit A.17 and legal counsel. Where specific sections were authored and reviewed by specific subject matter experts, that is noted in the response.

whether it produces a net improvement rather than a net loss — depends on the same existing-conditions baseline this section identifies as missing from the record. The County cannot rely on a "no net loss" characterization to avoid considering cumulative effects when that characterization is itself unsupported by the substantial evidence (D)(2)(b)(iv) and (B)(2) through (B)(4) require. At minimum, the record should show the County considered whether ongoing upstream construction affects the baseline against which "self-mitigating" is being measured.

Because these upstream activities may influence future environmental conditions, the County should consider whether the record adequately evaluates reasonably foreseeable changes in stream flow, sediment transport, riparian processes, and channel conditions. Reliance solely upon present-day conditions may not fully characterize either the existing ecological functions or the conditions under which the proposed restoration will ultimately function, and undermines the applicant's showing under (C)(3)(d) that the Riparian Area "can be restored to an equal or better condition."

Without evaluating these reasonably foreseeable upstream influences, it is difficult to determine whether the proposed restoration measures will achieve their intended ecological objectives throughout the life of the project.

Response:

CCPO cites a number of SEC-wr code standards in an effort to tether the characterization claim to an approval criterion. For the reasons set forth below, neither the text nor context of the cited provisions support the argument's conclusion that the applicant was required by the applicable SEC-wr code provisions to consider the cumulative or foreseeable impacts of the Bull Run Filtration Facility ("Filtration Facility").

Appropriate scope of MCC 39.5590(B)

The applicant has fully complied with the existing condition assessment required by MCC 39.5590(B). Subsection (B)(2) requires "a site plan of the property" that includes the property lines, the boundaries of the ground disturbing activities, and the location of "water bodies and wetlands on the site" among other features. The plan sets complying with this application submittal requirement are provided in Exhibit A.2. The applicant also submitted a "description and map of soil types in the proposed development area." Exhibit A.3, page 7. Notably, each of these application requirements are focused expressly and exclusively on the project site and project development area, which in this case is located entirely within the Cottrell Pond Property. As required by subsection

(B)(4), the applicant also submitted a report that includes plans and related surveys, including "an assessment of the existing condition of the Riparian Area in accordance with MCC 39.5590(D)" (emphasis added) prepared by a qualified professional. *See* Exhibit A.5 - Riparian Area Inventory, Assessment and Restoration Plan.

Consistent with the plain language of the code, the scope of the assessment of the existing condition of the riparian area is dictated by subsection (D), which in turn defines the three types of vegetated corridor conditions (Good Corridor, Marginal Corridor, and Degraded Corridor) at (D)(1), and addresses compensatory mitigation requirements for alterations to a riparian area by applying those vegetated corridor conditions to specific ratios for vegetated corridor creation or restoration at (D)(3). While compensatory off-site creation and restoration is permitted at a higher ratio, that off-site mitigation is allowed as a way to "offset the encroachment of development into the area." MCC 39.5590(D)(3). Again, in this case, the development area is defined and located within the boundaries of the subject property.

The argument submitted by the CCPO suggests that "baseline site analysis required under (B)(2) through (B)(4)" was flawed because it did not consider the construction activities and site improvements on the separate Bull Run Filtration Facility property located at least 700 feet from the Cottrell Pond property. Critically, this argument fails to acknowledge or consider the full text and context of the code provisions cited, and thus fails to identify or acknowledge the limited scope of the required existing conditions assessment. There is nothing in the text of the code that requires an applicant for an SEC-wr permit to engage in predictive watershed modeling to predict future conditions based upon site improvements occurring on property located outside of the project boundaries. Instead, the scope of the assessment required by (B)(4)(a) is expressly limited to the existing condition "in accordance with MCC 39.5590(D)." The existing conditions defined and addressed by Subsection (D) include vegetated corridor conditions and mitigation required for development within those areas. Again, the development proposed for this project within the SEC-wr zone is limited to the Cottrell Pond Property and thus, the scope of the plans, assessments, and inventories documenting the existing conditions on the Cottrell Pond Property meets the application submittal requirements identified in subsection (B)(2) through (B)(4).

The overriding public benefit factor at MCC 39.5590(D)(2)(b)(iv)

To support the claim that it is necessary to evaluate "reasonably foreseeable changes" the argument submitted by the CCPO asserts that the County has an "obligation under MCC 39.5590(D)(2)(b)(iv) to consider the cumulative adverse effects of past and ongoing activities on the Riparian Area." (emphasis added) While there are multiple flaws with the statement, the most obvious is the misrepresentation of the plain text of the code. MCC 39.5590(D)(2)(b)(iv) states "[t]he cumulative adverse effects of past activities on the Riparian Area either directly or indirectly[.]" There is no express, or even implied, reference to "ongoing activities" as claimed. Therefore, even

if CCPO's remaining points about the factor at (D)(2)(b)(iv) had merit, there is nothing in the plain text of (D)(2)(b)(iv) to support the ultimate assertion that it is necessary to evaluate foreseeable (i.e. future) or ongoing influences in any cumulative effects evaluation.

The remaining arguments the CCPO included related to subsection (D)(2)(b)(iv) seem to respond to the detailed code interpretation provided on page 2 of the Applicant's Pre-Hearing Statement at Exhibit E.2 responding to cumulative impact claims included in Ground 1 of the appeal. However, rather than engaging in an alternative interpretation of the code, the CCPO argument keys on and isolates the reference to the statement in the applicant's pre-hearing submittal that the project is "self-mitigating"[2] and erroneously asserts that was identified as the reason an exception to the mitigation sequence under (D)(2)(a) is not needed. Instead, the code analysis in Exhibit E.2 explains that an exception to the (D)(2)(a) mitigation sequence is not needed because "the project is consistent with the mitigation sequence[,]" of avoid, minimize, compensate first through restoring the affected environment and then restoring and enhancing resources on-site. More specifically, because the project objective requires soil and vegetation disturbance within the area protected by the SEC-wr overlay, avoidance is not possible. As detailed in the response to appeal Ground 3 in Exhibit E.2, impacts were minimized to the extent feasible while allowing for the proposed use. Finally, as detailed in Exhibits A.2 and A.5 compensatory on-site mitigation is accomplished through restoring a natural stream channel and restoring "Degraded Corridor" conditions to "Good Corridor" conditions across all habitat areas. In this case, no off-site replacement or enhancement is needed. The response to Ground 1 in Exhibit E.2 correctly concludes, "[b]ecause the Project does not rely on an exception to the mitigation sequence, the County was not required to evaluate the discretionary factors in subsection (D)(2)(b), including factor (iv)."

