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VIA: Email to LUP-hearings@multco.us

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

Re: Applicant's Final Written Argument – #T2-2025-0067

Hearings Officer Turner,

This letter provides final legal argument on behalf of City of Portland, the applicant ("Applicant") in the above-referenced appeal. For the reasons set forth below, we ask that you uphold County approval of a Significant Water Resources (SEC-wr) permit and lot of record verification to permit a stream restoration project along Johnson Creek.

I. Project Summary

The Applicant seeks to implement a stream restoration project on an 8.14 acre property that currently contains a pond that was artificially created by placement of an earthen dam along the mainstem of Johnson Creek (the "Cottrell Pond Property"). The restoration project will remove the impounding dam and grade the accumulated pond sediments to establish a meandering stream channel (the "Project"). (Exhibit A.3, page 4).

The Project was designed by a team of Project experts to meet the following restoration objectives: (1) convert a "Degraded Riparian Corridor" to a "Good Riparian Corridor" condition; (2) restore fish passage through the removal of the impounding dam; (3) improve water quality and decrease water temperature in Johnson Creek through the decrease in water surface area and residence time; and (4) retain ecological functions such as breeding opportunities for native amphibians and floodplain retention of flood waters. (Exhibit A.3, pages 8-9).

As detailed in the Cottrell Pond Site Restoration Project: Riparian Area Inventory, Assessment and Restoration Plan ("Cottrell Riparian Plan"), the Property includes 6.36 acres[1] of vegetated corridor in a

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[1] The inventoried existing vegetated corridor area exceeds the disturbance area. As explained in the Applicant's hearing presentation the total disturbance area for the Project is limited to approximately 4.3 acres with 3.0 acres of disturbance area within the SEC-wr overlay boundary. (Exhibit E.4, Slide 15).

"Degraded Corridor" condition as defined at MCC 39.5590(D)(1) across four existing habitat types. (Exhibit A.5, pages 4-7). The restoration plan will plant a total of approximately 6.68 acres across five planting units installing a total of 143 pounds of native seeds, 6,230 emergent or herbaceous plants, and 7,244 woody plants, including trees and shrubs. (Exhibit A.5, pages 7-10). The plan includes detailed plant lists for each planting unit that includes plant species, density, and spacing. The plan also describes the purpose and habitat benefits of each area.

The Project was reviewed by multiple federal and state resource agencies from the City of Portland Streamlining Committee Process (Exhibits A.15 and A.16), and the Project team made grading and design adjustments to promote fish habitat and ensure fish passage in response to comments from the Oregon Department of Fish and Wildlife (ODFW). (Exhibit A.12). ODFW submitted a letter of support for the Project noting the project "will transform the degraded headwaters of Johnson Creek into a resilient segment that supports native fish habitat, improves water quality, and helps a small breeding population of red-legged frogs," and expressing confidence that the Project team can implement the pond restoration successfully. (Exhibit E.3). The Johnson Creek Watershed Council also submitted a letter of support for the Project confirming that removing the Cottrell Pond dam was previously identified as a high-priority project and is in alignment with the Council's strategy for restoring ecological functions in Johnson Creek. (Exhibit A.7).

II. Overarching Legal Topics

A. Role of Substantial Evidence

Appellants[2] in this case have framed their challenges as substantial evidence arguments, asserting that existing conditions and potential project impacts were not fully evaluated. There is no dispute that land use findings must be supported by substantial evidence in the record. *See* ORS 197.835(9)(a)(C). The substantial evidence requirement, however, is not an independent obligation to evaluate every conceivable impact or existing condition. Instead, the applicant's burden is limited to providing substantial evidence to demonstrate compliance with approval criteria applicable to the land use decision. The nature and extent of the required evidence is therefore defined by the scope of those criteria. Where an approval criterion is narrow in scope and does not require a particular finding, an applicant is not required to produce substantial evidence addressing matters outside that criterion's scope. Put differently, substantial evidence is required only for findings that the applicable code actually requires. If the code

