

June 29, 2023

VIA HAND DELIVERY and EMAIL

Multnomah County Hearings Officer
1600 SE 190th Ave
Portland, OR 97233
LUP-Comments@multco.us

Re: Portland Water Bureau Filtration Facility and Pipelines
County Case File T3-2022-16220

Honorable Hearings Officer:

This firm represents the Cottrell Community Planning Organization (hereinafter “CPO”), a recognized Clackamas County neighborhood, including roughly 2,000 households and over 200 businesses, who will suffer direct and significant adverse impacts if the above-referenced development is approved. Contrary to the applicant’s assertions, the treatment facility, pipelines and communications tower uses are not permitted as a matter of right but are allowed only where a number of highly exacting Community Service conditional use criteria and environmental overlay criteria are satisfied. For the reasons explained in greater detail below, these criteria are not met, and this application must be denied.

As the numerous videos, photographs and over 50 letters submitted to date attest, residents and farmers who live and work, day-in and day-out, in the area have detailed the devastating effects that this development will have on the community’s economic base, livability and safety. This evidence of personal experience describing area character, prevalent traffic patterns, farm practices, school functioning and other public service constraints, and natural resources is more reliable than general statements in the application, provided by consultants based on single-day, windshield surveys or academic evaluation of farm practices, that are neither location, nor farm operation-specific. In *Stockwell v. Benton County*, LUBA held that reasonable decision maker could rely upon the testimony of an individual with personal experience as a farmer, notwithstanding general statements from an industry expert to the contrary. 38 Or LUBA 621 (2000). The same is true here. The applicant’s experts do not have the depth of understanding about the area characteristics, traffic patterns, natural resources or agricultural demands of residents and farmers, many who have lived in this area for decades.

The CPO members and farmers absolutely reject the applicant's characterization that their concerns catastrophize future events driven solely out of fear of the unknown. As the applicant's project engineer stated at a Portland City Council hearing held only two days ago, "this project is not a large project or a big project, it is a mega-project." June 28 City Council meeting, PM Session at 1:34.57. This is by far the largest, most expensive and complicated project ever pursued by the City of Portland. The magnitude and implications of such an endeavor on a pastoral, rural farming community cannot be dismissed or assuaged by committing future communication outreach or the selection of a quality construction team. The applicable review criteria require more.

Construction Impacts Were Not Given Meaningful Consideration

The Staff Report concludes that: "when reviewing a use, significant impacts created by the development / construction need to be considered." Staff Report p 47. This is true because the definition of the term "development," as used in Multnomah County Code (MCC) 39.2000, includes "any act requiring a permit...including associated ground disturbing activity." Construction of this facility not only requires a permit, it requires a tremendous amount of ground disturbing activity. Therefore, construction activities are an indivisible part of the use.

Consideration of construction impacts is also required as part of evaluating the significant impact / increased cost test applicable to all non-farm uses under ORS 215.296(1), the statutory farm impact test, which is directly applicable to the EFU-impacts portions of this project. *Von Lubken v. Hood River County*, 28 Or LUBA 362, 365 (1994) (changes in or increases in costs of accepted farm practices attributable to dust generated during construction must be considered in addressing ORS 215.296(1). Since the identical change to / cost of farm impact test applies to non-farm development within MUA-20 zoned areas under the local regulations, the County should rely on the same statutory obligation on the MUA-20 zoned areas as well.

Although the applicant did submit a construction-related traffic study, the remainder of the application materials, particularly the narrative addressing the criteria, is directed solely at the impacts resulting from operating the use and not from construction impacts. According to the construction traffic analysis, development is likely to generate an average of 300 trips per day removing dirt from the site or bringing concrete into the site for a period of 3-to-4 years, within an overall construction period extending for 5-to-7 year period. As the testimony from residents, farmers, Fire District 10, and the Gresham Barlow School District representatives have explained, the dust, noise, fumes and vibration, glare from temporary construction lighting and vehicle headlights, in addition to the vehicle congestion and safety concerns will be jarringly discordant with the character of the area, adversely affect natural resources, force a significant change and increase the cost of farm practices, require public services other than those programmed for the area, create hazardous conditions and violate the comprehensive plan. This fundamental failure to address the applicable criteria with respect to construction activities makes it impossible for the Hearing Officer to conclude that any of these criteria are satisfied.