The CCPO argument creates further confusion and misdirection by conflating alternative analysis provisions included in subsection (C)(3)(d) and (e) (related to restoration to an equal or better condition and net loss respectively) with the trigger for the considering the "overriding public benefit" factors at (D)(2)(b) that include, but are not limited to consideration of the cumulative adverse effects of past activities on riparian areas. The CCPO argument provides a circular argument and partial code language rather than code-based evaluation or roadmap to connect those disparate code provisions. As explained above and in E.2, the cumulative adverse effects factor is only relevant if the applicant is requesting an exception to the preferred mitigation

[2]In this case, the term "self-mitigating" refers to the fact that the primary objectives of this stream restoration project include actions that might otherwise be required as compensatory mitigation for a more typical development project. For example, one of the identified project objectives is to convert a "degraded Riparian Corridor" to a "Good Riparian Corridor" by restoring a total 6.36 acres of the site. Exhibit A.3, page 8. The project objective itself exceeds the compensatory mitigation requirements of MCC 39.5590(D)(3) by restoring a vegetated corridor that is larger than the corridor altered.

sequence. While the overriding public benefit conclusion was not requested or required for this project, the Decision at Exhibit C.3 correctly concludes, based on consideration of the factors, that the overriding public benefit criterion is met. That conclusion was never directly challenged by appellants.

Filtration Facility Stormwater

Even if consideration of reasonably foreseeable upstream influences on the restoration project were required by the code, taking into consideration the Filtration Facility stormwater system would not alter the conclusion that the Project meets applicable approval criteria for an SEC-wr permit. CCPO speculates that the Filtration Facility may influence hydrology, sediment transport, groundwater interactions, riparian vegetation, stream temperature, and channel stability on the Cottrell Pond Property. However, the facility stormwater system was designed to avoid impacts to water quality and aquatic habitat and improve downstream conditions.

The Filtration Facility is a conditional use and was therefore subject to an exacting "will not adversely affect natural resources" standard at MCC 39.7515(B) that is not applicable to this SEC-wr permit for a permitted use. Therefore, the Filtration Facility stormwater management system was designed to not only meet or exceed all generally applicable stormwater standards, but to also meet the conditional use criteria. The stormwater system was designed to collect, detain and treat stormwater, and discharge the treated stormwater off-site at rates and locations consistent with pre-development flows and conditions. An overlapping list of concerns was raised by opponents of the Filtration Facility, including CCPO, in the Filtration Facility land use proceeding.

As detailed in the excerpts from the Decision of the Hearings Officer, included with this submittal as Attachment 1, the Hearings Officer in the remand proceeding considered evidence in the Filtration Facility record related to: (1) stormwater management systems and best management practices (pages 100-105); (2) sedimentation (pages 105-105-107); groundwater seepage and depletion (pages 111-114); hydrology including stormwater quantity and flashy flows (pages 115-116); modification of natural drainage patterns (pages 117-120; and temperature (pages 121-130). A similar set of issues was also considered for the period of Filtration Facility construction (pages 249-252). The hearings officer's conclusion that the Filtration Facility will not adversely affect water quality or aquatic habitat was challenged through findings and substantial evidence related assignments of error in an appeal of the Filtration Facility remand to LUBA by CCPO and other parties. LUBA upheld the hearings officer's decision on stormwater water related issues. *Cottrell Community Planning Organization v. Multnomah County*, LUBA No. 2025-043, 72-85 (2026).

Finally, even if an upstream activity were to influence stream characteristics, that does not alter or diminish the benefits of converting the existing Degraded vegetated

corridor condition on the Cottrell Pond Property across all habitat types[3] to a Good condition across all habitat types. Nor would it eliminate the benefits of the additional project objectives, including restoring fish passage through the removal of the impounding dam, improving water quality by reducing water surface area and residence time to decrease downstream temperatures, and retaining ecological functions such as breeding opportunities for native amphibians and floodplain retention. The record includes evidence of the benefits of those objectives independent of external watershed changes from any upstream source.

CCPO #2 - Existing Biological Information Does Not Constitute a Project-Specific Habitat Assessment

> *The application references biological information collected by the Johnson Creek Watershed Council (JCWC) over approximately the past decade. The JCWC's community science program provides valuable information regarding watershed health and amphibian occurrence and represents an important regional conservation effort. However, these data do not appear to constitute the project-specific biological assessment contemplated by MCC 39.5590(B)(4), which requires wetland and related surveys prepared by qualified professionals sufficient to support the findings required for this application.*
>
> *The community science surveys were not conducted specifically to evaluate the proposed restoration footprint or to support the findings required for this land use application. Available information indicates that the program was designed to document amphibian occurrence throughout the watershed rather than to systematically evaluate Northern Red-legged Frogs, salamanders, or other amphibians within the specific area proposed for excavation, grading, dam removal, and riparian disturbance.*

Response:

This argument rests on an assertion that MCC 39.5590(B)(4) requires a "project-specific biological assessment," which in turn requires "wetland and related surveys" prepared by qualified professionals. However, the plain language of (B)(4) does not refer to a project-specific biological assessment or to other related surveys. Instead, subsection (B)(4) requires an applicant to submit:

[3] Exhibit A.5, page 2.

(a) An assessment of the existing condition of the Riparian Area in accordance with MCC 39.5590 (D),
(b) An inventory of vegetation, including percentage ground and canopy coverage, and location of nuisance and invasive non-native plants as defined in MCC 39.5520, and
(c) A detailed Mitigation Plan as described in MCC 39.5590 (D).

In compliance with these submittal requirements, the applicant submitted a Riparian Area Inventory, Assessment and Restoration Plan with the application at Exhibit A.5. The plan fully characterizes the current Degraded Corridor condition of the site; provides an inventory of vegetation that identifies the percentages of ground and canopy coverage across existing habitat types in the project area as well as the location of nuisance and invasive plants in each habitat aera; and includes a detailed mitigation plan that provides specific planting details for the restoration of 6.36 acres on the subject property across seven planting units that includes a total of 143 pounds of native seed, 6,230 emergent or herbaceous plants, and 7,244 native woody plants. In addition, and in further compliance with (B)(4), because the site includes wetland areas, the application also included the Cottrell Pond Wetland Delineation Report at Exhibit A.4. Collectively, the documents described above account for the only reports an SEC-wr applicant is required to submit.

