

STAFF REPORT ON REMAND



1600 SE 190th Ave. Portland, OR 97233-5910 ▪ Phone (503) 988 – 3043 ▪ www.multco.us/landuse/

Case File:	T3-2022-16220	Issue Date:	April 2, 2025
Permits:	Community Service Conditional Use Permit for Utility Facility (Filtration Facility), Community Service Conditional Use Permit for Utility Facility (Pipelines), Community Service Conditional Use Permit for Radio Transmission Tower (Communication Tower), Review Use for Utility Facility (Pipeline – EFU), Design Review (Filtration Facility, Pipelines, Communication Tower, Intertie Site), Significant Environmental Concern for Wildlife Habitat (Lusted Rd Pipeline, Raw Water Pipeline), Geologic Hazard (Raw Water Pipeline) and Lot of Record Verifications		
Proposal:	Portland Water Bureau proposes to build a drinking water filtration facility and communications tower located at the eastern end of SE Carpenter Road with raw and finished water pipelines connecting to the existing Bull Run conduit system.		
Applicant(s):	Bonita Oswald, Portland Water Bureau	Owner(s):	Various

Locations	
Filtration Facility Site:	35320 SE Carpenter Lane, Gresham Map, Tax Lot 1S4E22-00400 & 1S4E22D-00100 Alt. Acct. #R994220980 & R994220820 Property ID #R342619 & R342603
Base Zone:	Multiple Use Agriculture – 20 (MUA-20)
Overlays:	Significant Environmental Concern for wildlife habitat (SEC-h) & water resources (SEC-wr), Geologic Hazards (GH)
Pipeline Routes:	Portions of Dodge Park Blvd, Cottrell Rd, Lusted Rd, Altman Rd, and additional properties
Properties Involved:	35227 SE Carpenter Ln (R342606), 36910 SE Lusted Rd (R237226), 36800 SE Lusted Rd (R237225), 36322 SE Dodge Park Blvd (R154381), 33304 SE Lusted Rd (R342513), 6704 SE Cottrell Rd (R342553), 34747 SE Lusted Rd (R341824), Property to the Southeast of 34747 SE Lusted Rd (R342633), Tax lot located between 37039 SE Lusted Rd and Lusted Rd (R342647)
Base Zones:	Multiple Use Agriculture-20 (MUA-20), Exclusive Farm Use (EFU), Commercial Forest Use (CFU), Rural Residential (RR)
Overlays:	Significant Environmental Concern for wildlife habitat (SEC-h), Significant Environmental Concern for water resources (SEC-wr), Geologic Hazards (GH)

Recommendation:

1. Staff is not issuing a recommendation on whether the proposal satisfies MCC 39.7515(B) because additional evidence may be submitted during the open record period addressing compliance with that standard.
2. If the Hearings Officer finds on remand that the subject Community Service Conditional Use Permits can be approved, the 2023 Decision should be readopted, including all prior conditions, with modifications to include findings and any necessary conditions to resolve the issue(s) on remand.
3. If Applicant is found to have not met the MCC 39.7515(B) criterion as to any community service use to which the criterion applies, a determination should be made on a permit-by-permit basis as to whether any other Permit may nevertheless be approved.

To Review the Record: The complete case file, including all evidence associated with this application, is available for review at www.multco.us/landuse/portland-water-bureau-treatment-plant. Paper copies are available at the rate of \$0.46/per page for photocopies 11" x 17" or smaller. Aerial photographs and photocopies larger than 11" x 17" are \$12 per page. CDs are \$10 each. To request paper copies or CDs, please email LUP-hearings@multco.us.

❖ PUBLIC PARTICIPATION AND HEARING PROCESS:

The Hearing will be conducted pursuant to the procedures set forth in Multnomah County Code (MCC) 39.1140 (Hearings Process), as applicable to this remand proceeding; these procedures will be explained at the hearing and a copy of MCC 39.1140 is available at no cost at the website identified below (*see* Applicable Approval Criteria).

All parties interested in this matter may appear and testify virtually, in-person, and/or through the submission of written statements or evidence. Statements and evidence, whether offered through testimony or written submission, should address only those procedural or substantive issues within the scope of the hearing, and must be presented with sufficient specificity so as to afford the Hearings Officer and all parties an opportunity to respond to such statements or evidence. **The amount of time you may be allowed for oral testimony may be limited to ensure all parties have an opportunity to testify.**

In order for statements or evidence to be considered by the Hearings Officer in rendering a decision in this matter, oral testimony must be received by the Hearings Officer prior to the close of the hearing and written submissions must be received for admission into the record prior to the close of the record or any prior deadline established by the Hearings Officer.

