

May 27, 2025

VIA EMAIL

Multnomah County Hearings Officer  
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Re: Portland Water Bureau Filtration Facility and Pipelines  
County Case File T3-2022-1622  
Final Written Submittal

Hearings Officer Fancher:

This final written argument is offered on behalf of the Cottrell Community Planning Organization and the Multnomah County Rural Fire Protection District #1 (collectively CPO/RFPD1). This matter is the result of a remand from the Land Use Board of Appeals and, although the sole issue can be stated simply, it presents several complex questions. In simple terms, the remand requires the County to interpret and apply Multnomah County Code (MCC) 39.7515(B) which requires a finding that the development of the Portland Water Bureau's (PWB) facility "will not adversely affect natural resources."

The County, relying on guidance from PWB, failed to properly apply this standard in its initial review and has now been given a second chance. However, while the appeal was pending, PWB proceeded with construction in earnest. It has cleared over 108 acres of wildlife habitat, excavated and relocated over 1 million cubic yards of soil, at least 180,000 cubic yards of which were high value agricultural soils, disrupted riparian habitat by introducing sediment and altering creek flow patterns serving fish and amphibian populations and degraded the visual and auditory character of the pastoral landscape. As explained in the testimony below, the effects from all of these actions will remain after construction is completed and will be permanent. Further, the premature destruction of natural resources made it impossible for PWB to understand the nature of the resources - the fundamental first step in showing that the standard in MCC 39.7515(B) can be met.<sup>1</sup> Contrary to the theme underlying PWB's arguments on remand, PWB did, in fact have

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<sup>1</sup> The standard requires the applicant to demonstrate the development of its use "will not adversely affect natural resources." If the applicant cannot identify and show the degree of the natural resource systems present on the site prior to development, it is impossible to tell if there have been any effects, positive or adverse.

a choice; it could have held off in proceeding with development until the land use approval was final (allowing it to properly characterize the natural resources on the site) or it could have located this facility elsewhere, such as on Powell Butte, as was proposed over a decade ago.

During the public hearing, PWB's counsel explained that they had no reason to anticipate its current predicament - that LUBA would interpret MCC 39.7515(B) in a way that was completely at odds with how PWB believes the criterion has been interpreted previously. This statement overlooks the *West Hills & Island Inc. v. Multnomah County (West Hills)* case where LUBA and the Court of Appeals specifically interpreted and applied the now renumbered, MCC 39.7515(B) in a case that is remarkably similar to this one. \_\_\_\_ Or LUBA \_\_\_\_ (LUBA No. 83-018, June 29, 1983) *aff'd* 68 Or App 782, 683 P2d 1032, *rev den* 298 Or 150 (1984).<sup>2</sup>

In *West Hills*, Multnomah County approved Metro's request for a regional landfill on a rural-zoned, forested property near Sauvie Island. On appeal, petitioners argued that the conditional use criteria, including the adverse effects criterion at issue in this case, set forth "mandatory terms" that could not be interpreted flexibly based on need, plan policies or impossibility of compliance. LUBA, and the Court of Appeals, rejected all of these arguments finding MCC 39.7515(B) is stated as an "absolute" and "imposes a very stringent standard." *Slip op* 19. No party in *West Hills* disputed that the elimination of lands suitable for timber production to accommodate the landfill was not a natural resource that would suffer adverse effect. Rather, Metro's proposed mitigation - to replant the site after the landfill use had ceased - was rejected by LUBA as altering the language of the standard to allow for "eventual consistency," that would still allow some level of adverse impact to occur. "Had the county intended to legislate a substantial consistency standard, based on mitigation of effects, it could have done so." *Slip op* 15. Subsequent to the *West Hills* case, the County took up that suggestion and made legislative changes, amending its plan to provide that the siting of a landfill will "entail some adverse impacts" and expanding other regulations to make landfills easier to locate. *See Metropolitan Service District v. Multnomah County*, 13 Or LUBA 192 (1985). However, what the County did not do was alter the conditional use criteria with respect to other uses - including community services uses. The same strict protection for natural resources exist today just as it did over 40 years ago.

