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VIA: Email to LUP-Hearings@multco.us

Hearings Officer for Multnomah County
Land Use Planning
T3-2022-16220 Comments
1600 SE 190th Avenue
Portland OR 97233-5910

Re: Applicant's Pre-Hearing Statement – #T3-2022-16220 (Remand)

Hearings Officer,

These comments are submitted on behalf of the applicant, the Portland Water Bureau (the "Water Bureau" or "applicant").

I. Project Overview and Background

The Bull Run water system was constructed in the late 1800s. Twenty-four miles of pipelines were laid to create a gravity-fed supply of clean water from the Bull Run River for the region.



Pipeline construction in late 1800s.

{01529374;2}

Today, the Bull Run Water System provides safe and reliable drinking water to nearly one million people, including the City of Sandy and five other wholesale water districts in the project area. The large-diameter, gravity-fed pipelines (the “conduits”) have run through this area of the County for 130 years (since becoming operational in 1895).

PWB has made many improvements to the system in this area over those 130 years, including replacement of the original wooden pipelines, installation of additional conduits, and the construction of two existing treatment facilities in the area. The existing Lusted Hill Treatment Facility (“**Lusted Hill**”) is located one-half mile north of the proposed filtration facility (shown on the map below) and is designed to reduce corrosion of lead pipes found in some household and building plumbing. The existing Hudson Intertie is southeast of the project area and services the existing conduits. Neither of those existing treatment facilities has conflicted with local uses in the area. Instead, one neighbor described Lusted Hill as “not noticeable at all.” Video, Exhibit J.51.

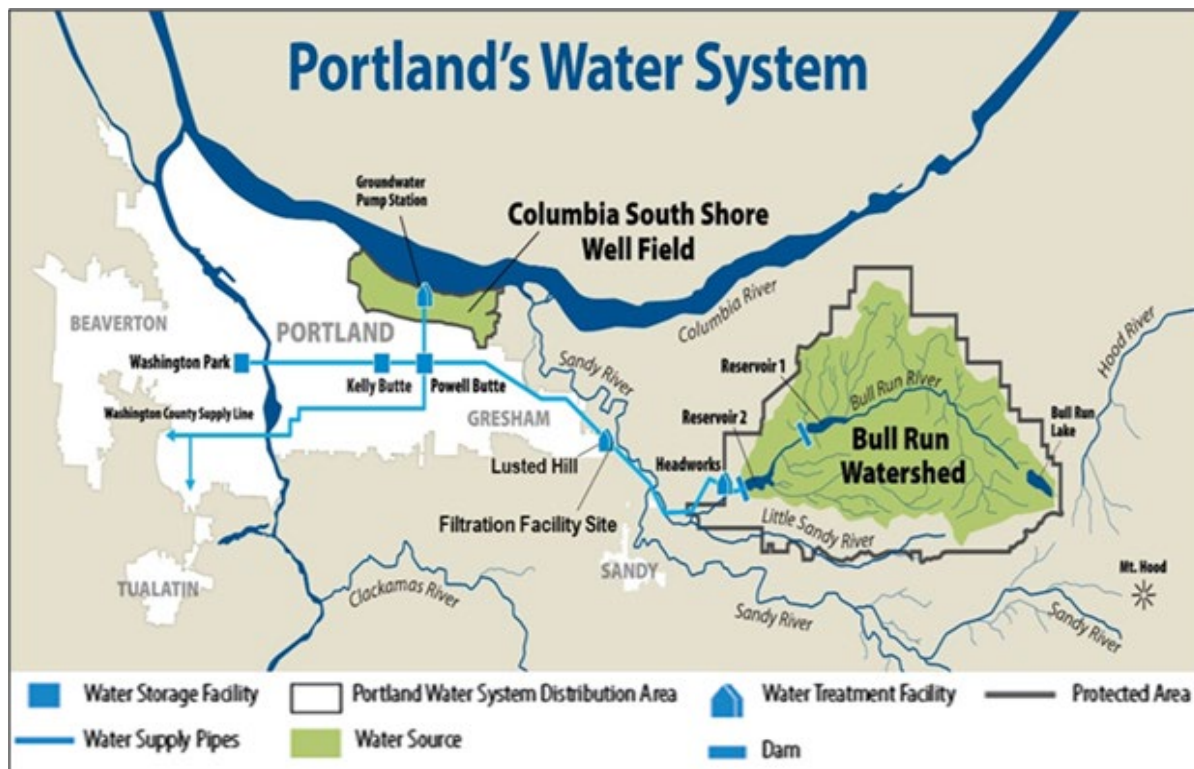


Figure 3. Portland's Water System Showing Proposed Filtration Facility Site

Over all those years, the Water Bureau has been a consistent steward of natural resources in the area. For example, in the past 11 years, the Water Bureau has planted 93,000 native trees and shrubs throughout the Sandy River basin, including the lower Bull Run River. The Water Bureau prioritizes stewardship of its properties by managing English ivy, holly, and other invasive plants on these properties and planting thousands of native plants where invasive plants are removed.

