

BEFORE THE LAND USE HEARINGS OFFICER
CLACKAMAS COUNTY, OREGON

Regarding an Appeal of a Type II Planning Director Decision Approving an Application for a Utility Facility in the EFU Zone.

Case File No: Z0036-23-HO
(Portland Water Bureau/Surface Nursery)

A. SUMMARY

1. The Portland Water Bureau (“PWB”) is the Applicant. The owners of the subject properties are: Surface Family Trust, Debra M. Surface, Trustee, and; Nathan Burkholder and Brittany Burkholder. The site address for the subject property is 36181 SE Bluff Rd., Boring, OR 97009, also known as T1S, R4E, Section 27, Tax Lots 00100 and 00200, and T1S, R4E, Section 26, Tax Lot 04800 (together, the “Property”). The Property consists of approximately 53.91 acres in these three separate tax lots. This location is along the eastern property boundary of 36181 SE Bluff Rd, directly north of the intersection of SE Bluff Rd. with SE Proctor Rd. and SE 362nd Ave. The Property is located within Clackamas County and is zoned Exclusive Farm Use (EFU), and is not located inside an urban growth boundary. This application was deemed complete on February 21, 2023. The 150-day timeline for final action on the application was extended by 162 days at the request of the Applicant to November 30, 2023.
2. The Applicant submitted a proposal to construct an emergency access road to serve a proposed water filtration facility in Multnomah County. The Applicant characterizes the use as a “utility facility necessary for public service”, which is a use potentially allowed in the Exclusive Farm Use zone. The PWB water filtration facility will continue to have primary emergency access off Carpenter Ln. However, a secondary emergency access to the PWB water filtration facility is required. The emergency access road is proposed to have an all-weather gravel surface and to vary in width from 20-26 feet (widening to 26 feet around the proposed fire hydrants) and will include fiber optic cable, a water supply line and two fire hydrants. The Applicant also proposes a temporary construction access road with an all-weather gravel surface and a width of 30 feet. A temporary construction easement access road with an all-weather gravel surface and a width of 30 feet. A temporary construction easement is also proposed adjacent to the emergency access road. Both the temporary and permanent easements will vary in width.
3. The application was processed as a Type II land use permit, with the County providing notice to applicable agencies and owners of property within 750 feet of the Property. On July 5, 2023, the Planning Director¹ issued a notice of decision that approved the application with conditions in part, and denied the application in part. The conditional approval was for the secondary emergency access only. A temporary construction road proposed to extend southwest across tax lot 200 from the proposed emergency access road was excluded from

¹ Zoning and Development Ordinance [ZDO] 1307.3(B) provides that the Planning Director includes “Any County staff member authorized by the Planning Director to fulfill the responsibilities assigned to the Planning Director by the [ZDO].” County Planner Joy Fields acted in this capacity.

this approval. Temporary construction easements adjacent to the secondary emergency access road are limited to those needed to accommodate construction of the secondary emergency access road. The land use decision did not authorize use of the secondary emergency access road by filtration plant construction traffic.

4. On July 17, 2023, the Appellant Surface Nursery, Inc. appealed the Planning Director's decision. The Appellant contends that the Applicant should be denied because: the secondary emergency access requirement could be met on property not zoned EFU by locating the PWB water filtration facility inside the Urban Growth Boundary, and; the Planning Director's imposed conditions of approval fail to ensure that the impacts from the secondary emergency access road, including construction of the access road, will not significantly change accepted farm practices at Surface Nursery or increase their costs, providing several specific examples.
5. Prior to ending the public hearing and closing the record, the Hearing Officer asked whether any of the parties or members of the audience wanted an opportunity to provide additional evidence, arguments, or testimony. At the request of the parties, the Hearings Officer agreed to hold the record open. The Applicant requested that the record remain open for ten additional weeks (70 days) as follows: four weeks (until 4:00 pm Thursday September 14, 2023) for any party to submit additional written evidence, argument, or testimony, for an additional four weeks (until 4:00 pm Thursday October 12, 2023) for any party to respond to new evidence submitted during the prior open record period, and for an additional two weeks (until 4:00 pm Thursday October 26, 2023) for the Applicant to provide a final responsive written statement. In addition to these extensions of the timeline, on April 12, 2023, the Applicant requested a 92-day extension of the timeline in this matter to provide the Applicant additional time to review and respond to comments.

B. HEARING, RECORD HIGHLIGHTS, AND POST-HEARING SUBMITTALS

1. On August 17, 2023, Hearings Officer Carl Cox conducted a public hearing to receive testimony and evidence about this appeal challenging the County Planning Director's partial approval of application. As a result of the appeal, the application was reviewed *de novo* by the Hearings Officer. In this proceeding, all criteria and standards relevant to the application were reviewed, including conditions of approval. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. The public hearing was conducted virtually over the Zoom platform, with the County providing an explanation for virtual participation.

Public Comments Submitted Prior to Hearing [Exhibits 1-74]

2. The County received numerous comments concerning this application submitted in advance of the August 17, 2023 public hearing in this matter. Among other things, Sandy Fire District No. 72 submitted comments concerning requirements for a secondary emergency access road to the proposed PWB water filtration facility. The first general requirement of the Fire District's comments states: "Secondary emergency access road off of Bluff Rd. is to be used for emergency use only by emergency services. For staff, maintenance equipment, and deliveries, the primary access to the facility off of Carpenter Ln. is to be used. The Fire District has concerns with the use of the secondary emergency access road by non-emergency

vehicles entering and exiting at the intersection of Bluff Rd. and Proctor Rd.” The comments also include requirements for an emergency vehicle access and maintenance agreement, and specific requirements for the road, including that: “The secondary emergency access grades shall not exceed 10 percent. Intersections and turnarounds shall be as level as possible and have a maximum of 5 percent grade with the exception of crowning for water run-off.” [Exhibit 3]

3. Kenneth Kent, Clackamas County Development Engineering, submitted written comments concerning the Applicant’s proposal, concurring with the findings of the Traffic Impact Analysis submitted by the Applicant, and making certain findings concerning the feasibility of the project. Mr. Kent’s comments included several proposed conditions of approval required to meet certain County development standards applicable to the proposal. Among other things, Mr. Kent submitted this finding concerning the proposed emergency access road: *“As noted by the applicant, the location of the proposed emergency access road at the intersection of SE Bluff Road/SE Proctor Road/SE 362nd Avenue, does not meet minimum access spacing for a rural minor arterial roadway, per Roadway Standards Section 220. However, as a gated emergency access with limited use, the location is acceptable.”* Mr. Kent also submitted these two relevant findings concerning the proposed temporary construction access road: *“The proposed temporary construction access road is located approximately 310 feet west of the proposed emergency access road, using an existing driveway serving the adjacent farm use. County Engineering has worked with the applicant on a suitable location for a construction access, providing adequate separation from the SE Bluff Road/SE Proctor Road/SE 362 Avenue intersection.”* [Finding 7.] and *“The applicant has provided a Traffic Impact Analysis (TIA) by Global Transportation Engineering, dated June 2, 2023 that evaluates construction traffic for the water treatment facility. A number of roadways and intersection were evaluated, with the majority within Multnomah County, but also including the proposed temporary construction access onto SE Bluff Road. The construction TIA finds that the temporary construction access and nearby intersection will perform within county mobility standards. The TIA also, found that the proposed temporary construction access will provide adequate intersection sight distance. County Engineering concurs with the TIA findings.”* [Finding 8.][Exhibit 57]
4. The County received a letter with several attachments from Applicant’s attorney, Steven Hultberg, shortly prior to the hearing. In this letter and supporting attachments Mr. Hultberg contends that the use of the temporary easement requested in the application, but denied by the County in its decision, is integral to constructing the emergency access road. Mr. Hultberg points to issues with out-of-direction construction travel, lack of space to turn around, conflicts with the school at the intersection of the existing farm road, and the confusing 5-way intersection that exists at this location. Mr. Hultberg requests a modification to this condition (Condition 1) allowing use of the proposed construction easement through tax lot 200. Mr. Hultberg submitted a Technical Memorandum, Changes to Use of Emergency Access Road, reflecting the changes to the access road due to the limitations imposed by the County’s decision and Condition 1. He also submitted an Emergency Access Road Construction Memorandum, reflecting the changes imposed by the County’s decision and including an updated construction schedule. Mr. Hultberg submitted an Agricultural Compatibility Review, supplementing its review, that reflects the changes imposed by the County’s decision and Condition 1, with findings stating that the conclusions set forth in the

Applicant's Agricultural Compatibility Review are not impacted by the imposition of the decision or condition. In addition, Mr. Hultberg submitted an Updated Clackamas County Project Review, supplementing and updating the existing project overview in the Applicant's Agricultural Compatibility Review to reflect the imposition of Condition 1. [Exhibit 74]

5. The County received approximately 80 public comments opposed to this application. Issues raised in these comments draw attention to impacts on safety at the intersection of the proposed emergency access road with the existing 4-way intersection of SE Bluff Rd., SE Proctor Rd., and SE 362nd Ave., asserting this will become a confusing and dangerous 5-way intersection with anticipated construction and maintenance traffic. Further, commentators point out that the Oregon Trail Academy school is also located at this intersection and is immediately adjacent to the proposed emergency access road. These commentators express concerns with respect to the proposal's impact on traffic safety related to the school, and express concerns that the construction noise, dust, and machinery will adversely affect the children who attend the school, its faculty, and the families that are part of that community. [Numerous Exhibits/Comments]
6. Other issues raised by commentators include assertions that EFU zoned property should not be used for the emergency access road if there are other site alternatives that could be used instead. Related to these assertions are comments that the Applicant inappropriately excluded alternatives due to cost. Also related are assertions that the Applicant should have chosen another site altogether for the water filtration facility to avoid these EFU zone properties altogether. Several commentators contend that, as several affected properties in the EFU zone are being farmed, the proposed emergency access road will automatically impose significant changes to these farming practices and cause significant increases to farming costs. Several commentators also point to the Applicant's proposed use of the proposed temporary construction easement over a five-year period as a construction road for the proposed water filtration facility, pointing to the disruption to existing farming practices from the construction traffic, the noise, dust, air quality, and impacts of the heavy trucks on the road surfaces, including an existing culvert. Additional comments were submitting asserting impacts to property values, environmental concerns including impacts to area wildlife, and general assertions that the proposal fails to meet ZDO criteria, or County comprehensive plan or State goals for EFU lands and rural property. [Numerous Exhibits/Comments]

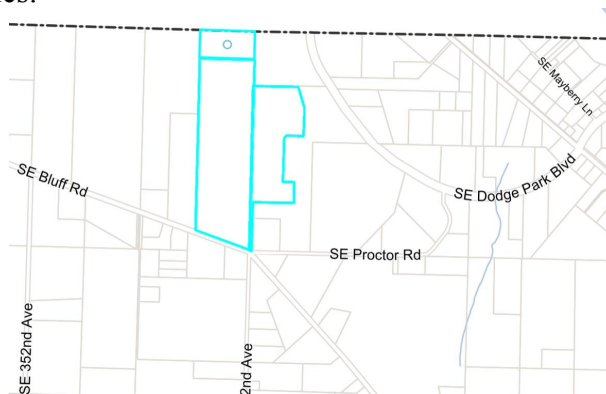
August 17, 2023 Public Hearing

7. The Hearings Officer received testimony and evidence at the August 17, 2023 public hearing about this application and during a subsequent open record period, including submittals identified as Exhibits 1-109. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearing, the Hearings Officer made the declaration required by ORS 197.763. The Hearings Officer disclaimed any *ex parte* contacts, bias, or conflicts of interest. The Hearings Officer stated that the only relevant criteria were those identified in the County's staff report, that participants should direct their comments to those criteria, and failure to raise all arguments may result in waiver of arguments at subsequent appeal forums. At the beginning of the hearing, the Hearings Officer made the declaration required by ORS 197.763. The Hearings Officer disclaimed any *ex parte* contacts, bias, or conflicts of interest.

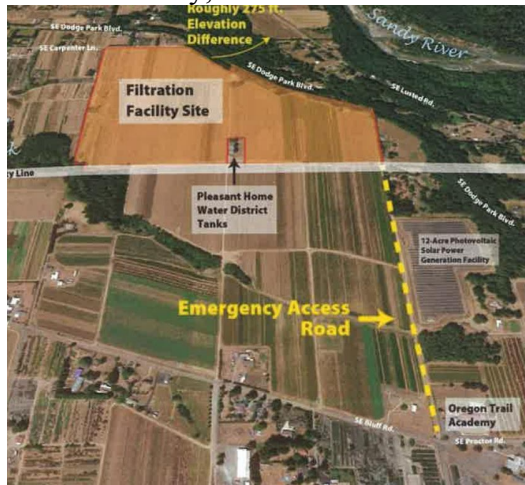
The Hearings Officer stated that the only relevant criteria were those identified in the County’s staff report, that participants should direct their comments to those criteria, and failure to raise all arguments may result in waiver of arguments at subsequent appeal forums.

County Staff Presentation [Exhibit 94]

8. At the hearing, County Planner Joy Fields discussed the application to construct an emergency access road to serve a proposed water filtration facility in Multnomah County, the July 5, 2023 Planning Director decision approving the application with conditions in part, and denying the application in part, and the appeal submitted by the Appellant Surface Nursery, Inc. Ms. Fields also provided discussion concerning related exhibits and comments submitted into the record, providing a PowerPoint presentation, and recommending approval with conditions of the application in part and denying the application in part consistent with the July 5, 2023 Planning Director decision.
9. Ms. Fields provided a slide and discussion concerning the Applicant’s proposal, noting that the Applicant is seeking land use approval to construct an emergency access road to serve a proposed water filtration facility in Multnomah County. Ms. Fields shared a slide and discussed four key components of the application: (1) To construct an emergency access road to serve a proposed water filtration facility in Multnomah County; (2) The applicant characterizes the use as a “utility facility necessary for public service”, which is a use potentially allowed in the Exclusive Farm Use zone; (3) The emergency access road is proposed to have an all-weather gravel surface and a width of 30 feet. A temporary construction easement is also proposed adjacent to the emergency access road. Both the temporary and permanent easements will vary in width.
10. Ms. Fields noted that the Property is located at 36181 SE Bluff Rd., Boring, OR 97009, on the north side of Bluff Rd. and the intersection of SE 362nd Rd., Bluff Rd. and SE Proctor Rd. Ms. Fields also noted that the proposed access road is approximately 2,600 to 2,650 foot long by 20-26 foot wide, located between farmland to the west, and a school, solar field, and residence to the east. There is an existing farm road/drive along a majority of the proposed road. She also pointed out that the zone designation is EFU, Exclusive Farm Use.
11. Ms. Fields provided a slide with an area map highlighting the locations of the affected properties:



12. Ms. Fields also provided a slide with an aerial photo of the vicinity showing the locations of the proposed access road, locations of SE Bluff Rd. and SE Proctor Rd., the Oregon Trail Academy school, the 13-acre solar power facility the County line between Clackamas County and Multnomah County, and the Portland Water Bureau's filtration facility site:



13. Ms. Fields shared slides with aerial photos of the southern end and northern end of the proposal site:



14. Ms. Fields also shared these slides of the Applicant's site plans:

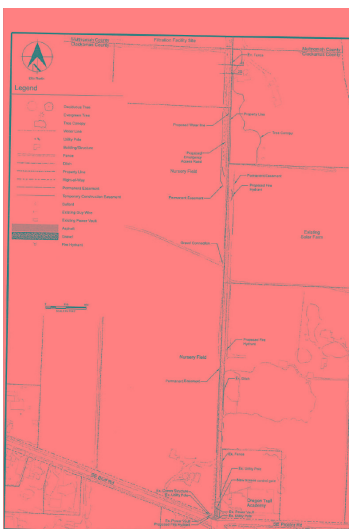
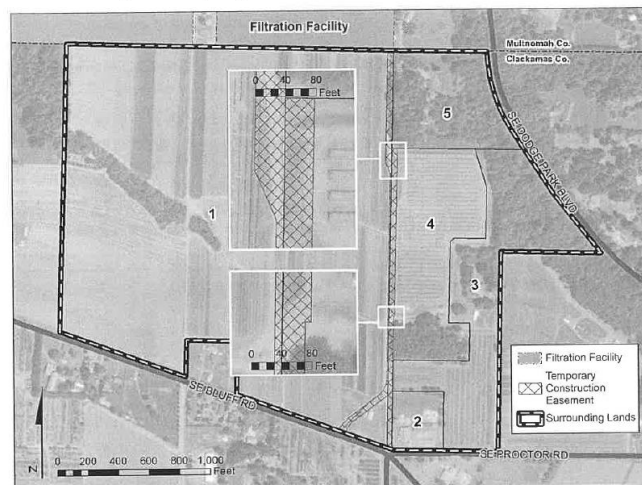
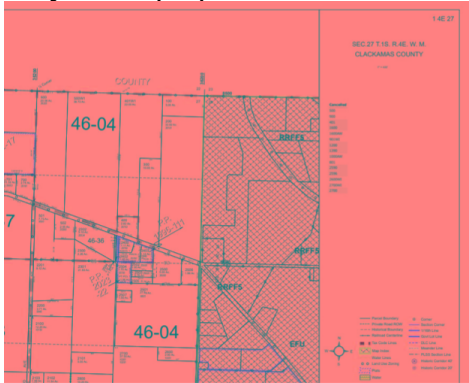


Figure 3: Temporary Access Easements for Temporary Access Road



15. Further, Ms. Fields shared a slide of the Tax Map for the affected properties and those in the vicinity of the proposal site:



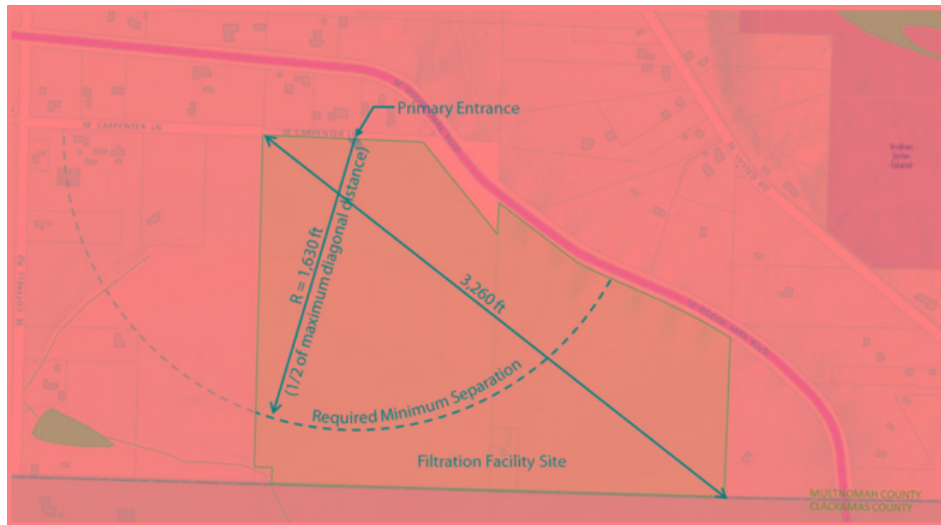
16. Ms. Fields provided additional slides and discussion concerning the County’s applicable review procedures, contained in ZDO Section 1307 – Procedures; Section 401 – Exclusive Farm Use, and; several applicable ZDOs in the 1000s series that included: Section 1002 – Protection of Natural Features; Section 1003 – Hazards to Safety; Section 1004 – Historic Protection; Section 1006 – Utilities, Street Lights, Water Supply, Sewage Disposal, Surface Water Management, and Erosion Control; Section 1007 – Roads and Connectivity, and; Section 1009 – Landscaping.
17. Ms. Fields provided a slide and discussion concerning the application criteria required under ZDO 1307.07, specifically pointing out that when the application was initially deemed complete, all of the property owners had signed the application form. However, property owner Debra Surface revoked her signature on March 9, 2023, and property owners Nathan and Brittany Burkholder revoked their signature on March 27, 2023. Ms. Fields then pointed to a letter date May 24, 2023 submitted by legal counsel for the Applicant, noting that the Applicant has the power of eminent domain and is “initiating the condemnation process...” Ms. Fields discussed staff review of this issue, reaching the conclusion that the Applicant was correct and the County must process the application regardless of the withdrawn signatures.
18. Ms. Fields discussed the application criteria under ZDO Section 401, and Table 401-1 allowing land use approval for a ...”utility facility necessary for public service”, which is identified as being subject to review as a Type II land use application. She pointed to the Applicant’s description that the filtration facility proposed in Multnomah County is a facility that is needed to “continue providing reliable, safe drinking water to nearly one million people.” Ms. Fields also provided discussion and review of the Applicant’s proposal for emergency access road vs. the temporary construction road the Applicant also requested for a minimum of 5 years. She noted that the Applicant cites *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011) for the proposition that “temporary construction activity is not a “use in itself [governed by the land use regulations], but rather an accessory function that is necessary to construct the authorized use.” Ms. Fields reported that County staff find that the construction of a road is an “accessory transportation improvement” under OAR 660-012-0065, and must be evaluated under the standards for a utility facility necessary for public service.