NOTE: In order for written submissions to be delivered to the Hearings Officer prior to commencement of the hearing, such submissions **must be received by the Land Use Planning office by April 15, 2025 at 2 pm.**

PREFERRED STANDARDS FOR WRITTEN SUBMISSIONS ARE SET FORTH BELOW.

The Hearings Officer may announce a decision at the close of the hearing or on a later date, or the Hearings Officer may continue the hearing to a later date, time and location. The Hearings Officer may close the record at the end of the public hearing or set the record to close at a specific date and time at the hearing. At the end of the hearing, any participant may request an opportunity to present

additional evidence, arguments or testimony by requesting a continuance or to keep open the record while the record is still open. The record of the hearing will be added to the Document Library on the website identified above as soon as practicable after close of the record.

Notice of the Hearings Officer's decision in this matter will be mailed to the applicant, subject property owners, any person who submitted written statements or evidence, requested the decision in writing, or provided oral testimony at the hearing. A decision by the Hearings Officer may be appealed to the Land Use Board of Appeals (LUBA) by the applicant or other participants at this hearing. An explanation of the requirements for filing an appeal will be included in the notice of decision.

NOTE: Failure of an issue to be raised in this hearing or before the close of the record, in person or in letter or other writing, or failure to provide statements or evidence sufficient to afford the Hearings Officer and all parties an opportunity to respond to the issue, precludes appeal to LUBA based on that issue.

❖ PREFERRED STANDARDS FOR WRITTEN SUBMISSIONS

To the extent possible, please submit written statements or evidence by email or the online comment form; you may also submit written statements or evidence by mail or at the hearing:

Email: LUP-Hearings@multco.us

Online Comment Form: www.multco.us/landuse/portland-water-bureau-treatment-plant

Mail: T3-2022-16220 Comments
1600 SE 190th Avenue
Portland OR 97233-5910

To the extent possible, digital or electronic submissions of statements or evidence should be in the following format:

- **Searchable/Editable Files:** PDFs and other files should be text searchable. Files should also be editable to allow staff to add exhibit labels.
- **File Size and Type:** To allow submissions to be uploaded to the County's online Document Library, electronic submissions should be within the following sizes and types (the limits of the website):
 - Documents: Size: 64mb or less per file. File type: .txt, .rtf, .doc, .docx, .ppt, .pptx, .xls, .xlsx, .pdf
 - Photos: Size: 5mb or less per file. *File type:* .png, .gif, .jpg, .jpeg, .webp with no high efficiency codecs (e.g., HEVC, HEIC, etc.)
 - Videos: Please do not submit videos with high efficiency codecs (e.g., HEVC, HEIC, iPhone videos, etc.) because they cannot be played on all media players.
- **Exhibit Numbers:** Please do not include exhibit numbers in the titling of your submissions. Staff will assign exhibit numbers to submitted files.
- **No Flash Drives:** Flash drives will not be accepted.

❖ APPLICABLE APPROVAL CRITERIA:

The subject proposal (i.e., application(s)) is subject to the criteria listed below; however, this hearing most directly concerns the criterion set forth in MCC 39.7515(B), such that not all of the following criteria may fall within the limited scope of this hearing, as explained further below. The code references below are as of the original application date of October 12, 2022. Please see <https://multco.us/info/portland-water-bureau-filtration-and-pipelines-project> for the zoning code that was in effect on that date.

Multnomah County Code (MCC): General Provisions: MCC 39.1250 Code Compliance and Violations, MCC 39.2000 Definitions, MCC 39.6850 Dark Sky Lighting Standards.

Lot of Record: MCC 39.3005 Lot of Record – Generally, MCC 39.3010 Lot of Record - CFU, MCC 39.3070 Lot of Record - EFU, MCC 39.3080 Lot of Record – MUA-20, MCC 39.3090 Lot of Record – RR.

Multiple Use Agriculture – 20: MCC 39.4305 Uses, MCC 39.4320(A) Conditional Uses, Community Service Uses, MCC 39.4325 Dimensional Requirements and Development Standards, MCC 39.4335 Lot Sizes for Conditional Uses, MCC 39.4340 Off-Street Parking and Loading.

