DECISION OF THE HEARING OFFICER

Case File: T3-2022-16220

Applicant: Portland Water Bureau

Proposal: Portland Water Bureau proposal to build a drinking water filtration facility and communications tower located at the eastern end of SE Carpenter Lane with raw and finished water pipelines connecting to the existing Bull Run conduit system.

A. Background and Procedures

On November 29,2023, a hearings officer issued a decision ("2023 Decision") approving, with conditions, the permits described above. The 2023 Decision was appealed to LUBA and on January 22, 2025, LUBA remanded the decision finding that the hearings officer misconstrued Multnomah County Code ("MCC") Section 39.7515(B) requiring a finding that the community service use "will not adversely affect natural resources."

On February 25, 2025, the county received a request from the applicant to proceed with the application on remand. The county mailed notice to all individuals who participated in the initial review that a public hearing would be held on April 16, 2025.

Multnomah County Land Use Hearings Officer Liz Fancher (the "hearings officer") presided over the public hearing on remand. Although the hearing was *de novo,* the hearings officer indicated that the scope of review would be limited to evidence and argument directed at MCC 39.7515(B) only. After hearing from County staff, the public, and all other participants, the hearings officer closed the public hearing but left the record open for the submittal of written testimony.

All parties were given until May 5 at noon to submit additional written evidence and argument. Any responses to written materials received during the first period had to be submitted before May 19. Final written argument based on information in the record could be submitted on or before May 27 and the applicant's final written argument was due on June 3. Any objection to the content of the post-hearing submittals had to be filed within three days after each of the stated deadlines.

B. LUBA Decision and Instructions on Remand

During the 2023 review, the hearings officer found that MCC 39.7515(B), or the natural resources criterion, was met for the water filtration facility because it is outside of the areas designated of Significant Environmental Concern (SEC-h and SEC-wr). Regarding pipelines, the hearings officer concluded that the natural resources criterion was met because, while the pipeline would go through the SEC-wr overlay, it would be installed via boring beneath the surface. In agreeing with the applicant, the hearings officer found that the remaining pipelines and intertie site were designed to avoid disturbing any natural resources that the county has designated as significant under Statewide Planning Goal 5.

Before LUBA, the Cottrell Community Planning Organization (Cottrell) argued that the obligation set forth within the natural resources criterion MCC 39.7515(B) was not constrained to SEC overlay areas. LUBA agreed finding:

> "We agree with Cottrell that the hearings officer misconstrued the code when they concluded that 'natural resources' in MCC 39.75159B) 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)." *slip op 121*.

Although LUBA did not conclusively determine what "natural resources" were to be considered when applying MCC 39.7515(B), LUBA offered instructive guidance. First, LUBA concluded that Chapter 5 of the current 2016 Comprehensive Plan (referenced by LUBA as MCCP but referenced herein as the 2016 Plan) is directed to "natural resources" and not to "significant natural resources."[1] *Slip op* 112. The definition of "natural resources" from the glossary of the 2016 Plan, quoted approvingly by LUBA provides:

> "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 121-122*.

Acknowledging that the glossary may not necessarily be controlling, LUBA relied on this definition, in part, to conclude that "natural resources" referenced in MCC 39.7515(B) are not constrained to "significant natural resources" and the County's Goal 5 program.

In conclusion on the interpretive point, the LUBA offered the following instructions:

> "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.

For its second Subassignment of error, Cottrell argued that finding compliance with Chapter 5 of the 2016 Plan could not serve as a surrogate for finding compliance with MCC 39.7515(B) and as such, the findings were inadequate. LUBA agreed that finding compliance with the Goal 5 policies was insufficient to find compliance with MCC 39.7515(B):

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[1] In fact, LUBA also found that "PWB does not respond to Cottrell's assertion that the hearings officer did not accept PWB's argument that MCCP chapter 5 established the scope of natural resources required to be considered." *Slip op 124*. Since LUBA found that PWB did not respond to this claim, PWB cannot be heard now to argue that the list set forth in the prefatory section of MCCP chapter 5 establishes the limit of qualifying "natural resources." Later on, LUBA says:

> "The hearings officer did not find that the natural resources identified in MCCP chapter 5 established the scope of protected resources."

Beck v. City of Tillamook, 313 Or 148, 153, 831 P2d 678 (1992).

> "The hearings officer's findings of conformance with MCCP policies do not respond to the question of whether all required natural resources have been evaluated when making the 'will not adversely affect' determination." *Slip op 125*.

In this Subassignment, LUBA reemphasized the need to evaluate "all required natural resources" which LUBA unambiguously determined had not been accomplished as part of the first review.

For the third Subassignment of error, Cottrell argued that the hearings officer failed to interpret, and then apply, the "adversely impact" provision to protect natural resources. In particular, Cottrell argued and LUBA found that, without engaging in the necessary inventory to evaluate species and the character of their habitat, such as that provided by Johnson Creek, its tributaries or loss of hedgerow trees, the County lacked data necessary to make findings as to no adverse effect. Therefore, LUBA's instructions were:

> "Under a proper construction of MCC 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." *Slip op 127*.

Although it is true that Cottrell did "identify" some natural resources as examples, it is clear from LUBA's holdings on the first two subassignments that the identification of resources provided by Cottrell was not proposed to end the inquiry as to what resources qualified for consideration. If LUBA had agreed that the "identified natural resources" included only those that Cottrell identified, a discussion of the definition of "natural resources," particularly the more expansive glossary definition, would have been irrelevant. Therefore, the hearings officer concludes that compliance with LUBA's instructions requires an adverse effect evaluation of all "identified natural resources" including those "natural resources" that the hearings officer finds fall within the ambit of the standard on remand.

For its fourth Subassignment of error, Cottrell challenged PWB's expert reports relied on by the hearings officer because they failed to set forth any systemic evaluation of natural resource qualities. In sustaining the first through third subassignments, LUBA did not reach or resolve this assignment, leaving it as an open question.

In its overall conclusion with respect to the natural resource criterion, LUBA held:

> "The hearings officer misconstrued the community use natural resources criterion and, based on that misconstruction, failed to adopt adequate findings supported by substantial evidence." *Slip op 130*.

Taken together, the hearings officer finds that the obligations on remand are as follows:

1) Interpret what MCC 39.7515(B) requires:
    a. What is a "community service use"?
    b. What "natural resources" are protected?
    c. When is the adverse effect threshold triggered?
2) Evaluate the evidence to determine if this criterion, as properly interpreted, is satisfied.

C. Interpretation of MCC 39.7515(B)

The rules of statutory construction apply to the construction of local ordinances as well as statutes. *City of Hillsboro v. Housing Devel. Corp*., 61 Or App 484, 489, 657 P2d 726 (1983). Questions of interpretation are resolved by considering the text, context, and any helpful legislative history. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). The goal in interpreting statutes is to discern the legislature's intent. *Gaines*, 346 Or at 170; see also ORS 174.020(1)(a) ("In the construction of a statute, a court shall pursue the intention of the legislature if possible."). The first step is to examine the text and context of a law. Next, the focus turns to any pertinent legislative history, where it "appears useful to [our] analysis" and determine its "evaluative weight." *Id* at 172. Finally, "[i]f the legislature's intent remains unclear after examining text, context, and legislative history, [we] may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id*.

1. Text and Context

Beginning with the text, for ease of reference, in order to allow a community service use, MCC 39.7515(B) requires a finding that the community service use "will not adversely affect natural resources." Three terms within this standard require further interpretation: "community service use," "adversely affect" and "natural resources." None of these terms are specifically defined within MCC 39.200, the general definitions section, or within the zone or use specific definitions contained with the code. Where the code does not define terms, courts resort to dictionary definitions in order to give words their "plain, natural, and ordinary meaning." *PGE v BOLI*, 317 Or at 611.

a. **"Community Service Use"**

A water filtration facility and water conveyance pipelines are "utility facilities necessary for public service" are community service uses, which are conditionally allowed in the MUA-20 zone under MCC 39.4320. Once construction is complete, the property will include massive underground storage tanks and 7-9 feet in diameter pipelines, and structures with offices to serve 26-full time employees. Ex A.3. These improvements required land clearing, tree removal and grading to widen roads, the excavation of an estimated 1,225,000 cubic yards of soil. Ex N.43.

In its initial report, staff took the position that the impacts from a "community service use" were limited to those resulting from operation of the facility, as a way to distinguish from construction impacts. The CPO objected to such a narrow approach noting that a "use" includes not only how a building functions but also the impacts resulting from changes in the existing condition of the land necessary to accommodate the use. The County regulates that which is built as a use (but not impacts specifically arising during and confined to the construction period). Thus, the impacts upon natural resources which continue once construction is complete must be considered. MCC 39.4305. A contrary interpretation would serve only to nullify the duly adopted code provisions discussed here. In its supplemental staff report at W-1, Multnomah County staff amended its position to agree that a use includes the long-term impacts resulting from a development. Ex W.1. The hearings officer agrees with the County and the CPO on this point.

b. "Natural Resources"

Next, the hearings officer must interpret the term "natural resources" to identify what is protected under the standard. Starting with the text, *Webster's Third New Int'l Dictionary* defines the term "natural resources" to mean "capacities (as native wit) or materials (as mineral deposits and waterpower) supplied by nature." P 1507. Separating the words, "natural" means "in accordance with or determined by nature." In context, the term "nature" means

> "a particular order of existence or of existing things that is the subject matter of art; as a: one having an unchanged as contrasted with a developed, ordered, perfected or man-made character b: real and objective existence: the work of mined and matter external to an observer: reality as observed c: the aspect to out-of-doors (as a landscape); natural scenery." P 1508.

The term "resources" is defined as "available means (as a country or business): computable wealth (as in money, property, products): Immediate and possible sources of revenue (rich natural -s)" p 1934. Taken together, "natural resources" are those living and non-living things that exist in their created form without influence or creation by humans that provide some value. This would mean wildlife, including fish, amphibians, mammals and birds, including the habitat necessary to sustain them. Natural resources include trees, wetlands, riparian areas, groundwater, geologic conditions, and agricultural soils which are not man-made and serve an economic or aesthetic purpose. Like other mineral and energy resources, agricultural soils are a living and life-giving natural resource that is a non-renewable resource providing the basis for the production of food. Ex U.1.

The 2016 Comprehensive Plan discussion of natural resources provides additional context and reinforces the dictionary definition. *Baker v. City of Milwaukie*, 271 Or 500, 509, 533 P2d 773 (1975). The Plan Glossary defines a "natural resource" 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." App B, p 7.

As part of its decision, LUBA pointed out that terms within the 2016 Plan Glossary are offered as a "convenience." More specifically, the prefatory provisions from the Glossary provide:

> "This Glossary of Terms includes common definitions of terms used in the Comprehensive Plan and is intended as a convenience to help readers better understand some of the terms used in the Plan. Definitions for terms used in this Comprehensive Plan that are defined in the Multnomah County Zoning Ordinance or in state statutes or administrative rules are found in those documents and those definitions control in the case of any conflict between those definitions and any statement in this Comprehensive Plan. Lastly, because the definitions in this Glossary are intended solely for the convenience of the reader in conveying a general idea of the meaning of the terms used in this Plan, nothing in this Comprehensive Plan prohibits the County from previously or subsequently defining

> any term, whether in the Zoning ordinance or otherwise, in a manner that may or does conflict with the meaning of any term used in this Plan." Appendix B, p 7.

