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June 10, 2025

VIA: Email to [LUP-Hearings@multco.us](mailto:LUP-Hearings@multco.us)

Ms. Liz Fancher  
Hearings Officer for Multnomah County  
Land Use Planning  
1600 SE 190th Avenue  
Portland OR 97233-5910

RE: Multnomah County Case File T3-2022-1622  
**Applicant's Response to "Exhibit Y.1 Objection to PWB Final Written Argument"**

Hearings Officer Fancher:

We represent the applicant, Portland Water Bureau ("**the applicant**"), in the above referenced case file. On behalf of the applicant, we submit for your consideration the following response to arguments made in Exhibit Y.1 Objection to PWB Final Written Argument (the "**Objection**").

The Objection asks to strike the entirety of Exhibit X.2 (Proposed Findings & Legal Argument) "as new evidence." Page 1. However, the Objection bases this overbroad request to strike on a fundamental misstatement of the applicable law and fails to explain how various "examples" provided in bullet points are new evidence rather than argument.

First, the Objection cites to "ORS [1]97.797(9)(b)" and provides a portion of the definition of evidence but does not provide the contrasting definition of argument. In full, ORS 197.797(9) provides:

"(9) For purposes of this section:

- (a) 'Argument' means assertions and analysis regarding the satisfaction or violation of legal standards or policy believed relevant by the proponent to a decision. 'Argument' does not include facts.
- (b) 'Evidence' means facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision."

By omitting the definition of argument, Ms. Richter argues that the fact that the applicant's Exhibit X.2 "demonstrate[s] compliance" with MCC 39.7515(B) makes that demonstration of compliance, even though based on evidence in the record, into prohibited evidence under (9)(b). This is plainly incorrect. Under (9)(a), "analysis regarding the satisfaction" of MCC 39.7515(B) by the Project is squarely within

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the realm of allowed final “argument”. That is true whether the argument’s analysis had been detailed in the record previously or not.

The “examples” provided in the Objection boil down to: If a *PGE/Gaines* analysis is not legal argument, what is? In the words of the Objection itself, it is argument about “how the [applicant proposes that the] hearings officer should apply the criterion” – not facts about the Project to which that criterion applies (the Project being the “what” rather than the “how”). Moreover, the applicant’s *PGE/Gaines* analysis was provided in response to Ms. Richter’s own interpretational analysis in her final legal argument (Exhibit W.3a), and it cannot be said that every argument in Exhibit W.3a had been made previously in the record.

- For the first bullet point, whether it takes “linguistic dexterity to understand the meaning of ‘adversely affect’” to require the creation of actual harm is not a new fact offered for the first time, but instead a quotation to caselaw to examine how another court interpreting this same phrase did their analysis. Ms. Richter’s Objection omits mentioning that the quoted language is clearly a quotation from caselaw. Ms. Richter also does not provide any argument that quoting caselaw analysis is a new fact rather than analysis and argument.<sup>1</sup>
- For the second bullet point, Ms. Richter does not identify why highlighting screenshots of the record is any different than quoting those same passages in the screenshots and adding emphasis through bolding, underlining, or italicizing the font in the quotation. Neither converts the quotation into new evidence – each is offered to mark a key part of the “analysis regarding the satisfaction” of the applicable approval criterion as argument under (9)(a).
- For the third bullet point, the Objection itself states that this was a proffered “interpretation” – as noted above, this is argument about “how the [applicant proposes that the] hearings officer should apply the criterion” – not facts about the Project to which that criterion applies (the Project being the “what” rather than the “how”). A *PGE/Gaines* interpretation analysis is quintessential legal argument under (9)(a).
- For the fourth bullet point, the Objection concedes that the USGS report cited is in the record, which resolves the matter. Moreover, Biohabitats *did* discuss this report and explained its relevance “to demonstrate the criterion was satisfied” in the record. Exhibit U.20.a, pages 19, 20, 27, 28, and 33. In particular, Page 19 of Exhibit U.20.a discusses the same passage that the Objection now seeks to strike. This bullet point does not identify any (9)(b) new evidence.

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<sup>1</sup> Perhaps this argument is not offered because a similar argument by Ms. Richter was already rejected by LUBA related to the prior proceedings in this case. *Cottrell Community Planning Organization v. Multnomah County*, LUBA No. 2023-086 (January 22, 2025), slip op. pages 40-41 (“We agree with PWB that its assertion that weight should be given to county staff opinion on the issue of road safety and citations to LUBA cases is permissible legal argument, that it is analysis regarding the satisfaction of legal standards or policy believed relevant by the proponent to a decision not including evidence.”).