19. Ms. Fields provided a review of ZDO criteria for Subsection 401.05(G) *A utility facility* necessary for public service may be established as provided in OAR 660-033-0130(16)(a) and ORS 215-275 and 215.276, noting that the Applicant provided evidence that the proposed emergency access for the water filtration plant is locationally-dependent, but no evidence was provided to indicate that the temporary construction roads were locationally-dependent.
20. Ms. Fields shared a slide and provided review of the County's partial approval of the application, explaining that the conditional approval was for the emergency access road only. Ms. Fields pointed to the fact that the temporary construction road proposed to extend southwest across tax lot 200 from the proposed emergency access road was excluded from this approval. Temporary construction easements adjacent to the emergency access road are limited to those needed to accommodate construction of the emergency access road. The land use decision neither considered nor authorized use of the emergency road by filtration plant construction traffic.
21. Ms. Fields also shared a slide and provided review of the appeal in this matter, including the Appellant's assertion that the PWB filtration facility could be located inside the Urban Growth Boundary. She pointed to the Appellant's assertions that conditions of approval for Z0036-23 fail to ensure the impacts from the emergency access road will not significantly change accepted farm practices or costs at Surface Nursery. Specifically, Appellant points to the need for unrestricted access to the emergency access road; impact to farming from the construction of the emergency access, and; limit of the emergency access to "emergency" and definition of the term "emergency."

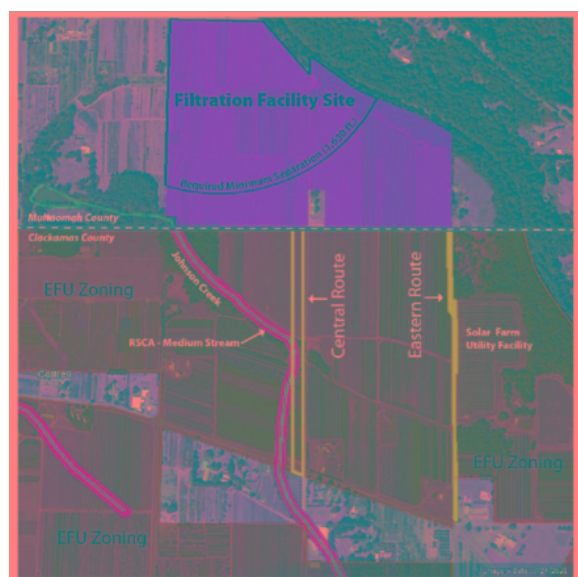
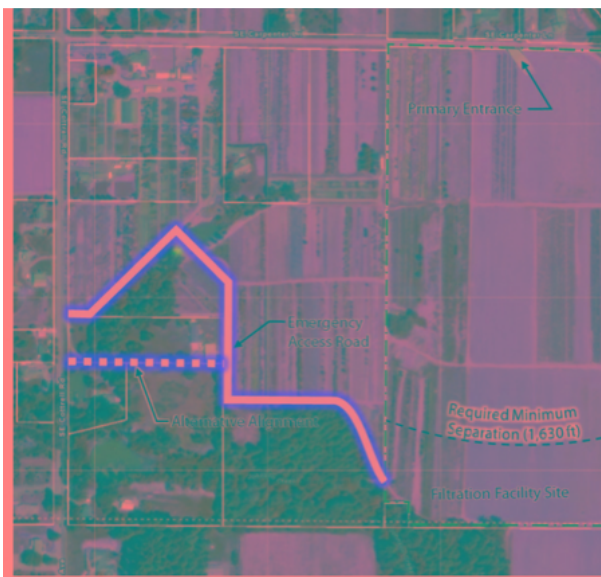
Applicant Presentation [Exhibit 96]

22. At the hearing, the Applicant's representative David Peters discussed the application by the PWB for approval to construct an emergency access road to serve a proposed water filtration facility. Mr. Peters provided a brief review of the PWB's Bull Run Filtration Projects, noting the history of Portland's water system that currently serves almost a million people, providing 100 million gallons of water on an average day, serving the City of Portland and 19 wholesale customers, including Pleasant Home Water District and the City of Sandy. Mr. Peters explained that improvements to the PWB system are needed to meet changes in national drinking water standards. Mr. Peters stated that the facility is planned on property Portland purchased in the 1970s for future water facilities. He provided a review of some of the identified advantages leading to the selection of this site for the new filtration facility, including: hydraulically preferred to maintain gravity flow; proximity to other facilities; zoned by Multnomah County Land Use Planning as Multiple Use Agriculture (MUA-20), stating that the use is allowed as a conditional use. Mr. Peters notes that the PWB filtration facility is not located in the County's EFU zone, and asserts that the site can accommodate a buffer between the facility and its neighbors, and provides a connection to Clackamas County.
23. Mr. Peters shared a slide showing an aerial view of the vicinity similar to that shared by Ms. Fields, but with an overlay of the proposed PWB filtration facility. He stated the facility would process 135 million gallons per day using conventional granular media filtration, and pointed to the location of the planned emergency access, stating it follows existing farm roads. Mr. Peters provided a slide and discussion concerning the emergency access requirement. He

noted that a secondary emergency access road is required for the PWB filtration facility, and these two separate fire access roads are required to be separated by at least ½ the diagonal lot distance, or in this case by a minimum of 1,630 ft., sharing this slide showing the required access separation:



24. Mr. Peters shared a slide with the following two diagrams showing three potential site accesses meeting required minimum separation requirements that were considered. Mr. Peters explained that no northerly options for the secondary access were selected along Dodge Park Rd. because it is heavily treed with steep slopes. Mr. Peters shared the map and diagram on the left below, which shows potential access from the western property line with two alternative approaches, pointing to the existing private residence, steep slopes, and environmentally sensitive areas including Johnson Creek. Mr. Peters shared the map and diagram on the right below showing two different southerly access options, including one designated the “Central Route” that would pass alongside Johnson Creek, and the one chosen that is designated the “Eastern Route”:



25. Steven Hultberg is an attorney representing the Applicant in this matter. Mr. Hultberg points out that the proposed utility facility is a permitted use on the subject Property. He asserts that the Applicant met its obligation to evaluate reasonable alternatives to the siting of the proposed emergency access road in an exclusive farm use zone, pointing to the factors in ORS 215.275.² Mr. Hultberg describes the emergency access road as an integral and required component of the planned PWB water filtration utility facility, noting the requirement is imposed by fire department standards.
26. Mr. Hultberg refers to the Geotechnical report submitted with this application, pointing to analysis of potential siting for the required emergency access road. Mr. Hultberg discussed issues with siting the road to the east along Dodge Park Road, including existing steep slopes and identified seismic concerns. Mr. Hultberg noted that the Applicant's Geotechnical report analysis rejected this location, concluding there was no effective way to mitigate these issues with an access to the east. With respect to access from the west, Mr. Hultberg pointed to findings of excessive slope, the indirect access route, and impacts to state and federally regulated environmental areas including Johnson Creek and wetlands. Mr. Hultberg noted that to site the required access road through these areas of wetlands would required an alternatives analysis that would result in looking to potential southern approaches. Mr. Hultberg asserts these factors leave only the possible southern approaches, referred to as the southern "Central Route" and the southern "Eastern Route." Mr. Hultberg notes that while both of these southern options are through properties located within the EFU zone, the "Central Route" passes within the buffer for Johnson Creek, an RSCA Medium Stream, yet the "Eastern Route" does not and mostly follows an existing farm road. Mr. Hultberg points to the alternatives analysis leading to the conclusion that the selected "Eastern Route" emergency access is the only option. [Exhibit 2]
27. With respect to the selected emergency access route through these EFU zone properties to the south of the proposed PWB facility, Mr. Hultberg discussed requirements to minimize and mitigate impacts to farm practices and farm costs. He pointed to the Globalwise agriculture report concluding there are no such impacts, asserting the report conclusively demonstrates that the emergency access road will have no impacts to farm practices or result in increased costs to farm practices. Mr. Hultberg contends that the only evidence in the record is the Globalwise compatibility study, stating there are no impacts. He asserts that the Hearings Officer is obligated to rely on this expert testimony that is not contradicted, and find that there are no impacts to farm practices. Further, Mr. Hultberg asserts that the County is obligated to impose "clear and objective conditions" to minimize impacts. [Exhibit 2]
28. Mr. Hultberg points to the County's proposed condition one, and requests a modification to this portion in boldface type: **"The temporary construction road proposed to extend southwest across tax lot 200 from the proposed emergency access road is excluded from this approval. Temporary construction easements adjacent to the emergency access**

² Namely, (a) Technical and engineering feasibility; (b) The proposed facility is location dependent, meaning "it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographic needs that cannot be satisfied on other lands; (c) Lack of available urban and nonresource lands; (d) Availability of existing rights of way; (e) Public health and safety; and (f) Other requirements of state or federal agencies.

road are limited to those needed to accommodate construction of the emergency access road. This land use decision neither considers nor authorizes use of the emergency access road by filtration plant construction traffic.” Mr. Hultberg notes that this condition prevents use of a temporary construction easement across tax lot 200. He contends that the use of this temporary easement is integral to constructing the emergency access road. Mr. Hultberg points to issues with out-of-direction construction travel, lack of space to turn around, conflicts with the school at the intersection of the existing farm road, and the confusing intersection 5-way that exists there. Mr. Hultberg requests a modification to this condition allowing use of the proposed construction easement through tax lot 200. [Exhibit 1]

Appellant Presentation [Exhibits 88, 92, 93]

29. Carrie Richter is an attorney representing both the Appellant, Surface Nursery, Inc., and the Cottrell Community Planning Organization. Ms. Richter appeared and presented evidence and legal argument in support of the appeal in this matter. Ms. Richter began by introducing Mr. Shawn Nerison of Surface Nursery, Inc. to provide testimony in this hearing.
30. Mr. Nerison opposes both the emergency access road and the temporary construction easement. Mr. Nerison contends that approval of the emergency access road will result in Appellant Surface Nursery no longer being able to use their farm road. He describes current farm use of equipment similar in size to a bulldozer with cleats that is currently driven from his fields to the west of the farm road, across the farm road to the fields he is farming on the east of the farm road (the back side of the Cottrell School). Mr. Nerison reports that the cleats on this equipment will leave about a foot of mud on the road. Further, Mr. Nerison reports that he currently uses the farm road every day to move employees and equipment and often leaves vehicles parked on the road while work is done in the fields. Mr. Nerison asserts that if the emergency access road is approved, then he will have to build another farm road for his own use, parallel to the emergency access road. Further, Mr. Nerison points out that he will still have to cross the emergency access road every day to reach the fields on the west side, with his equipment damaging the emergency access road, essentially questioning how this will work.
31. Mr. Nerison points to the Applicant’s assertions that the proposed emergency access road will not result in impacts to farm practices or result in increased costs to farm practices, and points out that if the emergency access road is approved he will have to build a new farm road at a significant cost of perhaps \$50,000, and the new farm road will take up additional land the whole length of his field. Mr. Nerison asserts that loss of the access road will result in his losing more than an acre of his farm land, stating that he currently grows roughly 10,000 nursery trees per acre, selling them on a three-year growth cycle for roughly \$311,000. In addition, Mr. Nerison states that he will have to procure replacement trees for his buyers for all of the trees removed from the area affected by the temporary construction easement.
32. Further, with respect to the temporary construction easement, Mr. Nerison contends that the land that is temporarily used for the construction easement will be unusable for his farm operation afterwards, pointing to it being driven over and compressed, and mixed with other dirt, weeds, etc. In addition, Mr. Nerison points to irrigation lines and air vents that will require relocating. With respect to their initial signatures as owners of these affected

properties, Mr. Nerison reports they were only acknowledging that the applicant was seeking these easements.

33. Ms. Richter points to inconsistent statements by Applicant PWB concerning shared use of the emergency access road it proposed to build in place of the existing farm road. Ms. Richter points to the Applicant's easement documents, including requirements for prior written consent from PWB's Chief Engineer for any "activity" or any "change of grade" or "other impediment to [PWB]'s access within the easement area, and the specific statement that: "use by farm equipment is prohibited without the prior written consent of the Chief Engineer of [PWB]" and other similar restrictions on the Appellant's use of the road. Ms. Richter points out that these provisions, restrictions, and requirements for permission/prior written consent are not the same as unencumbered access, and are not consistent with customary farm practices.
34. Ms. Richter points to the diagrams of the "wide" and "narrow" easement cross-sections contained in the Applicant's agriculture compatibility report prepared by Globalwise, asserting that these cross-sections show that Applicant's proposed accessed road will result in a 40-foot easement across the appellant's farm, and adding another 12-foot farm road will result in a loss to Appellant of over 2 acres of farm land, much more than the approximately 0.6 acres reported by Applicant. Further, Ms. Richter points to Mr. Nerison's statement that he grows approximately \$311,000 worth of trees per acre every three years, costs and losses in addition to the cost Mr. Nerison will incur building a new farm road and moving irrigation lines, etc. Ms. Richter contends that, even if the Applicant pays for these things, Applicant is still asking Surface Nursery to obtain written permission to use the access road or to cross it, in addition to requiring Surface Nursery to give up land to accommodate the access road and give up additional farm land by having to build another farm road on it for their own unrestricted use. Ms. Richter submitted a video showing the existing farm road, which appears level along the edge of a nursery farm field planted with young trees, showing a small change in grade as the road approaches these fields. [Exhibit 93]
35. Ms. Richter cites several court cases concerning allowing construction access easements, and also refers to court cases that consider the cumulative impacts of such construction impacts, and the totality of the impacts. Further, Ms. Richter points to the Applicant's traffic impact analysis and asserts that it fails to discuss the impact of the Applicant's construction traffic on the Appellant's farm practices. With respect to the reasonable alternatives assessment by the Applicant, Ms. Richter contends that the Applicant has the available alternative of siting its proposed water filtration plant on its Powell Butte site located within the City of Portland, thereby avoiding impacting EFU property altogether. Ms. Richter also points to the Applicant's assessment of building its required emergency access road from Dodge Park Road, contending that the Applicant could grade the steep slopes and eliminate these issues. Ms. Richter also requested certain revisions to proposed conditions of approval to ensure that no road is built unless the Applicant's filtration facility is actually built, and clear and objective standards limiting Applicant's use of the emergency access road consistent with the description in the agriculture impact analysis anticipating no more than 20 trips per year.