[2] The County's approval of the SEC-wr permit was appealed by the Cottrell Community Planning Organization/Pleasant Home Community Association ("CCPO/PHCA"). Exhibit E.1. Tami Wensenk provided oral testimony during the hearing on behalf of CCPO/PHCA. The Roberts Family Trust ("Roberts") and CCPO (without reference to PHCA) submitted written testimony during the first open record period following the hearing. For purposes of this final argument, those parties opposed to the approval of the permit are referred to collectively as "Appellants" or individually when referring to party specific testimony. For ease of identification of testimony, the Appellants' documents in the record are referred to as follows: the Notice of Appeal Grounds at Exhibit E.1– Appeal Gound #; Hearing Testimony at Exhibit I.3 – Hearing -#; CCPO open record submission at Exhibit I.1 – CCPO-#; and Roberts open record submission at Exhibit I.2 – Roberts-#.

does not require a specific finding, the absence of evidence supporting that finding cannot provide a basis for denial.

In light of the arguments advanced by the Appellants in this case, it is important to clarify two fundamental legal principles that dictate the role of substantial evidence in this case: 1) what is required to meet the threshold of substantial evidence, 2) the role of code interpretation in determining what finding is necessary to conclude a given approval criterion has been satisfied.

Substantial Evidence Threshold

To determine what qualifies as substantial evidence it is instructive to look to LUBA's review of substantial evidence claims. On review at LUBA the question would be whether, when "viewing the record as a whole, a reasonable person could make the disputed factual finding." *Columbia Pac. Bldg. Trades Council v. City of Portland*, 289 Or App 739, 755 (2018). Stated another way, "[s]ubstantial evidence is evidence a reasonable person would rely upon in reaching a decision." *Costco Wholesale Corporation v. City of Beaverton*, 50 Or LUBA 476, 487 (2005).

In this case, the Applicant provided extensive expert testimony[3] with the application, as an attachment to the Pre-Hearing Statement, and through the Applicant's Open Record Response ("Applicant's Response"). Collectively, the factual testimony and exhibits create substantial evidence a reasonable person would rely on in reaching a decision that the Project meets or exceeds all applicable SEC-wr approval criteria. In contrast, Appellants primarily raised questions and offered speculation rather than challenging, or in many cases even acknowledging, the evidence and expert testimony the Applicant provided in support of the required findings.

Code Interpretation

The substantial evidence arguments offered by Appellants have a common thread. The arguments identify isolated words or phrases from applicable approval criteria to generate lists of alleged flaws or alleged gaps in evidence. This approach 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*). Under *PGE/Gaines*,[4] 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.

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[3] Resumes establishing members of the project team that prepared reports and testimony relevant to the applicable approval criteria as experts by education and experience are provided at Exhibit A.17.

[4] 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).

In isolating specific phrases and words from applicable code, Appellants' arguments fail the necessary evaluation of the text and often omit consideration of what the drafters included. Additionally, an evaluation of the full set of SEC-wr permit application requirements, approval criteria, and development standards applicable in this case reveals the relatively narrow focus of the SEC-wr permit on impacts to and restoration of vegetative cover and soil management within the development area. As detailed below, Appellants' attempts to expand the narrow focus of the SEC-wr permit are supported by neither the plain text of specific approval criteria, nor relevant context provided by the SEC-wr code section as a whole and standards applicable to other SEC overlay permits.

B. The Filtration Facility

The original ground for appeal and several arguments advanced by Appellants through the post-hearing open record period reference the Bull Run Filtration Facility ("Filtration Facility") project. The Filtration Facility project obtained final land use approval on February 11, 2026, when LUBA affirmed the County's remand decision approving the conditional use permit and other permits required for that project. *Cottrell Community Planning Organization v. Multnomah County*, LUBA No. 2025-043 (2026).

As a general matter, the County correctly determined in the June 16, 2026, Hearing Memo that the SEC-wr permit for the Contrell Pond project is a separate and distinct land use application that must be reviewed on its own merits as an independent use. Specific arguments attempting to connect Filtration Facility to the SEC-wr permit approval criteria applicable to the Project are addressed in the Applicant's Pre-Hearing Statement and the Applicant's Response and those responses are summarized below.