Not only does the CCPO argument attempt to expand the application requirements for an SEC-wr permit, but the introduction is also both inaccurate and misleading. The applicant has never referred to community science surveys conducted by JCWC for amphibian species at the project site or elsewhere within the watershed. The application, however, referenced water temperature data collected by JCWC upstream and downstream of the pond in 2018. See also Exhibit E.2, Attachment 2. This data thoroughly documented the specific effects of the Cottrell Pond on Johnson Creek water quality. In preparation for this Project, the City of Portland performed similar water temperature monitoring upstream and downstream of the Cottrell Pond Property in 2025. The results of that project specific evaluation were consistent with JCWC's earlier findings for this stretch of Johnson Creek. Further analysis of both JCWC and City water temperature monitoring are provided with this response as Attachment 2.

In addition to collecting site specific temperature data, the project team also conducted sampling to determine the presence of aquatic organisms in the pond, including amphibians. While not expressly required by (4)(B), the application also included the Cottrell Pond Sampling of Aquatic Organisms at Exhibit A.13 that detailed the sampling of the pond by qualified fisheries professionals. The sampling established the presence of one fish species and several amphibian species.

Accordingly, the referenced information does not appear to establish:

Response:

As explained above, the applicant submitted all assessments, inventories, and plans required by MCC 39.5900(B)(4) in addition to supplemental evaluation not required by the code. CCPO neither acknowledged nor referenced any of the information contained in those documents, and the argument fails to explain why establishment of any of the information in the bullet points below is necessary for compliance with SEC-wr permit approval criteria applicable in this case. Nonetheless, the applicant provides the following responses to the bulleted claims.

- *whether amphibians currently utilize the project footprint for breeding, egg deposition, larval development, overwintering, or seasonal refuge;*

Response: As detailed above, the applicant documented the presence of several amphibian species at the project site. *See* Exhibit A.13 Aquatic Sampling Report. Additionally, the observation of Red-legged Frogs at the site has been documented and is in the record as part of the Applicant's Hearing Presentation at Exhibit E.4, and was a specific factor in the inclusion of amphibian ponds in the design.

- *the location and extent of sensitive aquatic or riparian habitat within the disturbance area;*

Response: The location of aquatic and riparian habitat in the disturbance area is documented in SEC Narrative Appendix B: Riparian Area Inventory, Assessment and Restoration Plan, which is in the record at Exhibit A.5. A more detailed characterization of amphibian species-specific microhabitats within the disturbance area is not warranted, as it would not further inform the project design or implementation. The restoration project's objectives include the elimination of invasive bullfrog habitat and the creation of habitat that retains breeding opportunities for native amphibians such as Red-legged Frogs.

- *whether habitat use has changed since the referenced surveys were conducted;*

Response: There are no prior surveys of amphibians or amphibian habitat referenced by the applicant, other than sampling of the pond conducted in 2025 at Exhibit A.13.

- *how construction activities may affect species that are acknowledged to be likely present*.

Response: Construction will entail a thorough amphibian and fish salvage effort within the restoration grading footprint, as required by ODFW. Amphibian salvage requires an ODFW Capture, Holding, Transport, and Relocation (CHTR) permit which covers relocation of amphibian egg masses, larvae, and adults prior to construction. The CHTR the applicant obtained for anticipated 2026 construction is included in the submittal as Attachment 3. The permit details construction BMPs that will be followed to protect amphibians. The applicant will obtain a new permit for work that is now expected to occur in 2027.[4]

> *At the same time, the application recognizes that Northern Red-legged Frogs and Coastal Cutthroat Trout are expected to occur within or adjacent to the project area. If existing biological information is sufficient to conclude that these species are likely present, then that same information should also inform an evaluation of how excavation, grading, vegetation removal, construction timing, sediment disturbance, and other project activities may affect the habitats they occupy — information the County needs to support its (D)(1) "Good Corridor" determination.*

Response:

The determination of "Good Corridor" condition is based exclusively on the state of the plant community within the SEC overlay, not amphibian habitat as suggested. Pursuant to MCC 39.9950(D)(1), the "Good Corridor" condition requires "a combination of native trees, shrubs, and groundcover covering greater than 80% of the area, and greater than 50% tree canopy exists (aerial measure)," and less than 10% of the area being covered by invasive, non-native species.

While wholly unrelated to the vegetation focus of the "Good Corridor" designation, Red-legged Frogs and Coastal Cutthroat Trout are both documented to occur either within or adjacent to the project area and that documentation is referred to in the record. Downstream Cutthroat Trout distribution extends to the base of the existing dam and the dam's removal will allow Cutthroat Trout to recolonize an additional 1,000 feet of Johnson Creek to its headwaters. Red-legged Frogs use the pond and its surroundings to some degree, but the pond is primarily inhabited by invasive bullfrogs, which prey on Red-legged Frogs, among other native species. The proposed project will remove the perennial pond that benefits bullfrogs while preserving breeding habitat for Red-legged Frogs and other native amphibians.

[4] While the applicant intended to begin construction in 2026, the appeal of the SEC-wr permit has delayed the start of construction to the permissible project in-water work window in the summer of 2027.

A thorough amphibian and fish salvage effort will be conducted prior to construction to remove individuals from the restoration grading area. *See*, Attachment 3. Temporary impacts from construction will be limited to the extents described in the grading plan at Exhibit A.2, pages 6 and 7 and Pre-Hearing Statement at Exhibit E.2, and will be restricted in time to the period allowed by County code above the Ordinary High Water (OHW) line (June 15-September 15) and the relevant ODFW-prescribed in-water work window below OHW (July 15-August 31).

> *The question is therefore not whether additional species surveys are categorically required. Rather, the issue is whether the record contains sufficient project-specific information for the County to evaluate the effects of the proposed activities on the ecological functions protected by the SEC-WR overlay.*

Response:

The primary error in this conclusion statement is that the arguments provided by the CCPO never provide an explanation of what "ecological functions are protected by the SEC-wr overlay" that is grounded in the applicable code. As discussed above, the application requirements, approval criteria, and mitigation standards for the SEC-wr overlay are primarily focused on the condition of the vegetated corridor and erosion control measures. The CCPO arguments fail to clearly articulate where the code supports a broader scope of ecological functions that must be considered for SEC-wr permit compliance.