Public Participation at Hearing

36. The Hearings Officer invited participation by members of the public, but no one requested the opportunity.

Submissions Day of Hearing [Exhibits 75-96]

37. The County received several submissions on the day of the hearing in addition to the PowerPoint presentations shared by the County and the Applicant, and the video referenced by Ms. Richter. These submissions included written statements by several members of the public opposing this application, making arguments concerning use of EFU zone properties, impacts to farming, zoning criteria, safety, alternative access and siting options, and impacts to property values, reiterating many of the comments submitted prior to the hearing. Among these comments is a written statement by Lauren and Ian Coulter of West Slope Farms disputing the assertion by Applicant's representative Renee France in her June 15, 2023 response to public comments [Exhibit 53] that: "Globalwise attempted to reach the property owners by both email and telephone to discuss their farm operation, but never received a response." The Coulters report that this rebuttal is in response to their comments concerning impacts to their blueberry fields and u-pick customers from dust generated by construction of the emergency access road. The Coulters assert Globalwise did not attempt to contact them, stating that: "we have no record of email correspondence, phone calls, mail, or notices on our gate or in our mailbox."
38. The Appellant's attorney, Ms. Richter, submitted written comments that included legal argument consistent with the arguments she made at the hearing, asserting the Applicant has not satisfied the criteria necessary to site an emergency access road on EFU zone land. [Exhibit 88]
39. The Oregon Association of Nurseries also submitted written comments that included legal argument directed at the Multnomah County Land Use Hearings Officer contending the PWB's application related to its water treatment plant/facility should be denied. These written comments include opposition to the PWB's siting of its water filtration facility on farm use land, pointing to the values of such properties and the need to protect them from expansion of urban uses. The comments review legal requirements for the proposal, and discuss associated impacts of these types of non-farm uses of rural EFU lands. In submitting a copy of these written comments to the record in this hearing, Mr. Jeff Stone of the Oregon Association of Nurseries noted his opposition to this application for an emergency access road as well, contending this application fails to meet ZDO criteria, certain cited OAR requirements, and statewide planning goals. [Exhibit 95]

The Appellant's Written Comments [Exhibit 92]

40. The Appellant's owner and vice president, Shawn Nerison, submitted written comments in an August 17, 2023 letter stating: "We would like it noted for the record that reports contained in the application materials do not accurately represent our farm operations nor does it acknowledge the true impacts of this project that will force significant change in and cost to our farm operations." Mr. Nerison noted that the Applicant PWB had initiated proceedings to take about 0.92 acres of their property, providing a description of the nursery stock he grows and estimating that this amount of property produces approximately \$283,330 worth every

three years. Mr. Nerison also points to existing irrigation lines, infrastructure, and plants that are affected. Mr. Nerison disputes the assessment by Applicant's agriculture consultant, Globalwise, that removing this 0.92 acres is insignificant. In addition, Mr. Nerison points to Globalwise's representative Bruce Prenguber as the Applicant's paid consultant, essentially implying his assessment is biased. Further, Mr. Nerison contends that the land used for construction of the emergency access road will no longer be useable for farming after being used for construction purposes.

41. Mr. Nerison points to the existing farm road and contends it is crucial to his farm operation, is regularly used, that he crosses it regularly to farm the fields on the other side, and often parks his vehicles and equipment on it. Mr. Nerison asserts there is no other practical way for him to bring his equipment and employees to his field and he must cross the existing farm road (and proposed emergency access road) regularly with tracked or cleated farm equipment that is likely to damage a gravel road to reach the field on the other side. In particular, Mr. Nerison points to requirements in the easement documents drawn up by the Applicant that prohibit any farm equipment on the proposed emergency access road without the prior written consent of the Applicant. Mr. Nerison also points to the description in the Globalwise report stating that PWB will "allow farm use to return to the permanent easement area if the following conditions are met: 1) nursery trees will be kept at least 5' from any buried or above ground appurtenances, and 2) the farm use will have at least two feet of separation from the road..." [Globalwise January 2023, Exhibit 2 pg. 82] Mr. Nerison points out that this is not the same as continued use of the existing farm road for their operations, will require him to build a new farm road, and does not provide for his access to the fields on the other side of the emergency access road.
42. Further, Mr. Nerison contends that the proposed emergency access road will consist of an impervious gravel all weather surface that will cause runoff to flood his fields and any new dirt road he constructs. He also asserts that the road surface will be above the grade of his fields making it hazardous for his equipment to cross and preventing him from parking crew buses and equipment along the road or on the farm road as is his practice. Mr. Nerison also points to dust, noise, diesel fumes and particulates, and construction debris as impacting his employees and causing visible damage to his plants, making them unsalable. In addition, Mr. Nerison provides discussion of his chemical spray applications and certain necessary safety precautions, contending that the presence of PWB employees on the emergency access road will disrupt these farming activities as they involve various "no entry" periods.

Initial Open Record Period [Exhibits 75-103]³

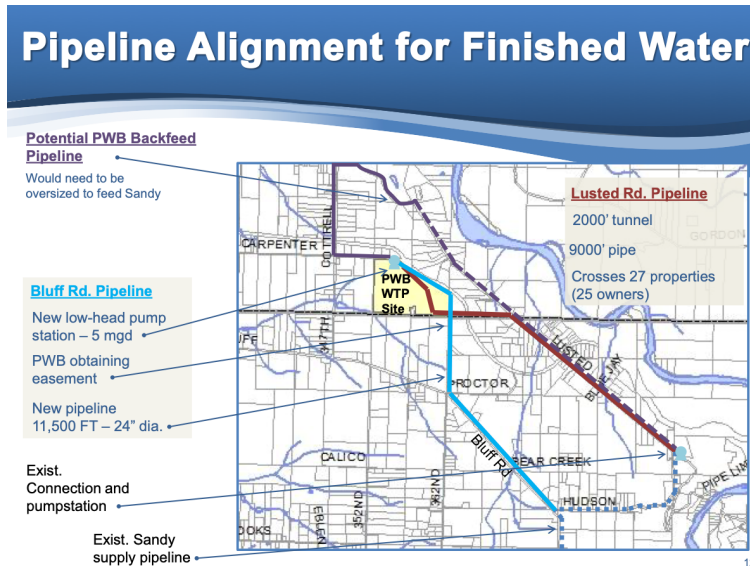
43. The County received several submissions during the initial four-week open-record period ending 4:00 pm September 14, 2023, including four separate written submissions by the Cottrell CPO received by the County on September 14, 2023. In written comments responsive to Mr. Hultberg's August 16, 2023 written submission "Re: Portland Water Bureau – File No. Z0036-23", the Cottrell CPO points to Mr. Hultberg's description of the PWB's

³ Several of these Exhibits were submitted the day of the hearing and are discussed in that Section. In his Final Written Argument submitted October 26, 2023, Mr. Hultberg mistakenly referred to certain of these exhibits as submitted after the first open record period, requesting I not consider them. Exhibits 75-103 were admitted and appropriately considered.

proposed Emergency Access Road and the assertion that it will be used “when the primary access from Carpenter Lane is not reasonably available.” The Cottrell CPO contends that “reasonably available” is too vague, pointing to the primary access to the PWB water filtration facility site via Carpenter Lane. They describe Carpenter Lane as a narrow, un-stripped road with farm traffic, contending that the facility construction will result in heavy congestion over the 5-7 year construction period. The Cottrell CPO essentially questions whether such traffic congestion makes the primary access “not reasonably available”? The Cottrell CPO also point to Sandy Fire District #72’s statement requiring: “Secondary emergency access road off of Bluff Rd. **is to be used for emergency use only by emergency services**” [emphasis by Cottrell CPO] and point out this is not the same as use when the primary access “is not reasonably available.” [Exhibit 97]

44. Further, in their first submission received September 14, 2023, the Cottrell CPO contends that the Sandy Fire District requirement regarding strict emergency service use only of the emergency access road unfairly impacts the businesses currently using the existing farm road, or currently crossing it. The Cottrell CPO also references Multnomah County Rural Fire Protection District #10’s statement that it does not have the capacity to serve the proposed filtration plant. The Cottrell CPO included an “Appendix B” with these comments, that includes copies of memorandum, and correspondence from the Multnomah County Case File #T3-2022-16220 PWB Land Use Application for Filtration Plant & Pipes. Among that correspondence is a June 1, 2023 letter from Gresham Fire Department Fire Chief Scott Lewis regarding a memorandum of an intergovernmental agreement with the City of Gresham and the public emergency services that will be needed for the PWB water filtration plant. In this letter, Fire Chief Lewis states that: “Regardless of their rationale, by no known standard can [the Gresham Fire Department] deliver the requisite personnel and equipment to a major event within the recognized time standards.” Appendix B contains a similar response from the Multnomah County Fire Protection District 10, with findings from their Board of Directors concluding they are unable to meet certain criteria and recommending denial of the conditional use permit. [Exhibit 98]
45. The Cottrell CPO submitted additional written comments responsive to Mr. Hultberg’s August 16, 2023 written submission “Re: Portland Water Bureau – File No. Z0036-23”, pointing to Mr. Hultberg’s description of the PWB’s proposed “Emergency Access Road Construction” and “Construction Schedule” and contend that the proposed emergency access road should be available when there are activities on the filtration plant site at the time of construction. They assert a schedule should be provided that ties the access road construction to the plant construction schedule prior to continuation of the application approval process. The Cottrell CPO submitted further written comments responsive to Mr. Hultberg’s August 16, 2023 written submission “Re: Portland Water Bureau – File No. Z0036-23”, pointing to Applicant’s statement that: “Easements allow for other utilities to be added under the road at a later time, but none are planned as part of this project.” The Cottrell CPO contends this is a reference to a proposed 24” finished pipeline from the filtration facility to supply the City of Sandy with filtered drinking water. They note that “**In this land use application, there has not been one mention about this easement accommodating the proposed pipeline, and calls into questions the statement that no utilities are planned.**” [Emphasis in original]. They further assert that: “if the Sandy pipeline is not built at the same time as the construction of the emergency access road (EAR), construction equipment and conditions will return to the

zoned EFU land, and disruptions to Surface Nursery will occur once more. This will cause more significant changes in farm practices and/or increased costs that should be considered in deciding the current case.” The Cottrell CPO provided a number of supporting documents, including this diagram showing the anticipated pipeline alignment: [Exhibit 99]



46. The fourth written comments the Cottrell CPO submitted responsive to Mr. Hultberg’s August 16, 2023 written submission “Re: Portland Water Bureau – File No. Z0036-23” point to Mr. Hultberg’s statement that: “The only surface water drainage improvement in the area of the road is a replacement of an existing culvert that runs under the existing farm road to convey storm water collected east of the road to the property “1” and through the property “1” filed to an existing buried pipeline to Johnson Creek.” They contend that the “only surface water drainage” existing culvert is not solely for surface water, asserting it is a conduit through which water from a spring feeds one of the headwater fingers of Johnson Creek. The Cottrell CPO contends the Applicant has not specified their Best Management Practices for protecting Johnson Creek during culvert replacement, providing an aerial view showing the location of the culvert on the east side of the proposed access road. [Exhibit 101]

47. The Appellant’s attorney, Ms. Richter, submitted a written statement dated September 14, 2023, contending that the testimony offered at the hearing, both orally and in writing, is not responsive to the issues raised by the Appellant and others in this appeal. Ms. Richter points to inconsistencies in the application and subsequent statements. Ms. Richter points to the August 16, 2023 letter by the Applicant’s attorney, Mr. Hultberg, indicating that the estimated time to construct the emergency access road is approximately 9 to 15 weeks, yet the Applicant filed a condemnation complaint six days later indicating that the temporary construction easement will be needed for a period of five years. Further, Ms. Richter points to the Applicant’s proposal to build a 20-foot wide road with 6 additional feet on either side to accommodate fire hydrants, noting this describes a 32-foot wide width, assuming no area for construction. Ms. Richter contends that the permanent easement will have a width of 40 feet, or 8 feet wider than the area necessary for the permanent easement. She contends this additional 8 feet should be included as part of the temporary rather than permanent easement request. [Exhibit 102]

48. Ms. Richter's September 14, 2023 written statement also points to the additional 40-foot wide temporary construction easement area at the southernmost area approximately 200 feet from Bluff Road, questioning why this is necessary or provides for looped access without using the access adjacent to the Oregon Trail Academy. Ms. Richter also points to the same issue of installation of additional utilities under the emergency access road pointed to by the Cottrell CPO, asserting that a condition must be imposed specifying that allowed uses permitted as part of this approval are limited to the fire protection pipeline, fire hydrants, fiber optic cable, electrical duct bank, and an emergency road, only, and no use beyond these enumerated uses are allowed. [Exhibit 102]
49. In her September 14, 2023 written statement, Ms. Richter contends that without knowing exactly what the Applicant proposes, it is not possible to evaluate the impacts associated with the Applicant's proposal. As an example, Ms. Richter points to the Applicant's Farm Impact Study, noting the Applicant's expert reaffirmed in Mr. Hultberg's August 16 letter that the total permanent farmland resulting from the permanent easement on the Appellant's property is 0.06 acres, but the permanent easement document states that the loss will be 39,847 square feet or 0.09 acres.⁴ Further, Ms. Richter points to the language of the permanent easement document requiring that written permission will be required for any farm equipment to pass along or across the emergency access road, contradicting statements made at the hearing assuring that such access would be unrestricted. Ms. Richter contends that Appellant will be required to build two new farm roads (one on each side of the emergency access road) to ensure continued and uninterrupted access to his fields on both sides, resulting in significant construction cost and loss of productive farmland. Ms. Richter provided copies of the documents she referenced. [Exhibit 102]
50. The Applicant's attorney, Mr. Hultberg, submitted a written statement dated September 14, 2023 with several attachments, addressing proposed conditions of approval discussed at the hearing and proposing language addressing certain issues discussed at the hearing, and modifications to the County's proposed conditions of approval. The materials submitted by Mr. Hultberg also included over 400 pages of documents that include: copy of City of Portland ordinance authorizing PWB to acquire the easements discussed in this matter; property appraisal and associated documents related to the easements; copy of County ZDO Section 410; copy of a USDA Custom Soil Resource Report for Clackamas County Area, Oregon and Multnomah County Area, Oregon; documents related to evaluating plants and cost values for ornamental nursery stock grown by Appellant, and; appraisal notice related to assessing value of Appellant's property. [Exhibit 100]
51. The responsive statement by Mr. Hultberg included a September 13, 2023 memorandum by Allan Felsot, Professor, WSU Dept. of Entomology assessing impacts of emergency access road regarding pesticide use and accepted farming practices, responsive to certain statements by Appellants. In his memorandum, Dr. Felsot refutes statements by Appellant Surface Nursery's owner, Shawn Nerison, regarding farming practices and application of pesticides. Dr. Felsot makes several statements relevant here, including:

⁴ I believe these are unintended errors and Ms. Richter intended "0.6 acres" and "0.9 acres" respectively, and read it as such.

- “The REI [Restricted Entry Interval] applies only to the treated crop area, not areas outside of the crop...Drift outside of a treated area is illegal. For this reason alone, there is no reason the farmer would need to relocate trees, increase a setback, or stop use of the emergency access road.”
 - “Application of chemicals without regard to weather conditions or the expected degree of drift onto adjacent properties is not an accepted farm practice. When off-site spraying is anticipated, it is an accepted farm practice to call or otherwise inform neighboring uses to advise them of the spraying activity. Therefore, informing the neighboring Water Bureau construction crew of a situation when off-site spray drift is anticipated will not force a significant change in the accepted farm practices of preventing spray drift in the first place and, second, of informing a neighbor when drift conditions exist.”
52. Dr. Felsot discussed Worker Protection Standard rules and Application Exclusion Zone rules, partially quoting from the Oregon OSHA guidelines and stating that “the farmer is not legally responsible for the Water Bureau contractor, nor to modify spraying practices or inform or coordinate with the contractor. While the *contractor* may decide to modify their construction schedule based on observations of spraying nearby, the construction will not force a change in the farmer’s accepted farm practices by requiring them to inform or coordinate with contractors constructing the road. The same is true during ongoing operations after construction, which will infrequently use the road.”
- “Regardless of the AEZ rule, pesticide applicators are still required to follow pesticide labels, which include a prohibition on drift that travels off-site, as well as Oregon state law that generally prohibits application of pesticides in a manner that causes pesticide drift off-site. All labels, including all those evaluated in the September 2022 Report, state the applicator is responsible for avoiding off-site spray drift. This mandate occurs on every pesticide label in the ‘Directions for Use’ section.”
 - “Pertinently, other subsections of product labels, for example ‘Environmental Hazards,’ mandate prohibitions against drift. Common language among labels in this section states, ‘Do not apply when weather conditions favor drift from treated areas.’ So, if the wind direction or other factors could create off-site spray drift, the farmer is already obligated – regardless of an AEZ – to suspend application, adjust the application method (such as height of application), or employ other drift reduction methods.”
53. Dr. Felsot’s September 13, 2023 memorandum included a number of attachments, including EPA Pesticide Worker Safety guidelines, Oregon Occupation and Health Division regulations, OAR 437-004-6405 Restrictions Associated with Outdoor Production Pesticide Applications, Oregon OSHA guidelines concerning the AEZ, a copy of Dr. Felsot’s “Memorandum in Response to Select Testimony from Land Use Review Process for the Filtration Facility and Pipelines,” a September 2022 report by Dr. Felsot concerning the “Use and Safety Characterization of Pesticides Used on Agricultural Properties Nearby the Proposed Site for the Portland Water Bureau’s Bull Run Filtration Facility” providing an analysis of agricultural and forestry land uses adjacent to the proposed PWB’s Bull Run Filtration Facility, including requirements for periodic applications of pesticides during routine production [farming] practices, with findings consistent with his quoted statements. Dr. Felsot’s September 13, 2023 memorandum included a copy of EPA Pesticide Worker Safety guidelines, including Restrictions to Protect Workers After Pesticide Applications, with discussion of restricted-entry intervals, and a copy of the entire label for the herbicide GramoxoneSL2.0.