III. Applicable SEC-wr Permit Approval Criteria

The County's decision approving the SEC-wr permit for the Project identified and applied all applicable SEC-wr permit criteria at MCC 39.5590. Project opponents cited several MCC 39.5590 subsections in the grounds for appeal, oral testimony, and written testimony. Those subsections were addressed in the Applicant's Pre-Hearing Statement and Applicant's Response.[5] The arguments and responses are summarized below. The County's findings for all other applicable subsections should also be upheld.

MCC 39.5590(B)(2)-(4)

MCC 39.5590(B)(2) through (4) do not include applicable approval criteria, but instead describe application submittal requirements for an SEC-wr permit. The application requirements in (B)(2) through (4) include in relevant part:

(2) *A site plan of the property showing*: (followed by a list of specific site plan features)

[5] In addition to applicable approval criteria, the grounds for appeal also cited MCC 39.5590(C)(4)(g), 39.6235, and 39.1105. For the reasons addressed in the Applicant's Pre-Hearing Statement, those code sections are not applicable to this SEC-wr permit and are not further addressed in this final written argument.

(3) *A description of map and soil types in the proposed development area and the locations and specifications for all proposed draining, filling, dredging, and vegetation removal, including the amounts and methods.*

(4) *Preparation of a report which includes by a qualified wetland or riparian consultant, fish and wildlife biologist, or other qualified professional at the discretion of the Planning Director. Approval of other qualified professional must be granted before the report is completed. Wetlands shall be identified and delineated by a qualified wetland specialist. The consultant shall prepare a report which includes:*

(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;

(c) A detailed Mitigation Plan as described in MCC 39.5590(D).

The plain text of the code describing what an applicant must provide is clear and unambiguous. The scope of the assessment required by subsection (4)(a) is also clear based on a review of MCC 39.5590(D). Subsection (D) identifies "existing conditions" through definitions of vegetated corridor conditions ranging from "Good Corridor" conditions to "Degraded Corridor" conditions based exclusively on native vegetation cover, tree canopy, and invasive vegetation coverage percentages. The Cottrell Riparian Plan is a joint inventory, assessment and mitigation plan for the Project (Exhibit A.5) prepared by a qualified botanist and restoration ecologist (Exhibit A.3, page 5; Exhibit A.17 resumes) and a separate wetland delineation report (Exhibit A.4) prepared and reviewed by qualified wetland specialists (Exhibit A.3, page 5; Exhibit A.17 resumes). While not required by the plain language of (B)(4), the Applicant also submitted the results of aquatic organism sampling in Cottrell Pond (Exhibit A.5, Appendix F) prepared by a qualified fish biologist (Exhibit A.3, page 5; Exhibit A.17 resumes). The Decision correctly concluded required application materials were included.

Appellants primarily sited these application requirements at MCC 39.5590(B)(2) through (4) to argue that submission of additional information was required to establish a baseline of existing environmental conditions broadly. *See* CCPO-1; Roberts-1. These claims are connected to the equally flawed claim that the SEC-wr permit requires consideration of the cumulative impacts of the Filtration Facility. The baseline claims and inapplicability of the cumulative effects factor are addressed at length in the Applicant's Response to CCPO-1 and Roberts-1 (Exhibit J.1, pages 1-6, 21-22) and Applicant's Pre-Hearing Statement response to appeal Ground 1 (Exhibit E.2, pages 2-3).

CCPO also referenced MCC 39.5590(B)(3) to contend at CCPO-5 that the description and map of "soil types" in the proposed development area required a soil characterization. As addressed at Applicant's Response to CCPO-5 (Exhibit J.1, pages 17-19) the claim is inconsistent with the plain, unambiguous requirement of (B)(3). Nonetheless, the soil assessment prepared for the Cottrell Pond Property was also included in the record as Attachment 9, along with the conclusion of the Portland Sediment Evaluation Team (PSET) comprised of representatives of multiple state and federal agencies at Attachment 10.

