BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

COTTRELL COMMUNITY PLANNING ORGANIZATION, PAT MEYER, MIKE COWAN, PAT HOLT, RON ROBERTS, KRISTY MCKENZIE, MIKE KOST, RYAN MARJAMA, MACY AND TANNER DAVIS, AND LAUREN AND IAN COURTER Petitioners, and PLEASANT HOME COMMUNITY ASSOCIATION AND ANGELA PARKER, dba HAWK HAVEN EQUINE, MULTNOMAH COUNTY RURAL FIRE PROTECTION DISTRICT NO. 10, OREGON ASSOCIATION OF NURSERIES, MULTNOMAH COUNTY FARM BUREAU, GRESHAM-BARLOW SCHOOL DISTRICT 10J, and 1000 FRIENDS OF OREGON Intervenor-Petitioners, v. MULTNOMAH COUNTY, Respondent, and PORTLAND WATER BUREAU, Intervenor-Respondent.	LUBA No. 2023-086

INTERVENOR-PETITIONER MULTNOMAH COUNTY RURAL FIRE PROTECTION DISTRICT NO. 10'S PETITION FOR REVIEW

JULY 2024

Exhibit M.8

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SUPPLEMENTAL APPENDIX

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TABLE OF AUTHORITIES

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I. STATEMENT OF THE CASE

A. Statement of Petitioner's Standing.

Intervenor-Petitioner Multnomah County Rural Fire Protection District 10 (RFPD10) has standing to pursue this appeal under ORS 197.830(3). Rec-796-813 and elsewhere.[1]

B. Nature of the Decision and Relief Sought.

The challenged decision is a decision by a county hearings officer to approve consolidated applications to build a 135 million gallon per day drinking water filtration facility and associated pipelines on land zoned Multiple Use Agriculture (MUA-20) and Exclusive Farm Use (EFU) in Multnomah County. This decision must be reversed or remanded.

C. Summary of the Arguments.

The hearings officer misconstrued MCC 39.7515(D), adopted inadequate findings that lack substantial evidence to show that the proposed use "will not require public services other than those existing or programmed for the area."

The hearings officer misconstrued MCC 39.7515(F), adopted inadequate findings that lack substantial evidence in concluding that construction and operation of a water filtration facility that will serve more than one million people "will not create hazardous conditions."

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[1] All record page numbers or "Rec" citations herein are to the County's Second Amended Record filed on May 23, 2024. All references to the Appendix or "App" citations reference to the Joint Appendix filed by the Petitioner Cottrell CPO *et al.* Additional references attached to this brief are references as "S.App."

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D. Summary of Material Facts.

In an effort to avoid repetition, the material facts raised in the Petition for Review filed by RFPD10 that supplement the statement of facts set forth in the Petition for Review filed by the Petitioners Cottrell CPO *et al.*

RFPD10 is the primary provider of fire and emergency services to an approximately 14-square mile area, including the property that is the subject of this proposal. This service is accomplished from Station 76, located at the corner of SE Dodge Park Blvd and SE 302nd Ave, which is staffed with three firefighters, 24-hours per day. It maintains one fire engine along with a second back-up engine owned by Gresham Fire and Emergency Services (GFES) that is parked at Station 76, except when it is needed at other city stations. Rec-3798. Hazardous materials response, confined space rescue and supplemental water tankers are not available at Station 76. These specialty services must be dispatched from stations in Gresham or Clackamas County stations. Rec-3799.

All of RFPD10 fire and emergency services are provided through the use of rural county roads. These roads have no sidewalks, bike lanes or other areas designated for pedestrians or equestrians, and few, if any, provide shoulders sufficient to accommodate additional motorized or non-motorized uses. Rather, all transportations users must share the existing two travel lanes. Rec-3801. These roads were designed to move farm products to market and were not designed to accommodate the construction or operation of an industrial urban-scaled water facility. Rec-3802.

Once completed, the PWB water filtration plant will filter water for "one quarter of Oregonians" or over one million water users. App-14, Rec-4175.

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Construction of this facility demands construction truck and worker vehicles that far exceeds existing rural traffic levels.[2]

In addition to traffic resulting from mobilizing the work force and materials necessary for construction, pipeline installation will demand full closures of three of the busiest intersections in the area - Dodge Park Boulevard at the Cottrell intersection, Lusted Road at Altman and Altman at Oxbow Drive along with numerous partial closures allowing for flagger-authorized one-direction travel. Maps at App-8-9. Rec-3004-4215-4216. Staging areas for pipeline construction will include not only construction materials and equipment, as well as some undetermined parking for all of the workers involved with the installation along roadways with little to no shoulder.[3] Rec-1974.

The water treatment facility will have the capacity to treat 135-160 million gallons of water per day, 7 days per week, 365 days per year. Rec-3809. Accomplishing this will require an average of 832 chemical deliveries

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[2] For comparison, the Cottrell / Carpenter intersection during the am peak hour experiences 14 am peak hour trips and 11 pm peak hour trips. Rec-4206. During the 5-to-7-year construction period, construction of this facility will add an additional average of 439 trips with a peak of 749 trips during peak hours. Although PWB agreed to a condition capping use of this intersection to 296 vehicles during peak hours, this is still a 25-fold increase to existing congestion levels. Rec-1941

[3] According to PWB, pipeline construction parking will be at the facility or at the pipeline site. App-258. Given the complicated ride-sharing scheme necessary for the facility, it is more likely that pipeline workers will park at the on-site, requiring something on the order of 120 parking spaces located within the right-of-way.

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per year – approximately 3 per day and an average of 468 sludge removal trips per year – approximately once per day. The amount of gasoline, diesel and other miscellaneous hazardous materials to be delivered and utilized on site during the construction period or during operation is not known. Rec- 3811.

After close review of the PWB proposal, RFPD10 adopted Resolution R-3-2022, which includes detailed findings explaining how it concluded that the proposed water filtration facility and pipelines would not satisfy the criteria necessary for approval and recommended denial of the subject applications. Rec-5290-5317. RFPD10 identified hazardous conditions created by the amount of construction traffic coupled with road closures necessary for road improvement and pipeline installation projects when coupled with the 14-square mile service boundary, and concluded emergency response times would be compromised and call load increased. Rec-5313. Upon reviewing PWB's own list of hazardous conditions anticipated at the completed plant, RFPD10 identified concerns over working at height, respiratory protection needs, emergency egress, chemical storage, dangerous and hazardous materials, moving equipment environmental conditions and pits and underground vaults. Rec-5316.

PWB responded by identifying a lengthy list of conditions of approval. Most notably, PWB would provide a Transportation Control Plan calling for notice to RFPD10 of road closures and priority travel movements to emergency services, App-318, and a Hazardous Materials Management Plan that will identify potential facility risks and facility designs "that minimizes the

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likelihood of a spill or incident" and includes an emergency response plan, App-308. In addition to adopting by reference much of PWB final written argument as findings in support of the decision, nearly all of the conditions proposed by PWB were adopted in their entirety by the hearing officer. This appeal followed.

E. Statement of Board's Jurisdiction.

LUBA has jurisdiction over "land use decisions." ORS 197.825(1). The challenged decision is a "land use decision" because it applies the Multnomah County Code (MCC), which are land use regulations as defined under ORS 197.015(11).