54. Mr. Hultberg's September 14, 2023 open record submittal also included a September 13, 2023 Memorandum Response to Testimony on Agricultural Soils Impact prepared by Dr. Denny Mengel, Certified Professional Soil Scientist and reviewed by Spencer Adams, P.E., Jacobs. The response addresses comments submitted by Appellant Surface Nursery's attorney, Ms. Richter, and by Shawn Nerison on behalf of Surface Nursery. [Exhibit 100]
- Comment 1: "The evidence was essential to the Planning Director's evaluation of the farm impacts test – the Applicant's Soil Restoration Plan – focuses solely on how farming activities will be restored after construction but does not describe the extent of the impacts during construction. This is an error."
 - Response to Comment 1: The authors point to Exhibit 2; Appendix C.3 (the "Soils Plan") and assert that the Soils Plan states "[t]he purpose of this Plan is to provide a framework for minimizing impacts to ongoing agricultural operations during construction and returning current agricultural operations and resources to their pre-construction conditions, where possible." Further, "Specific Plan elements include how the soil's growing layer will be treated during the construction process, construction oversight, mitigation measures, and post-installation monitoring of mitigation activities." The authors point to various subsections of the Plan describing minimizing and mitigation impacts to soil and farmland during construction activities, and also point to "the extensive Agricultural Compatibility Report prepared by Globalwise, asserting this report also describes potential impacts to farmland during construction. The authors point to the Technical Memorandum regarding emergency access road construction [also submittal with Mr. Hultberg's September 14, 2023 open record submittal] and assert: "There is no need during this short construction window [of 9 to 15 weeks] for Surface to create a temporary farm road adjacent to the easement area. With limited closures – all with reasonable prior notice to Surface – the farmer will be able to utilize the entire construction area for access to fields." The authors provide descriptions of impacts to different segments of the farm road affected by the emergency access road easement and the temporary construction easement areas, stating: "The Soils Plan clearly contemplates potential impacts to soils and farm practices both during and post construction."
 - Comment 2: "The Planning Director's finding of no significant change or increased cost is premised on the restoration of farmland occurring through a Soil Restoration Plan set forth in the application. The Appellant's representative offers a detailed response on this issue and attached are a number of academic studies disputing these claims as well. Even if the soil restoration effort is successful, the loss of farmland resulting from the taking of the existing farm road and requiring the Appellant to construct a new 20 foot parallel access road will permanently occupy the identified restoration area."
 - Response to Comment 2: The authors state that the Water Bureau [PWB] has agreed to allow Surface to use the emergency access road on the Surface Property as a farm road eliminating the need for a new access road in the restoration area parallel to the emergency access road. During the construction phase, the Water Bureau has committed to keeping the road accessible for farm use, including the ability to cross the road area to permit Surface to access fields to the east. Except for the area in which the existing farm road encroaches onto neighboring property, there is no need for a parallel road during or after construction." The authors point to the study attached to the comment, entitled "Pipeline Installation Effects on Soils and Plants: A review and Quantitative Syntheses" by Theresa Brehn and Steve Culman published in December 2022, in support of the review of the

specifications for soil restoration over the Water Bureau pipeline in the Agricultural Soil Restoration Plan, and in support of use of the double lift method of soil management to be used, resulting in no significant impacts to soil over time. The authors state that: “The double lift system will be used in areas of current crop production and which are identified as needing to be returned to crop production.” The authors also address the online article attached to the comment, entitled: ”Pipelines keep robbing the land long after the bulldozers leave” Grist Publications, Jan 07, 2022, contending this is not a peer review science journal, but is an online magazine founded in 1999 that publishes environmental news and commentary.

- Comment 3: “The error in this statement is assuming a road can be built, designed such that it can be driven on by heavy construction equipment and activity, and then moved a few feet over and it will have no effect on the soil. Experts in farming and farm practices, such as myself and other farmers in the surrounding lands, know this is an illogical claim. First, the permanent easement eminent domain paperwork makes no mention of returning the length of the 5’ easement west of the property line in property 1. Second, the use of this EFU land for a road to support construction activities at the main facility has been denied. We acknowledge the latter is dated more recently than the application, but still the idea of restoring land to productive farming that has been used for 5-7 years of construction support, including dump and haul trucks, excavators, graders, crew and more, totaling an estimated 1500 vehicle trips per day, is an unreasonable and illogical assumption. There is no way to feasibly store the original topsoil for 5-7 years during construction of this scale and magnitude, and no amount of subsoiling will break up the construction-related compaction of the silty clay soil that is characteristic of the area. Land under such conditions is simply never going to be successfully restored to any extent of its original condition, and certainly will not be productive farmland. Roads cannot be built, used, and then moved with no permanent impacts. We, the farmers on the surrounding lands, are the experts and know firsthand the effects of compaction on our local soils.”
- Response to Comment 3: The authors respond: “The road will take 9 to 15 weeks to construct. The road will only be used for emergency access. No construction traffic associated with the portions of the filtration facility located in Multnomah County will use the road. While there will be some compaction due to constructing the road within the temporary construction easement area, as indicated above, Surface Nursery has specifically requested that the perimeter not be restored to allow for a future farm road. Even if Surface elects to return the 10-foot construction easement area to cropland, the Water Bureau will restore the area between the 20-foot road and the 40-foot easement as per the Soils Plan. Areas of temporary construction impacts exposed to compaction will be ripped and plowed to restore soil tilth and infiltration capacity as part of the site remediation. For the very limited areas in current farm production that are disturbed during construction and which will be returned to production, topsoil will be salvaged from the area to be restored after construction prior to construction activities. In these limited areas the Water Bureau will use “two lift” excavation methods (here referred to as a “double lift”) that separate and store topsoil to be placed back on top of the pipeline fill. In the “double lift” method, native topsoil will be kept separate from sub-soil and returned over the temporary easement construction zone where nursery plants can again be grown. Subsoil ripping prior to topsoil replacement, as is required by the Water Bureau’s Soils Restoration Plan, will provide additional benefits by reducing compaction. The Agricultural Soil Plan also requires the use of a conservative topsoil stripping depth to

reduce the possibility of soil mixing. The topsoil stripping operation will additionally be monitored to ensure no mixing of subsoil – if, during topsoil stripping, the soil construction monitor observes subsoil is being removed, the depth of stripping will be reduced to avoid the subsoil.

- Comment 4: “Once our new road is built, it is not logical to move it and attempt to restore the land to production, as Globalwise suggests. The idea of moving or removing a road and returning 8’ of land to farming that has just had heavy construction trucks and equipment on it is laughable. No expert in farming or farm practices would suggest there is a reasonable expectation that, upon completion of the emergency access road, the portion of the easement used for construction of the road will be farmable. For starters, according to their application, this 8-foot section is between the emergency access road and the surrounding lands where we will have to build our replacement road. This will be lost land, landlocked between two roads. At best it will be able to support simple landscape. At worst, the soil will experience such massive compaction from construction activities that it will be barren, unusable land no longer capable of being devoted to farming. This is another example of the many errors in the mitigation strategies and conditions of PWB’s application for an emergency access road in EFU lands.”
- Response to Comment 4: The authors respond: “The Water Bureau has agreed to allow Surface to use the emergency access road located on the Surface property as a farm road, eliminating the need for a new access road parallel to the emergency access road on the Surface property. Moreover, to the extent that Surface elects to have the construction easement area restored (rather than maintained as a farm road as previously requested) the Soils Report and this supplemental memorandum demonstrate that impacts to soil productivity in these small areas will be minimal and temporary.”
- Comment 5: “The Soil Restoration Plan, commissioned by PWB in another attempt to show that all impacts can be mitigated or restored, also contains numerous errors and oversights. For example, on page 3, Section 2.1.2 states that PWB will work with growers to identify temporary access road and laydown locations “using existing farm roads where possible.” What this report fails to comprehend is that the only existing farm road available in the surrounding land *is* the farm road that PWB is seizing through eminent domain or condemnation to use as their emergency access road. The numerous references to construction do not specify if it is in regards to construction of the main facility or the emergency access road. This is a concern present throughout the entire application we feel indicates the likelihood that PWB will use this ambiguity to use the road in EFU land for construction-related purposes. Again, we firmly support the application being denied for construction activities of the main facility, but feel it is necessary to express our concern over the confusing and misleading statements made in these reports that are vague enough to ruin our farming practices if any part of the application is approved.”
- Response to Comment 5: The authors respond: “The emergency access road will not be used for construction traffic to build portions of the filtration facility in Multnomah County. As discussed elsewhere in this memorandum, with minimal interruption, Surface nursery will be able to utilize farm roads on its property throughout the 9-to-15-week construction period. There is no justification to construct a parallel farm road. Any decision to do so would be at the election of Surface Nursery and unrelated to the Water Bureau’s emergency access road.
- Comment 6: “Following that ambiguous and vague statement is a list of topsoil salvage mitigation measures, none of which are feasible in an active farming situation within the

amount of space of the easement. For example, one item states that crops will be “harvested or removed to facilitate clean topsoil handling” in the construction zone. This is again illogical, as well as contradictory to not causing significant costs to accepted farming practices. In this case, the accepted farming practice for bareroot trees is to follow a 3-year growth cycle. Harvesting or removing trees before the completion of that cycle renders them unsalable, causing a significant cost to our farm. Another item states “topsoil will not leave the parcel from where it was removed.” Again, we don’t believe there is enough room to construct the emergency access road and perform these soil-saving activities within the easement, and instead will most likely spill over to the surrounding lands. Another item of great concern states that “the Contractor will determine the methods used to prevent wind erosion. Contractors are not farmers, and they are certainly not local farming experts qualified to determine best soil practices on EFU land actively devoted to farming. This isn’t an urban lot in Portland; it’s a sensitive biosphere with a perishable, living product at risk that depends on maintaining the natural balance encouraged and protected by farmers as part of best farm practices. In fact, “the Contractor” is given expert authority over numerous soil-related construction activities identified throughout Section 2.3. This is not an accepted farm practice in any way, and creates a huge risk to soil health and overall field integrity. The entire plan proposed in the application for an emergency access road is overwhelmingly dismissive of accepted farming practices and the changes and costs this project will have on those practices. As we have discussed, the impacts from a project of this scale and magnitude on the surrounding EFU lands devoted to farming are significant and permanent, costly and unmitigable. For these reasons, we encourage the application for an emergency access road to be denied in its entirety.”

- Response to Comment 6: The authors respond: “The Water Bureau has planned ample room in the easement to temporarily store salvaged topsoil. The statement that “topsoil will not leave the parcel from where it was removed” refers to not using the topsoil as topsoil replacement on another parcel. If there is not sufficient room to store the salvaged topsoil on the Surface property’s easement, it could be stored in an adjacent staging area and then returned to the Surface parcel for topsoil replacement. Again, areas in current production that will be disturbed and returned to production are minimal and are limited to the area immediately adjacent to the 700-foot segment of the road on the north end of the Surface Nursery property and the .1 acre area on the south portion of the Surface property within the “dog leg.” “Wind erosion prevention techniques are well understood by the construction industry, not just by farmers. Industry standards are applicable to agricultural and urban areas. The soil on this parcel is not a unique soil type and traditional methods to curb wind erosion will apply here. “

55. Mr. Hultberg’s September 14, 2023 open record submittal included a September 13, 2023 Memorandum “Response to First Open Record for Appeal of Clackamas County Land Use Decision” from Bruce Prenguber, M.S., Agricultural Economist, of Globalwise Inc. In this memorandum, Mr. Prenguber provides responses to several comments submitted concerning this application, also referring to the Globalwise January 2023 report submitted as Appendix C.1 in the original application submitted [Exhibit 2].

- Comment by Mr. Nerison, letter dated August 17, 2023: “PWB has started proceedings to take almost an acre of our land through eminent domain or condemnation. The permanent ‘easement’ area is approximately 39,847 square feet, equal to .92 acres. It involves land

used for growing of trees as well as a small dirt farm road used to access our fields in this property. The fields on this property grow 10,000 trees per acre, and in the .92 acres of the affected fields are 4600 Acer Griseums (sold for \$44.97ea) and 4600 Double Sub Cherries (sold for \$51.27 ea). These trees, like most of our bareroot nursery stock, have a 3- year growth cycle. The total sales revenue for this land, after deducting a generous 20 percent cullage and customer discount is at the low end \$283,330.00 every 3 years. This is clearly a significant cost to our farming operation, and we disagree with Globalwise’s subjective and erroneous opinion that this .92 acre of producing farmland is insignificant.”

- Response by Mr. Prenguber: “The Farm Use Compatibility Report for the south entrance to the filtration facility was submitted before the Clackamas County Land Use decision (Notice of Decision on a Type II Land Use Permit) was issued. The emergency road will not be a haul route for the construction of the filtration facility. The disturbance of crop land will be for a short time of approximately 35 days within a total duration of 9 to 15 weeks while the road is being constructed (see Technical Memorandum “Emergency Access Road Use” submitted by Stantec concurrently in this open record period). The amount of agricultural land that will be subject to permanent loss is estimated at 0.6 acres. This is half of one percent of the total land in the Surface Nursery farm production unit west of the emergency access road, referred to as property “1” in my report.¹ The original study identified approximately 0.6 acres of cropland to be restored after completion of the road. If Surface elects to maintain the road within the temporary construction easement within the bump out area, no additional cropland will be restored. If Surface elects for this area to be returned to production, a maximum of approximately 0.1 acres of additional land will be restored pursuant to the soil restoration plan. The actual amount of restoration will depend on how much cropland is disturbed in this area, but the maximum amount of land to be restored is approximately 0.1 acres. This is not a significant amount of land in this large farm production unit – nor is this Surface’s only field in this area. Moreover, the easement is not at issue in this proceeding because it is the subject property – not the Surrounding Lands. The condemnation is, in effect, as if Surface sold a strip of their land, and adjusted their remaining land accordingly. The only difference is that the sale of the easement is by eminent domain rather than on the open market. The impact on the remainder parcel is taken into consideration in the condemnation proceedings. Stated another way, these impacts are not changes in farm practices or the costs of those practices. After the emergency access road is built, Surface Nursery will continue to farm all remaining land in its surrounding fields as they did before the emergency access road – including use of the emergency access road where on their property – with the same accepted farm practices and no increased cost of those practices. Also, gross revenue is not the impact test for farm impact, which looks at the costs of accepted farm practices. Finally, because there are no new roads to construct, there is no 3-year recurring total sales revenue loss.”
- Comment by Mr. Nerison, letter dated August 17, 2023: “This existing dirt farm road is crucial for field operations, which include but are not limited to moving irrigation pipes, crew and equipment through the fields. We will be forced to build and install a new road on the surrounding lands to the easement, the entire length of and parallel to the existing one. The cost to put in a road of this length will easily cost \$50,000, likely more. Our replacement road will have to be comparable to the emergency access road, for reasons

discussed in more detail later. To that point, our road needs to be 18' wide, which is comparable to the permanent emergency access road of 20' wide."

- Response by Mr. Prenguber: "Surface Nursery alleges they will have to build a new farm road for the full length of the eastern edge of their field. This claim is not accurate. Information from recent investigation of the existing Surface Nursery farm road from the solar farm to Bluff Road is either totally on Surface property or overlaps with the Burkholder road that will be the area for the Emergency Access Road. This is about two-thirds of the total distance of the Emergency Access Road. In locations along this segment of the Burkholder road, where the existing farm use road is off of the Burkholder property, Surface can continue to use their road during the new road construction and operation. Where the road moves over partially or completely onto the Burkholder property, Surface was trespassing in the past, but has now constructed their own road on the Surface property. Since trespassing is not an accepted farm practice, Surface was obligated to move their farm road. To the extent Surface is still trespassing on Burkholder property, they will need to continue the farm road on their own property. Creating the farm road on their property is not a change forced by the Applicant in constructing the Emergency Access Road. (See the Technical Memorandum "Emergency Access Road Use" submitted by Stantec concurrently in this open record period.) In the approximately 760 feet of road to be constructed on Surface's property, the road construction contractor will ensure Surface can use their existing farm road. The Technical Memorandum for the "Emergency Access Road Use" states that the peak construction activity occurs for just 5 to 7 days for the entire length of the road, and intermittently there is road construction over about 100 days. Thus, during construction, the majority of the road will not be under construction (and could be used by Surface Nursery) – only the portion under construction will be blocked. The Water Bureau will ensure that, at all times, at least one of the east-west Surface Nursery farm road connections to the emergency access road is fully open for Surface Nursery to use. This will allow Surface Nursery to gain access to the eastern most portions of Surface Nursery's property even when the emergency access road construction closes portions of the adjacent road (the farm road being upgraded for the emergency access road). That access will therefore be possible by traveling along the north-south farm road in the middle of their fields, turning onto one of the east-west farm roads, and then onto the portion of the emergency access road that is not closed for construction. Even for the portion under construction, a small number of vehicles could pass through the area under construction. For a particularly heavy day of farm traffic needs, the Water Bureau could provide flaggers at each end of the construction zone that could allow farm traffic to pass safely. For the short time periods where sections of the road are blocked for construction, but access can be coordinated as needed, Surface Nursery will not need to temporarily operate a farm road to the west of the temporary construction easement area. If for some reason Surface Nursery determines that a road to the west is necessary for some portion of the road, the Water Bureau will provide services to restore the small area impacted by soil compaction (pursuant to the Soil Remediation Plan in the record). Although not considered for the land use test to reduce impacts below the level of significance, the Water Bureau will also pay for any loss of net income from tree removal. After road construction is complete, Surface Nursery will have unrestricted farm use of the Emergency Access Road. The Water Bureau will allow Surface Nursery to use the portions of the emergency access road located on Surface Nursery property for accepted farm practices just as they have used the farm road in that location in the past, including

for tracked vehicles and to temporarily park its farm vehicles on the road while working in their fields. Regarding maintenance, the Water Bureau already regularly maintains its gravel roads on other properties in the region where Water Bureau facilities are located. The Water Bureau will additionally maintain the emergency access road, including to repair any damage caused by tracked vehicles or other Surface Nursery use, in order to keep the road up to standards required for fire and emergency access. This certainly will be an additional cost for the Water Bureau, but one that will prevent Surface Nursery from having to take land to build a new farm road or pull out trees for that farm road. Instead, Surface Nursery will have the benefit of an upgraded road that it does not have to take on the time or cost to maintain. For these reasons, Surface will not need to build any new farm road.

