

April 15, 2025

VIA 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 - Remand

Hearings Officer:

This firm represents the Cottrell Community Planning Organization (“CPO”) and Multnomah County Rural Fire Protection District No. 10 (“RPFD10”) in this proceeding on remand. As the hearings officer is aware, this remand deals with Multnomah County Code (“MCC”) 39.7515(B) and requires a finding that the community service use “will not adversely affect natural resources.” In applying this standard, LUBA offered the following instructions to the County:

“On remand, the hearings officer should determine whether any natural resources will be affected by the community service use and must find that the proposed use will not adversely affect those natural resources.” *Slip op* 123.

As a general proposition, application of a singular criterion, coupled with LUBA’s concise instructions, to a land use proposal might be viewed as a simple straightforward task. Given the massive nature of this proposal - a \$2 billion industrial plant with a sprawling array of associated pipelines- the largest public utility project within the state, would suggest that meeting this standard would be challenging. However, Portland Water Bureau’s (“PWB’s”) actions to date, on top of this massive proposal, has created a situation where compliance is impossible.

PWB’s decision to start facility construction before having final land use approval and destroying natural systems in these efforts have deprived PWB of the ability to inventory and evaluate resources on the site in the first instance. No expert can conduct resource inventories or evaluate habitat functions provided by hedgerows and trees, wetlands and ephemeral streams, agricultural fields, surface and groundwater resources when they have been removed or otherwise degraded. PWB made a calculation to proceed at its own risk with construction. That choice does not excuse or allow holding PWB to any lower standard when it comes to interpreting or applying this criterion.

Second, PWB has apparently forgotten that it bears the burden of proof to establish its application satisfies the relevant approval criterion, even after a remand. As of the date of this letter, PWB has yet to produce any evidence in response to LUBA's instructions on remand. The result being that PWB has failed to meet that burden and this application cannot be approved. In the event that PWB submits materials on remand for the first time right before or at the public hearing, County staff, the hearings officer and participants will be deprived of the opportunity to a full and fair hearing on review.

Moving beyond these insurmountable hurdles and with the caveat that it is not the opponents' obligation to produce evidence to show that this criterion cannot or is not met, the CPO and RPF10 offer the following legal framework in which the hearings officer must consider this remand request.

The Scope of Review on Remand

Compliance with MCC 39.7515(B) requires that the County make a new interpretation that takes a broader look at the term "any natural resources." and then determine whether the evidence in the record or submitted on remand shows that the standard is satisfied. These instructions are similar to LUBA's explanation of the "adverse affect" criterion at issue in *McCoy v. Linn County*, where LUBA explained the task as follows:

"In sum, to show that a proposed conditional use 'will not adversely affect the livability of abutting properties and the surrounding neighborhood,' the county must (1) identify the qualities or characteristics constituting the 'livability' of abutting properties and the surrounding neighborhood; and (2) establish that the proposed use will have no adverse effects on those qualities or characteristics." 16 Or LUBA 295, 301-302 (1987), *aff'd* 90 Or App 271 (1988).

This remand represents the first opportunity for the County to properly interpret and apply this standard and as such, the hearings officer is not pre-empted in the identification of natural resources or in evaluating adverse effects. During the initial review, PWB took the position that the only "natural resources" protected from adverse effects were those defined by Chapter 5 of the Multnomah County Comprehensive Plan as implemented through the Significant Environmental Concern (SEC) overlays. The hearings officer mistakenly agreed that no other natural resource outside of the SEC Overlay was protected. This will be the first time that the County has considered "any natural resource," as LUBA requires, and with no constraint.

The only limitation in the hearings officer's evaluation is with respect to the temporary impacts resulting from construction. More specifically, LUBA said that "the MCC does not regulate or apply the community service use approval criteria to temporary construction activities associated with a community service use." *Slip op* 22. Issues that could have been raised but were not raised in a prior LUBA appeal cannot be raised in a subsequent LUBA appeal of the decision on remand. *Beck v. City of Tillamook*, 313 Or 148, 153-54, 831 P2d 678 (1992). As a result,

temporary construction impacts to natural resources - such as the effect of diesel fumes from construction trucks on bird migration patterns - cannot be considered because they are a temporary construction impact. However, air, water or noise pollution resulting from ongoing operation of the filtration plant would be considered.

In its report on remand, County staff articulates this point as a distinction between the construction and the operation of a use, adding the phrase “as proposed to be operated” as an operative term into the criterion. April 2 Report, p 8. The County cannot interpret a criterion to insert new language into an adopted standard. ORS 174.010. In any event, County staff is wrong that the scope of any “use” is limited entirely to its operation.

A “use” in zoning parlance focuses on the physical impacts resulting from certain improvements necessary for those activities to occur. Zoning standards focus on the ways in which land is altered to accommodate structures, improvements, and surroundings as implemented through development and design standards like building height, lot coverage, and setback.¹ The improvements or alterations that result from application of those standards is an inseparable component of the use. The distinction therefore is between temporary impacts resulting during the act of constructing the improvement and permanent physical changes in the land realized after construction is complete.