II. ASSIGNMENTS OF ERROR

A. FIRST ASSIGNMENT OF ERROR – The Hearings Officer Erred by Misconstruing MCC 39.7515(D), Adopting Inadequate Findings that Lack Substantial Evidence to Show that the Proposed Use "Will not Require Public Services other than those Existing or Programed for the Area."

1. Statement of Preservation

During the proceedings below, RFPD10 continually maintained that it "cannot provide adequate services in light of what is proposed." Rec-3782, 3783-3786. RFPD10 explained why the Intergovernmental Agreement with GFES and the Fire Service Review Form are not evidence indicating that GFES or RFPD10 maintained existing or had programmed emergency services necessary to serve this use. Rec-3785. RFPD10 challenged all of the evidence relied on by PWB to suggest that this standard was satisfied. Rec-796-813. The issues raised here were preserved.

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2. Standard of Review

Under ORS 197.835(9)(a), LUBA must reverse or remand a land use decision if it "improperly construed the applicable law." Because the decision was made by a hearings officer, LUBA shall not give the interpretation any deference. *Gage v. City of Portland*, 319 Or 308, 317, 977 P2d 1187 (1994). This requires the application of the ordinary principles of constructions as set out in *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 611-12, 859 P2d 1143 (1993), and *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009), which requires a determination of the local government's intent in enacting the pertinent code provisions by examining the text in context, and available legislative history before resorting to general maxims of statutory construction.

Adequate findings must be responsive to the requirements of the applicable legal criterion and show that each criterion is met. Additionally, findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, (1979).

Substantial evidence is evidence that a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). A finding of fact is supported by substantial evidence if the record, viewed as a whole, would permit a reasonable person to make that finding. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988).

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3. Argument

One of the conditional use criteria for allowing a Community Service use, MCC 39.7515(D), requires a finding that the proposal "will not require public services other than those existing or programed for the area." App-2.

The relevant portion of the Hearings Officer's analysis of this criterion provides:

> "In my reading of the code, this section just requires that the services be available. I believe the RFPD10 comments are more appropriately addressed in the later sections that concerns whether a lack of the amount of service creates a hazardous condition. I do not believe the RFPD10 is arguing there is no fire service, just that it is inadequate for the scale of the project and it will create a hazardous condition. I find that there is fire protection services for the project. I adopt Applicant Final Rebuttal pages 190-192 as my findings that the fire services are provided.
>
> There was also considerable debate about specialty emergency services. The code does not specifically require all types of specialty fire protection services. I do not think an application could be denied under this criterion because the RFPD10 did not have a tall building fire response capability, a dive team, rope rescue team or hazmat team. An application that needed these capabilities and they were not in the area could potentially create a hazardous condition but that is not what the code requires. Similarly, just because an application may need more sheriff patrols or very rarely, a police negotiator, does not mean there is not sheriff service in the area. Even if the code did require these specialty teams to meet this requirement, I agree with the Applicant that special response services exists in the area. I adopt Applicant's Final Rebuttal arguments pages 192-194 as findings that to meet this criterion." App-55.

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First Subassignment of Error – The Hearings Officer Failed to Identify the Level of Fire and Emergency Services "Required" to Serve the Proposed Use.

Although no party disputes that fire and emergency protection services fall within the scope of "public services" subject to MCC 39.7515(D), the hearings officer misconstrued this standard to conclude that the "required" level of services requires nothing more than "availability" or the existence of an undetermined level of emergency services. Before evaluating whether services are available, by its plain language MCC 39.7515(D) demands an initial determination of what level of public services are "required" by this use. In this context, the term "required" means "to call for as suitable or appropriate in a particular case." *Webster's Third New Int'l Dictionary* 1929 (unabridged ed 2002). *PGE supra.* Determining what is suitable or appropriate for any particular case mandates some affirmative expression quantifying and characterizing the demand created by the use along with an evaluation of whether what is available is, in fact, adequate to serve the use.

The hearings officer makes no effort to identify the number or types of trucks, levels or qualification of staffing, required response times or specialty services that might be "required" in order to support this use. A corollary, and just as fundamental question that is also not answered, is whether providing such levels of service, assuming that they are available, can be accomplished without compromising existing levels of service. None of these questions were answered by the hearings officer or by PWB in its findings adopted by reference.

To the extent that some broad conclusions of adequacy might be sufficient to respond to this obligation in the abstract, this approach, to the

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extent that it was adopted by the County, is insufficient in the face of RFPD10 detailed and qualified concerns.[4] *Norvell v. Portland Area LGBC supra.*

Rather than acknowledge this express obligation, by stating that "the application could not be denied under this criterion if the identified service provider did not have special service capabilities that may be required by the use," the hearings officer effectively repudiated any such obligation. Determining the quality and character of the emergency services required by the proposed use is expressly what this criterion mandates. Without first determining the scope and quality of the public services that are "required," it is essentially impossible to then determine whether such levels or elements are "existing or programmed for the area."

Determining whether adequate public services exist, MCC 39.7515(D) required: (1) identification of the level of general as well as specialty services necessary to serve the proposed use including required equipment, number of personnel and qualifications, minimum response times, along with an evaluation of (2) whether these identified levels and types of services are, in fact, "existing or programmed for the area." By interpreting this standard to require nothing more than availability based solely on the existence of a fire service at some undetermined level, the hearings officer failed to give meaning to the obligation to determine what is "required" in the first instance.

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[4] In addition to identifying lack of staffing, training and required equipment, RFPD10 identified the impacts of increased traffic and deteriorated roads on the overall call load, the implications of simultaneous calls on Station 76 which has only 1 truck available for emergency response, and provided detailed explanation of the impact of "unit availability" and "distance" on "response time." RFPD10 pointed out that the existing service provider commitments provided by GFES are not indefinite, GFES is under extremely constrained funding limitations, and has no dedicated funding or plans to serve PWB. Rec-3783-3785.

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The hearings officer failed to articulate the level of emergency and fire services that must be available before simply concluding that they are met. This error requires remand.

Second Subassignment of Error –The Hearings Officer Misinterpreted the Standard to Require Evidence of Provider Ability and Commitment to Serve

Beyond failing to identify the minimum level of emergency service required, the hearings officer interpreted the MCC 39.7515(D) obligation to require nothing more than whether emergency service was "available." The term "available" means "such as may be availed of: capable of use for the accomplishment of a purpose." *Webster's Third New Int'l Dictionary* at 150. The hearings officer made no express findings identifying what evidence led him to believe that service was "available."

Rather, what the analysis in the finding implies is that the hearings officer was not interested in determining whether RFPD10 had committed to provide adequate levels of emergency service but rather applied a much lower threshold requiring only that emergency services exist within the area. No party disputes that RFPD10 exists and provides emergency services to rural uses within the Station 76 service area. However, the mere existence of functioning rural fire district is woefully inadequate to respond to a criterion that demands a qualitative inquiry into whether a rural service provider has the availability to serve and the required level of service without compromising service to existing rural uses. Without this qualifying evaluation, there is no ability to determine if the "required" services exist.

With respect to the term "programed for the area," the hearings officer concludes:

> "...I understand that meaning as, for instance, if an application needed a water line, it could still be approved even if the water

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> line was not currently in the area, if it was going to be installed before the project operated." App-54.

RFPD10 does not dispute the hearing officer's implicit interpretation of "programed for the area" as used in this water line example but it also illustrates the fundamental failure as applied to fire and emergency services. In the example, a water line is needed to serve the proposed use. Although the water line does not exist when the land use review occurred, presumably the record from this example reflects planning and engineering feasibility and conditions to ensure that the water line will, in fact, be installed and operating at the time of project operation.