None of the circumstances contemplated for deviation from the convenient definition have occurred in this case. As noted above, the term "natural resources" is not defined in the MCC or elsewhere in state law. In fact, this inclusion of agricultural soils within natural resource protections is further evident in 2016 Plan Policy 2.45, which specifically deals with community service uses in the context of adverse impacts; it provides:

> "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."

While the County could have defined the term differently from the definition set out in the glossary, there is no evidence that it elected to do so.

PWB has argued that the Glossary definition is constrained by the list of natural resources set forth in the opening portions of Chapter 5, the Natural Resources chapter, of the 2016 Plan, which include:

- "Water quality and erosion control
- Rivers, streams and wetlands
- Wildlife habitat
- Air quality, and noise and lighting impacts
- Scenic views and sites
- Wilderness areas
- Mineral and energy resources" p 5-2.

What precedes this list in both the introductory and scoping sections of the Plan is a statement that Chapter 5 of the County's Comprehensive Plan is directed to implement Statewide Planning Goal 5. p 5-2, 5-16. In fact, this list of resources tracks nearly identically to the categories of resource specific protections set forth in the Goal 5 rule, Oregon Administrative Rule Chapter 660, Section 23.

More importantly, LUBA was quite clear that Statewide Planning Goal 5, and plan policies that implement them, are not the limit of the natural resource obligations in MCC 39.7515(B). MCC 39.7515(B) predated the modern Goal 5 rule. A local government may find that the Goal 5 rule need not be applied when adopting a code amendment that would affect a resource that is not designated under Goal 5. *Home Builders Association v City of Eugene*. 41 Or LUBA 370, 426-27,(2002). *Slip op* 122. Based on this rationale, LUBA said:

> "A county may elect to regulate natural resources not included in the county's Goal 5 inventory and we agree with Cottrell that the county did so in MCC 39.7515(B)." *Slip op* 123.

For these reasons, the hearings officer finds that the obligation to "not adversely affect natural resources" exists outside of and entirely independently of Goal 5 and its requirements and therefore a list under Goal 5 does not control. Rather, it is the dictionary definitions, coupled with the glossary definition, that control.

PWB has also argued that the scope of "natural resources" is not determined by the 2016 Plan but rather by the Plan in place when the conditional use criteria were adopted in 1977. This approach would be inconsistent with the plan consistency obligation in *Baker, supra*. To the extent it is relevant as legislative history, it is discussed in greater detail below.

c. "Not Adversely Affect" Standard

Without any express definition of "adversely affect" in the code, the starting place for finding the appropriate measurement threshold is the dictionary. The definition of "adversely" means: "in an adverse or hostile manner – unfavorably or disadvantageously." P 31. "Adverse" means "acting against or in a contrary direction" or "in opposition to one's interests." P 31. The term "affect" means "to produce an effect upon." P 35.

These dictionary definitions are functionally identical to the County staff analysis of this issue, which relies upon the language of the comprehensive plan:

> "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." Ex N.7.

It is important to note that this standard is not modified by terms like "meaningful," "significant," "substantial." This exacting and strict no adverse effect standard prohibits any adverse effect. This standard might be contrasted with conditional use criteria relating to natural resources that are more flexible. For example, in *Citizens for Renewables v. Coos County,* the county could interpret an obligation to "protect natural resources" as having a "*de minimis* or insignificant impact." ___ Or LUBA ____, (LUBA No 2020-03, Feb 11, 2021) *Slip op* 46. In *Oregon Coast Alliance v. Clatsop County,* a site suitability criterion that required "considering" "natural resource values" as a factor, allowed the county to overlook natural resource impacts where it concluded that other factors were satisfied. ____ Or LUBA ____, (LUBA No 2022-076, Jan 10, 2023) *Slip op* 6. This is not the situation in the present case.

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." Ex N.7, p 8. The relocation of a single bird, the loss of one blade of grass, or the removal or redirection of natural water flows killing microorganisms would trigger an adverse effect finding under this exacting standard.

There are a number of cases where LUBA has considered interpretations of adverse effect criteria that are identical to MCC 39.7515(B). In *McCoy v. Linn County*, LUBA considered adversely affect as it relates to a livability standard:

> "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).

In *Coffey v. City of North Bend*, petitioner argued that prefatory provisions from the code relating to public safety were not adequately ensured through the conditions of approval in approving a conditional use permit for a correctional facility. 17 Or LUBA 527, 542 (1989). In addition to finding that this introductory language was not a controlling criterion for this type of use, LUBA also pointed out in a footnote that if the provision was worded differently, quoting MCC 39.7515(B) as an example, the obligation would require "eliminating virtually any adverse impact." *Slip op* 542.

PWB tries to distinguish *McCoy,* pointing out that it was an aggregate mining case where the adverse effect criterion was directed to livability rather than natural resources, claiming that there is no guidance in how to interpret this standard. What PWB fails to recognize is that there is one reported LUBA case considering the adversely affect natural resources text in MCC 39.7515(B) which is directly on point.

In *West Hills & Island Neighbors Inc. v. Multnomah County*, Metro sought approval for a regional landfill on rural property adjacent to US Hwy 30 near Sauvie Island. Or LUBA (LUBA No. 83-018, June 29, 1983), *aff'd* 68 Or App 782, 683 P2d 1032, *rev den* 298 Or 150 (1984).[2] Multnomah County approved the request and the decision was appealed to LUBA. The opponents' primary objection was that the county failed to apply the conditional use criteria in "mandatory terms." The impossibility that a landfill would have no impact on neighborhood character or adverse effect on natural resources required that the county find substantial compliance based on mitigation. Metro argued that plan policies directing the provision of community service facilities along with a general statement about the regional nature of solid waste disposal provided an indication that the conditional use criteria must bend to accommodate the community need. Disagreeing with the county's approach, LUBA explained:

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[2] 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*."

> "[W]e believe subsection 7015 should be applied consistently no matter what use is proposed. That is, the county has made a legislative determination that sanitary landfills and certain other uses are to be subjected to the scrutiny of the community service designation criteria. Had the county wished to ease one or more criterion for a particular kind of use, it would have said so in the ordinance." *Slip op* 7.

This holding is directly responsive to PWB's central strategy of focusing on its dire need for a water filtration facility at this location and the outside forces that it claims are beyond its control. PWB's pleas not only misrepresent the facts, as discussed in Ex S.13, but these efforts to procure a more lenient and flexible approach to interpretation of the 2016 Plan and code are directly contradicted by *West Hills & Island Neighbors, Inc*. The hearings officer finds that any direct public benefit realized or adverse consequences avoided by allowing a community service use play no role in the interpretation of the "not adversely affect" obligation.

The term "adversely affected" also appears in state law. For example, LUBA has jurisdiction to consider late appeals where a person is "adversely affected by the decision." ORS 197.830(3-5). In *Jefferson Landfill Committee v. Marion County*, the Supreme Court explained that: "'[A]dversely affected' means that a local land use decision impinges upon the petitioner's use and enjoyment of his or her property or otherwise detracts from interests personal to the petitioner. 297 Or 280, 686 P2d 310 (1984). LUBA has held that adverse effect can occur with the loss of scenic character, *Bonner v. City of Portland,* 11 or LUBA 40, 45 (1984), the sight and sound of natural water flowing, *Curl v. Deschutes County,* 69 Or LUBA 451, 456 (2013), and economic impacts where there is evidence of a causal link. *Schnitzer Steel Industries Inc. v City of Eugene,* 67 Or LUBA 444, 410 (2012). Where there is evidence of an effect by the decision, there is an "adverse affect."

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 off-site mitigation as a strategy to satisfy MCC 39.7515(B) by compensating for an otherwise adverse effect once it has occurred. If the County intended to allow mitigation as a strategy to avoid adverse effect, it would have stated as much. "The *absence* of language in a regulation should generally be considered intentional." *Cottrell CPO supra, slip op 26,* citing *Bert Brundige, LLC v. Dept of Rev*, 368 Or 1, 3, 485 P3d 269 (2021). The hearings officer has no ability to insert terms into a standard that are not there. ORS 174.010. For example, the County's regulations for the SEC-h, SEC-w and SEC-wr areas are expressly authorized by MCC 39.5540, .5580, and .5590. As a further example, MCC 39.5590(D) allows riparian development but "Mitigation shall be required to offset the impacts of development within the Riparian Area." There is no comparable mitigation text within MCC 39.7515(B) that allows a use to adversely affect a resource where mitigation is provided later. Without such language, the hearings officer concludes that there is no authorization for the same.

PWB and the County staff rely on *Stephens v. Multnomah County* for the proposition that any land use standard can be met with the use of conditions. 10 Or LUBA 147, 151 (1984). Opponents point out that the holding in *Stevens* is limited to considering the hazardous conditions criterion from MCC 39.7515 and not the adverse effect standard. Moreover, the condition in *Stephens* required maintaining compliance with DEQ regulations to avoid a hazardous condition. This type of avoidance condition is fundamentally different from the conditions of approval PWB seeks here which require planting and success of that planting to certain levels to partially satisfy the standard. In *Stephens,* the development would maintain a hazardous-free condition throughout the life of the project. That is markedly different from this case where the natural resources have

already been impacted and therefore, conditions taking effect after construction cannot, as a matter of law, avoid a finding of adverse effect.

In *West Hills & Island Neighbors Inc,* Metro argued that the impacts from the landfill would be mitigated by returning the site to timber growth after the landfill use was completed and the trash was covered with fill dirt. Stream loss would be compensated through the use of an alternate stream channel. Wildlife habitat destroyed was deemed "not significant because there are other habitats nearby." *Slip op* 18. In rejecting this approach, LUBA explained:

> "Here, the county has not explained how it is that this use will be consistent with the character of the area. Instead, the county has altered the standard by saying that it can only achieve eventual consistency. For now, the county uses mitigation measures that the county states will 'substantially' mitigate the impacts of the fill. There is nothing in the plan or ordinance that says substantial mitigation means consistency. 'Mitigate' means 'to make less severe, violent, cruel, intense, painful*** *Websters 3d International Dictionary* (1961). Had the county intended to legislate a substantial consistency standard, based on mitigation of effects, it could have done so." *Slip op* 15.

And further in its opinion:

> "We do not believe the county's findings show the landfill will not adversely affect natural resources. As we held in assignment of error no. 2, the standards imposed by MCC 11.15.7015 are stated in absolutes; and, together, they require any proposed community service uses to meet very stringent standards. Whether or not the land will be returned to commercial forest production begs the question of the impact of the use now. The ordinance does not allow the county to rest its conclusion about adverse effect on timberland on the eventual end of the proposed use." *Slip op* 19.[3]

LUBA has already concluded that mitigation cannot be used to achieve substantial compliance with the standard or that the standard can be satisfied where the finding is that the degradation caused by the use will eventually be restored far in the future. This is important because adverse effects to wildlife from the water filtration facility and pipeline use are addressed entirely through mitigation in the form of planted and, it is claimed, improved habitat. As discussed in greater detail below, the hearings officer finds that, at best, the water filtration facility use will contribute to and serve natural resource systems off-site at the levels before construction in years, probably decades. It makes no difference when in the life of the operation the mitigation takes effect whether it is one year after opening or after the use ceases operating. The question is what is the effect of the use on the same day that construction concludes. This eventual restoration of resource values is exactly what doomed Metro's landfill and places a very high bar of the degree

[3] It is interesting to note that forest land was considered a "natural resource," once again, suggesting that farm and forest uses did fall within this scope of "natural resources" under this criterion even in the few years after adoption and before the adoption of the 2016 Plan.

regarding mitigation that must be in place when the use opens for operation and not in the years or decades that follow.