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- For the fifth bullet point, pointing out that Ms. Richter's final argument's introduction paragraph<sup>2</sup> used "emotional descriptors" like "enjoyment, invigoration, joy and wonder" is not a new fact. Ms. Richter did argue, in the record, that such emotions could occur as "experienced consequences" of natural resources. There is no new fact in quoting her argument and pointing out that her argument is flawed, as "whether or not the natural resources bring 'enjoyment, invigoration, joy and wonder' does not make those emotions into a natural resource." Exhibit X.2, page 226. Finally, *proposing findings* on what could be concluded based on the 2023 record (which is explicitly part of the remand record) and "other conclusions the hearings officer [c]ould discern from images in the record" are not new facts, but argument in favor of proposed findings. Findings can, and indeed should, include "conclusions the hearings officer ... discern[s] from images in the record" as stated by the Objection. The Hearings Officer is under no obligation to agree with the argument's analysis and discern those same conclusions from the images – although Ms. Richter does not propose any alternative conclusions that could be drawn, for example, about the prominence of the existing green PHWD tanks (which are not part of the Project or PWB water system). Exhibit X.2, page 230. Moreover, the statement about those existing PHWD tanks that Ms. Richter specifically objects to is literally a quotation to Exhibit A.5, page 12. How can a quotation to a statement in the record be a "new fact" poisoning the entirety of Exhibit X.2 such that the entirety of Exhibit X.2 should be struck?

Instead of an objection to new facts, the Objection is a revival of an objection in Exhibit N.2, page 2, where Ms. Richter requested that "the hearings officer ... issue an order setting forth the review procedures including establishing a deadline, well in advance of the hearing, for PWB to submit materials in response to the remand." When Ms. Richter had the opportunity to make that request again during the long procedural discussion at the hearing, she did not do so. When the hearings officer did what Ms. Richter had requested in Exhibit N.2, and "issue[d] an order setting forth the review procedures including establishing a deadline" for the applicant's final legal argument (Exhibit S.1) Ms. Richter had another opportunity to object to the procedure agreed to at the hearing, and did not do so. Ms. Richter's fundamental argument in this latest Objection is that all (9)(a) argument made by an applicant has to be made before the hearing or at some point that "allow[s] parties to respond". Objection, page 2. That is simply not what Oregon land use law requires, nor was it required by the procedures in this remand set forth by the Hearings Officer both at the hearing and in Exhibit S.1, procedures agreed to by Ms. Richter. Striking Exhibit X.2 on the basis that the applicant followed the procedures set forth by the Hearings Officer would prejudice the applicant's substantial rights.

Overall, the Objection is not an objection to new facts in Exhibit X.2 -- as no new facts are identified in the Objection, only arguments.

For the reasons set forth above, we request that the Hearings Officer decline to strike Exhibit X.2.

Respectfully Submitted,



RADLER WHITE PARKS & ALEXANDER

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<sup>2</sup> Provided in a block quote at the bottom of page 225 of Exhibit X.2.



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

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**T3-2022-16220: Applicant's Response to "Exhibit Y.1 Objection to PWB Final Written Argument"**

4 messages

**Zoe Powers** <zpowers@radlerwhite.com>

Wed, Jun 11, 2025 at 2:47 PM

To: "lup-hearings@multco.us" &lt;lup-hearings@multco.us&gt;

Cc: Renee France &lt;rfrance@radlerwhite.com&gt;, Zoe Powers &lt;zpowers@radlerwhite.com&gt;, "Peters, David" &lt;David.Peters@portlandoregon.gov&gt;, "Cheek, Michelle" &lt;Michelle.Cheek@portlandoregon.gov&gt;, "Haium, Maja" &lt;Maja.Haium@portlandoregon.gov&gt;

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

Multnomah County Staff,

Please find attached, and provide to the hearings officer, the applicant's response to "Exhibit Y.1 Objection to PWB Final Written Argument" for the case of T3-2022-16220 on remand.

Thank you,

**Zoe Lynn Powers**

Partner



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E-Mail: [zpowers@radlerwhite.com](mailto:zpowers@radlerwhite.com)

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Pronouns: She/her

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**Applicant's Response to 'Exhibit Y.1 Objection to PWB Final Written Argument' (01564029xC624A) FINAL.PDF**

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**LUP Hearings** <lup-hearings@multco.us>

Wed, Jun 11, 2025 at 3:57 PM

To: Katherine Thomas &lt;katherine.thomas@multco.us&gt;, Jed Tomkins &lt;jed.tomkins@multco.us&gt;, Lisa Estrin &lt;lisa.m.estrin@multco.us&gt;, Alexandra Howard &lt;alexandra.howard@multco.us&gt;, Megan Gibb &lt;megan.gibb@multco.us&gt;, Kevin Cook &lt;kevin.c.cook@multco.us&gt;

We've received this unexpected submission. Please let me know how to proceed with it. Thanks.

Scott