In contrast, none of these steps identified by the hearings officer as required in order to determine compliance are satisfied in this decision. First, as noted above, there is no determination to what degree fire and emergency protection service is needed (the project needs a water line). Second, the hearings officer would have to determine if the identified level of service would be provided before the development is in operation (the water line would be in place). Third, there is a commitment from the fire service to provide the service (an adequate supply of water is available to serve the line). As discussed in greater detail below, the record lacks the requisite evidence to show that the required levels of service are available and will be provided.

Applying the hearings officer's water line example, whether a facility is "programmed for the area" would require review of the GFES or RFPD10 adopted service or facility plans identifying a need and intent to service an urban-scaled industrial facility as proposed. Such adopted plans would indicate that fire and emergency services have been scaled and supplemented to meet the demands of this use. Such plans are not in this record and to the best of RFPD10's knowledge, they do not exist. Rather, what the record reflects is that

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RFPD10 plans for and operates a fire district sized, funded and operated to serve rural uses within Station 76 service area. There are no plans to divert limited funding or services from these existing and future rural customers to serve the PWB-proposed industrial use. In fact, the testimony from RFPD10 was that:

> "The Board identified specific emergencies that RFPD10's Station 76 is unable to respond to due [to] lack of staffing, training, and required equipment. The RFPD10 report also provided information related to the impacts of increased traffic and deteriorated roads on call load; and the implications of simultaneous calls on station 76 which has only 1 truck available for emergency response. Furthermore, the Board provided a detailed explanation of the impact of 'unit availability' and 'distance' on 'response time.'"

Further within those same findings, RFPD10 states:

> "[I]t assumes that GFES is currently able to provide adequate service. This is not the case. The City of Gresham states: '**Our community safety systems are under extreme stress .....Simultaneous calls for one apartment fire and one medical emergency max out our emergency services.'**
>
> If GFES is unable to adequately respond to emergency service calls within its own primary service area, it will not be able to provide timely support of emergency service calls within RFPD10's primary service area." (Emphasis in original). Rec-3785.

The hearings officer's findings on this point close by adopting portions of the PWB's final written argument, pp 190-194 in support of their position. What is set forth in these pages is recitation of the evidence that PWB believes supports a finding that emergency services exist in this area. These pages offer no further explanation of the hearings officer's interpretation of the standard in the first instance. Rather, this evidence is insufficient to establish what level of

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service is necessary or that RFPD10 is capable or willing of providing services at this level.

Summarizing these two sub-assignments, the hearings officer failed to: (1) identify what level of service is required to serve this use; and (2) explain how that level of service will be achieved. These are the obligations set forth in the express and plain language of the standard and remand is necessary for the hearings officer to comply with the requirements.

Third Sub-Assignment of Error - The PWB-Cited Evidence Does not Support a Finding that Emergency Services will be Adequate to Serve the Use.

In this Subassignment, RFPD10 challenges the evidence relied on by the hearings officer in support of the conclusion that MCC 39.7515(D) is satisfied, largely by adopting wholesale portions of the PWB final argument as his own. App-296-300. Substantial evidence that the required level of emergency service will be available to serve this use would be an affirmative statement by RFPD10, the rural emergency provider with jurisdiction over the subject property, that it has planned for and committed to the provision of service.

No such statement from RFPD10 exists. Rather, what does exist is RFPD10 explanations that it has neither the committed funding, facilities or specialized services available, either by itself or through its contractor GFES, to serve this industrial-scale use, nor was it willing to commit any funding or other efforts to this purpose. Rec-3785. RFPD10 explained that its Station 76 is staffed with 3 firefighters with one engine available for calls. Rec-5313. Specialty response services including hazardous materials, confined space rescue expertise and supplemental water tankers are not available at Station 76. Rec 5314.

There is no backup first responder nearby if Station 76 is responding to an emergency elsewhere and receives a call from the PWB facility. GFES

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provides secondary supportive and specialty emergency services through Station 72 (highest level of overlapping calls) and Station 71 (second highest level of overlapping calls) but substantial growth in demand and lack of funding call into question GFES's ability to provide consistent and timely service to the proposed facility.

RFPD10 explains how over one million construction vehicles during the lengthy construction period, extensive pipeline construction and the ongoing operation of an industrial water plant will increase its call load and compromise its ability to maintain service levels for current and anticipated growth in its rural service area. RFPD10 notes that it currently levies the maximum the District is authorized to collect and, therefore, cannot increase existing levels of staffing or equipment to service this proposal. Rec-5313.

Undeterred by the lack of affirmative commitment to provide service from RFPD10, the PWB relies on three particular documents that it claims support finding compliance with MCC 39.7515(D). These include an IGA with GFES, a Fire Service Agency Review Form issued by GFES, and a Fire Protection & Life Safety Third-Party Consulting Review Report (Fire Protection Report). Of critical importance, none of these documents articulate what level of service in terms of number and type of personnel, equipment, response times or the scale or type of specialty service needs that are necessary to serve this use or that such service can and will be provided without compromising existing service levels.

For example, the IGA provides for the following level of service:

> "The City will provide a minimum level of service within the area of the District that is consistent with the service provided within comparable areas of the City; but in no event less than the level of service more specifically required by other provisions of this Agreement, including, but not limited to, Article II. Section 4.

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> Fiscal constraints could require a reduction in service...." Rec-1897-1898.

Nothing in the record indicates that the IGA contemplates or otherwise plans for service to what will be the largest urban-scale water treatment facility in the state, nor does it identify what the "minimum level of service" requires for this type of urban-scaled conditional use.

The record does not reflect whether any such fiscal constraints have driven a reduction in service, particularly when RFPD10 explained that GFES "current operational service levels are not sustainable with the existing funding gap[5] and according to a GFES statement, recounted by RFPD10:

> "Our community safety systems are under extreme stress ... Simultaneous calls for one apartment fire and one medical emergency max out our emergency services." Rec-3785.

These statements cast doubt on GFES ability to provide the required levels of service to an urban industrial use in the long-term and the IGA specifically contemplates reductions in staff if "fiscal constraints" so dictate.

The IGA was executed in 2015, long before this application was filed, the IGA is silent on providing service to new uses, particularly urban-scaled conditional uses that were not in existence when the agreement was signed. By its terms, the IGA expires on July 1, 2025. Rec-1910. In order for emergency service to exist or "be programmed" for the area, the evidence would have to show that there was an agreement in place to provide staffing at the minimum levels in perpetuity.

If the provision of adequate service can be implied to indicate that minimum levels of service will be achieved through staffing and maintaining

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[5] As evidence that this concern was justified, RFD10 pointed out that the public safety levy in May, 2023 was defeated. Rec-807.

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existing Station 76 equipment, nothing in the IGA identifies what levels of staffing are necessary to serve an industrial water treatment facility on rural lands or whether staffing at the necessary levels will, in fact, exist (or be available) to service this use. The only thing that this IGA shows is that Gresham Fire and RFD10 have a coordinated agreement to provide service through July of 2025, but knowing what levels are "required" for this use remains a mystery.

The second item noted by PWB in support of its claim of available service is the GFES "Fire Service Agency Review Form." Rec-3010-3015. Like the IGA, this form fails to articulate any level or type of emergency services that are needed to serve this facility. Rather, the Review Form says that "the subject property is located within our service boundaries or is under contract." (emphasis in original). Existence within the identified service boundaries does not identify what levels service will be necessary or indicate that those service levels will be provided.