2. The 1977 Plan and Legislative History

PWB has argued that the interpretation of MCC 39.7515(B) is controlled entirely by activities that led to the adoption of the conditional use criteria in 1977 through Ordinance No. 148 and the 1977 Comprehensive Plan, which was adopted concurrently. Although since renumbered, the text of these conditional use criteria have not changed.[4] PWB included a copy of the 1977 Comprehensive Plan at Ex. S.7 as well as recordings from the Multnomah County Planning Commission and Board of County Commissioners hearings from the fall of 1977 at S.37. The hearings officer has reviewed these recordings and although what comes across is a well-considered regulatory scheme with a strong commitment to the preservation of agricultural lands, even within the MUA-20 zone, there is no discussion of community service authorizations within those areas or the criteria for allowing them. Legislative history may reinforce the plain meaning of the text in the code and even illuminate it. However, where meaning can be discerned from the text, legislative history is helpful only to establish a latent ambiguity where there is clear legislative expression of intent. *State v. Gaines supra, see also State v Kelly*, 229 Or App 461 (2009). Although the hearing recordings from the time are not helpful, the 1977 Comprehensive Plan, which was implemented through the Ordinance 148 amendments does provide some directly relevant information that re-affirms the text and context findings above.

The 1977 Plan set forth the following policy for the area designated Multiple Use Agriculture:

> "The purpose of the Multiple Use Agriculture Area Classification is to conserve the agricultural lands for *diversified agricultural uses and encourage the retention of non-agricultural lands for other uses such as forestry, outdoor recreation, open space, and residential development* when these uses are shown to be compatible with the natural resource base, character of the area, and applicable plan policies. It is intended that uses other than agriculture and forestry practices will take place in accord with conditional use procedures.
>
> The intent of the classification is to protect and maintain the land predominately suited to agriculture or forestry and to allow, for example, rural planned developments, limited service commercial, and cottage and extractive industries and conditional uses on lands which meet the policies of this plan and prescribed criteria." (Emphasis added) p 205.

Not only were MUA lands to be protected for farm and forest uses, but there is an unambiguous acknowledgment that these lands are suitable for outdoor recreation and contain natural scenery furthering that purpose. The "examples of uses" that were to be authorized on MUA zoned lands provides, as pertinent:

> "3. On lands which are <u>not</u> predominately agricultural capability class I, II, or III, rural planned developments, cottage industries, limited rural service commercial,

[4] Formerly MCC 11.15.7015.

> and tourist commercial should be allowed as conditional uses upon the showing that the conditional use standards can be met; and
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> 4.The following uses should be allowed as conditional uses anywhere in the zone upon the showing that the conditional use standards can be met: commercial processing of agriculture or forest products, commercial services, commercial dog kennels and mineral extraction. " (emphasis in original) p 206

These policies allocate non-farm / non-residential uses into two categories, some of these uses were to be allowed on lands without high value soil and some were not. Nothing in this list references urban-scaled industrial utility projects as is proposed here. Utilities, such as water service, were categorized in the 2016 Plan as "community facilities," which were those that "fulfill a social need for the community." P 308-309. To the extent public utility projects were authorized rural residential and agricultural uses were to be protected by limiting non-farm uses as necessary to serve the rural community.[5] The idea was that non-farm uses were necessary to serve rural residential area and even then, they would be allowed only where the conditional use criteria were satisfied. The hearings officer considered the applicant's assertion that the water filtration facility will serve some rural areas; however, the vast majority of users are within the City of Portland and other incorporated cities.

The community facility location policies set forth in Plan Policy 31, provide: "[Community facilities] must be located in a manner which maximizes the net gains to the public and relates to the service area." Specific location policies were identified for the particular type of community service use. This list included regional public facilities such as power substations, airports and hospitals, but there was no reference to regional water filtration facilities, or water systems generally. In discussing how the locational criteria would apply, the plan states:

> "It is intended that these locational criteria be construed in a flexible manner, in the interest of accommodating a proposal which, though not strictly in conformance with the applicable criteria, are found to be in the public interest and capable of harmonious integration into the community. The burden of proving conformance of a proposal to the Plan should vary with the degree of change and impact on the community; the more drastic the change and the greater the impact, the more strictly the criteria should be construed." p 251.

Although this might authorize some discretion in applying the criteria, it is critical to remember that, at best, this authority applied to the location criteria in Policy 31 and not the MCC 39.7515 conditional use criteria. In the *West Hills* case, Metro tried this argument and it failed. Metro argued that the public benefit realized by a regional landfill demanded greater interpretational flexibility that would allow adverse impacts. LUBA rejected the argument that Policy 31 could be used to transform the conditional use criteria to require anything other than what the plain language provides:

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[5] The County's West of the Sandy River Rural Area Plan made this most plain in Policy 14.2 "New non-agricultural businesses should be limited inn scale and type to serve the needs of the local rural area through provisions in the zoning ordinance."

> "Our view that strict standards apply is supported by the lack of any controlling plan policies on solid waste in contrast to plan policies on siting of other community service uses. See footnote 3, supra. Also, we add that, in part, our holding here is based on our holdings under assignment of error nos. 3, 4 and 6, as these matters touch on overall "consistency" of the use with the area. That is, the criteria under MCC 11.15.7015 all are stated in strict terms and all have bearing on how "consistent" the use is with the character of the area." p 16.

In footnote 3, LUBA sets forth that portion of Policy 31 dealing with Major Regional Facilities and notably it does not include landfills.[6] Faced with this ruling, the County felt made it impossible to site landfills, in 1984, the County amended its Framework Plan policies recognizing that the "siting a sanitary landfill will 'entail some adverse impacts'" and expanding other regulations making them easier to locate. These amendments applied prospectively and did not include Metro's proposed site. Metro appealed the amendments to LUBA and LUBA affirmed the county's decision. *Metropolitan Service District v. Multnomah County*, 13 Or LUBA 192 (1985). The critical takeaway from this decision is that, although Policy 31 was amended the county expressly elected not to liberalize the conditional use criteria that LUBA characterized as strict and narrow but instead made a use-specific carve out for landfills. This was a deliberate choice – to retain the same strict protections for natural resources when considering community facility / service uses, such as utility uses.

Based on the foregoing, the hearings officer concludes that the legislative history revealed through the 1977 code and the landfill litigation from the early 1980s illuminates the County's strong commitment to protecting farmland and natural resources through severely constraining non-farm uses, including community facilities.

3. Impossibility of Performance and Maxims of Construction

Another issue raised by the parties was whether a strict interpretation of adverse effects without mitigation would make it impossible to site this use or other community service uses on this property or others throughout the county and would lead to an absurd result. To be clear, this is not the only possible site for this use. The County and the City of Portland contain several potential locations that are properly zoned and would not require compliance with MCC 39.7515(B). The City chose this site and must comply with the criteria that apply here. S.13, p 3.

In cases where the legislature's intent is not clear from the text, context, and legislative history, the court may resort to maxims of statutory construction to resolve the uncertainty. *PGE* at 612. One of these maxims is to avoid an interpretation will "lead to an absurd result that is inconsistent with the apparent policy of the legislation as a whole." *State v. Vasquez-Rubio*, 323 Or 275, 282-83, 917 P2d 494 (1996). "[A] court cannot subvert the plain meaning of a statute, even to avoid a supposedly absurd result." *Greenway v. Parlanti*, 245 Or. App. 144, 150, 261 P3d 69 (2011); *see also Brundridge v. Board of Parole*, 192 Or App 648, 656, 87 P3d 703, *rev den*, 337 Or 327, 99 P3d 290 (2004) ("[W]here a term has an unambiguous meaning, the fact that it could lead to an absurd result does not justify interpreting it to mean something else.").

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[6] Although it is irrelevant to this proceeding, it is interesting to note that the Policy 31 list of regional facilities in what is labeled the 1997 Comprehensive Plan set forth as S.7 includes landfills and refuse transfer stations. These amendments did not occur until the early 1980s.

These same principles have led to very sparing application of this maxim in the land use context as well. For example, in LandWatch Lane County v. Lane County, the Supreme Court determined that statutory limitations that would preclude the current owner from constructing a replacement dwelling on EFU zoned land but allow a subsequent owner to make such an improvement cannot be struck down as absurd:

> "[S]he claims that the arbitrary eligibility distinctions in LandWatch's proposed interpretation would lead to absurd results, which should weigh against that interpretation if the statutory text is capable of multiple constructions. But the absurd results canon is best applied sparingly—only when the statute is truly ambiguous and the result is truly absurd. If we were to do otherwise, 'we would be rewriting a clear statute based solely on our conjecture that the legislature could not have intended a particular result.' *State v. Vasquez-Rubio*, 323 Or 275, 283." 364 Or 724, 741, 441 P3d 221 (2019).

Although not discussed in terms of the absurd results maxim, in *West Hills & Island Neighbors, Inc.,* LUBA considered how strict application of the MCC 39.7515 conditional use criteria would make it impossible to develop community service uses within Multnomah County,

> "Respondent Metro argues the county did find that where long term consistency is shown, short term inconsistencies are permissible if minimized by mitigation measures. Metro claims the county adequately explained the reason for this interpretation. The county recognizes that landfills are always inconsistent with neighborhood uses. There would be no landfills, ever, were the consistency standard absolute. To read the consistency requirement strictly would ignore MCC 11.15.7020(A)(16) which specifically allows landfills in a community service district. Metro goes on to say the county imposed 20 specific measures which would substantially mitigate inconsistencies with the surrounding area. Metro adds that mitigation does not require that impacts be totally eliminated. Metro and the county argue the county must be free to interpret the ordinance." (Record citations omitted) *slip op* 12.

In expressly rejecting Metro and the county's reliance on impossibility as a defense, LUBA explained:

> "It is important to note the community service ordinance recognizes that its enumerated uses <u>may</u> be suitable for any district in the county. Whether or not a particular enumerated use is suitable for a particular district depends on whether the use can meet or be made to meet the requirements of MCC 11.15.7015." (Emphasis in original.) *Slip op* 15.

During the hearing there was some discussion about how community service uses could be accommodated if they cannot be located on farmland. The hearings officer agrees with OAN's

comment that these uses could be accommodated on previously developed properties.[7] Another option is identified in the 1977 Plan Goal 3 exception statement, which provides, in relevant part:

> "The Multiple Use Agriculture District is only a slight deviation from the EFU provisions, therefore, there are very few proposed uses to be discussed....The other permitted uses (as conditional uses) include mostly community services uses which enhance the community. Based on the fact that all the MUA locations have a rural service center in the area it is most likely that these uses would locate there as they have in the past.
>
> [discussion of other unrelated specific non-farm uses]
>
> The other allowed uses would enhance the sense of community and add other economic benefits for the areas. None of the conditional uses would be allowed to jeopardize the existing agricultural capabilities of the MUA lands." p 397.