CCPO-2 references the assessment required by MCC 39.5590(B)(4) to claim the code requires submittal of a project-specific habitat assessment. For the reasons set forth in the Applicant's Response to CCPO-2 the argument is inconsistent with the plain text of the assessment described in subsection (B)(4), and relies on an erroneous interpretation of the "Good Corridor" definition at subsection (D)(1).

Not only is the limited scope of the report required by MCC 39.5590(B)(4) clear from the plain text of the code at MCC 39.5590(B)(4) and (D), but an evaluation of relevant context further supports the narrow focus of the report. The corresponding application requirements for an SEC-w (wetland) overlay permit are provided at MCC 39.5580(B)(3). An applicant for an SEC-w permit must provide: "An assessment of the wetland's <u>functional characteristics and water source</u>, and a description of the vegetation types and <u>fish and wildlife habitat</u> in a written report by a professional riparian wetland specialist." (emphasis added). The focus in the SEC-w report on functional characteristics, hydrology, and fish and wildlife habitat stands in contrast to the more limited SEC-wr report that requires an assessment of the existing vegetated corridor condition (as described in MCC 39.5590(D)) and an inventory of vegetation. The SEC-w requirements demonstrate that when the County seeks more specific report details that include functional values, hydrology details, and habitat descriptions, it knows how to request that information.

Finally, even if CCPO were correct that an expanded habitat assessment were required by subsection (B)(4), the Applicant's Response to CCPO-2 (Exhibit I.1, pages 6-10) identifies evidence previously in the record and added to the record through Attachments 2 and 3 that addresses each of the habitat considerations raised by CCPO-2.

For these collective reasons, we request that the Hearings Officer uphold the Decision conclusion and find that the Applicant's submittal of all required application materials is supported by substantial evidence in the record.

<u>MCC 39.5590(C)(3)</u>

MCC 39.5590(C) contains the SEC-wr permit approval criteria and subsection (3) specifically addresses Alternatives Analysis Sites:

> *(3) Alternatives Analysis Sites – <u>Development proposed within a Riparian Area</u> 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. The applicant shall prepare an alternatives analysis which demonstrates that:*
>
> *(a) No practicable alternatives to the requested development location exists on the property further than 100 feet from the protected water feature; and*
>
> *(b) Development within the Alternative Analysis Site in the Riparian Area has been limited to the minimum area necessary to allow for the proposed use;*
>
> *(c) Development shall occur as far as practically possible from the protected water feature; and*

> *(d) The Riparian Area can be restored to an equal or better condition; or*
>
> *(e) Any net loss on the property of Riparian Area is mitigated.* (emphasis added).

The plain text of the introduction states that the focus of the alternatives analysis is on development within a Riparian Area. Subsections (a), (b), and (c) are equally focused on development within the protected area. That focus provides context for the options provided in subsection (d) and (e). An applicant can either restore the riparian area where development occurred to an equal or better condition, or can mitigate net loss of riparian area on the property where the development occurred.

Both the application requirements MCC 39.5590(B) and the descriptions of vegetated corridor conditions at subsection (D) provide further context for the intent of "equal or better condition" under the subsection (d) option. As discussed above, the application must include an assessment of the existing condition of the Riparian Area in accordance with MCC 39.5590(D), which in turn defines the ratings for vegetated corridor conditions. Therefore, the Decision findings addressing the (d) option correctly focused on the fact that a primary project objective is to upgrade the project area from a "Degraded" condition to a "Good" condition in concluding that the riparian area will be restored to an equal or better condition; this is consistent with both text and context.

An evaluation of the stark contrast between SEC-w permit approval criteria at MCC 39.5580(C) and the SEC-wr permit approval criteria provides additional context supporting the interpretation that the SEC-wr permit review is intended to be narrowly focused. Pursuant to MCC 39.5580(C)(2), an applicant for an SEC-w permit must demonstrate that the proposal:

> "[w]ill have as few adverse impacts as is practical to the wetland's functional characteristics and its existing contour, vegetation, fish and wildlife resources, shoreline anchoring, flood storage, general hydrological conditions and visual amenities."