By following the same playbook as Metro in *West Hills*, PWB portends a similar demise. On remand, PWB spends a majority of its hearing testimony and its initial written submittals on the critical, historically valuable role PWB plays for the region and how water filtration at this property was strictly a federally imposed obligation with deadlines. N.54. PWB's efforts to seek

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<sup>2</sup> In the original LUBA decision, the Petitioner is identified as "West Hill & Island Development Inc" but in all subsequent cases the citation is to "West Hills & Island Development Inc."



sympathy or flexibility within the standard where it is clear that under *West Hills* none exist cannot be tolerated. Seeking to reject the current plan definition of “natural resources” that expressly includes lands for “farm practices,” PWB argues for an originalist interpretation. Yet, in *West Hills*, forest practices were unambiguously considered a natural resource. It is difficult to get more original than a case decided six years after the code was adopted. Given the devastating effect of construction on the wildlife habitat, PWB’s only option is mitigation with a claim that it will, within a few years, reveal an even greater opportunity for natural resources to thrive. Again, quoting from *West Hills*: “Had the county intended to legislate a substantial consistency standard, based on mitigation of effects, it could have done so.” *slip op* 15. Mitigation, by its definition, reveals that adverse effects have occurred and as such, it cannot be used to establish compliance with this standard.

This exacting and strict “no adverse effect” standard prohibits any adverse effect, even where it might be mitigated to some reduced level. Finding helpful context in Comprehensive Plan Policy 1-3, County staff points out that this standard prohibits any “environmental degradation” which 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,” demands a finding no “damage by weakening or loss of some property, quality, or capability of such system.” N.7 p 8. The relocation of a single bird, the loss of one blade of grass, or the removal of natural water flows containing one microorganism would trigger an adverse effect finding under this exacting standard.

An overwhelming amount of evidence documenting adverse effects was presented by neighbors, which offers the best, and only, first-hand, assessment of the condition of these resources before construction began as well as an understanding of what has been lost. Mass grading of the filtration facility property, along with removing trees, shrubs, vegetation and agricultural soils on edges and hedgerows adjacent to roadways and on private farms decimated habitat that once served a wide array of wildlife. N.6, N.8, N.10, N.18, N.41, N.52, N.53, R.6, S.19 and others. Most particularly, PWB removed a nearly one mile long hedgerow along Dodge Park Boulevard containing between 320-400 trees, some more than 80 years old and over 100 feet tall, shrubs, grasses and flowers. N.43, p 43. Owls, eagles and other birds were regularly seen perched on the tallest trees within this hedgerow and the chirp of song birds was savored during residents’ daily walks and by visitors as a sign that this was a place where nature was valued. U. 23. Residents have witnessed the destruction of two natural draws and wetland habitats; a qualified aquatic species biologist has explained that this removal has, and will continue, to negatively affect fish, amphibians and the aquatic insects that rely on those waters. N.43.

PWB attempts to diminish the neighbors experience, saying that these are a result of construction impacts that are not germane to this review. Although this is a correct statement of the law with respect to construction generally, the neighbors’ testimony remains relevant to identifying natural resource conditions before construction began, documenting the degree of loss to date



which informs the level of impacts that will be present when construction concludes. These permanent impacts include the removal of approximately 90 acres of high-value farmland on the facility site along with additional acres of private farmland condemned to accommodate pipelines, the loss of old trees providing established habitat for mammal, birds and insects and the degradation of water quality from the redirection of stormwater flows. W.2, N.43, 56.

PWB's experts argue that the opposition testimony of pre-construction conditions is overstated. They claim that active farming introduced the same levels of pollutants and that wildlife adaptability will allow a finding of no adverse impact. The problem for PWB is that it never evaluated the question, because it did not think it would ever have to. Before construction, PWB surveyed only for endangered species (not all species), completed wetland delineations (but did not delineate other habitats), and checked for bird nests before cutting trees (but did not consider other animal use of the trees) – these were all actions required by federal law. You can bet that if PWB believed that documenting the nature and extent of natural resources might be required, PWB would not be relying on claims of bird nest surveys and a Habitat Evaluation Procedure (HEP) to simulate habitat demands for key species in a desperate effort to cobble together a supportable baseline for other wildlife resources as it was forced to do here. The adverse effect test demands an exacting review of what existed previously and the HEP, without independent peer review, is unreliable to achieve that end. With respect to water quality, where PWB focuses on farmland pollutants fouling streams, no pre-construction fish counts or water quality testing for toxics or temperature was done. Simply stating that pesticides were polluting the streams to a greater degree than will occur with stormwater treatment, without any testing, is a conclusion, not substantial evidence.

In order to dig itself out of the hole of adverse impacts created by this development, PWB relies on mitigation. As defined by LUBA in *West Hills*, “‘mitigate’ means ‘to make less severe, violent, cruel, intense, painful\*\*\*’ *Websters 3d International Dictionary* (1961).” *slip op* 15. Using this definition, LUBA found that mitigation serves to make something less objectionable but it does not alleviate the adverse effect in the first instance, which is the measure that this criterion requires. Stated differently, if mitigation is required, there is, by definition, an adverse effect. Again, as LUBA stated in *West Hills*, if mitigation could be used to restore an adversely affected property, the County's code or plan would have stated as much.