Taking the act of construction out of the equation, MCC 39.7515(B) requires that the hearings officer identify the qualities or characteristics of the natural resources and their functions existing before construction begins against the qualities and characteristics of the natural resources that exist after construction ends to determine whether the use will have an adverse affect.

Which “Natural Resources” Must be Evaluated?

In order to identify natural resources, the hearings officer must first determine the scope of the term. In considering this issue, LUBA explained:

“We agree with Cottrell that the hearings officer misconstrued the code when they concluded that “natural resources” in MCC 39.7515(B) includes only those significant resources included in SEC overlays. We do not find support for the argument that the title of MCCP chapter 5 serves as a definition of “natural resources” for purposes of MCC 39.7515(B). The MCCP glossary explains that with the context of the MCCP, “natural resource” is defined as: ‘Generally, *a functioning natural system*, such as a wetland or a stream, wildlife habitat or material in the environment used or capable of being used for some purpose, also including minerals and fuels, agricultural resources and forests.’ Although the

¹ MCC 39.4305 opens with: “No *** land shall be used and no buildings*** shall be hereafter erected;*** when found to comply with MCC 39.4325 through 39.4345***” The County regulates what is built as a use (but not for the period during construction) and therefore the impacts from that building must be considered.

glossary is intended as a ‘convenience’ it contradicts the hearings officer’s conclusion that ‘natural resource’ as used in MCC 39.7515(B) and MCCP chapter 5 means only significant natural resources.” Footnotes and internal citations omitted. *Slip op* 121-122.

Providing additional context, MCC 39.7515(B) serves to implement MCCP policy 2.45 states:

“Support the siting and development of community facilities and services appropriate to the needs of rural areas while avoiding adverse impacts on farm and forest practices, wildlife, and natural and environmental resources including views of important natural landscape features.”

Since the MCC or other state law does not set forth a definition of “natural resource” and this is the only definition that reflects how the community service uses would be considered outside the Goal 5 SEC rubric, the hearings officer should adopt this interpretation.

What is critical about this definition is that it is concerned with protecting a system that furthers a broad range of agricultural, environmental, aesthetic or economic objectives. The focus is on the level of the functioning system, which need not be unique, pristine or otherwise optimal, to qualify for protection. If the nearby trees or hedgerow provide support for nesting and migrating birds, as well as rodents and insects that serve as food for bird species, then those trees or hedgerow contribute to the natural system supporting this wildlife. Determining the level of function requires an understanding of the demands of the resource. For example, suitability of a habitat for fish demands understanding the existing water quantity, temperature, flow rates, turbidity, source for and supply of food, as well as how the fish themselves function within this habitat.

What exists in the record so far from PWB are unsubstantiated conclusions. For example, PWB claimed that its stormwater containment methods would increase water quality over its existing “pesticide laden” condition. E.17. Yet, there is no evidence that PWB ever tested the water in support of this claim. There must be some monitoring and effort to establish a baseline level of habitat functions, which has yet to occur.

When is the “Not Adversely Affect” Standard Exceeded?

Next, the hearings officer must determine whether the impacts to identified natural resources exceed the “will not adversely affect” standard. For its Third Subassignment of Error to LUBA, the CPO argued that the County failed to: (1) interpret “adverse affect” in the first instance; and (2) demanded that PWB provide an inventory of natural resources describing their character and habitat function and then (3) evaluate the impact resulting from this use. Pet for Rev 39-40. Agreeing with the CPO, LUBA concluded:

“Under a proper construction of MC 39.7515(B) on remand, the hearings officer should determine whether any of the identified natural resources *will be affected* by the community service use and must find that the proposed use will not adversely affect those natural resources or explain why the identified natural resources are not subject to the criterion.” (Emphasis added) *Slip op* 127.

Again, LUBA’s holding in this case is entirely consistent with its analysis in *McCoy v. Linn County*, where LUBA explained:

“The use of the language ‘will not adversely affect’ in a mandatory approval standard imposes a very stringent standard. *West Hill & Island Neighbors, Inc. v. Multnomah County*, __ Or LUBA __ (LUBA No. 83-018; June 29, 1983), *aff’d* 68 Or App 782, 683 P2d 1032, *rev den* 298 Or 150 (1984). Under such a standard the county must find that proposed development will cause no adverse effects on the protected subject (in this case, the “livability of abutting properties and the surrounding neighborhood”).” 16 Or LUBA 295, 300 (1987), *aff’d* 90 Or App 271 (1988).²

Webster’s Third New Int’l Dictionary defines the term “affect” as “to act upon; a: to produce an effect upon or b: (1) to produce a material influence upon or alteration in.” 35 (unabridged ed 2002.) Similarly, the County staff recommendation is to consider “whether the use impairs any functioning natural system as a result of damage by weakening or loss of some property, quality, or capability of such system.” Taken together, any finding that the use will negatively alter the quality or character of natural systems, demands that the hearings officer deny this consolidated application.