Moreover, as address above and throughout this response, the record includes extensive project specific information that the CCPO fails to address or acknowledge related to the ecological improvements that will be created by the proposed resource enhancement project. The record contains substantial evidence through the vegetation inventories and assessments to support a finding that the approval SEC-wr approval criteria and mitigation requirements focused on the condition of the vegetated corridor are satisfied. Additionally, broader surveys, assessments, and project coordination were conducted in support of the restoration objectives not directly regulated by the SEC-wr permit.

CCPO 3 - Temporary Construction Effects Should Be Evaluated Independently From Long-Term Restoration Benefits

> *Although the project is characterized as ecological restoration, restoration activities themselves may temporarily impair the very ecological functions the SEC-WR overlay is intended to protect. This distinction matters under MCC 39.5590(D)(2), which governs the sequence of avoiding, minimizing, and compensating for adverse impacts, and under the erosion and protection standard at (C)(4)(i).*

The record should distinguish between temporary construction impacts and anticipated long-term ecological improvements rather than assuming that future restoration benefits fully offset short-term habitat degradation.

The County should have sufficient information to evaluate temporary impacts associated with:

- *excavation and grading;*
- *heavy equipment access within the riparian corridor;*
- *vegetation removal;*
- *temporary channel disturbance;*
- *sediment generation and turbidity;*
- *bank destabilization;*
- *temporary changes to groundwater and surface water connectivity;*
- *temporary habitat fragmentation;*
- *noise and vibration affecting wildlife.*

Understanding these temporary impacts is particularly important where the project area provides functioning habitat for sensitive amphibians and native salmonids, and where the compensatory mitigation general requirements at (D)(3) presume a defined, monitorable mitigation plan.

Response:

Meeting project objectives requires temporary construction impacts, including excavated removal of the dam and recontouring of the impounded footprint to reestablish a stream channel, floodplain, and offline seasonal ponds for amphibian breeding habitat. However, as established in the record, the applicant has quantified and minimized temporary disturbance from construction activities to the extent practicable in light of project objectives. A thorough description of temporary construction impacts and efforts to minimize them is in the record, especially the construction plan set at Exhibit A.2, pages 6 and 7, and the Pre-Hearing Statement at Exhibit E.2.

While this CCPO argument cites several code sections and generalized statements, it fails to clearly establish why those criteria require additional evidence related to construction to find compliance. The record clearly establishes the project's compliance with the mitigation sequencing requirements of MCC 39.5590(D)(2), including establishing how the project has minimized the stream restoration grading area. *See* Exhibit E.2. The Decision also clearly describes how the project complies with the erosion control provisions at subsection (C)(4)(i) through the separate Erosion and Sediment Control Plan submitted to comply with the separate Erosion and Sediment Control Permit requirements. Exhibit C.3, page 13. CCPO neither acknowledges the condition of approval requiring the construction focused permit nor challenges the decision's findings. Additional construction plans for the Erosion and Sediment Control Permit, including a list of erosion control BMPs are included with this submittal as Attachment 4. The Department of State Lands Removal-Fill Permit for the project, included with this submittal as Attachment 5, also includes and requires specific Erosion Control Methods to prevent erosion and minimize movement of soil into waters of the state.

Finally, while CCPO has failed to establish how the extensive bullet point list connects to an applicable approval criterion, the record contains evidence related to each topic:

Excavation and grading: The areal extent of restoration grading is summarized in Exhibit A.2, page 6, and described in the SEC Narrative at Exhibit A.3 and Hearing Presentation at Exhibit E.4. Approximately 1.2 acres will be graded and recontoured to meet the project objectives. An additional 1.8 acres within the SEC-wr overlay may be disturbed in support of the restoration grading, including areas for equipment access and staging, staging of materials, and amending of soil in upland areas with pond sediments, to provide a planting medium. Additional information on areas and volumes of removed and filled grading material approved through the DSL permit is included with this submittal as Attachment 6.

Heavy equipment access within the riparian corridor: The SEC-wr application requirements at MCC 39.5590(B) do not require submittal of a construction management plan. Nonetheless, equipment access routes are discussed in Exhibit E.2. Further details on hauling routes, heavy equipment staging, and site construction entrance are included in the construction details at Attachment 4. Access routes between the restoration grading area and the upland areas where equipment and materials will be staged have been restricted to three narrow corridors to protect existing stands of riparian trees.

Vegetation removal: Trees that must be removed to meet project objectives are limited to 20 trees greater than 6 inches dbh (including 12 native trees and 8 non-native trees) which equates to 8 percent of existing trees on the site. The trees to be removed and their locations are indicated in Exhibit A.2, page 6. Additionally, grading of the invasive

reed canary grass meadow to the east of the pond will involve over-excavation to remove root masses to facilitate the establishment of native riparian vegetation as described in Exhibit E.2.

Temporary channel disturbance: A primary objective of the project is the reestablishment of a free-flowing stream channel. The existing impounded pond and upstream channel which flows through an invasive reed canary grass meadow growing in pond sediments will be permanently replaced with a stream channel and floodplain patterned on reference conditions upstream and downstream of the restoration grading area, depending on the design channel gradient.

Sediment generation and turbidity: The restoration grading area will be dewatered and Johnson Creek flow will bypass the construction area to eliminate the chance of turbidity. Details of the water management plan for this project are included in this submittal as Attachment 4. As depicted, Erosion control BMPs will be implemented, are a part of the ESC permit being sought from Multnomah County, are described in the Construction Management and Erosion Control/Water Management Plan included in State and Federal permitting and have also been included with this submittal as Attachment 3. As depicted on Sheet 6, during construction a temporary diversion dam will be placed at the east end of the stream restoration area and stream water will be diverted to a temporary diversion pipe. The water will be returned to the channel at the west end of the stream restoration area. Federally, the project is permitted under the Nationwide Permit 27 ("NWP 27") for aquatic habitat restoration projects. The NWP-related DEQ 401 Water Quality Certification approval for the Cottrell Pond Project requires upstream and downstream turbidity monitoring and specifies necessary actions if turbidity thresholds are exceeded, in addition to a number of other BMPs. A copy of the DEQ 401 Water Quality Certification Approval for the Cottrell Pond Site Restoration Project is included with this submittal as Attachment 7.