SEC-w subsection (C)(3) further requires an applicant to demonstrate the proposal "[w]ill not cause significant degradation of groundwater or surface-water quality." These are far more exacting approval criteria than those that apply to an SEC-wr permit. For example, rather than a disturbance area requirement limiting development to the minimum area necessary as required for the SEC-wr permit, an SEC-w permit applicant must demonstrate the proposal will have as few adverse impacts as practical to specific habitat and resource categories including resource function, fish and wildlife resources, anchoring, flood storage, and hydrological conditions. There must also be a quantification of impacts to groundwater and surface water quality for the SEC-w permit. The SEC-w list is strikingly similar to the evaluation and evidence Appellants claim is missing from this SEC-wr permit record. While the evidence in this record would likely be sufficient to demonstrate compliance with the more exacting SEC-w approval criteria, the salient point for this appeal is that the substantial evidence necessary to demonstrate those criteria are satisfied is not required for approval of the applicable SEC-wr permit.

Appellants cite MCC 39.5590(C)(3) in several of the substantial evidence arguments. First, Appeal Ground 3 (Exhibit E.1, page 3) and Hearing-3 (Exhibit I.3) refer to the "minimum area necessary" text at MCC 39.5590(C)(3)(b). The claim that there is no substantial evidence in the record to support a conclusion that development was limited to the minimum area necessary to allow for the proposed use was addressed in the Applicant's Pre-Hearing Statement (Exhibit E.2) and the attached supplemental memo provides expert testimony from the project team addressing the minimum area necessary issue.

(Exhibit E.2, Attachment 4). The "minimum area necessary" claims were not repeated in any of the Appellant's post-hearing submittals.

Second, the Roberts-3 claim essentially contends that the alternatives analysis at MCC 39.5590(C)(a) and (b) cannot be met without evaluation of the Filtration Facility and the Roberts' property. However, the development necessary to achieve the project objectives at issue in this SEC-wr permit application will be limited to the Cottrell Pond Property. There is nothing in the plain text or context of (C)(a) or (b) to suggest that the alternatives analysis extends outside of the Cottrell Pond Property, and Roberts provides no interpretational analysis to support the contention that it does.

Third, Hearing -1 (Exhibit I-3, page 1) seemingly claims that the Applicant did not provide sufficient assessment of pre-project conditions to establish baseline conditions necessary to support the conclusion at subsection (C)(3)(d) that the riparian area can be restored to an "equal or better condition." Because the argument does not cite the extensive and detailed Cottrell Riparian Plan, it is difficult to determine if Appellants reviewed that document. In any case, the combination of the detailed assessment and identification of the existing "Degraded" vegetated corridor conditions across 6.36 acres of existing habitat types on the Cotrell Pond Property, and the detailed vegetation restoration plan that describes the type and number of plants that will be planted across five distinct restoration units to restore a total of 6.68 acres on the Property to a "Good" condition, provides substantial evidence for the County to correctly conclude that the Applicant demonstrated that the riparian area where the Project development occurs, can and will be restored to a better condition. Roberts-1 (Exhibit I-2, page 1) makes similar claims to the Hearing-1 statement, but seemingly adds an argument that the restoration provision of subsection (C)(3)(d) extends to the Roberts' property and requires restoration for impacts created by the Filtration Facility. To the extent that is the argument it is without merit for the reasons set forth above and in the Applicant's Response (Exhibit J.1, pages 21-22).

Finally, CCPO-4 (Exhibit I.1, page 3) contends that the "equal or better condition" finding at (C)(3)(d) requires an extensive evaluation of the downstream effects of the dam removal. CCPO cites just four words of the criterion and fails to evaluate the full text or context of subsection (C)(3)(d). For example, the argument ignores the fact that (d) is not mandatory because the mitigation to account for net loss "on the property" is an available alternative. Focusing on limited text also discounts relevant context. The vegetated corridor conditions in subsection (D) describe the specific "conditions" to be restored. The argument that specific downstream functions, including fish and amphibian habitat and hydrological conditions must be evaluated is further weakened by the comparison to SEC-w permit approval criteria provided above. Moreover, even if subsection (C)(3)(d) could be interpreted broadly to include a consideration of off-site impacts, the expert testimony in Applicant's Response documents the downstream benefits of the Project across the evaluation topics included in CCPO-4, providing substantial evidence that even if the claimed off-site conditions were contemplated in MCC 39.5590(C)(3)(d), the downstream riparian areas can and will be restored to an equal or better condition than the pre-project conditions created by the dam and resulting pond.