Finally, it is worth mentioning a point about mitigation and the use of conditions to – perhaps – restore damage to natural systems. Nothing in the plain language of this standard contemplates mitigation as a strategy to restore an otherwise adverse effect once it has occurred. If the County intended to allow mitigation as a strategy to avoid adverse effect, it would state as much. For example, mitigation plan demands for certain impacts to SEC-h, SEC-w and SEC-wr areas are expressly authorized by MCC 39.5540, .5580, and .5590. There is no comparable language within MCC 39.7515(B).

Although LUBA has held that conditions may be used to “ensure compliance with ordinance criteria,” this is a function of maintaining compliance and not restoring what has been lost. *See*

² *See also* Footnote 14 in *Coffey v. City of North Bend*, where LUBA offered MCC 39.7515(B) as an example of standards that would impose an absolute prohibition on impacts. 17 Or LUBA 527, 542 (1989).

MCC 39.7510 and *Stephens v. Multnomah County*, 10 Or LUBA 147, 151-51 (1984). For example, conditions that reduce a hazard to an insignificant level avoid creating a hazardous condition. *Slip op* 90. Applied in this context, a condition requiring the retention of certain trees in order to maintain a certain habitat function would be permitted. By contrast, mitigation necessary to compensate or make up for identified loss cannot satisfy the standard because, by definition, the degradation of the resource will have already occurred. For example, planting of trees to mitigate for the natural resource impacts from tree or hedgerow removal is insufficient where the degradation has already occurred. The only way to allow mitigation planting as a reasonable means to respond to this criterion would be in a situation where an applicant establishes a fully functioning replacement habitat before the impact occurs. Conditions could then ensure the retention of the replacement habitat consistent with MCC 39.7510 and *Stephens supra*.

Conclusion

For all of the reasons stated, compliance with this criterion sets an extraordinarily high bar for finding compliance, particularly given PWB's activities to date. The burden is entirely on the applicant to establish the habitat value and show no adverse effect. Nonetheless, the CPO and RFPD10 offer this incomplete summary of permanent, adverse impacts to natural resources resulting from this use that are already in the record:

- Removal of the hedgerow along Dodge Park Rd, consisting of 324 trees greater than 6 inches in diameter that will no longer serve as shelter and foraging opportunities for birds and small mammals.
- Operation of a communications tower that interferes with the flight path of migrating birds.
- Redirection of stormwater to point source discharge rather than natural surface flows, which changes flow rates and water temperatures that will alter the habitat provided by the Johnson Creek headwaters for coho salmon, winter steelhead, and coastal cutthroat.
- Retention and filtration of stormwater will not remove the fine sediment inputs in Johnson Creek that are created by operation of the new asphalt and concrete surfaces.
- Elimination of the agricultural productivity previously realized by farming the water filtration plant property (approx. 95 acres) and the reduction of the nursery stock output of other private, high value farmlands as necessary to accommodate the pipeline.
- Removal of any open habitat for ground birds such as the streaked horned lark, western meadowlark, and western bluebird.
- Reduction of farm habitat formerly used by deer and elk for winter feeding.
- Groundwater pumping reduces water table levels, changes discharge from seeps and springs into the Sandy River and Johnson Creek and creates shortages in the supply available for use in nearby adjacent domestic wells.

Multnomah County Hearings Officer
April 15, 2025
Page 7

- Mass grading of the site has removed topsoil increasing erosion levels, creating slope instability and landslide risk.
- Destruction of a large wetland at the entrance to the raw water pipeline tunnel. The wetland was known to have multiple small ephemeral water bodies with populations of native amphibians, as well as numerous large coniferous trees.
- Off-site soil relocation exposing hazardous substances to the surfaces making them susceptible to erosion and leeching onto adjacent farms or nearby waterways.
- Destruction of the natural and pastoral scenery within the West of Sandy River Planning area, adjacent to the Wild and Scenic Sandy River, for enjoyment by nearby residents and the public at large.

Additional evidence on these, and other, points will be added into the record as part of these proceedings. PWB has not, and cannot, satisfy MCC 39.7515(B). The consolidated application, including all of the accessory components made necessary because of the filtration facility, must be denied. As part of this denial, the hearings officer must also adopt specific and exacting criterion for restoration of the lands affected by PWB's premature use.

Please place this letter into the record of these proceedings and provide me notice of your decision.

Very truly yours,



Carrie A. Richter

CAR:kms

cc: Client

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LUP Hearings <lup-hearings@multco.us>

Portland Water Bureau Filtration Facility and Pipelines - T3-2022-16220 Remand

1 message

Carrie Richter <crichter@batemanseidel.com>

Tue, Apr 15, 2025 at 6:44 PM

To: LUP Hearings <lup-hearings@multco.us>, "lisa.m.estrin@multco.us" <lisa.m.estrin@multco.us>

**External Sender** - Be Suspicious of Attachments, Links, and Requests for Payment or Login Information.

Good Evening,

Attached please find written testimony submitted on behalf of the Cottrell CPO and the Multnomah County Rural Fire Protection District No. 10. Hard copies will be provided during the hearing tomorrow as well.

Thank you,

Carrie

Carrie Richter**Bateman◇Seidel****Bateman Seidel Miner Blomgren Chellis & Gram, P.C.**

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