This Proposal is not Consistent with the Character of the Area

MCC 39.7515(A) requires a finding that the proposal “is consistent with the character of the area.” The critical first step for compliance is identifying the study area necessary to evaluate potential impacts. Figure 4, of the facility application narrative, Ex A.3, shows a triangular shaped study area extending over one mile from the filtration facility in all directions except in the area over the Sandy River to the northeast. The applicant does not explain what methodology justifies the location of the impact area boundaries which is a requirement under *Wetherall v. Douglas County*, 51 Or LUBA 699, 726-727 (2006). Without such justification an applicant could choose whatever study area produced the results it desired.

A quick scan of farms included within the study boundaries at Figure 5 suggests that the study area boundary locations employed exactly this same reverse engineered approach that proved problematic in *Wetherall*. By extending the study area to the southwest along 327th (a local street unlikely to provide access to or from the proposed use), the applicant was able to include the Schmidt Nursery, the largest nursery on the list, thereby skewing the average nursery size to make it look like the filtration facility will have a comparable visual impact.¹ Because plant nurseries are allowed outright and the proposed non-farm use is only conditionally permitted, any comparative evaluation relying on permitted farm impacts is irrelevant.

Similarly, by excluding the Sandy River area directly to the northeast, the applicant was able to avoid acknowledging any contribution this SEC-H overlay designated area provides to the overall character of the area. In some places, only one or two residential properties separate the filtration facility from the mapped Sandy River SEC-H area. Whether the dramatic change in elevation between these two areas provides a natural visual buffer is irrelevant when this area is not insulated from noise and vibration, particularly with respect to wildlife and birds that are more sensitive to such impacts. As the testimonials by residents’ attest, wildlife and birds in this area are not constrained to following the County’s mapped overlay boundary lines but rather regularly spill out onto the filtration plant property as it is conveniently situated between the Sandy River and the headwaters to Johnson Creek.

Further, the approximate one mile radius is insufficient to capture impacts from installation of the pipelines that extend to the western edge of the study area or the impact of heavy truck traffic regularly leaving the site and travelling beyond the study area boundaries along Lusted Road or Oxbow Drive to reach Gresham or Portland, Bluff Road to reach Sandy or along SE 302nd into Springdale in order to reach I-84 during the estimated 5-7 year construction period. Without an explanation of how or why the impact area boundaries were selected, given the character and

¹ Excluding the Schmidt Nursery from the estimated building coverage total when averaged would reduce the total to 61,342 sf, instead of 84,369. The filtration facility footprint is approximately 89,000 sf, significantly larger than the average.

potential impacts resulting from the use, this application cannot be approved. *Multnomah County v. City of Fairview*, 18 Or LUBA 8 (1989).

This gerrymandered study area provides the foundation for the applicant to build upon another unsupported conclusion that the visual, transportation, noise, lighting, air quality, dust, and groundwater impacts from nursery operations will be greater than those resulting from the proposed facility. This mega-project filtration facility is in no way comparable to a large-scale nursery that the applicant uses as the surrogate for identifying impacts under the worst-case development scenario. This approach is flawed because nurseries of any scale have nothing in common with industrial filtration plants. First, nurseries in MUA-20 and EFU zones enjoy preferential zoning such that impacts must be tolerated whereas impacts from non-farm uses do not. Second, the overall use intensity and density of the proposed industrial, particularly during construction is in a whole different “mega-league” than any existing large nursery use. For example, the R & H Nursery receives and loads, in an average year, approximately 60 to 100 semi-trucks per year. This is far less than the 300 estimated truck trips per day, projected during the most intensive 3-4 year construction period. There is no evidence that this level of transportation impacts along with its corresponding noise, air pollution, and groundwater impacts is commensurate with nearby nursery operations.

Similarly, with respect to rural residential character, the applicant equates the impacts from this facility, again considering the operations only, to rural residential uses because residential uses “generate substantial traffic and have external impacts related to noise outdoor lighting and appearance.” P 21. Although it is true that residences do generate traffic, lighting and aesthetic impacts, they are nothing on the scale or intensity of the proposed filtration facility and pipelines. No home in the area is 89,000 square feet in size and no residential use generates vehicle trips of the type or scale of this industrial use. Creating this false equivalency with existing nursery or residential uses should be rejected.

Another limitation is that the applicant’s approach focuses solely on comparing the discrete proposal elements – like the facility or the pipelines, to individual or types of uses rather than comparing the impacts of the entire proposal from construction to long-term operation impact on the character of the area as a whole. The County Comprehensive Plan includes, as part of the vision statement for the West of the Sandy River Area, which states:

“We value all of the features that make this a rural place, including the quiet open spaces, vistas of productive farm and forest lands and of Mt. Hood, country roads, healthy air, soils and streams, and a night sky where we can clearly see the stars.” Plan 1-26

This statement, which was crafted by residents and farmers 20 years ago, represents a formal adopted and acknowledged declaration of the character of this area. The testimony submitted in opposition indicates that the character of this area remains consistent with this vision. This

character that will be entirely overwhelmed by the construction and operation of a water filtration facility that will result injecting massive disruptions for a 5-7 year development period followed by an operations that introduce hazardous chemicals coupled with pipelines sized to deliver water to the 26th most populous city in the US.