Exclusive Farm Use: MCC 39.4215 Uses, MCC 39.4225(A) Review Uses, Utility Facilities..., MCC 39.4245 Dimensional Requirements and Development Standards.

Rural Residential: MCC 39.4355 Uses, MCC 39.4370(A) Conditional Uses, Community Service Uses, MCC 39.4375 Dimensional Requirements and Standards, MCC 39.4385 Lot Sizes for Conditional Uses, MCC 39.4390 Off-Street Parking and Loading.

Commercial Forest Use: MCC 39.4065 Uses, MCC 39.4080 (A) (5) Conditional Uses, Community Service, Water intake facility, related treatment facility, pumping station, and distribution line, MCC 39.4100 Use Compatibility Standards, MCC 39.4105 Building Height, MCC 39.4110 Forest Practice Setbacks and Fire Safety Zones, MCC 39.4115 Development Standards for ...Structures, MCC 39.4140 Lot Size for Conditional Uses, MCC 39.4145 Off-street Parking and Loading.

Utility Facilities Community Service Conditional Use: MCC 39.7520(A)(6) Use, Utility Facilities, MCC 39.7505 General Provisions, MCC 39.7515(A) through (H) Approval Criteria, MCC 39.7525 Restrictions, MCC 39.7750 Maintenance.

Radio Transmission Towers Community Service Conditional Use: MCC 39.7520(A)(8) Uses, Radio Transmission Towers, MCC 39.7560 Application Requirements, MCC 39.7565 Approval Criteria for New Transmission Towers, MCC 39.7570 Design Review, MCC 39.7575 Radiation Standards.

Design Review: MCC 39.8005 Elements of Design Review Plan, MCC 39.8010 Design Review Plan Approval Required, MCC 39.8020 Application of Regulations, MCC 39.8025 Design Review Plan Contents, MCC 39.8030 Final Design Review Plan, MCC 39.8040 Design Review Criteria, MCC 39.8045(C) Required Minimum Standards, Required Landscape Areas.

Parking, Loading, Circulation and Access: MCC 39.6505 General Provisions, MCC 39.6510 Continuing Obligation, MCC 39.6515 Plan Required, MCC 39.6520 Use of Space, MCC 39.6525 Location of Parking and Loading Spaces, MCC 39.6530 Improvements Required, MCC 39.6535 Change of Use, MCC 39.6540 Joint Parking and Loading Facilities, MCC 39.6545 Existing Spaces, MCC 39.6555 Design Standards: Scope, MCC 39.6560 Access, MCC 39.6565 Dimensional Standards, MCC 39.6570 Improvements, MCC 39.6575 Signs, MCC 39.6580 Design Standards: Setbacks, MCC

39.6585 Landscape and Screening Requirements, MCC 39.6590 Minimum Required Off-Street Parking Spaces, MCC 39.6595 Minimum Required Off-Street Loading Spaces, MCC 39.6600 Exceptions from Required Off-Street Parking or Loading Spaces.

Signs: MCC 39.6710 Conformance, MCC 39.6720 Exempt Signs, MCC 39.6725 Prohibited Signs, MCC 39.6730 Determination of Frontages, MCC 39.6740 Base Zone Sign Regulations, MCC 39.6745 Signs Generally, MCC 39.6780 Sign Placement, MCC 39.6805 Directional Signs, MCC 39.6820 Sign Related Definitions and Figures.

Significant Environmental Concern: MCC 39.5510 Uses; Sec Permit Required, MCC 39.5515 Exceptions,

Wildlife Habitat: MCC 39.5520 Application for Sec Permit, MCC 39.5545 Definitions, MCC 39.5560 General Requirements for Approval in The West of Sandy River Planning Area Designated As SEC-wr or SEC-h, MCC 39.5860 Criteria for Approval Of SEC-h Permit -Wildlife Habitat.

Geologic Hazard: MCC 39.5075 Permit Required, MCC 39.5085 Geologic Hazards Permit Application Information Required, MCC 39.5090 Geologic Hazards Permit Standards.