Bank destabilization: Construction will involve dewatering of the restoration grading area and the establishment of new stream banks. Erosion control BMPs are indicated in the Construction Management and Erosion Control Plan at Attachment 4. Additionally, as indicated in Exhibit A.2, page 1, this project must adhere to the City of Portland's Standard Construction Specifications, Section 00280 Erosion and Sediment Control. As described in Exhibit E.2, all unsupported banks are designed at a slope of 3 horizontal feet to 1 vertical foot to comply with County code (MCC 39.6225(B)(3)) for stability.

Temporary changes to groundwater and surface water connectivity: During construction, surface flow of Johnson Creek will be bypassed around the restoration grading area following standard practices. Details of the water bypass are given in the water management plan described above and depicted in Attachment 4.

Temporary habitat fragmentation: The restoration site is fragmented under existing conditions by the presence of an impounding dam, which impedes movement of aquatic

organisms such as fish and amphibians. A primary objective of the project is to remove the obstructing dam and restore connectivity. Construction will not cause temporary habitat fragmentation, as connectivity does not currently exist.

Noise and vibration affecting wildlife: Construction activities will necessarily involve some temporary noise and vibration that accompanies grading and movement of fill. There are no federal or State Threatened or Endangered species on site that require special protections from noise production. The timing of grading, after July 15 below OHW, will be after the majority of the migratory bird nesting period has passed (February 1-July 31 in the Portland area).

Finally, CCPO's assertion that understanding this broad list of construction issues is necessary because of the compensatory mitigation requirements at subsection (D)(3) highlights the significant disconnect between the extensive list above and the actual focus and requirements of the SEC-wr permit approval criteria. The compensatory mitigation requirements at (D)(3) are limited to a requirement to restore or create a vegetated corridor based upon objective restoration and creation ratios (subsections (a) and (b)), the condition and priority of riparian corridors appropriate for vegetation corridor restoration (subsections (c) and (d)), an off-site mitigation provision that does not apply (subsection (e)), and methods for ensuring mitigation areas are established and maintained (subsection (f)). In other words, none of the construction items listed above are related to the vegetation corridor focus of the compensatory mitigation requirements at (D)(3).

CCPO 4 - Downstream Effects of Dam Removal Require Evaluation

> *Dam removal frequently results in temporary channel adjustment, mobilization of accumulated sediments, and changes to downstream aquatic habitat. These effects bear on the development standards at MCC 39.5590(C)(4), generally, and on whether the "equal or better condition" finding required by (C)(3)(d) can be supported for reaches beyond the immediate project footprint.*
>
> *The record should evaluate whether removal of the structure may result in:*
>
> - *downstream transport of fine sediment;*
> - *burial of spawning gravels;*
> - *increased turbidity;*
> - *alteration of streambed substrate composition;*
> - *impacts to juvenile fish rearing habitat;*

- *changes to channel morphology;*
- *impacts to amphibian breeding habitat downstream;*
- *long-term channel adjustment following removal.*

The application should also describe the measures that will be implemented to minimize these effects, including sequencing of work, erosion and sediment control measures, monitoring, and adaptive management should sediment releases exceed expectations, consistent with the erosion-protection standard at (C)(4)(i). Without this information, it is difficult to conclude that downstream effects on protected water resource functions have been fully evaluated.

Response:

The development standards in MCC 39.5590(C)(3) and (4) specifically refer to the property where development is proposed and do not require or allude to an analysis of the condition of the Riparian Corridor downstream of the development area. Therefore, while the project team designed a restoration project that considered downstream effects, that does not mean that the alternatives analysis and development standards require evaluation of CCPO's list for SEC-wr permit approval.

As documented in the record, this restoration is intended to benefit downstream reaches, including a dramatic improvement in stream temperature and a restoration of sediment transport continuity. *See* Exhibits A.2, A.10, and A.14. Additionally, removal of the impounding dam would restore transport by the stream of other habitat-forming features such as large woody debris. In addition to providing downstream benefits, the project team also designed the project to minimize the potential for adverse effects downstream, including the following considerations related to the list included in the argument submitted by CCPO.[5]

Downstream transport of fine sediment/burial of spawning gravels: Removal of the dam and reestablishment of a free-flowing stream will restore the transport of channel-building sediments through the project site to downstream reaches. While fine sediments can be detrimental when they episodically are deposited over gravels where fish have spawned, the transport of fine and course sediment over time is vital to the formation of floodplains and renewal of spawning beds. Removal of the dam will restore this long-impacted process.

Increased turbidity: Amelioration and monitoring of the risk of construction-related turbidity through dewatering of the restoration grading area and the implementation of

[5] The following responses were prepared by Burke Strobel, the senior fish biologist on the project, and reviewed by Roslyn Gray, P.E., a supervising engineer with the Portland Bureau of Environmental Services. See, Exhibit A.17 for project team resumes.

Erosion Control BMPs is discussed above. *See* Attachment 4. Exhibit A.5, page 11 describes the site stabilization plan for disturbed areas post-construction and prior to October 15 (MCC 39.5590(C)(4)(i)), which include the application of straw ground cover and bales. Following revegetation in the post-construction planting season, stream banks will be stabilized by the establishment of Good Corridor conditions through the establishment of native riparian plant communities, as detailed in Exhibit A.5.

Alteration of streambed substrate composition: The streambed substrate downstream of the project site is undoubtedly impaired by the interruption of sediment transport by the impounding dam. Generally, this would lead to a coarsening of streambed material and loss of spawning gravels as small particles are carried away by flood flows without subsequent replacement. Removal of the dam will restore Johnson Creek's sediment transport capacity at the site.

Impacts to juvenile fish rearing habitat: Implementation of the proposed project will benefit downstream fish-rearing habitat by restoring water quality and habitat-forming processes. Information in the record discusses the benefits of the project to downstream water quality by reducing stream temperatures by up to 8 degrees C (Exhibit A.2 and additional documentation added to the record-- Field Note: Cottrell Pond Water Temperature Monitoring). Exhibit A.10 discusses the benefits of restored sediment transport continuity. Additionally, the transport of large woody debris, a process vital to fish habitat formation and interrupted by the impounding dam, will be restored.

Changes to channel morphology/long-term channel adjustment following removal: The benefits of restored sediment transport to channel morphology are discussed above. Floodplains are built from transported and deposited sediments, often during high flow events. Restored floodplain connectivity and enhanced surface roughness in the form of microtopography and large wood embedment reduce scour potential compared to confined flow conditions. As detailed in Exhibit A.14, there are no anticipated changes to peak flows at the project site or downstream as a result of the project which could affect channel morphology or channel adjustments. (See also, the Hydrology & Hydraulic Analysis, Streambed Design technical memo included as Attachment 8) Finally, consistent with condition of approval 1.d, the applicant must obtain a separate Flood Development Permit as required for the alteration of a watercourse that requires a detailed hydraulic analysis related to flood levels.