In 1975, the City of Portland purchased the 94-acre property off Carpenter Lane where the filtration facility is proposed to be located. The location was selected for the facility because of its proximity to existing water infrastructure and its hydraulic gradeline that allows continued gravity flow of water. The size of the facility site was also a consideration, as it allows for a large, vegetated area around the property perimeter that provides both habitat value and a buffer between the facility and adjacent properties.

The project includes a filtration facility designed to filter up to 135 million gallons of water per day, along with raw water pipelines, a finished water intertie, and finished water pipelines to connect the facility to PWB's existing water system in this area. The project also includes a local distribution main to allow for continued service to PWB's existing local water customers and wholesale water districts.

Like PWB's existing facilities in the project area, the filtration facility is designed with multiple engineered safety features and will be staffed by certified and trained operators to make sure systems are operated in manner that protects public health and the environment. The operating facility is expected to have 26 full-time employees (with just 10 on the largest, morning shift).

PWB must build a filtration facility and pipelines to protect public health and comply with federal and state safe drinking water regulations, including the U.S. Environmental Protection Agency (EPA)'s treatment requirements to remove *Cryptosporidium* (a disease-causing microorganism) from the water supply. The City of Portland entered into a Bilateral Compliance Agreement with the Oregon Health Authority (OHA) to have the new facilities in operation and begin delivering filtered Bull Run water by September 2027. Both EPA and OHA have determined that the project is necessary to protect public health, comply with federal and state drinking water regulations, and continue providing reliable, safe drinking water to nearly one million people.

II. Prior Land Use Process & MCC 39.7515(B)

In 2023, Multnomah County issued an approval of the project, with the key approval being of a Conditional Use Permit ("**CUP**"). The approval decision (the "**Prior Decision**") was written by a County Hearings Officer and was appealed to the Land Use Board of Appeals ("**LUBA**"). LUBA affirmed the vast majority of the Prior Decision and remanded back to the County on one issue related to the approval criterion in MCC 39.7515(B), which requires an applicant to show that a proposed project "will not adversely affect natural resources[.]" LUBA's remand instructions are to determine the proper legal construction of MCC 39.7515(B) and then apply it to the project. No one sought review of LUBA's decision by the Court of Appeals, making the LUBA decision final. This remand proceeding followed.

In the Prior Decision, the former Hearings Officer applied the County's longstanding interpretation of MCC 39.7515(B) to limit the "natural resources" under review to those inventoried under Goal 5. The Prior Decision was not remanded by LUBA on the *substance* of the project's careful design to avoid and mitigate impacts to natural resources. Instead, in the Prior Decision, the "hearings

officer reviewed other cases and concluded the county consistently interpreted natural resources to mean those located within an SEC overlay[,]” which implements Goal 5. Exhibit M.25,¹ slip op at 120.

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

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

It is LUBA’s rejection of that longstanding County legal standard – not the project’s compliance with any standard – that led to the remand.

As the Staff Report provides, LUBA’s direction was for the Hearings Officer to “address both the meaning and application of MCC 39.7515(B).” Exhibit N.7, page 7. While the purpose of this letter is not to provide the applicant’s legal argument regarding the meaning of MCC 39.7515(B), we note that we disagree with Staff’s interpretive analysis because it does not follow *Portland General Electric Company v. Bureau of Labor & Industry*, 317 Or 606, 859 P2d 1143 (1993), *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009), and their progeny – generally referred to collectively as *PGE/Gaines*. In particular, the definition of the term “natural resource” set forth in the Glossary of the Multnomah County Comprehensive Plan (“**MCCP**”) is legally inappropriate context to consider under *PGE/Gaines*. Instead, the text – the actual words used by the drafters – is the starting point in any *PGE/Gaines* analysis. Similarly, Staff’s reliance on “environmental degradation” to define “adversely affect” is inconsistent with the sequence of analysis provided in *PGE/Gaines*. Rather than look to the dictionary definition of “adversely” or “affect,” the Staff interpretation refers to the first paragraph of the Introduction and Citizen Involvement section of the MCCP, which includes “to protect natural resources from environmental degradation” as one of the very general reasons to explain why the County has embraced land use planning. Staff then provides the dictionary definition of “degradation.” The point of looking to the dictionary definition of an undefined word in an interpretation is to determine what the body adopting the text likely intended when they selected the specific word or term in the code. In this case, the Board did not use the word “degradation” in MCC 39.7515(B). Instead, they used the term “adversely affect.” As noted above, this letter is intended as an evidentiary submittal rather than to provide applicant’s legal argument. Applicant will provide additional legal analysis of MCC 39.7515(B)’s six words during the hearing and additional remand process.

¹ We note that the PDF of LUBA’s decision on the County’s website is incorrectly marked as “Exhibit M.4”, which is also assigned to another document from the LUBA process.