- Comment by Mr. Nerison, letter dated August 17, 2023: “Depending on what is approved or denied, it could prove necessary to move our 6” buried irrigation mainline which cannot withstand anything more than regular farm traffic. The no less than \$50,000 cost of replacing the road being taken from us and having to rebuild it on EFU land devoted to farming is significant and prohibitive, and the repeating loss of over \$280,000 in revenue every three years from land taken out of farm production is devastating to our operation and a danger to our future.”
- Response by Mr. Prenguber: “Most of these comments have been answered in my previous response. As stated above, there is no need for Surface Nursery to build a new permanent farm road. Therefore, there is no road construction cost for Surface. Although gross revenue loss is not the measure for farm use impact analysis (cost is), there also will be no recurring gross revenue losses. Any one-time net income losses will be compensated as part of the condemnation process. The Water Bureau’s soil expert, Dr. Denny Mengel explains the extensive soil remediation that will be used to bring any disturbed soil in the temporary and permanent easement areas that can be farmed back to high level productivity after the permanent road is built. See the response of Dr. Mengel submitted concurrently into the record with this memorandum.”
- Comment by Mr. Nerison, letter dated August 17, 2023: “Movement of crews and equipment between and within fields in the surrounding lands of the proposed easement is an important and accepted farming practice, and any activity that causes an interference with that practice qualifies as causing a significant change. Restricted access to our farm fields, at any time and for any length of time, including the requirement to obtain prior written permission, creates massive logistical issues for our farming practices and violates the approval criteria contained in ORS 215. For example, the eminent domain easement, necessary for the emergency access road to be built, states in letter E that PWB will “construct and maintain a gravel all-weather surfaced road in the Easement Area for mutual use of the Grantor and Grantee, provided however that use by farm equipment is prohibited without prior written consent of the Chief Engineer of Grantee.” In a somewhat contrary statement found in a report submitted with their application, it is stated that PWB will “allow farm use to return to the permanent easement area if the following conditions are met: 1) nursery trees will be kept at least 5’ from any buried or above ground appurtenances, and 2) the farm use will have at least two feet of separation from the road,” (Globalwise’s ‘Compatibility... with Surrounding Agriculture’ report, p. 13). Later in that same report, it states that PWB “will allow farm use of portions of the permanent easement that are not the road surface itself or a minimal buffer around the road surface,” (p. 29). While the eminent domain easement agreement states we can use the emergency

access road with advance written notice (it's important to note that all activities on farm roads involve farm equipment), it is clearly prohibited in their application materials. The easement they are taking is our current existing dirt farm road that they are converting to the emergency access road. Prohibiting the continued farm use of the existing farm road not only forces a very significant change to the accepted farming practice that farmers, crew and equipment rely on unencumbered movement in and among their fields, but it would also mean that we have to build a parallel road on the surrounding EFU lands so that we have continued access in our field, which is a significant cost. The portion of the current dirt farm road that we have to replace is approximately 2250 feet long. The width of land needed to build a dirt farm road, from the edge of the easement, is 26' total. This allows for a road surface wide enough to accommodate our widest implements, plus the 2' buffer PWB requires between the emergency access road and 'farm use,' plus 6' between the edge of the road and the nearest row of trees. The current dirt road is only about 12' wide, but it is a very primitive farm road and our implements extend well past the roads' edges on either side because there is plenty of space. However, PWB states that no farm use can come within 2' of the emergency access road (Globalwise, p. 13-14), so the new road must be wide enough to accommodate our 16-foot-wide implements with one foot of room on either side to avoid ruts, plus this 2' buffer taken from the surrounding lands and not the easement. The square footage of the area of surrounding lands, beyond any used for easements, that we will convert to a road to replace the road PWB is taking is approximately 58,500 sq ft, or 1.34 acres. This strip of land is parallel to the proposed emergency access road, in the surrounding EFU lands, and currently planted with rows of bareroot nursery stock."

- Response by Mr. Prenguber: "The Water Bureau has concrete plans to assist Surface Nursery with continued access to the Burkholder property they farm east of property "1." It is not the intent of the Water Bureau to have activity that "causes any interference" with Surface Nursery's farm vehicle movement on or near the emergency access road, either during construction of that road or afterward. Moreover, "any interference" is not the standard for approval of this project. The Water Bureau's road construction contractor will, at all times during construction, keep one or both of the two crossing locations open for passage by Surface Nursery to the eastern fields that Surface farms in the Surrounding Lands. I note that any access by Surface Nursery on to adjacent property is subject to the consent of the adjacent property owner (Burkholder). Assuming that Surface Nursery has consent of the adjacent owner, the Water Bureau will provide access to adjacent fields during and after construction of the emergency access road. As explained above, the road on Surface's property is not 2250 feet long – much of the road is actually on the neighboring solar farm property. The only relevant portion is the approximately northern 760 feet where the road jogs to avoid a stand of trees on a third-party's property. I also note that Surface Nursery has existing farm roads that provide access to the fields adjacent to the emergency access road. One road traverses the entire northern boundary of the affected area, one road traverses the entire western boundary, and two roads bisect the affected fields. While use of alternate roads may entail a temporary inconvenience during the times when the eastern road cannot be accessed, Surface Nursery will have access to all of its fields during the construction window. As explained above, the Water Bureau will allow complete farm use of the completed road and will provide access during the temporary construction period. The previous language in the application related to the contemplated use of the road during construction of the filtration facility. Since the

Emergency Access Road is not going to be a hauling route for construction materials going to or from the filtration facility, there is no need for Surface Nursery to build a temporary or permanent farm road.”

- Comment by Mr. Nerison, letter dated August 17, 2023: “We have buried mainline that currently is underground that will be partially in the easement that cannot have construction traffic and activities driving over it without causing severe damage. Unless we are actively irrigating, in which case damage would be immediate and require turning off the irrigation to perform the repairs, damage could easily go unnoticed for months during non-irrigation season. There is also an air relief valve that extends 3-4’ into the ground and connects to a 6” mainline. This air relief valve must be placed with adequate space around it should repairs need to be made. It is very close to our property line and within the proposed 5’ easement on the south portion of the road. It will have to be moved west of the road far enough to accommodate our replacement road, which means we have to remove about 50 trees. The cost of labor to move the air relief valve is estimated at \$3,500.00. The loss of 50 trees, currently 2- year-old Norway Maples, valued at \$39 each when saleable, and allowing for a higher-than- average cullage of 20 percent, results in a revenue loss of \$1,560.00. Again, there is no feasible mitigation strategy to avoid moving this air valve and preventing the additional loss of tree revenue, other than denying the application on the grounds that it causes significant changes in and impacts to accepted farming practices on surrounding lands established and devoted to farm use.”
- Response by Mr. Prenguber: “The buried mainline and air vent for irrigation have been located by the Water Bureau during the on-site survey of existing conditions. The buried mainline that crosses the new Emergency Access Road will be replaced by the Water Bureau at its expense to bring it to standard needed for heavy emergency vehicle passage. It will be replaced at the same location to demonstrate that there will be no changes in accepted farm practices for irrigation access to the eastern fields. The replacement of the buried irrigation pipe will be promptly installed so there is no significant delay in irrigation water supply to any fields that are irrigated. The current location of the Surface Nursery air vent in relation to the Emergency Access Road and the Surface farm road does not appear to require relocation. However, if further evaluation of its location does indicate it needs to be relocated, the Water Bureau will do so at its expense.”
- Comment by Mr. Nerison, letter dated August 17, 2023: “Another error in the Globalwise report is an illogical restoration claim. On page 30, it states that ‘Beyond the 10 feet of easement area, a temporary farm road 12 feet in width will be used by the farmer during the construction period. After construction of the filtration facility is complete the final location for the permanent farm road will adjoin the property line for property 1. This results in 10 feet of area for restoration for the entire length of the 10-foot-wide easement area (see the areas referenced to as ‘Potential Area for Restoration’ and ‘Post Construction Period’ in Figure 6).”
- Response by Mr. Prenguber: “Since the Emergency Access Road is not going to be a hauling route for construction materials going to or from the filtration facility, there is no need for Surface Nursery to build a temporary or permanent farm road. The above responses explain that Surface Nursery can use existing farm roads on their property, including where the emergency access road will be constructed, both during and after construction.
- Comment by Mr. Nerison, letter dated August 17, 2023: “These examples [mitigation actions for returning land to farming after construction of the emergency access road is

competed] demonstrate that the impact to the surrounding lands outside the permanent easement areas is significant in regards to both accepted farming practices and will force an increase in cost of those practices. Since emergency access roads are prohibited from having regular farm traffic on them, there is no possible mitigation to us losing our current farm road that does not result in a significant change and/or increased cost to our accepted farming practices on the surrounding lands devoted to farm use, and therefore this application fails to meet the approval criteria set forth in ORS 215 and OAR 660.”

- Response by Mr. Prenguber: “The specific mitigation planned for Surface Nursery and Burkholder properties does not justify increasing the Surrounding Lands beyond the 5 properties defined in the Globalwise report, Farm Use Compatibility Report. Mitigations include replacing any damaged farm infrastructure on the Surface and Burkholder properties, restoring disturbed soil for crop production on the Surface property after road construction, and providing dust control and airborne particulate management during the short term of road construction. None of these mitigation actions will produce impacts beyond the Surrounding Lands as defined.
- Comment by Mr. Nerison, letter dated August 17, 2023: “The report fails to state where all this displaced soil will be stored during the trench construction and utility placement. ...Our concern is that this displaced trench dirt spills into our fields in the surrounding area that border the easements and contaminate the topsoil.”
- Response by Mr. Prenguber: “Any excess soil from trenching will be hauled off and properly disposed of off-site. See the Technical Memorandum for the “Emergency Access Road Use.”
- Comment by Mr. Nerison, letter dated August 17, 2023: “PWB’s application and supporting documents fail to recognize another unmitigable impact that involves blocking our access to an entire field we farm in the surrounding land, also zoned EFU and devoted to farm use, labeled “Property 3” in Globalwise’s report. This leased field is part of our normal, daily farming operation and accessed from via our Bluff Road farm access and then through Property 1. Our accepted farm practice of accessing this field for all crew and equipment is to cross the existing farm road directly into Burkholder’s field. This has been the accepted practice as long as we have farmed this property. This practice provides parking for our crew busses on the farm road and access for our farm equipment between the two fields. There is no other appropriate access to this leased field.”
- Response by Mr. Prenguber: “Surface Nursery will not be blocked from access to the fields indicated that they farm. First, at the two locations where Surface currently crosses to reach the Burkholder fields, the gradient of the Emergency Access Road will be kept at the same gradient as currently exists on both sides of the new road. This is included in the design specifications. Just as currently, there will be no safety issues for crossing with the Surface Nursery tree digger or any other farm vehicle and nor will there be changes in accepted farm practices for Surface to cross with any of their farm vehicles. There will also be no blocked access for crossing between the westside and eastside of the road to reach fields. Either one or both of these crossing locations will be available at all times during road construction for Surface to cross.”
- Comment by Mr. Nerison, letter dated August 17, 2023: “Globalwise, in the same report, also claims that our least busy months for field work are October to mid-November. However, this statement misrepresents our accepted farm practices. When interviewed by Mr. Prenguber, I never indicated that there are any months that are significantly less in any

type of farm or nursery work. Field work takes place every day, and October and early November, the last of the dry months, are certainly no exception.”

- Response by Mr. Prenguber: “In face-to-face meetings with Mr. Nerison he repeated on several occasions that October was the lowest time of year for his business’s farming activity. This was when he said, for example, that he could take significant trips to leave the farm. In discussions with Mr. Nerison as well as other farmers, I asked about accepted farm practices for bareroot nurseries. From these discussions I cataloged the main accepted farm practices and their timing, which was included in a report I submitted to Multnomah County to document conditions for the land use application to build and operate the filtration facility and pipelines. The description of bareroot nursery accepted farm practices primarily came from Mr. Nerison as well as other bareroot nursery farmers I interviewed during my 2.5 years of study and analysis. This extensive review of the accepted farm practices includes the timing of activities throughout the year. At no time have I stated there were days or weeks where there would be no field work for bareroot nurseries. It should also be pointed out that neither Mr. Nerison nor other farmers have indicated any disagreement with the accepted farm practices I detailed in the earlier report.
- Comment by Mr. Nerison, letter dated August 17, 2023: “Compromised air quality from dust, diesel particulate and construction debris in the air is another serious concern with a significant impact on our employees’ health. It is in a nursery’s best interest to generate as little dust as possible, for employee’s health as well as the health of the trees and plants. We achieve this by spacing out tractor work in fields, avoiding field work on foot when a tractor is doing row work nearby, and by avoiding tractor work in windy conditions so as to prevent or minimize the loss of top soil. Normal farm operations and accepted farm practices include regular work in the fields on foot performing essential tasks such as hand pruning and trimming, working on or moving irrigation, hand spraying, planting, digging, and more. During these activities, the fields are quiet and free of equipment stirring up dust. At our Bluff Road fields, employees regularly perform this work in the fields within the surrounding lands adjacent to the proposed easements for the construction and emergency access roads. This impact on respiratory health is a grave concern. Myself and our employees will be subjected to unusually high levels of dust and debris plus high concentrations of diesel fumes and particulate from construction activities adjacent to the surrounding lands.”
- Response by Mr. Prenguber: “In raising these concerns, Mr. Nerison is undoubtedly making partial or full reference to construction at the filtration facility site and perhaps also reference to the earlier plan to use the Emergency Access Road as a hauling route for the filtration facility site. These references are not relevant to this appeal. The Emergency Access Road will not be used as a hauling route for any construction at the filtration facility site. Construction of the Emergency Access Road itself will require no more than an estimated 200 truck trips. There will be a peak period of construction in a 5 - 7 day window with up to 25 truck trips on those days at the location of this new road. As stated earlier, the road construction contractors have a dust mitigation plan to keep fugitive dust to a minimum, mainly by applying only enough water to the ground to reduce dust creation from vehicle movement. Furthermore, environmental conditions affect dust which include rainfall level at the time of construction and also wind conditions. Given the short duration of significant road construction, it is not clear that any type of dust suppression will even be needed. Regarding construction debris, the site will be monitored so that any miscellaneous materials that could blow off site are monitored by construction personnel.

They will be instructed to properly dispose of any debris not created, which is minimal for road construction. Regarding diesel fumes, all vehicles working at this construction site will meet the City of Portland's emission standards. The City of Portland participates in the Clean Air Construction (CAC) Program which aims to reduce sources of diesel emissions on construction projects by implementing a standard set of requirements. Contractors working on the project will need to certify that all applicable diesel equipment and vehicles are registered and in compliance with the CAC Program or have a valid exemption. Compliant equipment and vehicles will be issued a decal to keep displayed. Contractors will need to take the following steps to reduce unnecessary diesel equipment idling, unless exempted:

- ❖ All nonroad diesel equipment must shut down after five minutes of inactivity, and
- ❖ All nonroad diesel equipment shall have decals/prompts visible to the operator to remind them to shut down the equipment after five minutes of inactivity, and
- ❖ Contractors will post "Five Minute Limit" signs in high foot traffic areas of the job site, visible to workers, and
- ❖ Contractors will ensure all diesel equipment operators are aware of the policy.

In addition, contractors will need to meet the CAC Program diesel engine requirements unless exempted and pursue engine retrofits or install emission control devices to reduce diesel particulate matter. Qualifying emission control devices must capture diesel particulate matter at a level of 85 percent or greater. These requirements apply to diesel-powered nonroad construction equipment greater than 25 horsepower and to all on-road diesel dump trucks and concrete mixers. Note however, that Surface Nursery farm tractors are exempt from meeting any air emission standards. Additionally, the main construction is more than 10 feet from where farm workers will be in the Surface field to the west. Surface Nursery workers now work within 10 feet of farm roads that have vehicle traffic passing them. Finally, the temporary nature of construction makes dust, airborne particulates, and construction debris even more unlikely to significantly impact any farmer. For these reasons, dust, airborne particulates, and construction debris will not change any accepted farm practices, or force any increase in the cost of accepted farm practices for Surface Nursery or any other farmer in the Surrounding Lands of the Emergency Access Road. Also there will be no impacts on the respiratory health of those engaged in accepted farm practices in the Surrounding Lands.

- Comment by Mr. Nerison, letter dated August 17, 2023: "Construction traffic will consist of hundreds of heavy-duty dump trucks and haul trucks likely pulling trailers, contractors and crews in diesel pickups, heavy duty construction vehicles towing in equipment and generators, and a diesel water pump truck constantly trying to keep all the dust down. In reality, a water truck trying to keep up with spraying down the dust will just be adding to the dust and the diesel fume problem, plus likely creating slippery, wet, muddy conditions. Accepted farming practices in our surrounding lands won't even be possible in this scenario, which is estimated to last 5-7 years under the construction access scenario. If only the emergency access road is approved, and assuming all contractors and construction traffic refrain from using it for site access, the road itself still must be constructed. Although it would take less time to construct just the emergency access road, the same massive construction activities will take place and greatly affect our ability to perform our accepted farming practices and daily field work in the surrounding lands adjacent to the easements. Noise and dust disturbance to field workers and our trees is a reasonable concern and there is no mitigation that is guaranteed to be successful in

reducing dust and noise levels where we farm in the surrounding lands.”

- Response by Mr. Prenguber: “Building the Emergency Access Road will require only 200 truck trips spread over a 9 to 15 week period and with just one week of peak activity. It is an extreme exaggeration to characterize this as a massive construction activity. Regarding “slippery, wet, muddy conditions” from watering the ground to prevent dust, the contractor is experienced in applying the correct amount of water to provide for dust containment without overly saturating the soil. The previous response further addresses why there will be a lack of dust generation at the construction area. Regarding noise, the noise will be a temporary condition, and will not cause Surface Nursery and their workers to significantly change any of their accepted farm practices or force a significant increase in the cost of any accepted farm practices. While noise from construction may be annoying, in general, farming is not sensitive to noise, since tractors, pumps, and other farm equipment often generate significant noise. During farm field operations, tractors generate noise in the range of 80 to 100 decibels or more. Farmers already must provide hearing protection for workers because of the noise generated by this farm equipment. The hearing protection can come in the form of earplugs or earmuffs, for example, that are worn when in proximity to those farm noise sources. It is possible that workers would need to use earplugs or earmuffs more of the time. This would be limited to the time when those workers are in very close proximity to the boundary of an active construction area. However, there is not a significant change in practices to use existing hearing protection slightly more often for the small amount of time when working in fields that are directly adjacent to construction noise during the temporary construction period.
- Comment by Mr. Nerison, letter dated August 17, 2023: “This impact on accepted farming practices will not only put employee health at risk, but also employee job satisfaction. It is not an accepted farming practice or normal work duty to have to have to wear a heavier-duty respirator for hours at a time while performing duties that do not themselves require respiratory protection. Employees do not want to wear extra gear when working outside, especially during warmer months when the need will be the highest due to the peak of construction. The excessive amount of dust on their skin, hair, in their ears and on their clothes every day, in addition to having to wear extra protective equipment such as a respirator, goggles and headphones just to perform their normal duties will cause some employees to seek employment where they will not have to endure years of construction-related impacts on their work environment, job duties, their commutes, and especially their health. Replacing an employee who leaves involves the expense of finding, hiring and training the new employee; and the loss of productivity during the time it takes to do so. Many of our employees carpool to work, so this will not be a problem of losing just one employee, but it would mean up to 4 employees at once could decide to seek work elsewhere.”
- Response by Mr. Prenguber: “This is an unfounded and speculative claim. Road construction peaks for one week’s time and as described earlier, the road construction contractor has the experience and a dust mitigation plan in place to manage fugitive release of dust.”
- Comment by Mr. Nerison, letter dated August 17, 2023: “In addition to impacting the health of our employees and overall labor force in general, the dust and airborne particulate will affect our trees. The massive amount of dirt & top soil to be excavated for the 3-4’ trench, the base of the road, and any grading required for the road needs to be segregated and stored or hauled off-site. This will generate quantities of dust and diesel

particulate in the air that far exceed what is part of accepted farming practices. The dust and diesel fumes generated by construction traffic through our fields cannot be adequately mitigated as described earlier in this letter. Excessive amounts of dust will fall onto and cover plants and trees at a minimum in the field where the construction road will be built within feet of our rows of trees. It is a fact that leaves that are coated in dust or other contaminants have a reduction in photosynthesis that results in growth problems. Dust covering leaves also clogs their tiny pores and affects respiration and transpiration which increases leaf temperature which allows the penetration of phytotoxic gaseous pollutants. This leads to the tree or plant having visible damage and becoming unsalable, and it also causes decreased growth and productivity. Dust also carries mites which feed on and destroy leaves. A mite infestation can be devastating to an entire field, and requires immediate intervention with pest control practices to minimize plant loss. The only acceptable mitigation for this impact on our trees is to have them monitored daily and hand sprayed with water as needed. I will need to dedicate a minimum of one full-time employee to this task because the trees will need to be checked daily by a nursery employee with specific training in plant & tree care. A contractor-provided employee is not sufficient, it must be a nursery professional. Monitoring would need to take place every day that any construction activities are happening on the proposed road easements or in the surrounding lands, even when we are not working there. When dust and diesel particulate accumulation is identified as present on leaves, it will have to be immediately washed off by an employee using either hand spraying or tractor spraying, whichever is called for to avoid damaging the tree or flooding the field but that will sufficiently remove the dust from the leaves. This inevitable impact forces a significant change to our accepted farming practices, because full-time monitoring trees for health problems caused by massive construction activities is not an accepted farm practice anywhere. The cost impact is equivalent to one full-time employee who would have to be contracted for this particular job duty which is difficult with no information from PWB as to how long construction activities might last in the proposed easements and surrounding lands. Even if the construction activities are limited to the building of the emergency access road, they will require the same amount of activity, equipment and traffic but assumedly for a shorter period of time, thus still forcing a significant change in and cost to our accepted farm practices in the surrounding lands devoted solely to farming.”