For these collective reasons, we request that the Hearings Officer uphold the Decision conclusions that the Project meets the Alternatives Analysis approval criteria at MCC 39.5590(C)(3) and find the conclusion is supported by substantial evidence in the record.

MCC 39.5590(C)(4)

MCC 39.5590(C)(4) identifies the development standards for development within the Riparian Area. The most cited standard in Appellant testimony is subsection (C)(4)(i) that provides:

> *(i) Areas of erosion or potential erosion shall be protected from loss by appropriate means. Appropriate means shall be based on current Best Management Practices.*
>
> > *(i) Soil disturbing activities within a Riparian Area shall be limited to the period between June 15 and September 15. Revegetation/soil stabilization must be accomplished no later than October 15.*

The plain language of (4)(i) simply requires erosion control using current Best Management Practices (BMPs). It does not prescribe a particular set of BMPs or a particular outcome. Subsection (4)(i)(i), in turn, sets objective time limits on when soil disturbing activities can occur and revegetation/soil stabilization must occur.

Appellants largely cite these dual standards to try to expand the scope of the SEC-wr permit. First, CCPO-3 (Exhibit I.1, pages 2-3) specifically cites subsection (C)(4)(i) to support a claim that temporary construction effects should be evaluated independently from long-term restoration. However, CCPO offers absolutely no explanation of how a requirement to apply current BPMs to protect against erosion supports the desired conclusion. There is not a temporal concept included in the development standard. It is further unclear how erosion control BMPs relate to several items on the CCPO-3 list of potential construction impacts, including temporary changes to ground water or surface water connectivity, temporary habitat fragmentation, or noise and vibration impacts on wildlife. In contrast, the Applicant has provided a clear and complete explanation of how the conclusion that the erosion control development standard is met through substantial evidence in the record and conditions of approval (See Applicant's Response, pages 10 to 14).

CCPO cites the erosion control standard at MCC 39.5590(C)(4)(i) in the conclusion to the CCPO-4 claim downstream effects require evaluation. Specifically, the conclusion contends that the application should describe a list of measures related to erosion control, monitoring, and adaptive management, to be consistent with subsection (C)(4)(i). The flaw with this argument is that while the standard requires erosion control protection using BMPs it does not proscribe any specific management practice. As described in Applicant's Response to CCPO-4, the record clearly establishes the erosion control BMPs that the Project will and must comply with as conditions of this approval and as conditions of approval of other permits and authorizations with more specific BMP requirements. (Exhibit J.I, pages 14-17). While only a few of the items in the list of suggested downstream evaluations relate directly to erosion control, the Applicant's Response to CCPO-4 also addresses the complete list of downstream issues included in CCPO-4.

CCPO-5 claims that the chemical characterization of the dam and ponds sediments is information relevant to the erosion standard at MCC 39.5590(C)(4)(i), yet offers no explanation grounded in the text or even context of the standard to explain the connection. Nonetheless, Applicant's Response addressing CCPO-5 includes evidence that the soil was characterized through a Phase II ESA. (Exhibit J.1, pages 17-19).

Finally, CCPO-6 erroneously points to MCC 39.5590(C)(4)(i) as the source of a requirement for work to be conducted in compliance with ODFW work windows. The Applicant's Response (Exhibit J.1, pages 19-21) clarifies the actual source of the ODFW in-water timing limitations at MCC 39.5590(D)(4)(e). The response also addresses each of the timing and assessment points included in CCPO-6 and explains the construction timeline in Exhibit A.2, Sheet 1 accounts for both the in-water work window (July 15 to August 31) and the subsection (C)(4)(i) limitations on soil disturbing activities both above and below ordinary high water (June 15 to September 15). Condition of approval 2 ensures compliance with the County's timing standard.