Further, the question MCC 39.7515(A) asks is not whether the impacts are less than other permitted uses in the zone but rather whether the particular proposal is “consistent with” the area character. *Websters Third New Int'l Dictionary* defines “compatible” as “2 * * * b : marked by agreement and concord * * * : coexisting and showing no noteworthy opposing, conflicting, inharmonious, or contradictory qualities or trends : COMPATIBLE.” 484 (unabridged ed 2002). This requires a fact-specific identification of the fundamental characteristics of not just the existing large-to-medium scale nursery uses, but other non-agricultural, non-farm uses as well that together contribute together to create an area character.

The fact that water treatment facilities exist in other rural areas throughout the state is irrelevant to the fact-specific question of whether this proposed treatment facility and pipelines, including the externalities resulting from construction, are consistent with the character of this exact location. If these other facilities were relevant to evaluating consistency, a table submitted into the record shows that only the filter facilities located within a residential setting are substantially smaller than what is proposed.

With respect to noise, the applicant’s sound study indicates that the baseline daytime noise levels range between 41 dBA and 49 dBA. As proposed and as required by staff-recommended conditions, the limit of the daytime noise will be 50 dBA and 60 dBA during testing of emergency equipment. Staff Report p 50. Both of these operational noise projections exceed the baseline. Further, these studies fail to acknowledge that the noise levels in this area are not sustained over long periods. Periodic noise from farm equipment or bird calls is not comparable to drone of generators that will run non-stop for the first 6 months after occupancy or until electricity is available onsite. This analysis and conditions provide no evaluation of the noise associated with construction. Relying on data from the Federal Highway Commission, the attached testimony explains that the noise level from construction vehicles at 50 feet will exceed 80 dBA and this construction noise will go on for 10 hours per day for years. The noise from construction from the facility and then spread around an additional 7 mile area from pipeline installation will have an transformative impact on the existing pastoral character.

In summary, the applicant fails to adequately justify the bounds of its study area for purposes of analysis, relies on a spurious comparison between large nursery operations and the proposed uses and employs the wrong comparative lens for evaluating if the proposed uses are compatible. The evidence submitted shows that the noise, traffic, dust, vibration, glare from headlights and diesel fumes from hundreds of construction trips per day will significantly impact the character of the area in violation of MCC 39.7515(A). For these reasons, this application must be denied.

Natural Resources will be Adversely Impacted

MCC 39.7515(B) requires a finding that the proposed use “will not adversely affect natural resources.” The application focuses solely on the two Significant Environmental Concern overlays and concludes that since these SEC criteria are satisfied, this criterion is met. There are two fundamental problems with this analysis. First, this criterion is not constrained to the consideration of only those “natural resources” that occur within SEC overlay zones. This is true because of the plain language of the standard is directed at “natural resources” and not just those that may be designated within an SEC area. To assume that the only “natural resources” requiring protection under this standard at the same level of SEC required protection requirements would make this standard redundant and meaningless.

Further, Comprehensive Plan policy 5.2 and 5.27, which also serve as independent review criteria by virtue of MCC 39.5560(G), provide additional support for a more expansive view of natural areas protections than that offered by the SEC review:

“5.2 Protect natural areas from incompatible development and specifically limit those uses which would significantly damage the natural area values of the site.”

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

The term “natural resources” as used in the comprehensive plan includes, as relevant here:

- Water quality and erosion control
- Air quality, noise and lighting impacts
- Rivers, streams, and wetlands
- Tree protection
- Wildlife habitat
- Wilderness areas

Submitted testimony explains how the pipeline will invade wetlands, through areas designated as Crucial Habitat for threatened or endangered species, and result in the loss of 324 coniferous and deciduous trees that currently provide important hedgerow for wildlife. Although trenchless boring may avoid more intensive impacts to forested SEC-h zones, the standard requires a finding of no “adverse affect” and cannot be met by merely acknowledging an election to do less harm than otherwise might result. The application does not include any resource inventories, serious evaluation of non-ground disturbing impacts to wildlife, wetland delineations, or consultations with DSL. Rather, the Wildlife Conservation Plan and assessment of impacts was created based on a single site visit and aerial photographs and a quote from an ODFW biologist taken out of context. There’s been no serious effort to identify, evaluate or reconcile a variety of sources that clearly document the ecological values of the area especially in the raw water

pipeline area and regarding the filtration site and its proximity to Johnson Creek and the Sandy River.