In the comments attached, GFES identifies development components including emergency access roads and fire flows. As PWB admits, the Form deals with those "items needed to comply with fire code and those items were incorporated into the facility design including meeting requirements for fire flow." App-296. This is an inquiry into facility design and makes no mention of the levels of emergency service capacity that must be available to serve this use necessary to satisfy MCC 39.7515(D).

The Review Form closes with a letter from RFPD10 explaining that the scope of the review form is limited to specific fire code related issues and should not be construed "as an approval or implied approval of the proposed facility by RFPD10." App-325, Rec-3010. Nothing in this form, or its attached

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exhibits, conclude that fire services exist or will exist at levels required to serve the proposed use.

In fact, in response to the PWB's statements that the IGA, coupled with the Review Form, were sufficient to establish compliance with MCC 39.75159(D), GFES Chief Scott Lewis explained:

> "The authors either have no experience in evaluating the delivery of fire and emergency services, are purposely trying to mislead you and Multnomah County, or are making assumptions based on incomplete information, facts, and knowledge. Regardless of their rationale, **by no known standard can Gresham Fire and Emergency Services (also known as the Gresham Fire Department) deliver the requisite personal and equipment to a major event within the recognized time standards**. For reference: NFPA Standard 1710 Organization and Deployment of Fire Suppression Operations, EMS and Special Operations in Career Fire Departments." (Emphasis added) Rec-4200.

The county findings offer no response to this GFES-identified failure. See *Norvell v. Portland Area LGBC, supra.*

Perhaps, most importantly, GFES is not the designated service provider in this case. RFPD10 is the rural fire protection district charged with providing fire protection and emergency medical services to the area where the PWB facility is to be located. GFES is the contractor serving RFPD10. While GFES provides input and technical advice on emergency services, the elected RFPD10 Board has sole discretion over matters related to policy and the allocation of District resources.

Taken together, these documents show that RFPD10 contracts with GFES to provide specific emergency services but they do not indicate any ability or commitment to serve a conditional use or the PWB facility in particular. These documents do not purport to provide the type of individualized assessment of use demand that is critical to know what is

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required, nor do they commit to provide service to this particular use, either now or throughout the life of the project. Nor do they refute the specific testimony from both RFPD10 and GFES that they do not have the capacity to provide the necessary service.

From this point, rather than identify the levels of emergency services required, PWB attempts to discredit the RFPD10 adopted resolution and other testimony by referencing the Fire Protection Report. App-297, Rec-1828-1894. In addition to inappropriately shifting the burden to RFPD10 to show why the emergency services are insufficient, this Fire Report remains inadequate and lacks substantial reason. *Fasano v. Washington Co. Comm.*, 264 Or 574, 586, 507 P2d 23 (1973); *Murphy Citizens Advisory Comm. v. Josephine County*, 28 Or LUBA 274 (1994).

First, the Fire Protection Report was completed by a third-party consultant from North Carolina. The report provides no indication that the recommendations were based on any on-site evaluation of the rural road system, its condition or the implications of the massive construction project. Rec-1828-1894. This lack of a site visit is particularly important when this expert's opinion serves as the basis for PWB identified "minimum emergency access and coordination" conditions of approval relating to roads that were never seen. App-318. No reasonable person could believe the expertise of an out-of-state consultant as to whether the road system capacity could accommodate pipeline construction while providing continuous immediate passage for emergency responders without a site visit. To make matters worse, Transportation Control Plan Condition 7(c), which PWB claimed were essential to ensure coordinated emergency vehicle access were not adopted as part of the hearings officer's final decision.

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Second, the Fire Protection Report is non-responsive to any determination of whether emergency services are or will be adequate. First, the PWB relies on the Fire Protection Report finding that Station 76 experiences a low call volume, a high probability of "unit availability" and a Station Demand Reliability of 90%, which the fire expert maintains is "considered the best practice and the most reliable measure to perform." App-297 citing Rec-1834. The fact that Station 76 is currently operating smoothly and able to meet some of its existing service metrics is not responsive to determining what additional demand the PWB facility will place on Station 76 and whether this demand will compromise existing service levels.

The Fire Protection Report goes on to project that this facility would be expected to experience a call volume that is the same, or reduced, from those experienced by a wastewater treatment plant located in Gresham or 4.5 calls for service per year. App-297. Setting aside whether RFPD10 agrees that it is reasonable to assume 4.5 service calls per year,[6] there is no analysis of what effect adding an additional 4.5 service calls per year will have on RFPD10's ability to maintain existing levels service. More importantly, there is no discussion of how rural road conditions, including all of the additional traffic resulting from construction, would impact RFPD10's ability to meet minimum service standards. *Sunnyside Neighborhood v Clackamas County Board of Commissioners*, 280 Or 3, 569 P2d 1063 (1977). Identifying a comparative call

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[6] This PWB identified comparator is inapt because this facility presumably maintains an urban level of fire protection that is more proximate, specialized and is not available in a rural area. Further, it is unlikely that construction of this city facility introduced urban levels of construction traffic into a rural area along with numerous complete and partial road closures that will disrupt and delay RFPD10's service abilities.

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volume producer alone is insufficient to establish that emergency services will be available.

RFPD10 raised concerns about response times which it explained will exceed the response time standards established by the National Fire Protection Association (NFPA). Rec-5313. Rather than address NFPA minimum response time standards directly, PWB's North Carolina consultant concludes that: (1) if minimum response times are already exceeded, the facility will have no impact on this metric, and (2) it would be reasonable to expect 7-8 minute response times given the location of the facility from Station 76. Rec-1836. Whether or not response times will be comparable to other uses in the district is not the standard. The question is what response times will be available to this use given existing commitments and whether that meets the NFPA standard, which remains unknown.

In *Langford v City of Eugene,* LUBA identified a lack of evidence and insufficient findings explaining how an emergency response time of four minutes would be satisfied where the hearings officer found that a three- to five-minute response time was available to the subject property. 26 Or LUBA 60, 64 (1993). Here, the applicant does not identify what response time is the minimum necessary to serve this use, how satisfying these minimums will be achieved during or after construction or to what degree this addition will impact existing service.

Further, to the extent that LUBA finds that there is conflicting evidence about the extent to which fire service necessary to serve this facility exists, RFPD10 questions the hearings officer's reliance on the Fire Protection Report over evidence of RFPD10 in the first instance. First, Comprehensive Plan Strategy 11.17 specifically and explicitly provides for RFPD10 review and a determination of fire service adequacy is required:

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> "As appropriate, include school districts, policy and fire protection, and emergency response service providers in the land use process by requiring review of land use applications from these agencies regarding the agency's ability to provide the acceptable level of service with respect to the land use proposal." S.App-1.

In fact, during the public hearing, the hearings officer stated:

> "One of the things that stood out to me was the Fire District's expert testimony. Those, and I can tell you right now, those people have proved that they are experts." Video 4:55:31.

Yet, rather than rely on the RFPD10 findings that it is not capable of providing an acceptable level of service, the hearings officer relies on evidence provided by a third-party "expert" that is not the designated service provider. When it comes to evaluating expert testimony, findings must explain why it found certain evidence more reliable. RFPD10 experience is stated at Rec-3783. Where there is conflicting evidence, the local government may choose which evidence to accept, but it must state the facts it relies upon and explain why those facts lead to the conclusion that the applicable standard is satisfied. *LeRoux v. Malheur County*, 30 Or LUBA 268, 271 (1995). The hearings officer failed to explain why the North Carolina consultant's evidence was deemed more reliable in determining what emergency services could be provided over the testimony of the actual designated service provider - RFPD10.