Not only does this provision directly address the level of agricultural land protection anticipated by the MUA-20 zone and that community service uses were to be scaled to serve the community, the community service uses were intended to be accommodated within the rural service center zone and not within the MUA-20 zone to the detriment of existing agricultural uses.

D. <u>Application of MCC 39.7515(B)</u>

With the interpretation questions resolved, the hearings officer must apply those interpretations to the facts to determine whether the water treatment facility and pipelines adversely affect natural resources. In *Cottrell CPO I,* LUBA held that temporary construction impacts resulting from development could not be considered when applying these criteria. *Slip op 26*. Keeping this limitation in mind, the hearings officer takes a systematic approach by: (1) evaluating the efforts to identify and document the nature and extent of the natural resources before development began, (2) identifying the nature and extent of the natural resources after construction is completed and then (3) comparing those levels to determine if any degradation will occur. If there is evidence that the level of natural resources will be diminished in any respect, the hearings officer must conclude that MCC 39.7515(B) is not satisfied. If there is substantial evidence to show that there will be no degradation, the criterion is met.

Development of this property for a water filtration use began in December, 2018, when the Portland City Council adopted Resolution 37402, authorizing PWB to proceed with construction of the water filtration plant on the subject property and with Ordinance No. 189146 authorizing contracts to proceed with construction. Ex S.27. Pursuant to these authorizations, PWB did proceed. Site

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[7] PWB had alternatives for proceeding with this particular development on this property. "This project" is not federally required. PWB designed something far larger and more impactful than they needed to satisfy the EPA's LT2 rule. Ex S.13. Calling it a filtration plant is misleading because they are not just building a filtration plant; this is a full water treatment facility, with filtration being one component. PWB chose this project (scope and scale) and they chose this site (Carpenter Lane) knowing that they would struggle to meet the conditional use criteria. In evaluating site alternatives as early as 2002, a citizen panel recommended locating its treatment facility on Powell Butte in Portland on land that the PWB has owned since 1925. Ex S. 13, p 3.

evaluation work commenced in October, 2019. Ex S.32, p 8. Surface Nursery, the tenant farming the PWB facility property was asked to cease farming operations in 2019 as well. Ex W.2a, p10. Elimination of active farming and allowing the land to go fallow prior to obtaining land use approval were part of the temporary construction impacts. As such, the hearings officer rejects PWBs efforts to downplay the pre-construction conditions showing turbid stormwater pooling on muddy vacant land from 2021 / 2022 as indicative of the pre-construction condition. Ex N.55, p 6 and N.64. The best evidence of preconstruction conditions on the facility property are at Ex S.25 taken before PWB development activities began.

The comparator against the pre-construction baseline is the condition of natural resources when construction is complete. It is the day that occupancy is granted which, according to PWB, will be in 2027. Ex N.54, p 3.

It is also appropriate at the outset to make some general findings regarding the factual evidence submitted in this case. Both sides presented evidence by experienced experts trained and qualified in their respective fields to evaluate natural resources. The record includes resumes of these experts' and these qualifications are sufficient to establish them as experts. However, the hearings officer is under no obligation to accept expert evidence of that of non-experts, particularly where the criterion does not demand particular technical expertise. *Falcon Ridge, LLC v. City of Klamath Falls,* 57 Or LUBA 651, 659 (2008); *Sellwood Harbor Condo. Assoc. v. City of Portland*, 16 Or LUBA 505, 515 (1988); *McCoy v. Marion County*, 16 Or LUBA 284, 290 (1987). Therefore, because residents, as well as resident experts, who live, recreate and experience the natural resources first-hand, the hearings officer finds that they are also qualified, if not more so, to establish pre-construction conditions of natural resources, adverse impacts and mitigation.

1. Wildlife Habitat

a. Preconstruction Conditions

To evaluate impacts on wildlife, the applicant submitted a *Wildlife Habitat Impact Analysis* (HIA), prepared by Environmental Science Associates (ESA). Ex N.56. The HIA was developed using "existing information and conducting field surveys" and also relying on a Habitat Evaluation Procedures (HEP) analysis intended to predict pre and post-construction wildlife habitat conditions. Based on the HEP evaluation, the ESA study also quantified the quality of the habitat by assigning a Habitat Suitability Index (HSI) number by the area of habitat to calculate Wildlife Habitat Units (WHU) as an expression of the "value" of an area for wildlife. HSI is a measure of habitat conditions relative to an optimum condition.

The HIA, as well as the open record responses, detail the PWB's efforts to evaluate pre-development conditions. Ex N.56, p 9 and S.32, p 8-9. In 2019, the applicant's consultants sought computer-generated data on the existence of endangered and threatened species along with a field survey of habitat conditions in the area of the raw water pipeline, an area designated with the SEC overlay. In 2020, the applicant consulted with federal agencies to determine there were no federally protected habitats and conducted a field survey for Nelson's checkermallow in the smaller wetland areas, open grassy areas, and ditches along road. That same year, an inventory of invasive plants and trees planned for removal were identified. Although native trees was identified, "non-native, non-invasive landscape species were not inventoried." *Id*

In 2021, ESA conducted a site-specific survey for the federally threatened streaked horned lark on three different days for 4 to 5 hours from April to mid-July. Ex N.56, p 9. In 2023, ESA documented "woody vegetation" along SE Dodge Park Boulevard and along the proposed Raw Water Pipeline alignment west of SE Lusted Road concluding that they are small, non-native trees compensated for by mitigation. Ex I.96, p 5-6. Finally, ESA made additional site visits in "the early spring and summer of 2024" to conduct "pre-construction bird nest surveys prior to vegetation removal." Ex N.56, p 9.

Opponents' experts challenged the adequacy of this inventory work noting that none of these activities explain the techniques used and where observation points were located (as necessary to show that this included the whole of the development property) as would be customary with this type of data collection. Ex. S.26, p2. Surveys also failed to cite broadly accepted protocols, such as those typically used for streaked horned lark, and instead cited materials developed for non-technical public audiences, raising questions about the training and expertise of field staff. Most of the "surveys" were site visits conducted at one point in time, primarily in the fall, and failed to capture seasonal fluctuations that occur with wildlife presence. Ex S.26, p 3. Opponent's experts explained that objective assessments require a detailed explanation of the methods used such that another expert could repeat the same survey, verify results, or evaluate the rigor of the assessment.

Residents of the area who regularly view the subject properties identified the presence of significantly more species than the eight species PWB claimed were representative. The residents' list included elk, black bear, cougar, deer, coyote, bobcat, and beaver, red-breasted nuthatch, varied thrush, black-capped chickadee, grosbeak, bald eagle, retailed hawk, great horned and western screech owls, redwinged blackbird, northern flicker, downy woodpecker, bushtits, western flycatcher, spotted towhee, three toed salamander, rubber boa and yellow warbler. N. 43, p 39 and elsewhere. These animals all lived within the farm fields of the water filtration plant property, and the farm and forest edges and hedgerow alongside roadways for the various pipelines. The record lacks any systematic assessment of these resources and their habitat as required to provide substantial evidence necessary to satisfy the adverse effect determination

Further, substantial contrary evidence was offered that farmland supports pollinators, birds, and beneficial insects and the more contiguous farmland acreage, the better. Large, connected acreage provides uninterrupted and safe habitats for bees and butterflies, and undisturbed areas for resident and migratory bird species for foraging, shelter, and nesting. According to the recent USDA Census of Agriculture (2022), PWB's proposed filtration facility site is one of the largest contiguous pieces of farmland in Multnomah County, exceeding the county's average acreage of approximately ~40 acres. It is surrounded by similarly sized farmland parcels. Removing 90+ contiguous acres from agricultural production and fencing it entirely from access fragments the area's natural resources. By removing this significant agricultural natural resource, PWB is fragmenting and therefore disrupting the existing ecosystem and permanently altering the area's biodiversity. Ex N.43, p 64.

The only property-wide evaluation arguably occurred in 2024 with the efforts to identify bird nests immediately before construction began. This effort was pursued to comply with the Portland Environmental Services Protecting Nesting Birds Best Management Practices

document. Ex U.20.c. Although it may be an exemplary approach for identifying and protecting birds from construction impacts (a concern that PWB has steadfastly asserted is not relevant to this review), nothing in PWB's recounting of these efforts suggests that they included documenting anything other than birds. Nor did this document analyze the effect of the permanent displacement of this habitat following completion of construction and initiation of the filtration plant use.

PWB's claims that its consultants have "extensive personal knowledge" of the site and took photographs in the summer from which ESA could evaluate hedgerow conditions. ESA notes identifying bedding for elk in the spring of 2024 and in August 2023, investigated a small pond on the property for turtles, noting the existence of heron and American robins. Ex U.20.c. Although this information suggests that PWB experts responded to particular wildlife-related concerns when the law required as much, there is no indication of any systematic, development-wide, seasonal survey of wildlife. Opponent's expert, who has 25 years of experience evaluating these types of studies opined:

> "Inventory for wildlife use requires multiple techniques and repetitive seasonal visits to assess wildlife presence. For example, bird surveys should be completed in winter and summer periods and include point-based listening/observation plots within each habitat type. Completion of valid scientific protocols allow more accurate quantification of habitat and its use. Mammal surveys typically use night cameras and scent stations to document movement and presence. Amphibian and reptile surveys should occur in the early spring and summer months when these species are moving to and from seasonal water features and forested cover. Field data and reference sites are then used to validate Habitat Suitability Indexes and thus, HEP models. ESA does not address any of these elements. No reference areas were identified to validate ESA's model assumptions." Ex S26 p 3.

Conversely, the evaluation of the vegetation documented by PWB is inadequate because it was directed at quantifying trees for removal and designing a landscape replacement plan that would "inform site management and planting plans." U.20.c p 18. Other than perhaps the wetland delineation efforts that do describe the quality of the wetland habitat, what PWB has offered are lists of tree and plant species. No qualitative or quantitative vegetation sampling was conducted to determine habitat structure, vegetation composition, downed wood or ground cover. Nothing in this information, to the extent it exists in the record, identifies or evaluates the quality and character of how this vegetation works together to provide habitat. The hearings officer notes this list does not analyze the effect of the permanent displacement of trees caused by operation of the water pipeline after construction is complete.

The only way to meaningfully evaluate adverse impacts to natural resources is to understand what existed before development occurs. As opponents' expert explained, this required a comprehensive and detailed wildlife habitat assessment and thorough inventory not just of vegetation but also of the wildlife, including pollinators, to the small mammals,to the amphibians and to game and larger predators, that rely on forest and wetland habitats. This evaluation must be project-wide to be informative. The hearings officer finds that the

applicant's inventory work is insufficient to inventory wildlife resources that are protected by MCC 39.7515(B), because the applicants' reports do not provide the level of detail that a reasonable person would rely on to conclude that the pre-development natural resources are adequately documented. Therefore, the record lacks substantial evidence to support a finding that natural resources will not be adversely affected.