Impacts to amphibian breeding habitat downstream: There are no foreseeable impacts to amphibian breeding habitat downstream. It is reasonable to expect that native amphibians will also benefit from the restoration of stream processes such as improved water quality, sediment transport continuity, and the wood cycle.

Finally, while the project team has considered all of the items identified in the final paragraph of the CCPO argument, the cited development standard, MCC

39.5590(C)(4)(i) provision only requires one of the items in the list that the CCPO asserts must be included in this SEC-wr permit application – erosion and sediment control measures. The project's compliance with subsection (C)(4)(i) is discussed in detail above.

CCPO 5 - Existing Sediment Conditions Should Be Characterized Prior to Excavation

> *The proposed project includes excavation within an impounded area where fine sediments have accumulated over many years. The record does not appear to include an evaluation of the physical or chemical characteristics of these sediments before they are disturbed, notwithstanding the soils and grading information required under MCC 39.5590(B)(3).*
>
> *Previous proceedings associated with the Bull Run Filtration Facility documented residual agricultural contaminants, including DDT, DDE, and dieldrin, within portions of the upstream project area. Those proceedings also evaluated the potential for contaminated soils to migrate to nearby natural resources, including Johnson Creek. Although the Bull Run analysis ultimately concluded that completed site improvements would reduce future contaminant mobilization, those proceedings demonstrate that contaminant transport within this watershed has previously been recognized as an issue requiring evaluation.*
>
> *Given the project's downstream location and the excavation of accumulated pond sediments, the record does not appear to address whether sediments proposed for disturbance have been characterized to determine whether contaminants are present that could be mobilized during construction — information relevant to the erosion and sediment protection standard at (C)(4)(i).*
>
> *The purpose of such an evaluation would not be to presume contamination exists, but rather to determine whether sediment quality has been adequately characterized before excavation and whether appropriate management measures would be implemented should contaminants be identified.*
>
> *If sediment characterization has not been performed, the record should explain why existing information is sufficient to conclude that excavation, sediment disturbance, and downstream transport will not adversely affect the water resource functions protected by the SEC-WR overlay.*

Response:

The argument references two code sections. Neither requires characterization of the pond sediments. First, MCC 39.5590(B)(3) requires an SEC-wr permit application to include "[a] description and map of soil types in the proposed development area…" (emphasis added). The application complied with this requirement by providing a map and table that identify three soil types across the Cottrell Pond property (Exhibit A.3, page 7). (B)(3) does not require an applicant to provide an evaluation of the chemical characteristics, and the CCPO argument provides no text or contextual support for the claim that it does. Second, CCPO's claim that chemical characterization is information relevant to the erosion and sediment protection standard at subsection (C)(4)(i) is equally unavailing. The development standard at (C)(4)(i) states "[a]reas of erosion or potential erosion shall be protected from loss by appropriate means. Appropriate means shall be based on current Best Management Practices." The language is squarely directed at erosion control through application of BMPs and does not require soil characterization that is unrelated to erosion protection.

While the analysis of the fine sediments accumulated within the impounded area for chemical contaminants is not required or requested through the SEC-wr review process, for reasons unrelated to SEC permit approval, the applicant conducted a Limited Phase II Environmental Site Assessment to test upstream pond sediments, dam soils, pond bank sediments, and upland shallow soils for contaminants (including DDT, DDE, and dieldrin) as a part of federal and state removal-fill permitting. The Phase II report and site investigation activities were conducted in accordance with current Oregon Department of Environmental Quality (DEQ) guidance and Oregon Administrative Rules Chapter 340, Division 122 Hazardous Substance Remedial Action Rules.

Results indicate impounded sediments and shallow site soils are consistent with clean fill and contain low contaminant values below residential screening criteria and regional background metals concentrations established by the DEQ as well as freshwater screening levels (SLs) established in the 2018 Sediment Evaluation Framework of the Northwest (SEF). Therefore, any excavated soil or sediment may be reused as clean fill on- or off-site in areas above typical high-water levels. A copy of the Phase II Environmental Site Assessment is provided with this submittal as Attachment 9

The test results were provided to the Portland Sediment Evaluation Team (PSET), comprised of the U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, Oregon Department of Environmental Quality, U.S. Fish and Wildlife Service, and National Marine Fisheries Service for evaluation in accordance with the SEF. The PSET determined that the site qualified for a "Low" site management area ranking due the "test results, location setting, previous and planned land use, and that there is no

reason to believe that the project sediments have chemicals of concern at concentrations above SEF freshwater SLs or above natural background concentrations". Accordingly, PSET determined that the restoration activities do not require additional sediment physical or chemical evaluation per the CWA section 404(b)(1) guidelines. The PSET's response is included as Attachment 10.

CCPO 6 - Seasonal Biological Resources Require Evaluation

> *Northern Red-legged Frogs utilize shallow aquatic habitats for breeding and egg deposition during late winter and early spring, while Coastal Cutthroat Trout utilize stream habitats for spawning, incubation, and juvenile rearing during seasonally sensitive periods. MCC 39.5590(C)(4)(i) specifically requires that work in fish-bearing streams be done in accordance with the ODFW in stream timing schedule.*
>
> *The record should identify:*
>
> - *anticipated construction timing;*
> - *proposed in-water work windows;*
> - *seasonal timing restrictions intended to avoid breeding, spawning, incubation, larval development, and juvenile rearing where practicable;*
> - *any pre-construction biological assessments proposed to identify sensitive life stages within the work area;*
> - *contingency measures should sensitive species or life stages be encountered during construction.*
>
> *Without identifying when construction activities will occur and how biologically sensitive periods will be addressed, it is difficult for the County to determine whether temporary impacts to aquatic resources have been minimized as required by (C)(4)(i).*

Response:

MCC 39.5590(C)(4)(i) neither requires work in fish bearing streams be done in accordance with the ODFW in-stream timing schedule, nor requires temporary impacts to aquatic resources be minimized as asserted. Instead, subsection (C)(4)(i) requires implementation of erosion BMPs and compliance with the timing

requirements for soil disturbing activities within the County designated Riparian Area. As addressed above, the applicant will comply with erosion control BMPs during construction. A requirement for all in-steam work to comply with the ODFW in-stream timing schedule is included in subsection (D)(4)(e), and as described below. The applicant will comply with that requirement.