For these reasons, the County erred in concluding that evidence supported a finding that this use "will not require public services other than those existing or programmed for the area."

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Fourth Sub-Assignment of Error – The Hearings Officer's Finding that Hazardous Materials Response, Confined Space Rescue and Supplemental Water Tankers will be Available are Insufficient and Lack Substantial Evidence.

Beyond a finding that no evaluation of specialty emergency services is necessary, the hearings officer's findings close with a statement in the alternative that, if a finding of specialty services availability is necessary, the criterion is satisfied for the reasons set forth in PWB's final written argument at App-298-300.

The focus in these findings is again on the Fire Protection Report. That report explains that a complete hazardous materials or technical rescue response are not required for the first response station but rather will be provided out of Gresham Station 72, approximately 16 minutes from the project site. App-298. There is no indication that a 16-minute response time from Gresham Station 72 is the level that is appropriate or "required." PWB disavows that the NFPA includes any defined time threshold for specialty responses. Either PWB must show that whatever the applicable NFPA response times are, that they will be satisfied, with the emergency services available or planned for the area, or some other standard, determined to satisfy MCC 39.7515(D) must be identified and shown to be satisfied. This determination must take into account RFPD10 and GFES commitments to existing and future growth customers[7] as well as budget constraints that might interfere with or limit those options.

A reasonable person would not rely on the conclusions of a North Carolina consultant who had never visited the site or its surroundings over that of the RFPD10, the experts in emergency service provision for this area. For these reasons, this decision must be reversed or remanded.

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[7] RFPD10 specifically noted estimated growth of population and employment of 3-3.5% and determined any excess service capacity should be reserved for this growth. Rec-5313.

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B. SECOND ASSIGNMENT OF ERROR – The Hearing's Officer Misconstrued the Standard, Adopted Inadequate Findings that Lack Substantial Evidence to Show that the Proposed Use "Will not Create Hazardous Conditions."

1. Statement of Preservation

All of the arguments set forth below were preserved. RFPD10 argued that the proper interpretation of this standard required a finding of no hazards and that compliance could not be achieved through conditions requiring mitigation. Rec-3787. The utilization of large volumes of hazardous materials on a "24/7/365 basis" creates "the potential for release of hazardous materials" during "transport, off-loading, storage and feed equipment failure." Rec-3817. Notwithstanding facility design, training and best management practices, including a hazardous materials plan and construction traffic management plan, the hazardous conditions will remain. Rec-797. RFPD10 also raised concerns that the additional construction traffic, coupled with the road closures or detours necessary for pipeline installation, will delay RFPD10 response times creating hazardous conditions that will affect the broader community. Rec-801-802.

PWB's interpretation of "create hazardous conditions" was set forth for the first time in its final written argument after the record was closed to any further response. Because RFPD10 could not have known that PWB would assert these new legal arguments RFPD10 cannot be foreclosed from doing so now. *Washington Co. Farm Bureau v. Washington Co.*, 21 Or LUBA 51, 57 (1991).

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2. Standard of Review

Under ORS 197.835(9)(a), LUBA must reverse or remand a land use decision if it "improperly construed the applicable law." Because the Decision was made by a hearings officer, LUBA shall not give the interpretation any deference. *Gage v. City of Portland, supra.* This requires the application of the ordinary principles of constructions as set out in *PGE v. Bureau of Labor and Indus., supra* and *State v. Gaines, supra* which requires a determination of the local government's intent in enacting the pertinent code provisions by examining the text in context, and available legislative history before resorting to general maxims of statutory construction.

ORS 215.416(9) requires counties to adopt findings responding to each issue raised in the proceedings. Adequate findings must (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards. *Sunnyside Neighborhood v. Clackamas Co. Comm., supra.*

Substantial evidence is evidence that a reasonable person would rely on in making a decision. *Dodd v. Hood River County, supra.* A finding of fact is supported by substantial evidence if the record, viewed as a whole, would permit a reasonable person to make that finding. *Younger v. City of Portland, supra.*

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3. Argument

MCC 39.7515(F) requires that the development "will not create hazardous conditions." App-2.

First Subassignment of Error - The County's Interpretation of MCC 39.7515(F) was Incorrect as it Added Terms Not Contained in the Plain Language of the Standard, Failed to Consider the Purpose for the Provision and Lacks Adequate Findings.

The hearings officer determined that the hazardous condition created by the proposal must be "significant," "exceptional," "continuous," "certain" and cannot be "mitigated to a point that it is no longer seriously hazardous" in order to violate the standard. App-56. More specifically, the hearings officer found:

> "To be denied, [a hazardous condition] would have to be something about the proposal such as an entrance with no sight clearance, a swing set that swung across a road or a sand box that was quicksand, that created an exceptional, unreasonable, continuous and unmitigated hazard. Just because the playground added trips to the road and incrementally made them more hazardous does not mean it would violate this criterion." App-56.

This interpretation is inconsistent with the plain language of the standard because terms such as "exceptional," "unreasonable," "continuous" and "unmitigated" are not terms that appear on the face of this text.[8] ORS 174.010 (when construing a statute, the judge is "not to insert what has been omitted). *Western Land & Cattle, Inc. v. Umatilla County*, 230 Or App 202, 210 (2009)

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[8] The findings are replete with similar narrowing terms that do not appear in the plain language of the standard. For example, in responding to the various hazardous conditions regarding chemical usage, the hearings officer found: "....the use of chemicals at the facility will not create an *unduly* hazardous condition and complies with this criterion." App-56.

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(ORS 174.010 is also applicable in reviewing a local regulations). Certainly, if the county had intended to prohibit only those hazardous conditions that are significant, exceptional, continuous or serious hazards, it would have stated as much.

Because the MCC does not define the term "hazardous condition," LUBA must look to the plain meaning of the word. *PGE supra*. The meaning of "hazard" is:

> "an adverse chance: danger, peril b: a thing or condition that might operate against success or safety: a possible source of peril, danger, duress, or difficulty c: a condition that tends to create or increase the possibility of loss." *Websters Third New International Dictionary* P 1041.

Two fundamental principles emerge from this definition. First, an activity can create a "hazard" when it could result in "danger," "peril," "duress" or the "possibility of loss." The degree of the danger or loss that might qualify – whether it must be "significant," "serious" or "unreasonable" is not prescribed within the definition. Second, a "hazard" exists where there is a chance or an increased likelihood of an adverse outcome. No absolute certainty or significantly high likelihood is necessary.[9] It is the chance or potential for

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[9] This conclusion is reinforced by Comprehensive Plan Policy 2.50 which provides:

> "As part of land use permit approval, impose conditions of approval that mitigate off-site effects of the approved use when necessary to:

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something to go wrong that creates a hazardous condition. As with defining the degree of harm, the likelihood of that harm is in no way limited by definition of "hazard" considered alone.