In addition, the applicant asserts that a HEP analysis set forth in the HIA "provides an objective and conservative" approach by identifying the presence of eight focal species that represent the habitat needs for multiple species that is then used to guide post-construction mitigation for the benefit of a wide range of species. Ex N.56, S.32, p 9. The HEP relies on an assumed future condition at the site that will require decades to mature. Notwithstanding the wildlife impacts that will occur in the interim, credibility of ESA's conclusion depends on a theoretical best-case outcome for the mitigation efforts, with no plan for post-project wildlife monitoring to verify effectiveness. The HEP also assumes a baseline condition that the pre-construction nursery land at both the Filtration Facility Site and the Intertie Site provided limited habitat quality. This assumption is contradicted by public testimony from residents familiar with wildlife use of these properties.

The hearings officer finds reason to believe the assumptions made by ESA when constructing its theoretical HEP analysis are likely incorrect. The opponents' wildlife expert explains at length why the HEP procedure was inappropriate for this use and, to the extent that it might be appropriate, the lack of teams approach and peer review , and the selection of inappropriate and generalist focal species that "do not accurately represent the community of wildlife affected." Ex S.26 and U.19, p 4-6. The hearings officer notes that the opponents' wildlife expert is a retired US Fish and Wildlife biologist with a 34- year career conducting habitat assessments and the hearings officer finds this evidence qualified and credible. Ex N.43, p 69.

Further, the hearings officer finds that the applicant did not complete a thorough inventory of wildlife species in the area.

In its initial review, LUBA expressly rejected the county's reliance on Goal 5 comprehensive plan policies serving as a surrogate for identifying natural resources, instructing that "all required natural resources have been evaluated when making the 'will not adversely affect' determination." *Slip op* 123. The HEP approach, which focused on habitat conditions for eight species is defective for the same reason. Nothing in the county's standards suggest that estimates based on key indicator species provides a reasonable evidentiary basis to determine "no adverse effect," particularly given the strict and mandatory language of the standard. The obligation is to identify the condition of all of the natural resources. The fact that the HEP provides little more than a theoretical estimate based on the assumptions of project proponents makes peer review by disinterested experts critical to validate the assumptions and clarify caveats. PWB's suggestion that City staff members or project landscape architect provided this valuable input are neither qualified, nor disinterested. Opponents' experts identified limitations in the selection of focal species related to the downy woodpecker, the white crowned sparrow and Western bumble bee, but there is no responsive evidence from PWB, as well as use of undocumented survey methods. Without a response, it is not possible that a post-hoc HEP could be sufficient to establish the baseline conditions. The hearings officer cannot conclude that this HEP is sufficient.

Given these identified shortcomings, the hearings officer simply cannot conclude that patchy and sporadic site visits coupled with the assumptions undergirding the HEP analysis offers substantial evidence of pre-development conditions. LUBA has rejected an evidentiary challenge to the decision-makers reliance on lay testimony where the expert evidence reflects uncertainties inherent in the evaluation. *Ericsson v. Washington County,* 26 Or LUBA 169, 176 (1993). Lack of a detailed species specific habitat analysis, when coupled with expert-identified defects in the HEP, along with a poorly-informed assumption about pre-construction conditions, undercuts the adequacy of the applicant's evidence. The hearings officer finds that these efforts to build an after-the-fact inventory of conditions are inadequate. Therefore, the requisite finding of that the use will not adversely affect natural resources is not supported by substantial evidence.

b. Post construction conditions

Development of this property for a water filtration facility use requires mass grading. On the pipeline routes, grading occurs along farm edges and hedgerows adjacent to roadways and on private farms removing trees, shrubs, vegetation and agricultural soils that once provided animal habitat. Ex S.19. More specifically, in addition to the mass-grading of the 90-acre water treatment plant site, approximately 0.7 contiguous miles along SE Dodge Park Blvd west of SE Cottrell Rd (often referenced as the "hedgerow"), and 0.3 miles of SE Dodge Park Blvd east of SE Cottrell Rd, and was fully cleared and that ecosystem no longer exists. Nearby on SE Carpenter Lane – the entering roadway to the filtration site – the mature trees and shrubbery along the roadside were also cleared. Ex N43, p 48. Within the hedgerow it is estimated that between 320-400 trees greater than ½ foot in diameter, deciduous and evergreen shrubs, grasses and flowers were removed. Ex N.43, p 43. Many of the trees within this hedgerow were over 100 feet tall, with caliper width far greater than 2", and estimated to be 50 to 85 years old including bigleaf maple, bitter cherry, Oregon ash, Douglas fir and *pinus contoria*. Ex N.43, p 43-45. The hearings officer notes there is no contrary evidence in the record to suggest these resources have not been removed as described by opponents' testimony.

Although the parties disagree about the quality of the hedgerow habitat, all parties appear to agree that the hedgerow did provide wildlife habitat and that through clearcutting and land clearing, all parties appear to agree that the habitat offered by the agricultural, forest and hedgerow environment has been destroyed to some degree. In response, PWB relies upon ostensible future creation of habitat, claiming that this compels a finding of no adverse effect. Ex N.56.

Opponents identified a significant decrease in wildlife species since construction of the facility began and raised concerns that this absence would be permanent. Ex N.6, N.8, N.10, N.18, N.41, N.52, N.53 and R.6. PWB argues that the loss of wildlife during construction is irrelevant to the evaluation of this criterion. The hearings officer finds, upon reviewing it, that if this is a correct statement, it misses the significance of this circumstance. If the comparison is between the level of natural resource activity on the water filtration and pipeline properties before the development and the level of natural resource activity in the general area after, then the fact that the natural resource levels degrade to nothing on the water filtration and pipeline properties in the interim (during construction), would set a fairly high bar for PWB to meet through off-site mitigation, even if MCC 39.7515(B) did allow off-site mitigation, which it does not.

PWB's submittals also seek to minimize or eliminate the finding of impact either as a matter of law or of fact. In the first of these arguments, PWB points out that the hedgerow was located within the public right-of-way and as such, clearing to accommodate public infrastructure was assumed. The hearings officer finds that nothing in the express language of MCC 39.7515 suggests that activities within right-of-way or a public utility project generally are excluded or that the natural resource protection obligations apply differently in those areas. Whether the county could clear cut as necessary to widen a roadway is irrelevant to the obligation to comply with this conditional use criterion. The authority to widen roads in order to serve permitted development cannot provide authority for clear cutting to accommodate a conditional use in the face of a criterion that prohibits any adverse effect.

Second, ESA, the applicant's expert, claims that hedgerows can act as a "mortality sink" attracting animals to an unsafe place, again disqualifying the value of the hedgerow as habitat. Ex S.32, p 1. In response, the opponent's wildlife biologist found "no published studies suggesting that hedgerows that parallel two lane roads are a mortality sink for wildlife or cause an unusually high degree of nest failure." Ex U.16, p 8. This finding is supported by ODOT and wildlife connecting area mapping which does not suggest that this area has a high degree of motor vehicle / wildlife accidents. Ex U.16, p 7. Based on the foregoing, the hearings officer concludes that hedgerows serve as important habitat for wildlife.

PWB's expert asserts that the presence of wildlife fluctuates over time, suggesting that the lack of wildlife could be part of naturally occurring rhythm rather than the result of construction or operation of the water filtration facility and pipelines, and that adjacent nurseries and property edges are being used by birds suggesting relocation of wildlife rather than removal. Ex S.32, p 5. Certainly, the mobile nature of wildlife suggests that its numbers vary with the seasons and species needs. This is why it was incumbent on PWB to evaluate species presence or absence for more than one single season. Ex S.26, p 5. However, the hearings officer finds this is undocumented speculation at this point because the applicant did not conduct field surveys during the different seasons as necessary to support this claim. Opponents respond that in order for adjacent farm fields to serve as habitat for displaced wildlife would suggest that this habitat on adjacent farms was entirely vacant and available for use. Further, there is no evidence to suggest that wildlife is relocating to nearby farm fields and edge trees, evidence that these areas were vacant and available to serve as replacement habitat, or even evidence that the wildlife has, in fact, relocated itself. Finally, not all of the wildlife using that area could move to an alleged "adjacent habitat" and as such, it is likely to assume indirect mortality occurred when the wildlife was pushed off of the facility property and out of the hedgerow areas. Ex U.16, p 2. Given that there is no evidence to support a finding that adjacent forests and farmland have accommodated the displaced habitat and animals, the hearings officer concludes that elimination of the habitat supports a finding that the wildlife itself has suffered indirect and direct adverse effects of habitat removal and will continue to suffer adverse effect following completion of construction.

Finally, the applicant argues that the tree removal and mass grading are the result of construction of the facility and not its operation. As noted, the potential impacts identified in the HIA include human presence, noise and light, but do not include the displacement resulting from alterations of the property necessary for the water filtration and pipelines uses to operate in the first instance. As explained above, PWB cannot evaluate post-construction impacts without considering the degree

of adverse effect these actions had on wildlife. The habitat provided by the agricultural land, the hedgerow and the forest edges that existed before development is gone from the post-construction habitat. It is not being replaced. This loss of habitat and the wildlife from within the habitat are adverse effects.

The lodestar of PWB's case is not that development will have no adverse effect but rather that mitigation plantings will eliminate any adverse effect and will, in fact, leave wildlife resources in a better condition than before development occurred. The PWB mitigation plan includes replanting just under 40 acres of the filtration facility property including installing hedgerows along the property edges, including the planting of 2,485 trees. Ex. S.32, p 2. In its final open record submittal, PWB includes a table of projected tree cover of planted materials "by year 10." Ex. U.20.c, Attachment 6.

During the open record period, PWB expanded their mitigation proposal to include additional planting areas on two residential lots on the north side of Carpenter Lane. On 35227 SE Carpenter Lane, PWB proposes to include a 20-foot-wide hedgerow running in the north-south direction along the western edge of the property. PWB indicates that these areas will be planted with a variety of trees that vary from 5-to-8 feet in height or 1.5-to-2" caliper, and shrubs and other vegetation. PWB states that the residential lot plantings would be accomplished in the fall after construction resumes and that this installation would be in place at least one year ahead of full construction completion when, according to the applicant's expert, it: "will provide a variety of functions within one to two growing seasons following installation including shade, food (fruit and seeds), nesting sites (especially evergreen species) and shelter for wildlife." Ex. S.32 p 3. PWB would also plant the area where the Dodge Park hedgerow was removed with a shrub-dominated hedgerow including native plants. Ex. S.32, p 4. Taken together, PWB stated it would plant 3.88 acres (5,530 linear feet) of hedgerow habitat across the various planting areas including 110 trees, 17,383 shrubs and 6,416 flowing perennials.

c. Comparison of Wildlife Levels and Evaluation of Adverse Effects

One of the central concerns raised by the opponents is that mitigation efforts will not restore natural resources to the same level of mature, complex natural canopy that existed before development occurred. When planted, all of the trees will be less than 8 feet tall or 2" caliper, substantially smaller, less mature and less established than the stripped pre-construction habitat, complete with over its 100' ft tall Douglas firs and 85-year-old maple trees. Regardless of PWB's claims to the contrary, the planting plan for the hedgerows located around the filtration facility are not diverse – they will consist of one type of tree planting – the cascara – which is unlikely to attract the same variety of wildlife. No reasonable person would assume that this single- species planting will support the same variety of wildlife. Ex N.56, p 72. These new, significantly smaller plantings will not provide shade to keep out invasives and will take years. If not decades, to create the level of natural equilibrium that had taken nearly 100 years to establish. Opponents' expert, again with 25-years of experience evaluating restoration plan, testified:

> "I do not believe the mitigation plan will provide replacement habitat that functions as well as the existing combination of farm field, hedgerows, forest edge and wetlands that were present. Ex U.19, p 7.