For these collective reasons, we request that the Hearings Officer uphold the Decision conclusion that the Project meets the development standard at MCC 39.5590(C)(4)(i) and find the conclusion is supported by substantial evidence in the record.

MCC 39.5590(D)(1)

MCC 39.5590(D) states that "[m]itigation shall be required to offset the impacts of development within the Riparian Area[,]" and the subsection establishes how mitigation can occur. Subsection (D)(1) does not include mitigation requirements. Instead, it provides definitions that guide the scope of mitigation requirements, providing:

> *(1) Vegetated Corridor Condition: For the purposes of the SEC-wr Overlay, vegetated corridor conditions are defined below.*
>
> *(a) **Good Corridor**: A combination of native trees, shrubs, and groundcover covering greater than 80% of the area, and greater than 50% tree canopy exists (aerial measure).*
>
> *(b) **Marginal Corridor**: A combination of native trees, shrubs, and groundcovers covering 50-80% of the area and/or 26-50% tree canopy exists (aerial measure).*
>
> *(c) **Degraded Corridor**: A combination of native trees, shrubs, and groundcovers covering is less than 50% of the area, and/or less than 25% tree canopy exists (aerial measure), and/or greater than 10% of the area is covered by invasive, non-native species.*

Despite unambiguous text that explains that subsection (D)(1) defines the three categories of vegetated corridor conditions, Appellants claim at Hearing-1 and CCPO-2 that the County must make a (D)(1) "good corridor" determination. Not only is that assertion inconsistent with the plain language of the code, it underscores Appellant's overall approach of isolating specific words or phrases to get to the desired conclusion instead of engaging in the text and context analysis required by *PGE/Gaines*. While (D)(1) does not itself include a standard or require a specific determination, the vegetated corridor condition definitions provide relevant context for discerning the intent and narrow scope of impacts relevant for an SEC-wr permit.

MCC 39.5590(D)(2)(b)(iv)

MCC 39.5590(D)(2)(a) describes the preferred mitigation sequence of avoiding, minimizing, or compensating for adverse impacts to regulated natural resources. As explained, in subsection (2)(a), "when proposed development would cause adverse impacts to a natural resource area, the preferred sequence of mitigation as defined in 1 through 5 below shall be followed unless the applicant demonstrates that an overriding public benefit would warrant an exception to this preferred sequence." (D)(2)(b) in turn, identifies the factors the County may consider in granting an exception to the preferred sequence:

> *(b) When evaluating potential impacts to the natural resource, the County may consider whether there is an overriding public benefit for the public project given:*
>
> *(i) The extent of the public need for the proposed development;*
>
> *(ii) The functional values of the Riparian Area that may be affected by the proposed development;*
>
> *(iii) The extent and permanence of the adverse effects of the development on the Riparian Area, either directly or indirectly;*
>
> *(iv) The cumulative adverse effects of past activities on the Riparian Area either directly or indirectly; and*
>
> *(v) The uniqueness or scarcity of the Riparian Area that may be affected.*

While the text of subsections (D)(2)(a) and (b) is clear and unambiguous, Appellants focus exclusively on the term "cumulative adverse effects" in factor (b)(iii) to argue that the SEC-wr permit for development on the Cotrell Pond Property requires consideration of alleged adverse effects created by the Filtration Facility. (*See* Appeal-Ground 1, Hearing-4, Robert-4, and CCPO-1). The multilayered problems with that focus are addressed at length in the Applicant's Pre-Hearing Statement response to Ground 1 (Exhibit E.2, pages 2-3). In post-hearing submittals (CCPO-1 and Roberts-4) Appellants effectively responded to Applicant's points on the inapplicability and limits of the cumulative adverse effects factor, but yet again failed to engage in an accurate or complete evaluation of relevant text and context. The Applicant's Response specifically addresses CCPO's and Roberts' virtually identical arguments by once again evaluating relevant text and context of both subsection (D)(2) and unrelated SEC-wr provisions cited in Appellant's response to support their desired conclusion. (Exhibit J.1, pages 3 -5; 25-26). Finally, the Applicant's Response provides evidence that even if consideration of reasonably foreseeable upstream influences were required by subsection the (D)(2)(b)(iv) "cumulative adverse effects" reference, taking into consideration the Filtration Facility stormwater system would not alter the conclusion that the Project meets all applicable SEC-wr approval criteria. (Exhibit J.1, pages 5-6; Attachment 1).