III. Additional Evidence Showing Compliance with MCC 39.7515(B) Submitted With This Letter

A. Aquatic Habitat & Water Quality

The *Potential for Aquatic Natural Resources Effects from the Bull Run Filtration Project* prepared by Biohabitats provides the expert's review of the project with respect to potential adverse impacts that could occur to aquatic species or water quality in the area from project operations. Biohabitats assessed the pre-development and proposed post-development conditions in the area of potential effect of the project as well as reviewing project design, operation, and maintenance plans. Overall, Biohabitats concludes that the project will not adversely affect aquatic habitat or water quality.

B. Wildlife Habitat

The *Portland Water Bureau Filtration Facility Project Wildlife Habitat Impact Analysis* prepared by Environmental Science Associates (ESA) provides an evaluation of the effects of each component of the constructed project on wildlife habitat on and adjacent to the project. The analysis specifically identifies and quantifies the habitat areas, values, and functions (that is, the quality and quantity of the habitat) once the project is operational and compares that to the habitat areas, values, and function prior to construction. Taking into consideration the potential impacts of the project, the habitat creation already offered by the Water Bureau and memorialized in the Prior Decision through existing conditions of approval, and adding additional Water Bureau proposed habitat enhancements, the analysis concludes that the project will not adversely affect wildlife habitat.

C. Wetlands

The *Bull Run Filtration Project – Wetland Evaluation* memorandum prepared by Winterbrook summarizes the wetland evaluation and permitting process for the project. As detailed in the memorandum, the project successfully avoids all permanent impacts to wetlands. Although construction is not the land use under review in these proceedings, the memo also notes that temporary impacts during pipeline construction activities are limited to a very small temporary disturbance area of 83 square feet, about half the area of a standard parking space. That small area will be handled with best management practices approved under state and federal permitting, including restoration and reseeded that will functionally improve the natural resource value (quality) of the habitat in that area. Overall, this memorandum confirms that the project will not adversely affect wetlands.

D. Stormwater Drainage

The *Filtration Facility Site Stormwater Drainage Report* provides a revision of the prior stormwater system for the main filtration facility site to implement the Water Bureau's direction to examine the system with the assistance of experts focused on protection of natural resources. As a result, the stormwater system will not only meet or exceed all applicable stormwater design requirements but also provides excess and redundant water treatment capacity and provides flow control designed to conservative standards. Overall, the proposed stormwater system for the filtration facility site has been designed both to reliably meet current design standards protective of the surrounding natural resources and to continue to be protective of the surrounding natural resources under future conditions.

E. Stormwater Flow Spreader

The *Stormwater Flow Spreader and Vegetated Slope* memorandum provides additional detail for two elements of the filtration facility site stormwater management system: the flow spreader and the vegetated slope in the southwest quadrant of the site near Johnson Creek. The flow spreader and vegetated slope are designed as an integrated facility to provide energy dissipation and evenly distribute flows from the stormwater management system across the slope downstream of the flow spreader, conveying that flow to Johnson Creek without creating erosion or scour or mobilizing sediment. The proposed flow spreader and vegetated slope are conservatively designed, exceeding design criteria in the Stormwater Management Manual (SWMM) for similar facilities.

F. Land Use Drawings Packet

This packet of filtration facility site drawings consolidates the filtration facility site landscape and planning plans and incorporates the updates to stormwater system reflected in the *Filtration Facility Site Stormwater Drainage Report* and *Stormwater Flow Spreader and Vegetated Slope* memoranda discussed above.

G. Air Quality

The *Portland Water Bureau Filtration Facility Project: Operational Air Quality Analysis* by Environmental Science Associates (ESA) estimates and evaluates operational air quality emissions associated with the project from all potential sources. Overall, ESA concludes that the project would not have the potential to adversely affect air quality natural resources.

H. Soils

The *Effect of Development Related to Migration of Contaminated Soil* report provided by PBS evaluates the potential for soil previously identified as containing low levels of persistent pesticides to mobilize across and from the project sites and potentially affect natural resources. PBS concludes that the change in use associated with the project will result in a reduction of the potential for mobilization of contaminated soil to natural resource areas to occur compared to the potential for the sites to adversely affect natural resources in their pre-development state.

I. Agricultural

The *Agricultural Resources Review with Reference to Adverse Impacts* provided by Globalwise Inc. details the agricultural expert's analysis of the term "natural resources" as applied to agricultural inputs and concludes that, even if soils or other agricultural inputs were considered a natural resource, the project operations will not adversely affect off-site agricultural resources.

J. Pre-Construction Condition

The *Pre-Construction Condition Supplemental Information* packet provides photographs and documentation of the pre-construction conditions at project sites.

K. Legislative History and Other Documents

We have included a packet of information about the legislative history of MCC 39.7515(B) that is relevant to the *PGE/Gaines* analysis as well as other documents relevant to the context of this matter.

L. Resumes

This packet provides additional or updated resumes for experts relevant to this proceeding.

IV. Conclusion

Applicant requests that the Hearings Officer re-approve the applications.

Respectfully Submitted,



RADLER WHITE PARKS & ALEXANDER