- Response by Mr. Prenguber: “Mr. Nerison is again overstating dust potential by calling this a massive construction project when in fact it is a short-term, small-scale road construction job. There will be an insignificant amount of excessive dirt from grading or trenching that will be held on site for off-site removal. All excess dirt will be loaded and hauled off site. The amount of dust generated by the contractor will not be significant for build-up on nursery tree leaves. In addition to the small amount of dust generated from the practices to limit dust in the first place, the natural forces of wind and rainfall along with irrigation in the dry season are all ways that dirt will not accumulate on nursery plants. Furthermore, after construction when Surface Nursery transitions to use of the gravel road, they will generate less dust with each farm trip than they currently create on the primitive dirt roads. The result is no change in accepted farm practices and no increase in the cost of accepted farm practices at Surface Nursery or any nearby farm field.
- Comment by Mr. Nerison, letter dated August 17, 2023: “Employees working in the surrounding lands adjacent to construction activities will also be subject to high levels of construction noise completely incomparable to noise associated with accepted farming

practices. Globalwise claims construction equipment generates the same or even lower decibels that does farm equipment, but this is another example of where online research from places like the cornfields of Iowa is no substitute for real world experience. As local farmers, we know that the most common tractor used in field work is smaller than most backyard hobby tractors. These narrow tractors, small enough to fit between rows of trees without causing damage to them, are much quieter than a combine referenced in one of Globalwise's earlier reports. Plus, tractors move across fields and up and down rows, so only the operator has the sustained noise. Conversely, construction equipment doing a major project like building an emergency access road and burying utilities beneath it will often be stationary for hours. Haul trucks and other construction equipment onsite will have piercingly loud back up alarms every time they are put in reverse, perhaps hundreds of times a day across multiple pieces of equipment. Nursery field employees are used to quiet, low hum of a tractor or nothing at all but the sounds of nature."

- Response by Mr. Prenguber: "A combine was not referenced as a comparable noise generating tractor to those of Surface Nursery. I was granted permission to see the tractors and related equipment used by Surface Nursery where several tractors were parked in their machine shed. There are a wide range of sizes from the small tractors he references to medium and larger tractors. Just as tractors move across fields the construction equipment at the road construction site will primarily be moving. While perhaps slower than a tractor in a field, they are not stationary for hours. Noise will not result in a change in accepted farm practices or an increase in the cost of accepted farm practices at Surface Nursery or any nearby farm field, as explained above."
- Comment by Mr. Nerison, letter dated August 17, 2023: "The dust and noise disturbance to the surrounding EFU lands adjacent to the easements will be a nightmare. It's reasonable to assume there will be times when it is just too loud or dusty to safely (and sanely) work in the surrounding lands and work tasks will have to be suspended and redirected for no other reason, which qualifies as a significant change to our accepted farming practices. Mr. Prenguber arbitrarily states in the Globalwise report that noise generated from this massive construction project in this otherwise peaceful environment is no different than typical farm noise associated with farming."
- Response by Mr. Prenguber: "Again, Mr. Nerison is alluding to a false depiction of construction activity in an attempt to overstate the impact of a rather small road construction project at the eastern edge of the Surface Nursery field. Construction of this gravel all-weather road with utilities underneath is not a massive construction project. Additionally, Surface will cause less dust generation from their use of the new gravel road than the amount of dust they create from each trip they take on the existing dirt farm road now in use because the new road will be gravel rather than loosely compacted fine soils. See Photo attached at the end of this memorandum showing fine dust accumulation from farm road on vehicle. Noise from this road project is not excessive and it is temporary."
- Comment by Mr. Nerison, letter dated August 17, 2023: "Another concern this report insufficiently addresses is regarding our spray practices, which include pest, weed and field management. Our concerns that workers in the construction zone adjacent to our surrounding lands will be exposed to chemical spray applications if PWB does not follow our accepted farm practices which include various lock-out periods for up to 72 hours following spray applications. When this concern was brought up to Multnomah County, PWB's 'ag expert' replied that since we spray within 10' of Bluff Road, our spray practices in the surrounding lands will have no impact on the construction zone in the

proposed easements. However, Globalwise’s conclusion is completely false and a major error, and presents an inaccurate view of our farming practices. We do not spray pesticides within 10 feet of any roads at any of our fields. Our standard practice gives a generous setback, more than even the label instructions call for, in every field. Globalwise took our statement of concern and made an uninformed generalization to our practices, when the comment was intended to show our concern over the emergency access road being built so close to where trees are planted and spraying takes place. Their response acknowledges, as does their application in Clackamas County, that pesticide application is an accepted farm practice. However, they make the erroneous and arbitrary claim that nothing in their application for the project will force a change or cost to our accepted farm practices, including pesticide and other types of spray application. During construction activities in the proposed easement areas, construction workers will be within 10’ of where we currently farm in the surrounding lands. If we need to spray in that area, there is a time during and after application known as ‘no entry’ period where no one should be in the exposed area, especially within the short distance of the easements. The reason we raised concerns about the construction road being so close to our fields is precisely because of our careful and responsible spraying practices.”

- Response by Mr. Prenguber: “Dr. Felsot responded to the claim that Surface Nursery would have to avoid spraying at the edge of their field if construction workers were a short distance from the crop area being sprayed. See Dr. Felsot’s explanation in his Memorandum submitted concurrently with this report. Given that response, there is no change in accepted farm practices and no increase in cost of accepted farm practices regarding Surface Nursery pesticide spraying.”
- Comment by Mr. Nerison, letter dated August 17, 2023: “Globalwise has also failed to sufficiently address our concern regarding the potential for oil, gas, diesel or construction by-product being washed in the Johnson Creek Watershed where this project is sited. This is another example of the dismissive, subjective nature of their report. It is a reasonable concern that, despite following all maintenance and operation protocols, construction vehicles and heavy equipment could easily have an oil leak or inadvertently discharge a fuel or other by-product into the easement and surrounding lands, including Johnson Creek. The impervious gravel, all-weather surface of the emergency access road and any construction road furthers this risk by impeding those contaminants from being absorbed into the soil of the road area thus protecting nearby productive farm soils, and instead washing them to the lowest point which is the headwaters of Johnson Creek. The property in question is not a flat, even-grade field but rather rolling hills with obvious natural drainage features. Globalwise simply states that all vehicles will be inspected and maintained to avoid release of oil or gas on surrounding lands, but that doesn’t address the fact that it could happen. Maintenance and inspections are best practices, we agree, but we also want to point out that the operators may be unfamiliar with the hazards that uneven, unpaved, often muddy surfaces create, where damage and leaks can happen quickly and often go unnoticed until the next maintenance check. Construction activities differ significantly from farming activities in that farm equipment does not operate in a stationary manner, exposing the headwaters to contaminants for extended periods of time. Also, the scale of farming practices that use equipment that travels across the roads near the headwaters of Johnson Creek is incomparably less than the amount of construction vehicles and equipment that will be on site constructing the emergency access road, and possible construction road and main facility. Lastly, PWB does not address if there will be

onsite fueling and maintenance operations at the main site that will require additional travel through EFU land, and if so, what assurances are there that oil and gas won't be leaked from the source. And what assurances are there that all operators will be diligent about all protocols, 100 percent of the time? We don't think it's a risk worth taking with a water source as important as Johnson Creek. For the potential hazard to valuable natural resources like Johnson Creek, we encourage the application for an emergency access road through EFU lands devoted to farming be denied in its entirety."

- Response by Mr. Prenguber: "The contractor's construction equipment and vehicles are maintained according to best management practices. Limited on-site fueling of graders and similar equipment will be on-site. The limited fueling of equipment will be in accordance with the industry standard spill prevention and clean up procedures to ensure hazardous materials are handled safely and without incident. Any minor spill that may occur will be mitigated according to applicable state and federal regulations. No truck fueling will occur at the construction area. There is no reason to think that the maintenance and operation of any construction equipment or its maintenance will not be effective in protecting Johnson Creek waters from contamination."
- Comment by Mr. Nerison, letter dated August 17, 2023: "Finally, the most devastating economic loss is simply the loss of any amount of highly valued EFU land that has never been used for anything but farming. The soil here is unmatched and reported by the USDA to be some of the best in the world. For any amount of prime agricultural land to be taken out of farm production is devastating to Oregon's agricultural economy and its character. The wholesale nursery business is one of Oregon's strongest but last remaining farming industries and exports. The nursery industry brings revenue into the state, provides jobs for important groups of marginalized citizens, and protects Oregon's rich heritage as an agricultural center. Although an acre 'here and there' doesn't seem like much, it's a precedent our farming industry must be protected from, one that the EFU zoning laws should prevent altogether."
- Response by Mr. Prenguber: "The water Bureau is making a concerted effort to maximize the amount of agricultural land left in cropland production. First, the Water Bureau is following the wish of Surface Nursery by proposing the road location at the eastern field edge instead of bisecting the large farm field with a road dividing this field in two. Second, the road stays off Surface land as much as possible by following the existing access road on Burkholder property. Third, the easement area is limited in size along the entire route of the new road. Fourth, an extensive soil restoration plan is in place to quickly restore soil productivity for resuming crop production. The Water Bureau is meeting all requirements of Clackamas County and the EFU zoning, in the application for this community use facility, the new Emergency Access Road which is required by the Gresham Fire Department. The EFU zoning imposes its own farm impacts test and the road property easement itself is not in the Surrounding Lands, it is part of the project area. Nonetheless, the Water Bureau is taking the measures stated to minimize the amount of farmland removed for pipeline and road construction and is also taking comprehensive measures to restore the land disturbed during construction to high productivity for farming. Finally, through the condemnation proceedings, the Water Bureau will compensate Surface Nursery for the permanent loss of farmland for the new road."
- Comment by Ms. Richter: "This evidence is insufficient to show that cumulative impacts on the Surface nursery practices will be mitigated so as to avoid a significant change in accepted farm practices or increase their cost."

- Response by Mr. Prenguber: “The rebuttal above is sufficient to show that the Water Bureau project will have insignificant cumulative impacts. First, there is a negligible amount of land removed from crop land production. This is the minimal amount EFU farmland needed to construct the Emergency Access Road to meet the Gresham Fire Department’s requirements, has no increase in cost of accepted farm practices, and is not part of the Surrounding Lands Second, farm access remains unchanged for Surface Nursery travel between their farm field and the adjoining Burkholder fields that Surface farms; with no change in accepted farm practices and no increase in cost of accepted farm practices. Third, the Water Bureau, at their expense, will repair or replace any farm infrastructure as needed in the easement area, for no change in accepted farm practices and no increase in the cost of accepted farm practices. Fourth, during road construction, Surface Nursery farm travel will be accommodated in the construction area, leaving no need for a parallel farm road with no corresponding any change in accepted farm practices and no increase in cost of accepted farm practices. Fifth, Surface Nursery will have unrestricted access and use of the Emergency Access Road after construction, which also results in no need for a parallel farm road and no change in accepted farm practices. Any maintenance or repair needed as a result of farm travel on this road will be at the expense of the Water Bureau, resulting in no increase in cost of accepted farm practices – and actually causing a decrease in those costs, because the Water Bureau will take on the expense of maintenance of the road. Sixth, any disturbed soil from road construction that can be returned to crop production will be restored by the extensive methods proposed in the Water Bureau’s Soil Restoration Plan. Seventh, there will be no significant impacts from noise, dust, emissions, or debris. Accepted farm practices will remain unchanged and there will be no significant increase in the cost of accepted farm practices. Even when considering all of the above together, there are no significant cumulative impacts. Regarding changes in accepted farm practice, there are none. Finally, the cumulative cost increase in accepted farm practices remains insignificant.

56. Mr. Hultberg’s September 14, 2023 open record submittal included a memorandum titled “Dust Management Supplemental Information” prepared by Roy R. Martinez, Portland Water Bureau. Mr. Martinez is the Construction Engineering Inspection Manager for the Portland Water Bureau. Mr. Martinez has been with the Water Bureau for more than 32 years providing inspection oversight and building projects that have City of Portland Title 10 and State erosion control requirements. He is a Certified Inspection Sediment and Erosion Control (Certification 1652) in the State of Oregon, with extensive experience meeting dust control requirements. In his memorandum, Mr. Martinez provides descriptions of the Portland Water Bureau’s use of industry-standard dust suppression methods at construction projects, such as limiting vehicle speeds, establishing temporary gravel roads, using water trucks during the dry season and as needed, covering or watering stockpile areas as needed, minimizing drop heights and transfer points when loading, and using wheel washes and construction entrances for trucks exiting the work site. Mr. Martinez states that these methods are industry standards because they have proven effective for dust suppression at construction sites. He notes that similar practices are planned during construction of the filtration facility to manage dust during the dry seasons, providing several photos showing examples of dust suppression methods.

57. Mr. Hultberg's September 14, 2023 open record submittal included an August 30, 2023 Technical Memorandum concerning Emergency Access Road Use, prepared by Mark Graham, P.E., Project Manager of Stantec, Rafael Gaeta, P.E., of Emerio Design, and Roy Hankins, P.E. of Emerio Design. The Technical Memorandum was reviewed by Tom Bailey, P.E. of Stantec. This memorandum includes the following relevant statements:
- “The Emergency Access Road connecting the Bull Run Filtration Facility (Facility) with Bluff Road will be designed to allow multiple uses, including continued use by the underlying property owners for farming and general site access and circulation. As shown in Figure 1, the Emergency Access Road runs along existing property lines and will be built by widening existing farm or access roads to meet the standards established by Clackamas County and the Oregon Fire Code for use by emergency vehicles.”
 - “As PWB stated at the initial public hearing, the Emergency Access Road will not be used for construction traffic associated with the elements of the Filtration Facility located in Multnomah County. Construction use of the Emergency Access Road will be limited solely to construction traffic associated with construction of the road itself. Road construction is anticipated to take approximately 9 to 15 weeks, with approximately 35 working days during that period. Construction crews will range from 6 to 12 people, depending on the nature of the work being completed, with the most crew being on site during the grading and pipe and ductbank work. Over the construction period, the total truck traffic (in and out) is anticipated to be approximately 200 vehicles. This includes approximately 125 trucks importing gravel, and another 50 to 75 trucks related to materials delivery (other than aggregates) and off-haul of materials. At peak construction (a 5- to 7-day window), 25 trips per day are anticipated. This amount of construction-related traffic is far less than set forth in the construction transportation impact analysis previously submitted for the project. All construction-related traffic is accounted for in the supplemental construction transportation impact analysis (County Exhibit B 6-2-23).”
 - “... the Emergency Access Road is primarily (1,950 feet of a total 2,600 feet) located on property owned by Nathan and Brittany Burkholder, with approximately 760 feet of the road being located on the Surface Nursery property north of the existing solar farm. A portion of the road straddles both properties. Given the relatively short construction window and the construction methods to be employed by the Water Bureau, Surface Nursery will be able to continue to use the existing farm road on the Surface property while construction of the permanent road is being completed. The entire road won't be blocked the entire time the road is under construction. The majority of the road will not be under construction (and could be used by Surface Nursery) – only the portion under construction will be blocked. PWB will ensure that, at all times, at least one of the east-west Surface Nursery farm road connections to the emergency access road is fully open for Surface Nursery to use. This will allow Surface Nursery to gain access to the eastern most portions of Surface Nursery's property even when the emergency access road construction closes portions of the adjacent road (the farm road being upgraded for the emergency access road). That access will therefore be possible by traveling along the north-south farm road in the middle of their fields, turning onto one of the east- west farm roads, and then onto the portion of the emergency access road that is not closed for construction.”
 - “Even for the portion under construction, a small number of vehicles could pass through the area under construction. For a particularly heavy day of farm traffic needs, PWB could provide flaggers at each end of the construction zone that could allow farm traffic to pass

safely. For the short time periods where sections of the road are blocked for construction, but access can be coordinated as needed, Surface Nursery will not need to temporarily operate a farm road to the west of the temporary construction easement area. If for some reason Surface Nursery determines that a road to the west is necessary for some portion of the road, the Water Bureau will provide services to restore the small area impacted by soil compaction (pursuant to the Soil Remediation Plan in the record). Surface will always have access to the field to the west of the road via farm roads to the north, west and south. Similarly, in the two locations in which Surface must traverse the road on the Burkholder property, the Water Bureau will similarly maintain access, with grades appropriate for crossing, to the Burkholder property. As with portions of the road on the Surface property, the Water Bureau will provide reasonable prior notice to Surface of any anticipated short-term closure of one of the crossing areas.”