As explained below, the record identifies all of the suggested information in the CCPO's bullet list.

Anticipated construction timing: Contrary to the statement above, the anticipated timing of construction activities is in the record and is summarized in Exhibit A.3 (page 15). As reflected in the referenced construction schedule, construction was originally planned to begin on July 1, 2026 within the permitted windows. However, the appeal has delayed the implementation of the project, and the work is now planned for the summer of 2027. While the start of construction above OHW in 2026 was planned for July 1, work above OHW in 2027 will likely begin after June 15, in accordance with MCC 39.5590(C)(4)(i). All other dates will be adjusted by one year.

Proposed in-water work windows/seasonal timing restrictions: As reflected in the schedule and in the project plan set at Exhibit A.2, Sheet 1, the ODFW in-water work window for work below the ordinary high-water line is from July 15 to August 31. The in-water work window is established as a seasonal timing restriction to avoid impacts to, for example, spawning, incubation, and larval development of Cutthroat Trout in upper Johnson Creek. As noted above, MCC 39.5590(C)(4)(i) does not refer to the ODFW in-water work window but instead stipulates Multnomah County requirements for soil-disturbing activities (June 15 to September 15) and revegetation/soil stabilization activities (by October 15). The project will adhere to County code above OHW, as required.

Additionally, while not required by the SEC-wr permit standards, the City of Portland has adopted BMPs benefiting migratory bird species that recommend any necessary removal of trees and shrubs that could be used for nesting be performed outside of the main nesting period (April 15-July 31). The applicant will follow the City's BMPs related to nests for this project.

Pre-construction biological assessments: As discussed in the response to CCPO 2, all pre-construction assessments required by the code have been completed and are in the record. *See, e.g.,* Exhibit A.4—Wetland Delineation, Exhibit A.5—Riparian Area Inventory, Assessment and Restoration Plan, Exhibit A.13—Cottrell Pond Sampling of Aquatic Organisms. As a part of the amphibian salvage efforts, the pond will be surveyed for amphibian egg masses in the spring prior to construction and any identified egg masses will be relocated to appropriate nearby ponds in consultation with ODFW and in accordance with an ODFW Capture, Handling, Transport, and Relocation (CHTR) permit, included as Attachment 3.

Contingency measures should sensitive species or life stages be encountered during construction: Specific contingency measures are not required by the SEC-wr permit approval criteria. Nonetheless, a thorough amphibian and fish salvage effort will be conducted prior to the start of construction to remove sensitive species and life stages under an ODFW CHTR permit. The return of amphibian adults to the construction area will be discouraged, the area will be surveyed, and any new individuals found will be relocated, in accordance with BMPs provided in the CHTR permit.

Response to the Roberts Family Trust

Roberts 1: Existing and Baseline Conditions Must Include Our Reach of Johnson Creek

> *MCC 39.5590(B)(2) through (B)(4) require site analysis and biological/wetland survey information sufficient to establish existing conditions, and MCC 39.5590(C)(3)(d) requires the applicant to demonstrate the Riparian Area "can be restored to an equal or better condition." Neither the Cottrell Pond application nor the Bull Run Filtration Facility record appears to include baseline data collected on our segment of Johnson Creek — the reach that sits between the two project sites and receives whatever hydrological, sediment, and groundwater changes originate at the Filtration Facility before those changes ever reach the pond restoration site. Without baseline data from our reach, the County cannot determine whether the "existing conditions" described in the Cottrell Pond application accurately reflect the water resource as it exists today, or whether upstream construction has already altered it.*

The Filtration Facility obtained separate and final land use approval and was not subject to the SEC-wr approval criteria in this appeal, and Filtration Facility impacts on Johnson Creek are not relevant to this appeal. The proposed stream restoration project must be evaluated on its own merits subject only to the applicable SEC-wr approval criteria and application requirements.

As also addressed in the CCPO 1 response, the applicant fully complied with the limited application requirements of MCC 39.5590(B)(2) through (B)(4) to establish existing conditions and a baseline consistent with the scope of the approval criteria. The argument put forth by the Roberts that the application submittals were flawed because they did not include data collected on the reach of Johnson Creek located on their property is inconsistent with the plain text of the code.

Finally, note that MCC 39.5590(C)(3)(d) is included in the alternatives analysis subsection. The alternatives analysis introduction at (C)(3) provides "[d]evelopment proposed within a Riparian Area may be allowed if there is no alternative, when the other requirements of the Overlay including the Development Standards of subsection (4) and the provisions for Mitigation in subsection (D) are met." Therefore, the referenced (C)(3)(d) is neither a development standard nor a mitigation standard. However, those sections provide relevant context for scope of what should be restored to an equal or better condition and where in the absence of clear direction in the plain text. The Development Standards at (C)(4) are limited to on-site vegetation and development, and as discussed in several CCPO responses, the Mitigation provisions at (D)(1) and (2) are largely focused on the vegetated corridor condition based on vegetation coverage and (D)(3) describe the compensatory mitigation "required to offset the encroachment of the development into the area." (emphasis added) These provisions provide contextual support for an interpretation that the "equal of better condition" is appropriately focused on vegetation restoration efforts on the site rather than an off-site segment of Johnson Creek as seemingly suggested by Roberts.

That interpretation is further supported by subsection (C)(3)(e). An alternative analysis must demonstrate either the area can be restored to an equal or better condition under (C)(3)(d) or "{a]ny net loss on the property of Riparian Area is mitigated" under (C)(3)(e). In other words, the code makes it clear that mitigation for net loss on the subject property is an alternative to restoration to an equal or better condition.

For these collective reasons, collecting data from the Roberts' property was not necessary for the application or to demonstrate compliance with the SEC-wr approval standards applicable to the proposed restoration project that limits the development area to the Cottrell Pond Property.

Roberts 2 - Mitigation and Revegetation Commitments Must Account for Effects That Pass Through Our Property

> *The Compensatory Mitigation General Requirements at MCC 39.5590(D)(3), including the establishment and monitoring timeline at (D)(3)(f), require a defined and enforceable mitigation plan. As the landowners whose property forms the connecting corridor between the two project sites, we have a direct and immediate interest in whether that mitigation plan is adequate — because any shortfall in mitigation at either project site does not stay contained at that site. Sediment, altered*

flows, and bank instability travel through our property regardless of which project caused them. The record should identify how the applicant will monitor and account for mitigation performance specifically along the intervening reach, not only at the two project footprints themselves, and should explain what recourse exists if monitoring shows the intervening reach — our property — is being adversely affected.