Comprehensive Plan Policies: Land Use 2.50, Farm Land 3.14, 3.15, Natural Hazards 7.1, 7.2, 7.3, 7.4 Public Facilities 11.3, 11.10, 11.11, 11.12, 11.13, 11.17

Transportation Planning - Multnomah County Road Rules (MCRR):

MCRR 4.000 Access to County Roads, MCRR 4.100 Application for New or Reconfigured Access, MCRR 4.200 Number of Accesses Allowed, MCRR 4.300 Location, MCRR 4.400 Width, MCRR 4.500 Sight Distance, MCRR 5.000 Transportation Impact, MCRR 6.000 Improvement Requirements, MCRR 6.100 Site Development: A. Dedication of Right of Way Requirement & B. Frontage Improvement Requirements, MCRR 8.000 Off-Site Improvement Requirements, MCRR 9.000 Compliance Method, MCRR 13.000 Temporary Road Closures, MCRR 15.000 Truck and Transit Restrictions, MCRR 18.250 Access/Encroachment Permit, and MCRR 26.000 Stormwater Management.

Copies of the referenced Multnomah County Code sections are available by contacting our office at (503) 988-3043 or by visiting Land Use Planning's website at <https://multco.us/landuse/zoning-codes/> under the link **Chapter 39: Multnomah County Zoning Code** and at <https://multco.us/landuse/comprehensive-plan> under the link **Multnomah County Comprehensive Plan**. Copies of the referenced Multnomah County Road Rules sections are available by visiting Transportation Planning and Development Review's website at <https://www.multco.us/planreview> under the link **Related Documents**.

Findings of Fact

FINDINGS: Written findings are contained herein. The Multnomah County Code (MCC) criteria and Comprehensive Plan Policies are in **bold** font. Staff analysis and comments are identified as '**Staff:**' and address the applicable criteria. Staff comments may include a conclusionary statement in *italic*.

1.0 Project Description:

Staff: On November 29, 2023, a Hearings Officer issued a decision (“2023 Decision”) approving, with conditions, the permits described above. The 2023 Decision provides a Project Description starting at page 5. The Project Description was not challenged before LUBA.

2.0 Public Comments:

Staff: After LUBA issued its decision on January 22, 2025, staff received numerous public comments generally pertaining to the Project but they did not indicate that they were submitted for admission into the record in this matter.

Comments submitted for admission into the remand record have been added to the record within the Remand Submissions (labeled as “N”). Comments were still being received at the time of publication of the staff report and therefore are not summarized here. Those comments can be summarized as part of the oral staff report at hearing if requested by the Hearings Officer.

3.0 Recommended Time Limits for Hearing Oral Testimony:

Staff: Following the process that was used in the original hearing in this matter, Staff recommends that the Hearings Officer provide the following time limits for the presentation of oral testimony:

- Applicant: 30 minutes for opening and 15 minutes for rebuttal
- County recognized neighborhood associations:
 - Cottrell Community Planning Organization: 20 minutes
 - Pleasant Home Community Association: 20 minutes
- Multnomah County Rural Fire Protection District #10: 10 minutes
- All other testimony: 3 minutes

4.0 Remand Timeline:

Staff: Under ORS 215.435(2)(a), the Hearings Officer has 120 days from the date that the applicant requests in writing that the County proceed with the application on remand to take final action on the permit applications. The County received the request from the applicant on February 25, 2025 (Exhibit N.1). As a result, the Hearings Officer must issue its decision by June 25, 2025.

In light of that timeline, the County scheduled the remand hearing for mid-April to allow time for an open record period, with post-hearing briefing, and a decision by the Hearings Officer. All interested persons have had notice of the bases for remand since LUBA issued its decision on January 22, 2025. As explained more fully below, the remand requires the Hearings Officer to determine both the meaning and application of MCC 39.7515(B). The April hearing will allow interested persons to provide their interpretations of MCC 39.7515(B) and supporting evidence at the hearing, while also

leaving time for entry of responsive evidence and argument during an open record period following the hearing, if needed.

5.0 Issue(s) on Remand - Community Service Conditional Use Approval Criteria in MCC 39.7515(B):

§ 39.7515 APPROVAL CRITERIA.

In approving a Community Service use, the approval authority shall find that the proposal meets the following approval criteria, except for transmission towers, which shall meet the approval criteria of MCC 39.7550 through 39.7575, wireless communications facilities, subject to the provisions of MCC 39.7705, and except for regional sanitary landfills, which shall comply with MCC 39.7600 through 39.7625.