CCPO also cites subsection (D)(2) in support of its CCPO-3 claim that temporary construction effects should be evaluated independently, claiming the distinction between temporary construction effects and long-term restoration benefits "matters under MCC 39.5590(D)(2), which governs the sequence of avoiding, minimizing, and compensating for adverse impacts." (Exhibit I.1, page 2). CCPO however, provides no further explanation or evaluation of text or context to establish how those concepts are connected. Moreover, the record clearly establishes that the Project minimizes the stream restoration grading area (Exhibit E.2) and complies with the compensatory mitigation requirements of MCC 39.5590(D)(3) by providing on-site restoration by converting Degraded corridors to Good corridors at a ratio exceeding 1:1.

For these collective reasons, we request that the Hearings Officer uphold the Decision conclusion that the Project meets the mitigation sequence standards at MCC 39.5590(D)(2) and therefore does not require the overriding public benefit exception under the factors in Subsection (b); and further find these conclusions are supported by substantial evidence in the record.[6]

MCC 39.5590(D)(3)

MCC 39.5590(D)(3) establishes the general requirements for compensatory mitigation "required to offset the encroachment of development into the area." The primary requirement at subsection (D)(3)(a) is "[a]ny person who alters or proposes to alter a Riparian Area shall restore or create a vegetated corridor equivalent to or larger than the altered corridor in order to compensate for resource losses." Subsection (b) then applies ratios for both restoration and creation of riparian area that differ depending on whether the restoration or creation is off-site or on-site. In this case, vegetated corridor restoration following development is not just mitigation, it is a primary objective of the Project. In any case, the on-site restoration exceeds the required ratio of 1:1.

Appellants reference MCC 39.5590(D)(3) to make the point that "mitigation work and revegetation must be established and monitored on a defined timeline," (Roberts-2; see also Hearing-2), and mitigation requirements at (D)(3) presume a "defined, monitorable mitigation plan." (CCPO-3) While subsection (D)(3) defines the required vegetation and creation ratios for compensatory mitigation, subsection (D)(4) describes the mitigation plan requirements. The Decision correctly concludes that the restoration plan elements of the Cottrell Riparian Plan (Exhibit A.5) satisfy the subsection (D)(4) requirements including defined restoration goals and timelines. That conclusion was neither referenced nor challenged by Appellants. As addressed above, project timelines for in-water work, soil disturbance, and planting are further explained in the Applicant's Response to CCPO-6. Finally, Condition of approval 4 dictates the installation and the annual monitoring and reporting requirements for the vegetated restoration areas identified in the Assessment and Restoration Plan, and Condition 5 creates an on-going requirement for the property owner to maintain the Riparian Area in "Good Condition" pursuant to MCC 39.5590(D).

For these collective reasons, we request that the Hearings Officer uphold the Decision conclusion that the Project meets applicable compensatory mitigation standards at MCC 39.5590(D)(3) and the mitigation plan requirements at subsection (D)(4); and further find these conclusions are supported by substantial evidence in the record.

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[6] In the alternative, if the Hearings Officer finds that an exception to the preferred sequence is needed, substantial evidence in the record as a whole supports the conclusion that there is an overriding public benefit for this public project when considering each of the factors at MCC 39.5590(D)(2)(b(i) through (v).

IV. Conclusion

Applicant requests that the Hearings Officer deny the appeal and uphold the County's approval of the SEC-wr permit for the stream restoration Project. Overall, the substantial evidence in the record supports the conclusion that the Project meets or exceeds all applicable approval criteria.

Respectfully Submitted,

RADLER WHITE PARKS & ALEXANDER