Secondly, and perhaps more importantly given these facts, the PWB's proposed mitigation will not reproduce the natural resource functions previously in place as would be necessary to support a finding of complete abatement of impacts. A 100' foot broadleaf maple or an 85-year old Douglas fir teeming with wildlife will not be present in the removed Dodge Park Boulevard hedgerow on the day that filtration facility opens or ever again. What will be in this hedgerow area is a long line of 12-to-18-inch shrubs that will offer no shade or protection to wildlife or scenic interest to passersby, even after the shrubs are full grown. The definition of “nature” means, in relevant part: “one having an unchanged as contrasted with a developed, ordered, perfected or man-made character.” *Webster's Third New Int'l Dictionary* p 1508. When it comes



to upland habitat, PWB is going to create habitat out of whole cloth complete with bird boxes and bat roosts. This man-made habitat is, by definition and as depicted in PWB's renderings, unnatural.

A final point about mitigation - If mitigation is even possible under MCC 39.7515(B), then PWB must demonstrate that there is a reasonable basis to believe that it is going to succeed. The failure of the stormwater collection and conveyance system on site has shown what PWB<sup>3</sup> is capable of and calls into question their expertise in designing mitigation systems to protect natural systems more broadly. Its failure to control and comply with standards for the disposition of contaminated soils on other private property is out of compliance with DEQ mandatory conditions and PWB refuses to take any responsibility. Finally, starting construction before obtaining final land use approval indicates that the only thing that PWB has on its mind is construction and as the overwhelming amount of evidence in the record shows, natural resource protection or mitigation is not now, nor has it ever been, a priority. There is no reason to believe that natural resources will become a priority in the future.

As explained in more detail in the attached draft findings, the County's legislative intent could not be more clear. Land zoned MUA-20 was to be protected, not just for farming but to further its natural resource value as well. Community service uses, such as the proposed water filtration facility and associated pipelines, may be allowed, but only where there is no adverse effect. The hearings officer must follow LUBA's decision in *West Hills*, apply the code strictly, and once done, draw the inevitable conclusion of adverse effect. This filtration facility and pipelines will have an adverse effect on natural resources. These permits must be denied, along with all of the other permits consolidated for review as they were applied for at the same time and they are all associated with the same project. MCC 39.1140(G).

Finally, appreciating the opportunity to provide draft findings, they are submitted in Word form for the hearings officer's consideration. That said, it is important to understand that PWB has yet to provide any comprehensive explanation of the meaning and application of MCC 39.7515(B); a burden that only PWB bears. To date, PWB has submitted nothing more than a disparate set of evidentiary responses to review. PWB's approach has left the parties to speculate and make assumptions, hoping not to make PWB's case. For this reason, the hearings officer should not assume that these draft findings represent all of the issues that may be necessary for resolution. Rather, what is provided is a comprehensive legal framework for considering the issues and a discussion of a number of immediately identifiable evidentiary shortcomings. It is likely that these findings will need to be altered or enhanced should PWB proceed with finally presenting their case in the first instance after the record closes for all other parties to respond.

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<sup>3</sup> As shown in Exhibit N.14, PWB's storm water spreader, the system intended to collect and distribute stormwater in a way that will ostensibly mimic pre-construction flows failed resulting in sedimentation and introducing sediment and changing established flow patterns.

Multnomah County Hearings Officer

May 27, 2025

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Please place this letter and the findings in the record and provide me notice of your final decision.

Very truly yours,

A handwritten signature in black ink, appearing to read "Carrie Richter", with a long horizontal flourish extending to the right.

Carrie A. Richter

CAR:kms

cc: Client

[lisa.m.estrin@multoco.us](mailto:lisa.m.estrin@multoco.us)



LUP Hearings &lt;lup-hearings@multco.us&gt;

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**CPO - RFD10 final written submittal - T3-2022-1622**

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**Carrie Richter** <crichter@batemanseidel.com>

Tue, May 27, 2025 at 11:11 AM

To: LUP Hearings &lt;lup-hearings@multco.us&gt;, "LUP-comments@multco.us" &lt;lup-comments@multco.us&gt;, Lisa Estrin &lt;lisa.m.estrin@multco.us&gt;

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Hello,

Attached please find the Cottrell CPO and Multnomah County Rural Fire Protection District final written submittal including proposed written findings submitted in both pdf and Word-editable form.

Please confirm receipt.

Thank you,  
Carrie

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**3 attachments** **20250527091139769.pdf**  
1805K **CPO-RFD10 draft findings on remand.pdf**  
297K **CPO-RFD10 draft findings on remand.docx**  
115K