- “With respect to construction of the access road on the Burkholder property, Surface will continue to be able to use the farm road on the Surface property during construction. ...[T]he existing farm road adjacent to the solar farm and south to the “bump out” or “dog leg” area is predominantly outside the temporary construction easement area. Again, given the construction window and methods, the Water Bureau has committed to maintaining the use of the farm road during construction. As with the northern segment, if there are short periods of time in which passage is not possible, the Applicant will provide reasonable prior notice of any such closure and provide any needed accommodation, as described above. Again, the Surface property includes several other farm roads from which Surface will be able to access its fields in the event of a temporary construction-related closure.”
- “To facilitate delivery of materials and equipment necessary for construction of the Emergency Access Road, the Water Bureau has proposed to build a temporary construction access road along a TCE that connects to Bluff Road, generally following an existing farm road. The construction road is proposed to be 24’ wide to facilitate two-way traffic. As with the other temporary construction roads, the Water Bureau would allow joint use of this road and will provide reasonable prior notice to Surface of any anticipated short-term closure of the crossing areas. Following construction, and at the election of Surface Nursery, the temporary construction road would be removed and the ground restored. At Surface Nursery’s option, all or a portion of the improved road could be left in place.”
- “Attachment B is a memorandum from the Chief Engineer which will grant blanket permission to Surface Nursery to use the portion of the Emergency Access Road located on the Surface property for farm equipment when the easement is final and recorded. The Water Bureau will propose a specific condition of approval requiring execution of the consent memorandum. The consent will apply to all farm-related equipment and other farm-related vehicles (e.g., farm worker buses and farm manager vehicles). As a result, there is no need for Surface to construct a parallel farm road adjacent to the portion of the Emergency Access Road on the Surface property. The easement excerpt provides that the Water Bureau, and not Surface Nursery, retains all maintenance obligations associated with the Emergency Access Road.”
- “Based on prior discussions with Surface Nursery, survey work and aerial photography, Surface appears to use two crossings of the Emergency Access Road to access fields farmed by Surface Nursery on the east side of the road, as shown in Drawing FF-00-LU-802. The Water Bureau will maintain these crossings and provide driveway aprons and

appropriate grades to allow continued crossing of the Emergency Access Road. See Drawing FF-00- LU-807 which demonstrates the grade of the Emergency Access Road in the areas designated for crossing. Although the Applicant will provide appropriate crossings, any use by Surface Nursery of property owned by the Burkholders will be subject to Burkholder consent.”

- “Post-construction stormwater conditions will be similar to current conditions, as described in *Stormwater Drainage Report – Emergency Access Road* (Emerio Design, 2023), previously submitted as Attachment D. The northern portion of the Emergency Access Road generally follows the basin ridge line, with grade sloping to the east. The southern portion of the Emergency Access Road is generally perpendicular to the slope, with stormwater flows from the east largely flowing into the forested area at the low point near the center of the Emergency Access Road. Because of this topography, there is minimal on-flow to the emergency access road. The surfaces of the existing farm roads are a mix of compacted dirt and gravel, and are bordered by crop land and forested areas. Because of the high clay content of the soil in this area, infiltration into compacted dirt roads is low, and will be similar to that of the proposed gravel road. Regular maintenance of the gravel road by the Water Bureau will prevent the formation of channels in the road and instead promote sheet flow off the edge of the gravel. The construction of the Emergency Access Road, therefore, will not change the existing stormwater flow patterns onto the underlying or adjacent properties.”
- The August 30, 2023 Technical Memorandum asserts the construction and use of the Emergency Access Road is compatible with existing farm practices, concluding:
 - ❖ Coordinated use of the temporary and permanent easements during construction of the Emergency Access Road will not impair accepted farm practices.
 - ❖ Shared use of the portion of the Emergency Access Road fully on Surface Nursery property will not require the construction of a parallel farm road which would decrease the amount of land available for crop production.
 - ❖ Construction of a new farm road along the central and southern portions of the Emergency Access Road is driven by the need to relocate the existing farm road fully onto Surface Nursery property, not the establishment of the Emergency Access Road.
 - ❖ The Emergency Access Road will be designed and constructed to allow farm equipment to continue use of existing locations for crossing from Surface property to Burkholder property for farming purposes.
 - ❖ The proposed Emergency Access Road will not change the existing stormwater flow patterns or runoff volumes onto the underlying or adjacent properties.

58. On September 18, 2023 Appellant Surface Nursery submitted a written addendum to their August 17, 2023 written testimony. In this addendum (dated September 14, 2023), the Appellant’s owner, Shawn Nerison, reports receiving “Notice of Immediate Possession” related to the eminent domain proceedings the Applicant initiated to condemn property for the easements. Mr. Nerison points to the language in the easement and also notes that it does not reflect the language used at the August 17, 2023 hearing. Specifically, Mr. Nerison points to language concerning the construction easement being for a period of five years, essentially asserting that if this easement is not related to construction access for the PWB water filtration facility, then it wouldn’t require a 5-year period. Mr. Nerison contends it is to allow for the City of Sandy to connect their pipeline to the proposed PWB water filtration facility through

the easement being sought on their EFU zoned land, providing copies of documents related to this pipeline similar to those provided by the Cottrell CPO. In his written statement, Mr. Nerison states he:

“cannot continue accepted farm practices under the terms of the easement, which includes terms such as preventing farm equipment from using the temporary construction road; preventing the use or application of anything the Health Division deems a health hazard which could limit our ability to spray pesticides and other accepted practices for best management of pests, weeds, and tree and soil health; and preventing any crossing of the emergency access road with our farm equipment to access our adjacent field, thereby completely blocking our existing access to that field.” [Exhibit 103]

59. In his September 14, 2023 written addendum, Mr. Nerison points to issues with planning for his inventory, possibly planning for a new farm road (or two farm roads), and planning for additional operating costs related to these changes. He also disputes Applicant’s claims that the temporary construction easement area will be restored to its previous quality and productivity, contending that the Applicant and its consultants are not actual farmers. Mr. Nerison points to “the proven expertise and years of experience of local famers successfully operating local nurseries as the true authority on the subject of soil remediation.” He contends that the Applicant’s plan lacks any assurances and no enforceable criteria. Mr. Nerison also points to impacts to his farming operation from the additional traffic associated with the construction, asserting the construction traffic will interfere with his farm traffic entering and exiting their fields from Bluff Road.
60. Mr. Nerison points to the intersection at Bluff Road where the Applicant is proposing the emergency access road, and reports that this intersection was assessed by a traffic engineer as one of the most dangerous in the state of Oregon. Mr. Nerison submitted portions of a June 30, 2023 Technical Memorandum and Traffic Impact Analysis review by Michael Ard, PE, of Ard Engineering, prepared for the PWB Bull Run Water Facility proposal in Multnomah County. In this report, Mr. Ard provides a technical review of the transportation analysis materials (including a “Construction Traffic Impact Analysis” dated June 2, 2023) prepared by Global Transportation Engineering related to the PWB Bull Run Water Facility proposal. Mr. Ard’s report included the following statements related to Mr. Nerison’s contentions and relevant to the Applicant’s proposal:
- *Additionally, the report stated that the project team will provide information and notification to farmers regarding activities which may impact them. These described measures are unlikely to satisfy most farmers or meaningfully reduce impacts to their operations, however. The nature of farming is that changing weather conditions necessitate responses regarding when to turn or plant a field, when to fertilize or undertake pest control measures, and when to harvest crops. Since these conditions cannot be effectively projected in advance, providing advance notice of closures or other impacts cannot fully accommodate the needs of farmers in ensuring that their crops are planted, protected, and harvested appropriately. Since failure to respond to agricultural needs in a timely manner can result in the loss of crops, there is a potential for extremely significant impacts to farm uses in the site vicinity as a result of the proposed conditional use.*
 - *The intersection of SE Bluff Road at SE proctor Road has a reported crash rate of 1.740 CMEV. It should be noted that this intersection has five approach lanes, and there is no*

statewide data for this unusual intersection configuration. Accordingly, the observed crash rate was compared to the highest crash rate for any intersection classification in Oregon. This corresponds again to a rural, four-way stop-controlled intersection. Again, the mean crash rate for four-leg stop-controlled intersections in Oregon was 0.433 CMEV, and the 90th percentile crash rate was 1.080 CMEV. The crash rate at this intersection was far above the 90th percentile crash rate for any intersection classification in Oregon. Agricultural impacts from the project likely cannot be mitigated as proposed since farmers may require access to fields based on changing weather and cannot schedule to avoid conflicts in advance.

Second Open Record Period [Exhibits 104-108]⁵

61. The County received several submissions during the second four-week open-record period ending 4:00 pm October 12, 2023, including an October 12, 2023 submission by Mr. Hultberg on behalf of the Applicant that included two items: an October 12, 2023 Memorandum from Globalwise, Inc. responding to agricultural-related issues, and an October 12, 2023 Technical Memorandum from Mark Graham of Stantec, responding to road construction issues. [Exhibit 104]
62. In the October 12, 2023 Memorandum from Globalwise, Inc., Bruce Prenguber, M.S., Agricultural Economist, reviews and responds to comments received in the first open-record period that address accepted farm practices in the surrounding area. Mr. Prenguber references the fact that Globalwise previously the report: “Compatibility of Proposed Portland Water Bureau Filtration Facility South Entrance Road with Surrounding Agriculture,” dated January 2023, that was submitted with the original application.
 - Comment by Ms. Richter dated September 14, 2023 [Exhibit 14]: “... *the Farm Impact Study that is reaffirmed by the Applicant’s expert in the August 16 letter represents that the total permanent loss of farmland resulting from the permanent easement on the Appellant’s Property is .06 acres but the permanent easement document says that the loss will be 39,847 square feet or .09 acres.*”
 - Response by Mr. Prenguber: “I rechecked my estimate of a net loss of 0.6 acres and verified its accuracy. The loss of farmland is less than the area in the permanent easement because the Water Bureau is following the requirement to “minimize and mitigate” removal of farmland in the EFU zone. There are two reasons that the loss of farmland is less than the total area in the permanent easement. First, the emergency access road is going to overlay the existing Surface Nursery farm road which is not farmable land. Second, there is land within the permanent easement west of the new access road where the Water Bureau will restore the soil to farming productivity and allow Surface Nursery to farm. In my calculations, I have also included 2-feet of buffer from the emergency access road to compute the net farmable land loss. This means the Water Bureau will implement the soil restoration measures enumerated by Dr. Denny Mengel to all Surface Nursery land in the permanent easement 2 feet from

⁵ Exhibit 108 was received after the close of the *Second Open Record Period* but is admitted and considered as it merely corrects an inadvertent error in Exhibit 105. Exhibit 107 was only partly admitted and considered. Materials submitted with Exhibit 107 not responsive to the Applicant’s September 14, 2023 submittal (Exhibit 100) were not admitted or considered.

the new road. Surface can farm that additional area in the permanent easement when road construction is completed. For these reasons, my calculation of 0.6 acres accurately establishes the net loss of farmable cropland by Surface Nursery. Note also that the permanent easement area is not in the Surrounding Lands and is not subject to the farm impact test.”

- Comment by Mr. Nerison dated September 14, 2023 [Exhibit 13]: *“Whether the easement is five years or 15 weeks, I cannot continue accepted farm practices under the terms imposed by the easement, which include terms such a; preventing farm equipment from using the temporary construction road; preventing the use or application of anything the Health Division deems a health hazard which could limit our ability to spray pesticides and other accepted practices for best management of pests, weeds, tree and soil health; and preventing any crossing of the emergency access road with our farm equipment to access our adjacent field, thereby completely blocking our existing access to that field.”*
- Response by Mr. Prenguber: “The first alleged change of accepted farm practice is “preventing farm equipment from using the temporary construction road.” This is clearly not true. The Water Bureau will provide safe farm road travel by Surface Nursery even while the road is under construction. This is feasible because the road will be built in phases, thereby keeping sections of the road open at all times. The contractor will also notify Surface Nursery of the schedule, so Surface is accommodated for its field access needs (see Exhibit 100; pages 387-394). This accommodation is offered in order to help Surface Nursery avoid even temporarily using land west of the emergency road during the short duration of its construction. This is an effort by the Water Bureau to “minimize and mitigate” impacts on EFU land but is not a denial of Surface Nursery’s choice to operate their equipment on their farmland during road construction, should they wish to do so. The second alleged change in accepted farm practice is “preventing the use or application of anything the Health Division deems a health hazard which could limit our ability to spray pesticides and other accepted practices for best management of pests, weeds, tree and soil health.” Again, this has no basis. Dr. Felsot has previously explained that there are no restrictions for Surface Nursery to use farm chemicals following accepted farm practices during construction of the access road or afterward (see Exhibit 100; pages 208-210.) The third alleged change in accepted farm practice is “preventing any crossing of the emergency access road with our farm equipment to access our adjacent field, thereby completely blocking our existing access to that field.” Again, this has no validity. The Water Bureau is designing the emergency access road so that it will be at the same elevation as the farm fields at both locations where Surface crosses to the Burkholder fields. Additionally, the Water Bureau’s road construction contractor will keep one or both of the crossing locations open for Surface Nursery to cross between these fields at all times during and after construction (see Exhibit 100; page 391). For all of the reasons stated above, in none of these cases will the Water Bureau planned road construction or post-construction cause a change in the accepted farm practices alleged by Surface Nursery.
- Comment by Mr. Nerison dated September 14, 2023 [Exhibit 13]: *“Any time we lose product inventory it drives up operating costs. For example, I have no idea when I will have to remove trees currently planted not only in the easement area (which the Applicant has grossly undervalued in their calculations), but also in the surrounding*

lands, because I need to have a farm road available even during the construction period. Building a road alongside their construction road so that I continue to farm that field requires me to pull out trees for a width of 26', as explained in my written submission (Exhibit 92). Now I have the cost to build a new road of equal height/grade to the gravel construction road the Applicant proposes to build, plus the labor of removing trees and the deficit in inventory that creates because the trees will not be saleable unless they complete their 3-year growth cycle. Trees are planted based on customer demand, orders, and order history. Losing 1-2+ years of the growth cycle puts us that far behind in filling orders because we have to start over and plant completely new trees. Having less inventory means less sales and sales profit, but I still employ the same labor force just with less profit to offset the cost of production. This drives up my operating costs, in addition to having to find new land to replant the number of trees that will be removed in the easement as well as the surrounding lands for a new farm road. The extra labor associated with all these tasks is a significant cost, and it is not an accepted practice to have additional labor costs without an increase in production and the expectation of increased profits.

- Response by Mr. Prenguber: “Regarding cost of accepted farm practices, the farm impact test requires determination of a significant increase in the cost of the accepted farm practices. The impact test clearly is not a comparison of the cost of accepted farm practices to sales or profit, which is described by Mr. Nerison. Second, an increase in operating costs is also not the impact test, it is whether an increase in cost is significant. Mr. Nerison does not provide any objective assessment of his operating costs to measure if they are significant, and he does not explain how the nursery’s cost would significantly increase due to the loss of 0.6 acres of farmable land in this field (farm production unit) of over 100 acres. Instead, Mr. Nerison offers a general description of how his operating cost might increase in relation to sales and profit along with a statement that operating costs would be “significant.” In my response above to Ms. Richter’s comment, I explained the accuracy of my estimate that Surface will have a decrease of 0.6 acres of farmable land in the field of over 100 acres. There are several reasons that the operating costs stated by Mr. Nerison are not significant. The first is consideration of the percentage decrease in farmland in the Surface Nursery field. As stated in my report in Exhibit 100 on page 363, this decrease is half of one percent of the total field, a minimal share of this Surface Nursery farm production unit. Although such a minimal amount of land is taken out of production, Mr. Nerison states that he will need to “find new land” as replacement for the loss of farmland for the emergency access road. This is a false claim because Surface Nursery has unfarmed land in the southeast corner of this same field. More than 0.6 acres of idle land is available on both sides of the temporary access road. This excludes the building sites. Bringing this land into production would eliminate any lag in establishing new tree production that Mr. Nerison references. Mr. Nerison also refers to “building” a new gravel farm road for the temporary time (15 weeks) while the emergency road is being constructed. He is repeating this previous assertion, even though if Surface chooses not to use the emergency road area, the nursery can drive its few trips on the bare ground next to the new road while the road is under construction. However, I repeat, as shown in Exhibit 100, this is unnecessary because of the cooperation offered by the Water Bureau and its road construction contractor to coordinate with Surface for its use of the emergency road area during the short, phased

construction. As discussed in my testimony in Exhibit 100, page 364, Surface Nursery has also added a farm road on their property next to the Burkholder property because they were trespassing on that neighbor's property. In any case, the need for a farm road is eliminated and there is clearly no cost for "building" a temporary farm road on the Surface Nursery property.

63. The Appellant's attorney, Ms. Richter, submitted a written statement dated October 12, 2023, responsive to the additional materials submitted by the Applicant in the first open record period. [Exhibit 100] In this written statement, Ms. Richter points to a lack of response to Appellant's contention that city-owned land located on Powell Butte that is within the city limits remains a viable alternative. Ms. Richter argues that while the emergency access road may be considered a "utility facility use" it is not a "stand alone" "utility facility use" and only exists due to the proposing siting of the PWB water filtration facility. Ms. Richter argues that: "Nothing in the text of OAR 660-033-0130(16)(a) suggests that the obligation to consider alternatives is jurisdictionally constrained such that it only applies to those components of the project located solely within Clackamas County." Ms. Richter contends that the Applicant has failed to show Powell Butte has been considered and deemed not feasible following an analysis of the factors in OAR 660-033-0130(16)(a)(A) as implemented in County ZDO 401.05(G). [Exhibit 105]
64. In her October 12, 2023 written statement, Ms. Richter contends that the Applicant has not disputed Appellant's contention that the proposed emergency access road cannot accommodate both the emergency access use required by PWB and the farm road use required by Appellant. Ms. Richter contends that installing a separate farm access road will significantly change farm practices and significantly increase costs for Surface. Ms. Richter disputes Applicant's assertions that Surface can share the proposed emergency access road. She points to Applicant's assertions that the road can be shared, pointing to the applicable emergency access requirements imposed by the Oregon Fire Code. Ms. Richter quotes the below specific provisions, arguing they expressly do not allow parking:
- "503.4 Obstruction of fire apparatus access roads. *Fire apparatus access roads shall not be obstructed in any manner, including the parking of vehicles. The minimum widths and clearances established in Sections 503.2.1 and 503.2.2 shall be maintained at all times.*
 - 503.2.1 Dimensions. Fire apparatus access roads shall have an *unobstructed width* of not less than 20 feet (6096 mm), exclusive of shoulders, except for approved security gates in accordance with Section 503.6, and an unobstructed vertical clearance of not less than 13 feet 6 inches (4115 mm).
 - D104.2 Buildings exceeding 62,000 square feet in area. Buildings or facilities having a gross building area of more than 62,000 square feet (5760 m²) shall be provided with *two separate and approved fire apparatus access roads.*" [Emphasis added by Ms. Richter.]
65. Ms. Richter points to Mr. Nerison's description of his farm practices, stating that farm equipment and farmworker vehicles are regularly parked on the existing farm road. Further, Ms. Richter points to the provisions of the Applicant's offer to share the road as stated in the "Sample Memorandum" included with Applicant's Exhibit 100, asserting the terms are "not sufficiently secure to justify the continued and significant investment necessary to farm

nursery stock served by this roadway.” Ms. Richter contends that the “Sample Memorandum” or license offered by the Applicant is not an accepted farm practice, is not recorded and therefore does not provide notice to others nor run with the land, and is revocable by the Applicant for “material breach” without clearly defining the meaning of this term. Further, she contends that the easement language restricting such access will control over the license.