* * *

(B) Will not adversely affect natural resources;

* * *

Staff:

Scope of Remand

The remand proceedings are limited in scope to resolving the issue(s) remanded by the Oregon Land Use Board of Appeals in *Cottrell Community Planning Organization et al v. Multnomah County*, LUBA No. 2023-086 concerning the criterion of approval at MCC 39.7515(B). See *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992) (remand proceedings limited to “new, unresolved issues” relating to LUBA’s remand instructions). As a result, participants cannot raise, and the Hearings Officer cannot consider, “issues that LUBA affirmed or reversed on their merits, which are old, resolved issues.” *Id.*

LUBA remanded the 2023 Decision because it determined that the Hearings Officer “misconstrued the community use natural resources criterion [in MCC 39.7515(B)] and, based on that misconception, failed to adopt adequate findings supported by substantial evidence.” Slip op at 130. As a result, on remand, the Hearings Officer must address both the meaning and application of MCC 39.7515(B).

For these proceedings, the existing record of statements and evidence in this matter is before the Hearings Officer and new evidence and statements may be offered for admission into the record.

Scope of Application of MCC 39.7515(B)

MCC 39.7515(B) applies to the “approved use as opposed to its construction.” Slip op at 24. As part of its decision, LUBA examined whether construction impacts from establishment of a use are subject to the criteria in MCC 39.7515. Slip op at 18 (examining “whether the MCC requires the consideration of construction impacts associated with a community service use in the MUA-20 zone”). LUBA held that construction impacts are not part of the scope of the use to be evaluated under MCC 39.7515. Slip op at 130 (“The hearings officer did not misconstrue the applicable law in concluding that the county was not required to consider construction impacts under the community use criteria.”).

In light of LUBA's decision, the question before the Hearings Officer is whether the use, *as proposed to be operated*, will adversely affect natural resources, not whether the construction of the use will adversely affect natural resources.

Natural Resources

Before LUBA, the parties debated the meaning of the term "natural resources" in MCC 39.7515(B). With respect to that debate, Staff understands LUBA to have reached the following conclusions:

1. The term "natural resources" is not limited to "those significant resources included in SEC overlays." Slip op at 121.
2. Findings of compliance with listed Comprehensive Plan Natural Resource Topics and Policies are not, in themselves, sufficient to establish satisfaction of MCC 39.7515(B). Slip op at 125.
3. Chapter 5 of the Multnomah County Comprehensive Plan (MCCP) does not define the "natural resources" subject to MCC 39.7515(B). Slip op at 123 (standard is not limited to MCCP Ch. 5 resources because MCCP Ch. 2, Policy 2.45, promotes the avoidance of adverse impacts on natural resources; and MCC 39.7515(B) predates the Goal 5 SEC program in MCCP Ch. 5); *see also* slip op at 121 ("We do not find support for the argument that the title of MCCP chapter 5 ["Natural Resources"] serves as a definition of 'natural resources' for purposes of MCC 39.7515(B).").
4. "[W]ithin 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.'" Slip op at 121–122.

In light of the foregoing determinations by LUBA, and because the Code must be construed in compliance with the MCCP, Staff understands the definition of the term "natural resource" set forth in the Glossary of the MCCP to serve as the definition of that term for purposes of MCC 39.7515(B). Accordingly, the "natural resources" to be considered under MCC 39.7515(B) are *functioning natural systems*, such as wetlands or streams, wildlife habitat, material in the environment used or capable of being used for some purpose, minerals, fuels, agricultural resources, and forests.

Adversely Affect

As explained above in the Section entitled "Scope of Application of MCC 39.7515(B)," in light of LUBA's decision, the question inherent in MCC 39.7515(B) is whether the use, *as proposed to be operated*, will adversely affect natural resources, not whether construction of the use will adversely affect natural resources.

Although the term "adversely affect" is not specifically defined in the MCCP or the Code, the MCCP indicates that the County's primary concern with respect to protection of natural resources is avoiding "environmental degradation." MCCP 1-3 (explaining that the County has embraced land use planning as a necessary means "to protect natural resources from environmental degradation."). In relevant part, the term "degradation" means "5: impairment in respect to some physical property: a: damage by weakening or loss of some property, quality, or capability." *Webster's Third New Int'l Dictionary* 594 (unabridged ed 2002). Therefore, when taken together with the meaning of the term "natural resources," the appropriate inquiry under this standard is 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.