Response:

The core objection in this second argument is also related to the Filtration Facility. As explained above, the Filtration Facility obtained final land use approval following LUBA's affirmation of the County's decision on remand. Additionally, the Filtration Facility did not require an SEC-wr permit and was not subject to the Compensatory Mitigation requirements at MCC 39.5590(D)(3) cited above. This SEC-wr permit cannot be used to collaterally attack the final land use approval for the Filtration Facility, and to the extent elements in the argument relate to mitigation at the Filtration Facility, they are not relevant to this appeal.

Further, and as discussed in CCPO 3 above, the compensatory mitigation provisions at subsection (D)(3) are limited to a requirement to restore or create a vegetated corridor based upon objective restoration and creation ratios (subsection (a) and (b)), the condition and priority of riparian corridors appropriate for vegetation corridor restoration (subsections (c) and (d)), an off-site mitigation provision that does not apply (subsection (e)), and methods for ensuring mitigation areas are established and maintained (subsection (f)). While restoring the riparian area on the Cottrell Pond Property will contribute to bank stabilization, the comments related to sediment and altered flows are not addressed through the (D)(3) compensatory mitigation requirements.

Nonetheless, it is the case that the project team has designed this stream restoration project to consider both upstream and downstream impacts even though not directly required to do so for SEC-wr permit compliance.[6] Instead, it is an element of the project purpose. As noted, the Cottrell Pond restoration project is located downstream of the referenced property and has been designed to maintain existing upstream boundary conditions. Specifically, engineered grade control in the form of a channel spanning weir and rock-armored channel construction has been included in the

[6] The following description was authored by Roslyn Gray, P.E. and reviewed by Burke Strobel.

upper reach of the project to maintain existing grade and flow conditions at the upper project boundary. *See* Exhibit A.2, sheet 3 of 13 depiction of "Embedded Log Weirs", "Riffle 5" locations. The channel spanning weir is required to seasonally split flows between the main creek channel and the offline amphibian ponds, to support hydrology specific to the amphibian life stages. The rock armoring of the reconstructed channel at this location is required to maintain channel geometry that results in the desired flow split. Together, these elements provide grade control that maintains existing channel slope upstream of the flow split. Channel geometry upstream of the flow split is unchanged by the proposed grading plan. By maintaining a consistent channel slope and channel geometry at the upstream project boundary, the project maintains consistent conveyance capacity and sediment transport capacity. As such, the project poses no increase to scour potential or channel incision. This element of project performance will be monitored relative to performance metrics to evaluate for potential adjustments. Further details regarding grade control and the maintenance of hydraulic grade lines can be found in the Hydrology and Hydraulic Analysis Streambed Design report at Attachment 8. The Cottrell Pond restoration project has no effect on upstream hydrology and has been designed to prevent offsite impacts through the referenced property.

Roberts 3 - ***The Alternatives and Minimization Analysis Cannot Be Evaluated Without Considering the Intervening Property***

> *MCC 39.5590(C)(3)(a) and (b) require a showing that development has been limited to the minimum area necessary and that no practicable alternative exists. That analysis has been conducted site-by-site, as though the Filtration Facility and the Cottrell Pond restoration were unrelated projects with no shared effect on the land between them. Our property is that shared ground. Any alternatives analysis that does not account for how each project's construction and operation affects the reach running through our land is incomplete.*

The proposed development and use for purposes of this application and this appeal is a stream restoration project with a set of project objectives specific to the Cottrell Pond Property. The record demonstrates compliance with the alternative analysis provisions at MCC 39.9950(C)(3)(a) and (b) that are specific to this proposed use. *See* Exhibit E.2, pages 4 -5. The analysis of alternatives was appropriately site and project specific.

As addressed above, the Filtration Facility design avoided development in the SEC-wr zoned area. As a result, it was not subject to MCC 39.9950(C)(3) or any other approval criteria applicable to SEC-wr permit applications at the time it was approved and is not subject to SEC-wr approval criteria now. The fact that the Roberts' own property between the Filtration Facility site and the Cottrell Pond Property is not relevant to the scope of this appeal.

Roberts 4 - Cumulative Effects Cannot Be Assessed Without Evidence From the Property Between the Two Sites

> *MCC 39.5590(D)(2), and specifically factor (D)(2)(b)(iv), requires consideration of the cumulative adverse effects of past activities on the Riparian Area. We are positioned to speak to this factor directly, because our land is not a downstream observer of these two projects — it is the physical link between them. Any cumulative effect of Filtration Facility construction on streamflow, sediment, or groundwater necessarily crosses our property before the Cottrell Pond project can claim to restore "existing conditions" downstream.*
>
> *We anticipate the applicant will argue that MCC 39.5590(D)(2)(b)(iv) only applies if the applicant is seeking an exception to the mitigation sequence under (D)(2)(a), and that no exception is needed because the Cottrell Pond project is "self mitigating." That argument cannot be evaluated in isolation from our property. A conclusion that the pond restoration is "self-mitigating" presumes a stable baseline downstream of the Filtration Facility. But if conditions on our property — the connecting reach — have already been altered by ongoing Filtration Facility construction, then the baseline the applicant relies on to claim "no net loss" is not the true existing condition; it is a condition already shaped by the first project. The County cannot accept a self-mitigating characterization for the second project without first establishing what the intervening property, including ours, looked like before construction began at either site, and what it looks like now.*

This cumulative effects argument is nearly identical to the CCPO's cumulative effects argument in CCPO 1, and it fails to support the Roberts' position for substantially the same reasons. The only distinction is that the Roberts' version specifically references the location of the Roberts property between the Filtration Facility and the

Cottrell Pond Property and asserts that is a relevant factor. The location of the Roberts property, however, changes neither the purpose nor scope of the cumulative adverse effects factor that applies only when considering whether a project's overriding public benefit exempts it from the preferred mitigation sequence. Therefore, for the reasons explained in the CCPO 1 response the applicant was not required to gather or provide evidence from the Roberts property to demonstrate compliance with the SEC-wr approval criteria applicable to the stream restoration project on the Cottrell Pond Property.