PWB and its expert's mitigation plan assumes the benefit will be realized within 10 years. Ex U.20.c, p 43 and Att. 6. This assumption is overly optimistic and unsupported by substantial evidence. Even if everything planted matures the way PWB anticipates, re-establishing natural resource levels 10 years after construction fails to satisfy the standard. Again, *West Hills and Island Neighbors, Inc*. stands for the proposition that any mitigation must realize the same levels of improvement when the use starts and not at some future time thereafter.

PWB identifies a number of immediate steps including vegetation planting, removal of invasives, installation of bird and bat boxes, placement of brush piles and removal of elk fencing. Ex U.20.c, p 43. However, PWB fails to offer any correlation between these immediate steps and the habitat character and quantity necessary for the hearings officer to conclude that these initial efforts will be sufficient to immediately recover wildlife adversely affected by operation of the water filtration and pipeline uses. For example, whether bird boxes will provide the same accommodation for birds of prey and owls at numbers needed to support the previous population is unknown. At best, this is speculative. For this reason, the hearings officer cannot conclude that the immediate measures identified will promptly restore wildlife habitat at levels to avoid adverse impact.

PWB's claims that wildlife is quick to respond, and relies on the Lusted Hill Corrosion Project development as evidence of that point. The Lusted Hill development is not instructive to this analysis. The Lusted project occupies 1.5 acres, took less time, occurred at an existing development site, and was exponentially less impactful on natural resources. Ex U.4. Therefore, how quickly the wildlife responded in this situation is not evidence a reasonable decision maker would rely on to determine whether or how quickly wildlife will recover from the adverse effects of operating the water filtration and pipeline uses on 108 acres in this case. As such, the hearings officer concludes that this is not substantial evidence.

Opponents also pointed out that the mitigation planting relied on the by PWB to illustrate its good stewardship illustrates generally how mitigation planting does not compare in its character or quality in serving wildlife. Ex U.3. Even if PWB is a good steward when it comes to mitigation efforts, the photos of those areas taken after over 10 years of growth, clearly show that these areas are not as established as the undeveloped areas in the surroundings.

Although the area dedicated to tree and shrub planting and the raw number of trees planted may exceed those that existed on the water filtration and pipeline sites before construction began in sheer numbers, when it comes to wildlife, the character and quality of the habitat matters as much or more than quantity of trees. More importantly, although the opponents' expert disclaimed the quality of the mitigation plan, PWB's expert statement that the mitigation area would start providing habitat within two planting seasons falls far short of any affirmative statement that the habitat that this area provides after two seasons will match the level of habitat, in terms of variety and diversity of animals, that existed before construction began. Without such an affirmative statement, the hearings officer cannot conclude that the mitigation will eliminate any adverse effects to the wildlife resources.

In summary, the hearings officer finds that with respect to wildlife and their habitat, operation of the proposed use will have an adverse effect. This criterion is not satisfied.

2. Aquatic Resources

These findings deal with a wide range of water quality related issues necessary to support water-reliant wildlife including fish, frogs and other amphibians and aquatic insects. Concerns focused on impacts that the filtration project and finished water pipeline once developed would have on wetlands and stream habitats including the Johnson Creek headwaters and the middle and north fork of Beaver Creek. Although the hearings officer understands that construction impacts cannot be considered, once developed, the project will change how stormwater moves through the site, particularly because all stormwater runoff from the facility property is directed to Johnson Creek. Therefore, grading to change the site elevation, land clearing, and stormwater facilities are all germane to evaluating the adverse impact question.

a. Preconstruction Conditions

All parties appear to agree that Johnson Creek and Beaver Creek are directly adjacent to this development support several species of native migratory and resident fish including cutthroat trout and sculpins. Ex N.55, p 8 and N.43, p 48. Resident salmonids including coho salmon are documented in Johnson Creek within two miles downstream and steelhead trout distribution is documented within one mile downstream. Ex N.43, p 50. The parties also agree that these water bodies are home to a wide variety of amphibians including the northern red-legged frog, rough-skinned newt, salamanders and turtles. Ex N.55, p 9.

Although the parties generally agree that fish and amphibian species likely exist, site-specific information to confirm presence, numbers, locations or water quality testing necessary to establish habitat conditions necessary to support these species was not provided by the applicant. PWB's expert Biohabitats determination of the presence of fish relied on a statewide distribution plan based on a number of stream attributes, known as the 24K Project, and their professional opinion. N55, p 9. Regarding amphibians, Biohabitats relied on data collected from iNaturalist, which does not "provide exact location information to the sensitivity of most amphibian species" and surveys conducted downstream. Ex N. 55, p 10.

The waters adjacent to the subject property were never field surveyed by PWB or its experts. Regarding water conditions, the only field testing was accomplished by opponents. On August 22, 2023, opponents' expert completed a snorkel survey which established fish presence, dissolved oxygen and temperature. Ex N.43, p 52. Opponents presented photographs showing the native northern red-legged frog, the Pacific tree frog, the rough-skinned newt and the Cascades frog within 150 feet of the facility site. Ex N.43, p 54. This represents the only field-based documentation of amphibian presence in the record. Ex N.43, p 54.

Opponents' experts explained what is customary industry standard for evaluating aquatic species for a project of this type in detail including weekly or monthly field survey using well-documented protocols over a three-year period to estimate species diversity and density using direct capture or passive observation methods. Assessments would typically include species life-history descriptions along with known or limiting factors, a literature review, and pre-construction habitat conditions from on foot and aerial surveys. Ex U.15, p 2.

PWB's expert Biohabitats responds that their obligation "was not to evaluate the aquatic habitat in Johnson Creek or other area waterways." Ex U.20.a, p 20. Rather, they claim that their only charge was to identify the effects of development. This striking admission directly contradicts the task at hand – to document the nature and extent of the pre-construction conditions which is the compulsory first step to determine whether a use will adversely affect natural resources.

PWB expert evaluation assumes that nursery farming on the facility property was adversely affecting riparian areas. Biohabitats statement in its final written submittal responding to opponents challenge about the lack of a survey makes this clear:

> "seasonal water quality sampling would indicate that surrounding land uses (agricultural) are significant contributors to sediment to Johnson Creek. However, sampling is not needed to know that is true. (Capel, et al. 2018, Shortle, 2021, USGS 2010." Ex U.20.a. p 22.

Although the hearings offer cannot confirm these sources, the evidence in the record detailing the existence of fish, amphibians and insects co-existing in harmony with agricultural interests is evidenced by experts and witnessed by residents offering the only qualified evidence of this fact. Whether this activity was adversely affected by farming activities before construction does not change this fact. But a determination of existence alone is insufficient. Compliance with the strict adversely affect standard requires knowing exactly where and how the resources exist. Without documentation, the hearings officer lacks any basis from which to conclude that the impacts before construction were any greater than what will result after construction.

Opponents raised concerns that some species like river otters, macroinvertebrates, freshwater mussels and crayfish were not specifically listed as natural resources considered in Biohabitats initial analysis. Ex U.15, p 3. Biohabitats response is that they will be benefit from improved water quality just as all of the other aquatic life will benefit. Ex S.31. This response is unscientific, unsupported and not qualified because there is no consideration of these species habitat and how that habitat will be adjusted once development is complete.

b. Postconstruction Conditions and Evaluation of Adverse Effects

PWB strategy for avoiding future adverse effect is through the design and operation of a project that "will not lead to adverse impacts to aquatic resources in Johnson or Beaver Creeks as the project is specifically designed to *reduce* the potential for impacts to occur, particularly when compared to the pre-development agricultural use of the site." (emphasis in original.) Ex U.20.a, p 22. The claim is that these storm facilities will make the water flowing from the property cleaner than pre-construction conditions when there was little to no historic attention to this concern. There is simply no evidence documenting that this will, in fact, be the case. Opponents dispute this conclusion. Ex S.21, p 3. Without any evidence to suggest otherwise, it might be reasonable to assume, given the long-standing farm practices, that the fish, amphibians and microorganisms within the adjacent streams were not impacted by farming practices. Ultimately, on this record, the hearings officer cannot make this determination. Identifying what these species needed to continue living without any degradation is the requirement and PWB's speculation without study is insufficient to satisfy this requirement.

Water quality and flows will be controlled primarily through the use of a stormflow spreader which will collect and distribute stormwater in a way that will ostensibly mimic pre-construction flows so as to not impact water quality or aquatic species. This storm spreader was installed as part of the site preparation for construction. According to PWB experts, the flow spreader did not function properly. As a result, PWB engineers have identified modifications that it claims will increase performance including adding two points of discharge, replace rip-rap with additional plantings and regrading to make the slope below the flow spreader level so as to not concentrate flows and thereby avoid these impacts. Ex S.31, p 4-5.

1. Toxic runoff

Opponents have noted that the trucking of diesel, chemicals and sediments, coupled with an increase in impervious surfaces, will introduce pollutants into the groundwater. These contaminants can seep into the aquifer, affect the quality of surface water in Johnson Creek, and adversely affect sensitive aquatic species such as those observed in Johnson Creek. Ex J.19, p 16, S.10 and S.15, p 1. PWB's response is that there is "far less risk" of contaminants impacting nearby waterways because of planter basins, bioswales and ecoroof that will reduce the potential for contaminates. Ex U.20.a, p 9. This statement begs the question – "far less risk" than what? Presumably this is a comparison between the previous farming condition which PWB assumes contributed diesel fumes from tractors and application of pesticides. Again, as noted above, PWB made no effort to quantify the extent of this pre-construction farm impact and without doing so, PWB's assertion is nothing more than a guess. If the "far less risk" statement is in reference to the risk of pollutants entering streams without the planter basins, bioswales and ecoroof, then such a statement is not responsive to the requirement which is to have no adverse effect, not simply to create "far less risk." Rather, the hearings officer finds this statement an admission of adverse effect.

2. Temperature increases

Large, paved surfaces, such as the facility proposed at the headwaters of Johnson Creek, are known to cause thermal pollution, degrading stream habitat and harming coldwater fish species. Moreover, PWB plans to hold stormwater in detention ponds prior to release into Johnson Creek. These ponds will increase the transfer of solar energy, heating up the water in the spring and summer prior to its release into the creek. In addition, turbidity from runoff at the site will raise water temperature because suspended particles absorb the sun's heat. Ex N.43 p 56.

To address this issue, as part of its final evidentiary submission, PWB announced its plans to acquire and remove a pond, known as the Cottrell Pond, which is a long-identified contributor of increased stream temperature. The Cottrell Pond is located 1,000 feet downstream of the southwest corner of the filtration facility site. U.20.a. Removing this pond will dramatically reduce the thermal loading in this reach of Johnson Creek which will, according to PWB, outweigh any risk of thermal loading in stormwater leaving the property through the stormwater spreader (also referenced as Discharge Point #2). Ex U.20.a, p 13.