Perhaps acknowledging the lack of any limitation, PWB raises for the first time in its final submittal that "condition" means "a mode or state of being" and therefore requires continual existence of the hazardous state. App-302. Again, this argument is adopted by the hearings officer by reference. App-56. RFPD10 questions whether PWB's preferred definition is not more appropriate to describing a personal characteristic such as a social rank, work or physical status. Rather, RFPD10 believes that the more appropriate definition of "condition," given the context, would be "something that exists as an occasion of something else." *Webster's Third Int'l Dictionary* art 473. It is the "hazard" that creates the "condition" that exists. Either way, neither of these definitions suggest that any particular level of circumstance continuity or permanence is required for a "condition" to exist.

As discussed in greater detail below, a lengthy construction period significantly increasing traffic, introducing hundreds of dump trucks and heavy truck trips per day, coupled with road closures and detours is going to remain

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1. Protect the public from the potentially deleterious effects of the proposed use." S.App-2.

This further undermines the hearings officer's overly narrow interpretation of hazardous conditions to apply only to project elements that are always and certainly hazardous in their condition rather that those conditions that could be "potentially" hazardous and require conditions of approval in order to protect the public.

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hazardous for a period of 5-to-7 years would certainly create hazards for a sustained period. In addition, the 16 chemical delivery trucks entering and existing the site every week for the life of the project on roads that do not currently experience these chemical deliveries, is most certainly a continuous condition that RFPD10 identified as hazardous. Rec-1165.

The third element to PWB's efforts to narrow the definition of hazardous conditions hinges on the idea that only those hazardous conditions that a proposal "creates" qualify and PWB will not create the existing substandard road conditions. App-313. Certainly, PWB did not create the existing rural road conditions but by placing this facility at this location, at this scale, PWB is injecting 832 chemical deliveries per year, an average of 468 sludge removal trips per year for the life of the project, hundreds of thousands of heavy truck and labor force trips, and an unknown amount of gasoline or diesel deliveries during the estimated 5-to7 year construction period. Rec-3811. As a result, PWB is solely and directly responsible for creating the hazards that result from its actions.

Taken together, nothing in the plain language of "create hazardous conditions" suggests the high bar for qualification in terms of severity, length of time or permanence of condition that the hearings officer concluded was necessary. Rather, by requiring that the hazardous condition must be "exceptional, unreasonable, continuous and unmitigated hazard" the hearings officer inserted terms that are not apparent from the plain meaning of the term "create hazardous conditions." This error requires reversal or remand.

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To the extent that there is any doubt about the strictness of this obligation, in *Stephens v. Multnomah County* LUBA considered a challenge to an approval to store and transfer sewage between tanker trucks or to a storage tanks and compliance with this identical criterion. 10 Or LUBA 147 (1984). Although LUBA held that using conditions as mitigation to make a hazardous condition not hazardous is acceptable, the standard requires "an unequivocal finding of no hazardous conditions." *Id* at 152. As such, LUBA remanded for the county to adopt findings that "no hazardous conditions should result if the operation is conducted in a manner controlled by DEQ" and a determination of whether the evidence supported a finding of "no hazard."

LUBA's interpretation of this criterion in *Stephens* is exactly what the hearings officer expressly refused to accept in this case. The county had an obligation to interpret the standards consistent with the text and context of the standard. *PGE / Gaines supra.* The hearings officer's fundamental error was in not only failing to make "the unequivocal finding of no hazardous conditions" in this case but, in fact, expressly rejecting any obligation to do so. If the county or PWB do not like the strict or narrow nature of this standard, the solution is to amend the standard and not to insert additional qualifiers into the standard because doing otherwise would disallow a favored use. *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 218, 843 P2d 992 (1992) (*citing 1000 Friends of Oregon v. Wasco County Court*, 299 Or 344, 703 P2d 207 (1985) and *West Hills & Island Neighbors v. Multnomah Co.*, 68 Or App 782, 683 P2d 1032, *rev den*, 298 Or 150 (1984)).

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Rather than rely on the plain language of the standard as required by *PGE*, the hearings officer agreed with PWB arguments based on past interpretation of this criteria. App-56. How a regulation has been applied in the past is entirely irrelevant in determining whether the interpretation is correct, nor is past application relevant in the *PGE / Gaines* interpretive rubric. *Reeder v. Clackamas County*, 20 Or LUBA 238, 244 (1990); *Okeson v. Union County*, 10 Or LUBA 1, 4-5 (1983). Further, this conclusion is entirely at odds with the hearings officer statement found earlier in the findings that past interpretations are not binding. App-36.

Finally, without any analysis, the hearings officer's statement that requiring a finding of no hazard would be "unreasonable" is entirely conclusionary. In the event that PWB's final argument is construed to provide the required missing analysis, it provides:

> "The interpretation that RFPD10 encourages the County to adopt cannot be what the drafters of the criterion intended and leads to an absurd result. It would [be] impossible for virtually any Community Service use or other type of conditional use to meet an approval criterion that requires an applicant to demonstrate that there is no possibility that the proposed use will create a hazardous situation or result in harm either on the site or off the site." App-305.

This statement, along with the examples used to illustrate the point that follow, are entirely new facts submitted for the first time depriving Petitioners of any opportunity to respond. As it is, there is no evidence in the record to support a conclusion. To suggest that the hazardous conditions created by constructing and operating the largest water treatment facility in the state,

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serving one-quarter of all Oregonians, filtering 135,000 gallons per day would be commensurate with constructing or operating a rural hospital or school is nothing more than hyperbole. The scale of chemical and fuel demands for a water treatment utility far exceeds what would be required for any rural-scaled use.

In the event that LUBA concludes that the text does not provide sufficient guidance of intent to view qualifying hazardous conditions broadly, *Gaines* calls for relying on adopted purpose statements as informing regulatory intent. Neither Comprehensive Plan policy 2.45, which limits community services uses at App-4 or the purpose for the MUA-20 zone as set forth in MCC 39.4300 calling for the protection of existing uses at App-7 provide for allowing urban-scaled utilities that endanger surrounding uses.

In discussing the various risks, PWB's is myopically focused on its facility design, its operations and mitigation. For example, when discussing mitigation efforts, PWB explains that the obligation "requires a use specific inquiry and requires that the mitigation and safety measures implemented must be commensurate with the risk." App-305. The critical element that PWB leaves out is any consideration of the surrounding uses and character of the existing area. According to PWB, no hazards will be created by the regular transportation of chemicals because these same chemicals are transported to the Bull Run Headworks, which is in Clackamas County. App-313. However, the chemicals are not the same. Transporting chemicals on other rural roads does

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nothing to ameliorate the hazards created by introducing different hazardous chemicals onto entirely different roads in a different county.

By focusing solely on the intensity, duration and risk of the activity to determine if it qualifies as a "hazardous condition," failed to look at the effect of introducing these hazards. What the record shows is that this is a pristine farm and rural residential area that does not experience much in the way of non-farm construction traffic, road closures or utility operational service demands at all and certainly none of the scale proposed here. Rec-3203/3218. The hearings officer's erred by failing to take this surrounding area context into account to inform the extent to which potentially dangerous or threatening activities should be allowed. Interpreting this criterion and making specific findings that, with conditions, the hazardous conditions created by the PWB project will not adversely affect this particular community must be provided.

For these reasons, this decision must be reversed or remanded.

Second Subassignment of Error – The decision finding that no hazardous conditions will be created lacks substantial evidence.

By setting such a high bar for finding a hazardous condition, the hearings officer was able to rely heavily on the conditions of approval-imposed mitigation measures. Thus, he was able to conclude that those mitigation measures would reduce the hazard below the "exceptional and continuous" level. It is important at the outset to note that although conditions can be used to make a condition that would be hazardous less hazardous, the unequivocal nature of the standard requires mitigation to a degree that no hazardous

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condition exists. *Stephens supra.* Any mitigation conditions that do not serve to eliminate the hazard are insufficient to satisfy the standard.