Further, the staff report notes that the exit pit for the Distribution Main will encroach into the SEC-h zone with no evaluation of the impacts. Further, to the extent that the evaluation is limited to the SEC areas, there are a number of SEC development standards that are not satisfied by the proposed design and staff notes that the Wildlife Conservation Plan is insufficient to satisfy the MCC 39.5560(C) criteria. Staff Report p 113.

Comprehensive Plan Policies are not Satisfied

MCC 39.5560(G) requires a finding that the proposal “will satisfy the applicable policies of the Comprehensive Plan.” The application fails to address a number of plan policies that are applicable not just to the County Planning Department but to new development as well. Policies 2.8 and 3.16 are identical in applying the following mandatory obligation to development within Multiple Use Agriculture and Rural Residential areas:

3.16. New non-agricultural businesses should be limited in scale and type to serve the needs of the local rural area.² See also Policy 2.8.³

The proposed filtration facility is sized to filter every drop of water provided by the City of

² This policy explicitly implements one of the vision statements articulated for the West of Sandy Rural Plan Area:

“In order to maintain this vision, we recognize that the planned density of residential development must not increase, that the agricultural economy of the area must remain strong, and that development of new non-agricultural businesses should serve the needs of the area.” 1-26.

³ This obligation is reinforced by the statement in the vision plan particularly applicable to the West of the Sandy River area:

“In order to maintain this vision, we recognize that the planned density of residential development must not increase, that the agricultural economy of the area must remain strong, and that development of new non-agricultural businesses should serve the needs of the local area. This plan is intended to help us in our stewardship of the environment, our lifestyle, and our community over the next 20 years.”

Portland to over a million residents. This facility is so much more intensive than what would be necessary to serve the local Pleasant Home and Water District and the Lusted Water District within the West Sandy River area. As a result, this comprehensive plan policy is not satisfied.

With respect to natural resource-related policies, in addition to policies 5.2 and 5.27 quoted above, there are cultural resource protection policies that are similarly directly applicable to the proposed development:

“6.2 Protect cultural areas and archeological resources and prevent conflicting uses from disrupting the educational and scientific value of known sites.

6.5 Where development is proposed on areas of cultural significance, require evaluation of alternative sites or designs that reduce or eliminate impacts to the resource.”

Attached are letters from residents reporting the inadvertent discovery of archeological resources on both the filtration site and within the pipeline area by previous and current owners. These statements have been reviewed by a trained and experienced archeologist who has opined that these items are the result of at least two spatially discrete precontact archaeological sites and that further inventory and investigation in consultation with affected tribes and the State Historic Preservation Office before the entire subsurface of these areas is permanently removed.

These directly applicable plan policies are not met and therefore, this application must be denied.

The Proposed Development will Require Public Services other than Those Programmed for the Area

MCC 39.7515(D) requires a finding that the proposal “will not require public services other than those existing or programmed for the area.” The Multnomah Rural Fire District #10 (FD#10) Board of Directors raised concerns that it lacks the necessary specialty response services necessary to serve the proposed facility. The applicant’s planning consultant responded that these concerns are not germane to the land use review. Yet, this type of concern is exactly what MCC 39.7515(D) is there to prevent – allowing a use that will demand a type of public services that are not programmed for the area. There is no evidence that FD#10 or any other fire service provider can provide specialty response times and services necessary to address hazardous materials transport and storage as required by this use. Whether the Gresham Fire District has a long history of responding in support of FD#10 in the past is not responsive to the question of whether these districts have the facilities, the person-power and the equipment necessary to protect this proposed use, as well as surrounding families, farmers and their property.

Clackamas County approval of the “Emergency Access Road” to Bluff Road Must Precede Commencement of Any Ground Disturbing Activities

Included as part of the filtration facility is what the application calls an “emergency access road” exiting to the south of the subject site and connecting to Bluff Road. Located solely within Clackamas County’s jurisdiction, the staff report recommends a condition of approval requiring Clackamas County approval before facility occupancy. If this road was only providing emergency road access for the facility once it is operational, this condition would make sense. However, in response to comments submitted by FD#10 and as part of its Construction Traffic Impact Analysis, the applicant has indicated that the Bluff Road access will provide construction access as well. As illustrated in Figure 2 in the Construction Impact Analysis, the projected truck route between the project site and Bluff Road along this “emergency access road” will be something between 0% to 100%. This is a fairly wide range given the estimated 300 trips per day for 3-to-4 years. Even if the presumption is that the number of truck trips during construction would be 0%, Figure 2 projects that 30% of the construction traffic commuter traffic⁴ will use this access. Either way, this connection is going to provide a critical access point during the construction period and as such, any conditioned approval must require Clackamas County land use approval as well as improvement of this road before any ground disturbing activity necessary to develop this use.