Assuming that PWB has offered substantial evidence to show that the thermal load of Johnson Creek downstream of the Cottrell Ponl will improve, this evidence does not deal with the increased temperature of water entering Johnson Creek from the project site, 1000-feet upstream of Cottrell

Pond. The focus of the natural resources criterion is not just broad scale effects. If that were true, the applicants could provide mitigation elsewhere in the region and assert net benefits to aquatic resources. Local impacts must be evaluated to ensure no adverse effects on or adjacent to the project site. This would include the 1000-foot stream reach from the project site down to Cottrell Pond. Without any quantifiable evaluation otherwise, Biohabitats has assumed uniformity in water resources exists from the headwaters downstream into an established channel. This assumption leads to the inevitable conclusion that increased temperatures caused by the flow spreader will adversely affect the 1000 feet of Johnson Creek directly to the east of the Cottrell Pond.

3. Sedimentation, Flashy Flows and Changes in Established Flow Patterns

Opponents' experts submitted testimony that this water filtration plant, both when it is operating, as well as permanent impacts resulting from construction have, and will continue to, increase fine sediment loads into Johnson Creek. Ex N.43, p45. This fine sediment and turbidity reduces water clarity and blocks sunlight penetration, negatively affects aquatic plant growth and can alter macro and microhabitats where invertebrates live and serve as prey for fish. Excessive fine sediment has the effect of reshaping the stream channel, changing flow patterns and filling in riffles and pools that are essential for salmon feeding and refuge. Ex N.43, p 55.

The term flashy flows refers to rapid and unpredictable changes in water flow most often during storms, that alters aquatic habitats. Flashy flows scour course gravel and cobble substrate, dislodge wood, erode and change streambeds making it difficult for fish to find suitable areas for spawning, rearing and refuge. Salmon and trout rely on uniform flow rates for successful reproduction and flashy flows create migration barriers and physical injuries. Ex N.43, p 56.

As explained above, most of the stormwater leaving the site will travel through the stormflow spreader. Before development, a substantial portion of the stormwater at the site infiltrated into the substrate, slowly percolating into the ground and travel as hyporheic flow into Johnson Creek and Beaver Creek. Once the ground was saturated, excess surface water flowed into Johnson Creek headwaters, but it entered the creek gradually over a length of 1400-1500 feet of stream bed. This happened as sheet flow without any point sources. Ex. A.73. After construction, all of the stormwater from the filtration facility will be collected and discharged into three point sources as shown on the plan marked Ex. A.73 Att. A Fig. 3. This redirection of flows will adversely effect natural resources because they create single points of discharge that will alter stream hydrology. Ex S.21,

Opponents raised concerns that the failure of the stormwater flow spreader adversely affected natural resources by introducing sedimentation and changing established flow patterns and that these effects will extend after construction is complete. Biohabitats' response is that the failure caused "minor erosion and sedimentation into Johnson Creek", far less than what would be expected with pre-construction farm flows and therefore, the long-term effects are "negligible." Ex S.31, p 3. This response lacks substantial evidence in that it fails to offer any data-based information in support. No reasonable person would conclude that the concentration of flows from a property denuded of top soil and trees through a failing storm spreader would have less of an adverse effect than had the same amount of flows run off actively farmed property with plants or cover crop through sheet flow and farm drainage ditches. Moreover, this response misconstrues the standard suggesting that "negligible adverse effects" are acceptable. Finally, whether the

amount of flows were greater or not, this statement does not address the long-term effect of the failure one way or the other.

Opponents go on to question whether changes to the storm spreader, if performing correctly, would disperse water over a length of the Johnson Creek Headwaters approximately 175-200 feet in length as PWB claims. Ex U.18. As shown in PWB plans, there are eight discharge channels built into the low end of the distribution field. However, the field is sloped so that, although the discharge is spread out, gravity will direct all discharge toward the southeastern side of the property that is approximately 6-7 feet lower in elevation. See Fig 1, Ex N.59. The photos depict a noticeable topographical depression running south across the slope, effectively acting as a collection ditch. Although these runoff effects may be slowed by landscaping and riprap, the fundamental problem is that the sloped topography will direct all of the stormwater into a single point along the distribution field running through the SEC-area and into Johnson Creek. The record lacks any evaluation, technical testing or examination of this issue. Without major regrading of the outfall area adjacent to the SEC, water from this concentrated flow will continue to follow its natural path, inevitably leading to erosion, causing erosion and point-source flashy flows. This was observed in winter and spring of 2025 according to opponents' testimony and photos of the newly formed channel.

Biohabitats' findings rely on unverified assurance that prior construction-related impacts have been fully mitigated and that future compliance will be achieved through improved practices. However, the hearings officer finds, that similar assurances were made in previous submittals to Multnomah County that were not borne out in practice, as evidenced by documented violations and adverse impacts. Ex N.43 and N.14. Harm has already occurred and undermines any confidence in Biohabitats' assurances or PWB-engineers' design expertise and stormflow calculations, particularly given the absence of supporting data, that stormwater will be conveyed so as to have no adverse impact.

3. Aesthetic Scenic and Landscape Resources

These resources refer to the features of an environment that contribute to its visual and sensory appeal. These resources shape how people perceive and experience a place, particularly in terms of beauty, tranquility and harmony. Aesthetic resources identified in this case include scenic views, landscape patterns, vegetation, wildlife and birds, and the quality of light and sound in the area. The visual and sensory quality enjoyed by people are a natural resource because they are experienced consequences created by nature often communicated as enjoyment, invigoration, joy and wonder.

a. Preconstruction Conditions

Residents testified enjoying regularly seeing wildlife and birds of prey, hurds of elk, bobcats and cougars. The area was known for its dark skies and a great place for stargazing. Ex N.10. "Quiet has been a valuable aspect of the natural soundscape." Ex U.11. The North Fork of Beaver Creek was identified as providing home to a beaver pond that brings a source of enjoyment to residents. Ex N.49. According to one resident, "the area of wildlife wanders" and "human boundaries such as roads and county lines do not concern them." Ex R.2, p 2.

Opponents offered photographs of the Dodge Park hedgerow prior to its destruction. Ex N. 48, p 3. These photographs show a solid wall of vegetation including wide variety of tall trees, some over 100 feet in height, surrounded by a diverse array of shrubs and understory. The north side of Carpenter Lane was lined with giant sequoias, depicted at Ex N48, p 9. Numerous residents testified that Dodge Park Boulevard, and the hedgerow in particular, provided a tremendous scenic amenity, a source of shade and wildlife viewing opportunity to those walking, cycling or driving along this stretch. Ex N.10.

b. Postconstruction Conditions and Evaluation of Adverse Effect

The current conditions showing the impacts construction has had on the visual quality of the site is well documented. Ex N. 48, p 6, 7, R.2, and elsewhere. The area that once accommodated the sequoias is shown at Ex N. 48, p 10. All of this scenic beauty and its wildlife is now lost. Regular visits from owls and siting of eagles and red tail hawks, elk and deer have diminished. R.2. The frequency of coyote howls has significantly decreased. Ex S.6, U.11. Residents no longer fall asleep to the "delightful sounds of owls." Ex U.11. There is no response from PWB regarding these adverse effects.

Mr. Meacham, who walks along Dodge Park Boulevard six days a week, 52 weeks a year, rain or shine, noted that "when I walk this road each morning there is silence – there is no birdsong, no owls hooting or birds of prey sitting on the wires waiting to swoop down on a meal." Also refer to Ex N.10, pages 3 and 4, for "before and after" photos of the DPB section of the Byway. The loss of the Dodge Park Boulevard hedgerow is an adverse impact to the visual amenities created by natural resources.

According to PWB's planting plan, at Ex S.32, p 52, after the pipeline is installed, a replacement hedgerow will be planted where the Dodge Park Boulevard hedgerow once stood. This replacement hedgerow will be planted with woody shrubs of a height of 12-to-18 inches when planted and will grow no taller than ten feet. This mitigation planting will lack the opportunity to view opossums, owls or birds of prey. People experiencing this shrub-only area will miss any experience of the "teeming" wildlife that once inhabited this area. To the extent that these shrubs will accommodate wildlife, it will take years for them to provide the level wildlife habitat and it will never grow tall enough to offer the shade that it once did. If mitigation is permitted within MCC 39.7515(B), the hearings officer finds that this less than 10-foot tall line of shrubs along Dodge Park Boulevard will not come close to fully abating the visual impact of the loss of the Dodge Park hedgerow. This adverse impact remains.

The important thing to note about the hedgerow and mitigation planting proposed for the two Carpenter Road lots is that although the hedgerow will include trees that may, over decades, grow to be as tall as the Dodge Park Boulevard hedgerow, it runs perpendicular to Dodge Park Boulevard and none of this new planting will be visible along Dodge Park Boulevard.

In Ex. U.20.i, response to the opponents concerns over scenic impacts, PWB details how the filtration facility itself will not be visible from the Scenic Byway due to the steep grade of Dodge Park Blvd. However, this explanation is not at all responsive to the adverse effect caused by the loss of nearly 1-mile stretch of mature tree hedgerow that was clear-cut in the Dodge Park Boulevard right-of-way and not at all made up for by the planting of 18-inch shrubs.

Regarding the visual impact of the water filtration facility along Carpenter Lane, PWB argues that the buildings are set in a depression, stepped down in height and are buffered from off-site view by trees and shrubs. Ex U.20.i. Opponents point out that the experience of walking down Carpenter Lane will be vastly different. The hearings officer has viewed the video at Exhibit E.38.a, "COTA Evening Walk Carpenter Lane Video." As explained in Ex I.22.d, this video depicts an evening walk from the residence at R&H Nursery to the PWB site on Carpenter Lane. The walkers perambulate through the same exact place shown in the rendering at Ex U.20.i, p 4. A vastly less natural and scenic experience, after construction is complete, Carpenter Lane will have a much wider suburban, rather than local lane feel. The elimination of the six giant sequoias that previous served as the entrance along the north side of Carpenter Lane with a well-ordered row of cascaras to the south will further contribute to a developed rather than a natural experience. Rather than the feeling a wild county road where the dogs roamed freely, the as-built renderings convey an improved controlled, gated, landscaped and suburban development quality. A wide paved driveway with fencing, barbed wire and security signage are all planned. After development, Carpenter Lane will have lost its serene and pastoral character resulting in an adverse impact.

Without any evidence to suggest otherwise, the hearings officer finds that this use will adversely affect scenic natural resources and therefore MCC 39.7515(B) is not satisfied.

4. Contaminated Soils

A water filtration facility necessary to serve PWB objectives, requires the removal of more than 1 million cubic yards of soil excavation to accommodate massive water storage tanks. Ex N.43, p 34. In addition to depositing soil onsite for backfill and along road shoulders, PWB has relocated or has plans to deposit soils on two properties owned by T&K Sester Farms. The first, is the Gramor property located in Clackamas County, nine miles from the subject property, and the second is the Oxbow property located in Multnomah County. Ex N.43, p 34.

a. Preconstruction Conditions

The subject 95-acre water filtration property has a long-standing history of being farmed for nursery stock. According to the Department of Environmental Quality (DEQ), soil samples taken from the project site indicate that the upper 18 inches of the top layers of 66 acres of the filtration site are contaminated with DDT, DDE and Dieldrin levels five to eight times greater than DEQ's thresholds for clean fill. DDT and Dieldrin, which have been banned in the US since the 1970s, are known for their detrimental effects on wildlife, particularly birds. Both chemicals are classified as probable or likely human carcinogens, with Dieldrin also linked to liver damage, immune system suppression, and reproductive harm in animal studies. Ex N.43, p 34. There is no evidence, such as air samples or water samples taken from Johnson Creek prior to excavation, to suggest that the contaminated soils were migrating or otherwise affecting groundwater or nearby riparian resources.