Evidentiary Shortcomings with the HMMP

Regarding the hazards created by the use of chemicals at the facility, the hearings officer finds that the Hazardous Materials Mitigation Plan (HMMP) "is adequate mitigation for the identified hazards" and for the reasons identified by PWB, the facility will not "create an unduly hazardous condition." App-56. In addition to the improper insertion of the term "unduly" as qualifying the obligation, the hearings officer makes no finding that through the use of conditions, no hazard will result. Rather, PWB describes the scope of the HMMP "to minimize the risk of spills and safely contain and clean spills if they were to occur." App-307-308. This is not the unequivocal statement of no hazardous condition required by *Stevens* and therefore, the HMMP is insufficient to satisfy the standard.

Another distinct error that makes the HMMP defective is that the HMMP is a "living document that must be maintained and updated by operation staff as on-site materials or procedures change." App-309. In footnote 123, PWB highlights:

> "'anticipated hazardous material changes or additions depend on future equipment selection and maintenance products as well as future operations of equipment.' ...Table 6 reflects the fact that at [t]his time, it is not possible to identify every hazardous material that might be needed for final operation. However, the unknowable materials and quantities are not primary treatment chemicals." *Id.*

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As a result, the Hearings Officer imposed a condition of approval requiring that:

> "b) The Portland Water Bureau will review and update the HMMP annually, or more frequently as needed to document on-site material or procedural changes.
>
> c) All updated HMMPs will be provided to the County and Gresham Fire and Emergency Services." App-310.

By accepting PWB's argument and proposed conditions, the county is implicitly acknowledging that (1) it is not possible to identify every hazardous material that might be necessary to operate this facility and (2) to the extent that these materials are identified, it is anticipated that these hazardous conditions will change in the future.

Whether the chemicals are used for primary treatment or not is irrelevant to the obligation to not create hazardous conditions. A reasonable person would not rely on the statement of expert that it is not possible to identify every hazardous material that might be necessary to support a conclusion that no hazardous conditions will be created.

Second, the condition allowing for changes in the HMMP based solely on PWB's operational demands with no opportunity for review or input from the public on whether these changes will "create a hazardous condition." This condition runs directly counter to requirements imposed by the Court of Appeals opinion in *Gould v. Deschutes County* that a condition must be (1) based on evidence of a plan that is included in the record, and (2) where compliance with the condition is established through deferred review of the

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plan, it must include notice and a right to appeal. 216 Or App 150, 163, 171 P3d 1017 (2007). *See also Gould v. Deschutes County,* 79 Or LUBA 561, 578-579 (2019).

Here, PWB has submitted a HMMP that on its face explicitly anticipates amendments in the types and levels of hazardous chemicals that may be necessary and the condition calling for review of those amendments can be accomplished solely by county staff. Nothing in this condition allows for the public, or more importantly RFPD10 – the entity with expertise about the existence of hazards and their mitigation - the opportunity to review or challenge any such changes to ensure that they comply with MCC 39.7515(F). This is exactly the same defect that doomed the wildlife mitigation plan in *Gould* and it should prove fatal here as well.

Finally, the HMMP obligations are limited to operations only and there are no obligations imposed for hazardous materials and conditions resulting during construction or for the hundreds of deliveries of hazardous materials that will utilize rural roads for the life of the project.

Emergency Vehicle Access Evidentiary Shortcomings

The hearings officer concluded that construction on the roads will not create hazardous conditions because construction and truck drivers are able to share the road. App-50. Yet, this ignores significant concerns raised by RFPD10 that the exponential increase in the amount of construction traffic will result in more traffic accidents and the data that crashes on rural roads are twice as likely to be fatal. Rec-3804-3806. Disregarding these concerns, the hearings

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officer concludes that truck drivers are more skilled than other drivers. The only reference the hearings officer makes to the numerous opposition videos graphically depicting these conflicts is to conclude without any explanation that these impacts will not be significant. App-50. Nowhere in the hearings officer's findings or the PWB argument adopted by reference does anyone acknowledge the exponential increase in number of these construction / farm vehicle, pedestrian, or bicycle conflicts that will be created on substandard and poorly maintained rural roads throughout the area. No matter how good the drivers are, increasing the number of vehicles increases the risk. These videos show one truck having to back into a private driveway to allow a farm tractor with disk harrow to pass on Cottrell Road where PWB proposes to add over 400 trips per day – one truck every 1.5 minutes on this same road would dramatically increase this hazardous condition. Rec-902 and Video 23.

Although PWB reiterates its operations protocols around training drivers, scheduling deliveries to avoid weather, and other measures, these efforts are belied by testimony recounting an incident where PWB ordered a fuel delivery truck in an ice storm which slid off the road and PWB failed to respond. Rec-1165. This evidence calls into question PWBs trustworthiness when it comes to taking safety precautions and following through on safety obligations as set forth in the hazardous materials plans or other commitments.[10] The hearings

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[10] Testimony from Jeff & Mona Ayles: "We already experience water bureau trucks speeding by our driveway in the mornings on Lusted." Rec-3284.

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officer did not address this incident or otherwise adopt PWB's findings in response. Under *Norvell,* the County findings are inadequate.

In addition, installing pipelines within the road right-of-way will create road closures that will delay passage by emergency response vehicles, or require use of detours, creating hazardous conditions. Rec-3003. RFPD10 identified seven roads within its service boundaries that will be entirely closed to through traffic for some period of time.[11] RFPD10 explained:

> "Consider this scenario: Dodge Park Blvd. is closed for pipeline installation. More than one lane is impassible because there's a 15' to 20' wide trench excavated to depth of 15' on average. Next to this trench is a large semi-truck with 40' segments of 72" steel pipes that are in the process of being off-loaded and lowered into the trench. Emergency Response vehicle approaches....How long will it take to clear a lane? Any amount of time is too long! In this rural setting, detouring to another

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[11] Roads that will be entirely closed for some indeterminant period for pipeline installation include:

> "1. SE Lusted Rd. at the County Line— raw water line
> 2. SE Cottrell Rd/Dodge Pk Blvd— where finished water line heads west from the filtration plant
> 3. SE Dodge Pk Blvd. — where finished water line turns north to cross Ekstrom Nursery.
> 4. SE Lusted Rd.— where three finished water lines leave intertie facility, two will cross Lusted Rd then turn west along north side of ROW. The third finished water line will go west along the south side of the ROW.
> 5. SE Altman Rd.— where one finished water line will tie into existing pipeline at intersection of Altman and Lusted.
> 6. SE Pipeline Rd.— where the second finished water line will tie into existing pipeline at Pipeline Rd.
> 7. SE Altman Rd and SE Oxbow Dr.— where third finished water line will tie into existing pipeline in SE Oxbow Dr." Rec-3004.

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> route is not a viable option. We don't have city blocks. An alternative route may be a mile or more away." Rec-3003-3004.

In response, PWB relied on statements by its transportation consultant that:

> "the contractors will take measures to ensure they can accommodate emergency vehicles through a work zone regardless of the state of construction. For example, if a pipeline obstructs a cross street, the contractor will have on-hand the materials needed to plate the excavation." App-317.