Proposed Conditions are Inadequate and Fail to provide Participatory Rights through Subsequent Review

In a number of places rather than explain how identified adverse impacts will be mitigated, the staff report recommends certain conditions of approval that require the submittal of additional study and analysis to be completed sometime in the future subject to review by staff. In a long line of cases, the Courts and LUBA have held that any deferred decision-making for compliance must include the same participatory rights that would have been required had the decision not been deferred. *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007), *rev den*, 347 Or 258 (2009); *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992).

For example, with respect to dust, staff recommends the submittal of a dust control plan for use of the roads. Staff Report p 50. The staff report presupposes that dust from gravel roads can be mitigated by driving slowly or the use of dust control spraying. The application makes no mention of how dust on gravel roads will be addressed. Whether dust can or will be adequately controlled to create consistency with the character of the area and to avoid significant changes / increased costs to farming lacks evidentiary support. If the submittal of a Dust Control Plan pursuant to conditions of approval is the preferred method for achieving compliance with these

⁴ This is the term used in the construction traffic report to refer to “site worker, staff, clients, and craft laborers” who will travel to and from the site during the AM and PM peak periods. As such, these are essentially construction workers who will use the Bluff Road access like any other public travel way.

criteria, it must be accompanied with an obligation to provide notice and a public hearing before a Hearings Officer to ensure compliance.

The obligation to protect SEC-H zoned areas from erosion as required by MCC 39.5560(A) is through the implementation of “best management practices” but rather than identify those practices now, staff imposes a condition of approval that is defective because it defers finding compliance to obtaining an Erosion and Sediment Control Permit. Staff Report p 106. The same is true with respect to the provision of revised stormwater details to ensure that release volumes will not affect downstream properties. Staff Report p 82. An erosion control permit cannot substitute for finding compliance with the criteria and where such deferral is appropriate, review of a grading permit or revised stormwater details must include public notice and a hearing.

The applicant’s Construction Traffic Impact Analysis acknowledges partial and full roadway closures will be required to complete construction of the pipeline. Although assurances are made that farm field access will be maintained so as to minimize impacts on farmers, there is no commitment on road closures and detours necessary to determine if, in fact, impacts will be minimized. Prior applicant statements suggest that determinations on the location of detours and road closures resulting from construction will be a fluid determination based solely on contractor preference. See attached transcript from PWB update April 13, 2023. Staff has responded to these assertions by imposing conditions of approval requiring the submittal of a Traffic Control Plan (TCP). Staff report p 30. The first problem with this approach is that it defers any evaluation of impact to farmers to the review of a TCP to a later hearing without providing the public an opportunity to review.

The second and more systemic problem with this condition is that the TCP requires nothing more than a demonstration that farmers and school districts are notified of road closures and detours in advance. Advanced notice of a detour does nothing to ameliorate the significant change and increased costs farmers will need to incur planning and avoiding detours and road closures. The need for unfettered discretion to close roads and cause detours, with nothing more than notice to farmers, is ultimately an admission that these closures will change farm practices and increase costs.

Conclusion

Although the applicant may have submitted thousands of pages worth of study and analysis, this effort is insufficient to establish that the criteria necessary for granting approval for the treatment facility and pipelines are satisfied. The claims of “no impact” are not substantiated with any inventory or evaluation at a level of detail necessary to conclude that the criteria are satisfied. Rather, these efforts fail to accurately present a true and accurate picture of the character of the area and explain how this development, including the lengthy construction period, will not be inharmonious and inconsistent. This “mega-project” will adversely affect natural resources, significantly change and increase the cost of existing farm practices, overtax public safety

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services and fails to satisfy many directly applicable Comprehensive Plan policies. For these reasons, this application must be denied.

Please place this letter and accompanying attachments into the record of these proceedings and provide me with notice of the County's final decision.

Very truly yours,



Carrie A. Richter

cc: Client
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Attachments:

2023 Current Sound Measurements
Archeological Investigation Report
Interview with Arden Meyer
Interview with Annell Carlson
Transcript of April 13, 2023 Portland Water Bureau Work Session