PWB was aware of the presence of these contaminants as early as 2019 but failed to disclose them during the initial land use review. Ex N.43, p 34. See also Ex A.39 and A.41.

The Gramor property is a 29-acre property that had been excavated some time before revealing open and exposed pits that, before deposition of PWB soil, were filed with rain water from seasonal winter weather. Ex N.43, p 34.

The Oxbow property, located on the crest of the Sandy River Canyon, which is designated an Oregon Scenic Waterway and a federally recognized Wild and Scenic River, in Multnomah County. This property includes state-regulated wetlands, a perennial stream and areas designated under County zoning for Significant Environmental Concern (SEC). Ex N.43. p 44. This property remained naturally vegetated until late 2022 or early 2023. Ex N. 42, p 35.

b. Postconstruction Conditions and Evaluation of Adverse Effect

Excavation of the subject property began in the summer of 2024. Although there is evidence that dust (containing agricultural use related contaminates) was generated from this excavation and stockpiling likely had or will have an adverse impact on surrounding neighbors, no environmental risk assessment considered this risk, or any other air quality-related risk associated with the relocation of soils, has been completed. Ex S.20, p 2-4.

In the winter of 2024, during wet weather, PWB deposited 120,000 cubic yards of contaminated soil into the existing pits on the Gramor property, creating a high risk of uncontrolled movement of contaminated soil. Photographs show uncontrolled runoff from the areas of deposition of the contaminated soils. Ex N. 43, p 37. DEQ required that the approximately three feet of contaminated soil be covered with 1.5 feet of virgin soil and blended through discing to minimize risk. Instead, contaminated soil was dumped into excavated pits, some of which were filled with water at the time, and simply covered without the required mixing. N.43, p 34. Although PWB "advised" DEQ that this mixing would occur in the spring of 2025, this blending of soils has yet to occur. N.43, p 34

Regarding the Oxbow property, Sester applied for an agricultural fill permit to deposit 1.9 million cubic yards of excavation spoils from the PWB project. Though the County denied this permit, procedural defects resulted in approval by a circuit court. In 2022, land clearing and site grading began. As a result of complaints, the Department of State Lands (DSL), DEQ and the Oregon Department of Agriculture investigated and DEQ issued a pre-enforcement notice which noted "channelization visible on the 2023 aerial photograph appears as erosional rills in the recently disturbed soils along the bottom of the swale." Ex N.43, p 35. Photographs at Ex N.43, p 36 document this erosion. The pre-enforcement notice was re-issued in December, 2024, but to date, the property owner and PWB have failed to take any corrective action.

PWB responds to these concerns by explaining that opponents concerns are the result of construction and are not a permanent component of the proposed land use. Ex U.20.d. PWB disavows having any control over the Gramor property once the soils are deposited and thus, PWB disputes having any obligation to sample stormwater at the Gramor property. PWB also points out that risk of migration from the filtration facility property, road shoulders and onsite stockpiles are managed under PWB's 1200-CA permit requirements to manage dust, runoff and soil erosion. Ex S.34, p 12. PWB emphasizes that pre-construction farming required active working of soil that would have generated dust and unmitigated runoff in levels greater than post-construction conditions. Ex U.20.d, p 4.

The hearings officer agrees with PWB that adverse effects caused by contaminant migration borne in dust or surface water during construction are not germane to this review. However, the fact that these conditions are occurring and that PWB (or Sester) are currently in violation of DEQ conditions expressly requiring the discing of soils upon deposit undermines any claims by PWB or its experts that adverse impacts occurring during construction will not occur after construction is complete.

MCC 39.7515(B) places no significance on ownership or control and cannot be used to absolve PWB from any adverse impact requirement. The applicant is bound to establish that no adverse effect will occur regardless of where these effects take place. The evidence submitted documenting the actions to date do not suggest that land clearing activities on the Oxbow property or the treatment of contamination soils on the Gramor property has, or will be, properly disposed of to eliminate any adverse effect. Further, there is no indication that the dust and erosion caused by construction will not result in any long-term effects, after development has concluded.

Finally, regarding the claim that the transport and deposit of massive amount of contaminated soils create no greater impacts than previous farming activity lacks substantial evidence. No testing of water or air quality was accomplished while farming was occurring or before construction began. The applicant bears the burden of proof to show that their proposed use will not adversely impact natural resources. The evidence shows that adverse impacts from the removal, transport and deposition of soils on sites that PWB does not control have, and will continue to, create adverse impacts. This criterion is not met.

5. Air Quality, Carbon Sequestration and Greenhouse Gas Emissions

a. Pre-construction Conditions

Again, before construction, the filtration facility property was an actively managed farm. Farmland acts as a carbon sink that absorbs more carbon dioxide than it gives off, which in turn, reduces greenhouse gases in the atmosphere. Carbon sinks are vital to support ecosystem resilience and biodiversity through the mitigation of greenhouse gases. Nursery stock cultivation on the 90+ acre filtration facility property served as a carbon sink. N.43, p 28.

b. Postconstruction Conditions and Evaluation of Adverse Effect

PWB's expert ESA conducted an operational air quality analysis for the project. The analysis found that air pollutant emissions from facility operations, including those from mobile sources, emergency backup generators, and dry chemical transfers will remain below federal thresholds. Emission estimates accounted for worst-case conditions and showed minimal risk of health impacts from diesel particulate matter (DPM). The site's size and location contribute to dispersing emissions effectively, and the project complies with applicable state and federal air quality regulations. ESA concluded that the project will not adversely affect air quality or natural resources during operation. Ex N.61 and S.35.

While the ESA reports that operational emissions will not exceed federal thresholds, this assertion alone is not responsive to the County's stringent no adverse effect standard. Whether the levels of diesel particulate matter are low, or even de minimis, the standard prohibits any adverse effect and

PWB has failed to provide quantified modeling of localized cumulative impacts, especially for sensitive receptors such a residents, agricultural uses and ecological habitats nearby.

Opponents argue that once developed with impervious surfaces and higher levels of carbon emissions from facility-related vehicles, this property will be converted from a carbon sink to a carbon source. Ex N. 43, p 28. Opponents also argue that the release of thousands of tons of carbon emissions from construction equipment and haul trucks will have permanent long-term effects. Ex N.43, p 5.

PWB's expert challenges that opponents' claims lack substantial evidence. PWB points out that farming vehicles would off-set any carbon sequestration benefit from nursery stock, that sustainable design consistent with PWB's *Net Zero* strategy along with vegetation will sequester CO2 and that regardless, this project does not generate enough greenhouse gas emissions to "meaningfully affect or influence global climate change, nor would the Project's CO2 emissions separately affect natural resources in an adverse manner." S.35, p 1-2.

Again, there is no evidence to support the claim that pollution from farming vehicle had a carbon positive effect. Moreover, PWB misconstrues the exacting standard imposed by MCC 39.7515(B) by suggesting that adherence with the *Net Zero* strategy in its design can serve as a surrogate for achieving compliance. Whether a project will not "meaningfully affect" climate change is not meeting the strict no adverse effect standard.

PWB bears the burden of proving that CO2 emissions will not adversely affect natural resources based on substantial evidence that a reasonable person would believe. By failing to produce any data, analysis or qualitative explanation, PWB has failed to meet its burden, particularly given the testimony in opposition documenting the seemingly endless source of diesel fumes coming from construction and haul trucks during construction. PWB has offered no evidence to support its claim that these emissions will have no long-term effect on natural resources or residents.

Similarly, PWB has failed to provide any quantified analysis to support its claim that carbon emissions from the site were greater with the farm use than they will be during facility operation. Whether the planting of over 3,000 trees and new vegetation will "continue" carbon sequestration lacks foundational support when no effort is made to quantify the carbon emissions during farming. MCC 39.7919(B) is an exacting standard; it requires a finding of no adverse impact to natural resources. This finding can only be made if there is substantial evidence to support a finding and in this case, the evidence on air-quality and carbon-sequestration effort is inadequate. With respect to air quality and climate change concerns, MCC 39.7515(B) is not satisfied.

6. Agricultural Soils

a. Pre-construction Conditions

As documented at length in the Oregon Association of Nurseries (OAN) written argument and draft findings set forth in Ex W.2 and W.3, the water treatment facility property and pipeline properties, consisting of approximately 108 acres, are Class II soils and thus high-value farmland under Oregon law. Ex N.43, page 63. OAN has provided information from the Natural Resources Conservation Service including that high-value soils retain natural functions, including nutrients

and water storage characteristics making it uniquely suitable for support animals and to grow plants. Ex U.24. Prior to construction, this property was used by Surface Nursery to grow crops. Surface Nursery vacated the property in 2019, when site preparations began for construction. Ex S.27.

b. Postconstruction Conditions and Evaluation of Adverse Effect

Prior to construction, PWB estimates approximately 1,225,000 cubic yards of soil to be removed, of which it is estimated 245,200 cubic yards of High-Value Class 2 topsoil will be removed across 75 to 80 acres. Rec 3659. No party disputes the soil removal. Instead, the applicant explains that the topsoil has been relocated to a nearby property where it can be used for agricultural production. There is no evidence in the record that the relocated topsoil is actually being used for agricultural production, or that the receiving property is not already agricultural so that depositing the relocated topsoil will maintain the same number of acres of agricultural resources as before. For these reasons, the hearings officer concludes that the inability to replant seedlings for nursery crop adversely affects natural resources; MCC 39.7515(B) is not satisfied. Ex N.43, p 35-36.

E. <u>Conclusion</u>

PWB fails to offer any interpretation of MCC 39.7515(B) and has not conducted a comprehensive evaluation of the area's natural resources. Instead, they repeat the same error identified by LUBA on remand: attempting to narrow the broad definition of natural resource. The limited set of resources they chose to examine received poorly developed and incomplete assessments that do not support a conclusion that all adverse impacts will be avoided as required by the *West Hills* case. PWB's consultants further downplay the value of well-documented local natural resources in an effort to minimize the project's perceived impacts.

Where PWB conducted any pre-construction analysis, it focuses on only a few species, assumes that only federally protected species and habitats are relevant, fails to document survey methods, and lacks any repeatable or scientifically credible assessments. Without a complete pre-construction inventory, there is no way to meaningfully compare post-construction conditions to baseline conditions. Mitigation measures, if allowed, only address a small subset of affected resources, and they fail to establish complete abatement of all impacts on the date that construction is complete.

Upon reviewing all of the evidence in the record, the hearings officer finds that the permanent removal of agricultural soils, the elimination and permanent degradation of upland wildlife habitat, the removal of trees, changes to aesthetic qualities like scenic views, quite soundscapes, and dark skies, the concentrated direction of stormwater altering the flow, turbidity, and temperature of Johnson Creek, destruction of 0.25 miles of ephemeral stream, groundwater pumping, deep excavation and blasting affecting aquifer stability, the uncontrolled deposit of contaminated soils, air pollution, fencing restricting wildlife access to foraging areas, light pollution effects on nocturnal wildlife, and other consequences of the proposed project will "adversely affect" the area's natural resources. Therefore, MCC 39.7515(B) is not satisfied and the consolidated applications are denied.