As further assurance, PWB claims that the construction specifications for the project will require that the contractor allow for "immediate passage at all times" and a condition of approval 7d, imposes this same obligation.

Assuming that all contractors have steel plates on hand to "plate" trenches, there is no evidence to suggest that installing these plates will be feasible or how long this so called "immediate" response will take. Installing a steel plate will require stopping work, relocating construction vehicles, materials, potential contractor vehicles parked at the pipeline site, and any existing queued through traffic waiting passage to an alternative location and installing the plates. Assuming that this is possible, how long this will take to complete these steps is anybody's guess.

Although conditions of approval 7(e) do impose some limitations on the time of year when pipeline installation may occur, they are directed to accommodate farmers. No construction duration limitation or coordinated road closure scheme is in place to accommodate emergency responders. As a result, it is possible and, given PWB's self-imposed construction completion timeline,

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quite likely that multiple road closures will require emergency responders to await installation of steel plates at multiple locations in order to respond to a call. Any additional seconds of delay could spell the difference between life and death for someone experiencing an emergency. In addition to a lack of *Norvell* findings responding to RFPD10 concerns, no reasonable person looking at these facts, would draw the conclusion that the hearings officer did that "the application will not create a hazardous condition by potentially slowing down emergency vehicle." App-57.

PWB proposed to impose a second condition 7(c) requiring that the Transportation Control Plan (TCP) be amended to include an emergency coordination section that will: "provide construction update reports to emergency responders" weekly identifying the "dates and times of closure / partial closure" and contractors will prepare emergency coordination plans so "that the contractors and emergency responders are prepared to facilitate emergency vehicle access without delay." App-317. As noted above, this condition does not appear in the hearings officer's final decision.

In the event that it is made effective by an adoption by reference, this condition does not reflect the recommendation from PWB's expert finding that traffic obstructions can create hazardous conditions and as a result, RFPD10 consent to "approve lane/road closures during construction" so that construction crews are "aware of the direction of approach for emergency responders and procedures to make sure passage is provided without delay." Rec-509. However, rather than require RFDP10 review and consent in advance of

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construction as PWB's consultant recommended, Condition 7(c) requires that PWB tells RFPD10 what it is planning and nothing more. This condition is inadequate to ensure that hazardous conditions created by traffic disruptions from road closures will be conditioned as necessary to comply with MCC 39.7515(F).

Further, this condition is defective because it defers review of the adequacy of these amendments to a later time without any requirement that it be reviewed by the public, most notably RFPD10.[12] *Gould supra.* PWB's finding states that input from emergency responders will be requested, no condition imposes that requirement. App-319. Simply providing input is not the same thing as having any ability to require changes if the amendment fails to include substantial evidence to show that the minimum performance standards for fire and emergency service will be maintained, notwithstanding multiple road closures.

PWB claims that RFPD10 will aid in timely emergency response by providing advance notice to construction crews of an emergency by "calling ahead." PWB simply passes over GFES Chief Scott Lewis' statement that he has never encountered "emergency responders calling ahead" with a conclusionary statement that it is feasible and discounts RFPD10 statements of infeasibility by stating that GFES is responsible for emergency services in this

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[12] In footnote 132, PWB references a county road standard for allowing emergency access to the degree that it is "feasible" but compliance with this standard would be insufficient to supplant the more stringent obligation to not create hazardous conditions per MCC 39.7515(F). App-319.

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area. Rec-802. If the GFES Chief has no experience with calling ahead for any construction occurring anywhere with the greater Gresham service district, that would be pretty good indication that calling ahead is not "possible, likely, and reasonably certain to succeed." *Just v. Linn County*, 32 Or LUBA 325, 330 (1997) (*quoting Meyer v. City of Portland*, 67 Or App 274, 280 n 5, 678 P2d 741 (1984)). Far from being "likely" and "reasonably certain to succeed," condition 7(c), to the extent is applicable, is unrealistic, unenforceable and ineffective to ensure compliance with MCC 39.7515(F).

For these reasons, the county's decision must be reversed or remanded.

III. CONCLUSION

For all of the reasons set forth above, RFPD10 respectfully requests that LUBA reverse or remand the county's decision.

Dated this 5th day of July, 2024.

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CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with OAR 661-010-0030(2) and (2) the word-count of this brief (as described in OAR 661-010-0030(2)(b)) is 10,918 words. I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and the footnotes are required by OAR 661-010-0030(2)(d).

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CERTIFICATE OF FILING AND SERVICE

I certify that on July 5, 2024, I caused to be delivered by first class mail an original and one copy of the enclosed **INTERVENOR-PETITIONER MULTNOMAH COUNTY RURAL FIRE PROTECTION DISTRICT NO. 10'S PETITION FOR REVIEW** with the:

Land Use Board of Appeals
775 Summer Street, Suite 330
Salem, OR 97301-1283

and, on the same date, I caused to be delivered by first class U.S. mail, a true and correct copy of the foregoing document on

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complies with State law, the Regional Solid Waste Management Plan, and the County's intergovernmental agreement with Metro.

Strategy 11.16-1: *The County should revise its solid waste and recycling management program as needed to comply with amendments in state law, the Regional Solid Waste Management Plan, or its intergovernmental agreement with Metro.*

Police, Fire, and Emergency Response Facilities

11.17 As appropriate, include school districts, police and fire protection, and emergency response service providers in the land use process by requiring review of land use applications from these agencies regarding the agency's ability to provide the acceptable level of service with respect to the land use proposal.

Strategy 11.17-1: *Encourage school districts to review land use proposals for, among other factors as determined by the school district, impacts to enrollment and the district's ability to meet community educational needs within existing or planned district facilities and impacts to traffic circulation and pedestrian safety.*

Strategy 11.17-2: *Encourage police, fire protection, and emergency response service providers to review land use proposals for, among other factors as determined by the agency, sufficiency of site access and vehicular circulation and, for fire protection purposes, the availability of adequate water supply, pressure, and flow, whether provided on-site or delivered from off-site.*

Rest Stops

11.18 Explore opportunities to provide public rest stop facilities for the most heavily used travel routes, especially along popular recreational and tourist routes.

Strategy 11.18-1: *Rest stop facilities may include amenities such as restrooms, picnic tables, garbage disposal containers and water fountains.*

Strategy 11.18-2: *Inform the traveling public of rest stop locations through wayfinding signage.*

Strategy 11.18-3: *Partner with those agencies most involved in providing public parks and rest facilities, such as ODOT, OPRD or Metro, to determine suitable locations for these facilities.*

Strategy 11.18-4: *Involve affected stakeholders in the decision making process for rest stop locations and amenities.*

Other Policies

The following policies address other land use planning issues that do not fit into the previous policy topics.

2.48 The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued, altered, restored or replaced in accordance with Oregon Revised Statutes 215.130 and 215.135.

2.49 An alteration (including additions) or replacement of a nonconforming use or structure shall not create a greater adverse impact on the neighborhood, including but not limited to, noise, dust, lighting, traffic, odor, water use, sewage disposal impacts, and safety.

2.50 As part of land use permit approval, impose conditions of approval that mitigate off-site effects of the approved use when necessary to:

1. Protect the public from the potentially deleterious effects of the proposed use; or
2. Fulfill the need for public service demands created by the proposed use.

2.51 Consider applicable goals of the Climate Action Plan when developing Zoning Code amendments.

Policies and Strategies Specific to Individual Subareas

There are no policies in this chapter specific to individual rural planning areas.