66. Ms. Richter next addresses the Applicant’s Stantec Technical Memorandum [Exhibit 100, pp. 390-395], asserting that this report also “fails to identify where these worker vehicles and equipment will be parked when not actively in use.” Ms. Richter also contends that the report is deficient because: “Nothing in the Stantec report mentions the timing or efforts involved in relocating buried farming pipes and vents as part of the construction. This infrastructure and its continued functioning is critical to continuing existing accepted farming practices.” Ms. Richter next points to Applicant’s claims that Surface will be able to travel along the north-south farm road and then along one of the east-west farm roads where at least one connection will be kept open. Ms. Richter argues that:

“The limitation with this approach is that maintaining vehicular access along the outer edge of nursery fields is an accepted farm practice, critical for relocating irrigation and maintaining an adequate turning area to move equipment around rows of trees. When the northern portion of the emergency access road is under construction, Surface farmers will have no access to the eastern edge of its field for over half of the property to the north. Again, restoring farm practices necessary to continue growing crops, even during the 9 to 15 week construction period requires building a new farm access road.”

67. Next, Ms. Richter addresses Applicant’s description of mitigations in the Stantec Technical Memorandum during heavy farm periods, such as providing flaggers to allow farm traffic to pass safely. She contends out that the Stantec Technical Memorandum does not explain where the construction equipment will be stored temporarily awaiting the expiration of Application Exclusion Zone (AEZ) periods necessary to accommodate pesticide applications. Further, Ms. Richter contends it is not an accepted farm practice to coordinate daily farming activities with construction personnel. Ms. Richter also points to the Stantec Technical Memorandum and contends that it fails to integrate the activities in the applicant’s Soil Remediation Plan concerning preserving and segregating soils during construction, and does not explain how or where these soils will be stored. With respect to storage of these soils, Ms. Richter points to the statement by the Jacobs representative in Exhibit 100, p. 361 that: “If there is not room to store the salvaged topsoil on the Surface property’s easement, it could be stored in an adjacent staging area and then returned to the Surface parcel for topsoil replacement.” She contends this statement is at odds with the statement in the Applicant’s Soils Report that the topsoil must be stored in narrow windrows along the trench from where it was excavated.” Ms. Richter further points to the soils map indicating that the easement area contains two different types of soils. [See Exhibit 100, p.187]

68. Ms. Richter points to testimony by Mr. Nerison and other farmers that the accepted farm practice with respect to chemical applications is to consider both state and federal guidelines for current and potential spray needs. She also asserts that construction of the emergency access road will introduce 6-12 Applicant construction workers in areas within the application exclusion zone (AEZ) for chemical application on the Surface farm, an area Ms. Richter describes as extending 100’ or 150’ when applying and a rolling 15-minute no entry following

the last pass. Further, she points to Mr. Nerison's practice to stop spraying if someone appears within an AEZ while spraying, due to fear of liability. Ms. Richter contends that a reasonable farmer would avoid planting in areas with this potential interference, and would remove trees from such area, or in this case within 150 feet of the edge of the identified easement area. Thus, Ms. Richter contends that even though the Globalwise Report states that the Applicant "will also pay for any loss of net income from tree removal" [Exhibit 100, p. 365] the accepted farm practices on the Surface farm will change as a result of the proposed construction.

69. Ms. Richter points to the proposed revisions to the conditions of approval recommended by County staff submitted by Mr. Hultberg on behalf of Applicant. [Exhibit 100, cover letter] Ms. Richter disputes those revisions, and points to the conditions set forth in the County's staff decision, pointing to specific examples of needed changes. Ms. Richter points to Condition 8d requiring that the emergency access road is "gated and limited to emergency use only" asserting this language does not reflect the shared use of the access road as it is currently proposed and pointing out that Mr. Hultberg did not request any modification to it. Ms. Richter further points to the Soils Mitigation Plan in Condition 4, which states: *"Following completion of construction of the emergency access road, the applicant shall comply with the Soil Restoration Plan, except to the extent that any of the temporary construction easement adjacent to the emergency access road is converted to farm road use."* Ms. Richter contends that this condition is insufficient as the Plan is not clear and objective. For example, she points out that the Soil Restoration Plan only works if implemented before construction begins and not afterwards.
70. Next, Ms. Richter points to proposed Condition 2, addressing Applicant's efforts related to obtaining the easement through eminent domain, reporting that Debbie Surface has objected to the Applicant's request for early entry of orders of immediate possession., recommending that Condition 2 be changed to read: *"Prior to commencing any construction activities, the applicant shall submit to the County copies of any court order or recorded easement authorizing entry upon or occupancy of the subject property."* With respect to Condition 3, Ms. Richter points to Mr. Hultberg's proposed condition that: *"Construction activities shall not commence unless the water filtration plant in Multnomah County receives final land use approval, and such approval has not been stayed pursuant to OAR 661-010-0068."* Ms. Richter contends that this language is insufficient because a successful appeal of an approval in Multnomah County will result in remand or reversal of the facility decision, putting the primary use for which the emergency access road is an accessory use in jeopardy.
71. Ms. Richter addresses Mr. Hultberg's proposed condition regarding road use: *"This approval only authorizes use of this road for emergency access and monitoring and maintenance of the road and associated utilities."* She asserts that the proposed language is flawed as it fails to accept the limitations imposed by the Applicant's own worst case traffic assumption that the number of trips will not exceed 20 trips per year, in support of its own claims of no farm impact. Ms. Richter contends that if the number of trips will exceed these levels, then the evidence will not support a finding of no significant impact. Further, she points out that this limitation is necessary to mitigate and minimize the impacts of the proposed roadway under the farm impacts test and thus any condition ensuring compliance must be "clear and objective." Further, Ms. Richter contends that determinations as to when Carpenter Lane is

not available, triggering the need for emergency access use of the road, is also not “clear and objective” but is entirely within the Applicant’s discretion, as are decisions concerning the extend of necessary monitoring, maintenance, and types of “associated utilities” that may be accommodated. Ms. Richter argues that the only measurable, clear and objective condition restricts the number of vehicle trips.

72. Lastly, Ms. Richter reiterates that discussion of the contend of these proposed conditions should not be construed as suggesting that the Appellant believes the significant impact test can be satisfied through the imposition of conditions. Rather, she argues that even if everything Applicant asserts is true (which Appellant disputes) significant changes to Appellant’s farm practices will be necessary for Surface to continue farming and these changes will come substantial additional costs, including the cost of constructing a legally recognizable farm access road, and the various costs identified in the testimony submitted by Appellant Surface and Mr. Nerison. Ms. Richter argues that the Applicant has failed to produce sufficient evidence to conclude that the farm practices on the Surface farm will not be significantly changed or costs increased, and this application should be denied.
73. Mr. Nerison, owner of Appellant Surface Nursery, submitted an October 12, 2023 addendum to his written and verbal testimony submitted August 17, 2023 and September 14, 2023, in response to the September 14, 2023 materials submitted by the Applicant during the first open-record period (Exhibit 100). Mr. Nerison first references the Memorandum from consultant Allan Felsot submitted by Applicant titled “Response to Select Testimony for Lane Use Review Process for Filtration Facility and Pipelines” and an identically titled memorandum also referring to Multnomah County testimony [Exhibit 100; p. 208-222]. Mr. Nerison notes that each memorandum addresses impacts of this project and the PWB water filtration facility, to accepted farming practices in the surrounding lands. Mr. Nerison contends that the consultant’s responses to Appellant’s concerns seek to undermine the knowledge and experience of the farmers in this area. Mr. Nerison points to his years of successful commercial nursery experience (and that of other area farmers) in support of his contention that both projects will cause significant changes to their accepted farming practices, and most of those changes result in increases to the cost of their farming operations. [Exhibit 106]
74. Mr. Nerison points to Dr. Felsot’s discussion of EPA Worker Protection Standards and Oregon OSHA rules. Mr. Nerison disputes Dr. Felsot’s characterization of accepted farming practices as following the rules of the state rather than the EPA rules, asserting this statement does not apply to the entire nursery stock industry, reporting that it is his practice (and that of area farmers) to allow generous buffer zones and observe conservative restricted entry intervals. Further, Mr. Nerison argues that he was not speaking specifically about one type of spray (pesticide, fungicide, herbicide, etc), or one specific type of tree or plant, and was talking about both existing and future conditions based on historical evidence and years of experience. Mr. Nerison contends he must consider where he plants and what he plants, based on the characteristics of the field, stating: “The actual accepted farming practice, according to the expert farmers in this area, is to consider both state and federal guidelines for current and potential spray application needs.” Mr. Nerison contends that:

“The access road introduces the possibility that maintenance and utility personnel could be present within the boundary we currently practice when spraying. Ziply Fiber

will be buried under the road as will a water line connecting two fire hydrants – both of these present the opportunity that during application of a spray that requires a 100’ or 150’ application exclusion zone and a rolling 15-minute no-entry following the last pass in that affected AEZ. The accepted farming practice is not to simply evaluate conditions if someone appears within that AEZ while spraying, but it is to immediately discontinue spraying and then evaluate conditions. The example the consultant cites of evaluating conditions when someone appears in the AEZ is from an infographic on the EPA’s website and offers only one instance where a farmer may determine to keep spraying, but it is a poor example at best because we would not be spraying if wind was present in any direction. Also, 150 feet is required for all applications that require the applicator to wear a respirator. (See appendix A, OSHA’s AEZ infographics). A reasonable farmer will avoid planting trees where a new condition is planned that has this potential of interference with their accepted spray practices, and so it is also reasonable to assume to a reasonable farmer would remove trees from that area to avoid any potential conflicts with spray practices. This includes buffer zone considerations, which is not a technical term but rather a common and accepted farming practice amongst growers. It means that we consider the spatial distance from our trees that would include an AEZ of 150’, and what conditions exist that could potentially affect that, and plan our fields and plantings with those existing conditions in mind. We are not referring to an oversized spray application area to allow for intentional drift, as the consultant mistakenly implies and on which he bases the bulk of his response. When attempting to explain our farming practices to non-farmers in a case such as this, farmers tend to use common terms that get the general idea across.”

75. Mr. Nerison provided copies of Oregon OSHA Worker Protection Standards concerning the Application Exclusion Zone (AEZ), showing that the size of the AEZ is determined by both the type of equipment used and the type of pesticide being applied, with requirements for a 150-foot AEZ when pesticide labels require use of a respirator, and a 100-foot AEZ when the label does not. He also provided perimeter maps of his fields showing the effective crop boundary required to avoid AEZ overlap into the proposed easement area. Mr. Nerison points to Dr. Felsot’s assertion that the contractor can choose whether they observe the 15-minute “no entry” interval, stating:

“The applicant has indicated there will be 9-15 weeks of construction activity to construct the access road, at which time numerous contractors moving in and out the road area bordering out field. Because of the 15-minute ‘no entry’ interval that restarts with every pass, the construction activities would potentially need to be suspended for a few hours as that 15- minute interval would have to be observed following every pass that involves a 100’ or 150’ AEZ. It’s unsettling that the consultant would indicate that the contractor can choose whether they observe the 15-minute intervals, and no reasonable farmer would accept the liability of spraying trees where people within the AEZ are not following accepted farming practices and vacating that area until the spray has moved far enough away, they are no longer in the AEZ and the final 15-minute interval has passed. We wouldn’t allow our employees to choose to remain in the AEZ, doing so goes against label instructions, best use, and accepted farming practices. Adjusting our crop boundary to accommodate construction activity that, as stated on the record, will have the options to disregard compliance with AEZ and interval precautions, forces us to pull those trees back a distance of 150’ from the

permanent easement boundary so that the AEZ will never fall within the access road. This is a significant change to our farming practices because farmers do not adjust their field plans for new developments bordering their land. It will increase our labor costs with re-planting, or increase our overhead costs with purchasing new trees if re-planting is not a viable option. This applies once the access road is complete as well, as the applicant clearly has no intention of observing any precautions should any part of their land or access road fall into the AEZ.”

76. Mr. Nerison does not dispute that Appellant currently has trees planted within 10 feet of the farm road, and there are neighboring residential properties, a school, and a road adjacent to their fields. Mr. Nerison points out that these are not new conditions and asserts they cooperate with area neighbors, contacting them when spraying, and do not spray within 200 feet of the nearby residence and avoid spray practices that require AEZ or other precautions on school days.
77. Mr. Nerison points to Applicant’s September 14, 2023 submissions [Exhibit 100] and addresses the replacement of the farm road and use of the proposed emergency access road, and suggestions by Applicant’s consultants concerning use of alternate routes when the proposed emergency access road is blocked by construction activities. Mr. Nerison states that perimeter roads such as the farm road discussed here are a common and typical accepted farm practice and necessary for many farming activities, such as accessing irrigation, mainlines, valves, connections, moving pipes, trees and equipment. Mr. Nerison contends that impeding access to the farm road is a significant change to accepted farm practices forcing him to reevaluate field logistics, equipment mobility, and crew movement and task, further asserting that these changes will likely incur additional costs. With respect to the irrigation mainline currently under the existing farm road, Mr. Nerison reports that all fields are irrigated and contends that any delay to irrigation is significant. He points to Applicant’s intention to move the irrigation mainline currently under the farm road, and also points to the statement on page 368 in Applicant’s September 14, 2023 open record submission [Exhibit 100] that the mainline will be replaced at the same location to “*demonstrate that there will be no changes to accepted farming practices for irrigation access to the eastern fields.*” Mr. Nerison asserts there is no clear plan for doing so, and points out that the irrigation mainline should not be relocated to the same place anyway because it cannot be driven over by heavy construction traffic and emergency response vehicles.
78. Mr. Nerison also contends that Mr. Prenguber’s responses in Applicant’s September 14, 2023 open record submission [Exhibit 100], are not responsive to his comments. Mr. Nerison states that while Mr. Prenguber’s response asserts the specific mitigation plans will not produce impacts beyond the Surrounding Lands as defined, he was actually pointing to impacts to the farm land immediately adjacent to the farm road but outside the permanent easement area and Mr. Prenguber entirely missed the point. Further, Mr. Nerison points to Mr. Prenguber’s statement that Surface has been trespassing on the shared farm road that exists between the Surface Property and Burkholder property, asserting this is false. Mr. Nerison explains that the road is between these properties, with about a 5-foot width of the farm road on Surface property. He further explains that Surface has had an agreement to use the full width and length of that road for decades, regardless of which side of the property line it passes through, as they do now with Mr. Burkholder. Mr. Nerison asserts that losing access to the entire

length of the farm road will require him to construct a new road 2,250 feet long, and not just replace the approximately 760 foot portion at the northern end of the Surface property. Further, Mr. Nerison points to statements by Mr. Prenguber that imply Surface will not have unrestricted access to the emergency access road, such as this one: *“The Water Bureau will allow Surface Nursery to use the portions of the emergency access road located on Surface Nursery property.”* Mr. Nerison points out this implies the Applicant would allow Surface to use about a five foot width of the road, and not the full length of it. With respect to descriptions of these impacts as *“temporary inconvenience”*, Mr. Nerison contends that: *“Any inconvenience to farmers within EFU lands should disqualify the proposed use from being approved, even if only temporary.”*

79. Mr. Nerison points to Applicant’s reference to his statement indicating he would rather have the temporary gravel road left as it is, but contends the statement lacks context. Mr. Nerison explains that it is not an accepted farm practice to build a gravel road, drive construction equipment on it, and then attempt to return the ground to productive farm land. Mr. Nerison asserts that he does not want a gravel road near his trees, but views leaving it a slightly better option than attempting to dig it up and remove it. In sum, Mr. Nerison argues that the proposed PWB water filtration plant and the proposed emergency access road to serve it are not compatible with the agricultural and ornamental nursery farming practices in the immediate area.
80. Mr. Nerison submitted another October 12, 2023 rebuttal during the second open-record period as a “Collective Nursery Response” developed in partnership with several area nursery farmers with substantial experience in this farming industry, including: Patrick Holt, R & H Nursery, 46 years as a Nurseryman; Jesse Nelson, Hans Nelson & Sons Nursery, 25 years as a Nurseryman; Ryan Marjama, Don Marjama Nursery, 30 years as a Nurseryman; Kurt Clemence, Tree Source, 5 years as a Nurseryman; Jim Ekstrom, Steve Ekstrom & Brandon Schmidt, Ekstrom & Schmidt Nursery, 48, 13, and 18 years as Nurserymen, respectively. This submission is responsive to Applicant’s September 14, 2023 open-record submission [Exhibit 100] and rebuts several assertions made by Applicant. First, the submission rebuts Applicant’s characterization of access to the proposed emergency access road. They contend that the clause in the offered access license that is revocable for “material breach” is fundamentally inconsistent with the terms of the recorded easement expressly constraining use. They point to several accepted farm practices and contend such a license will cause significant changes to accepted farming practices, including: (1) restrictions on parking of equipment or worker transport vehicles; (2) lack of legally recognized access, and; (3) jeopardizing line of credit backed by farm or farm revenue, due to lack of access. They assert that: *“A reasonable farmer would not rely on this consent memorandum for providing permanent, unencumbered access as it can be revoked at any time.”*
81. Mr. Nerison’s October 12, 2023 Collective Nursery Response points to issues raised previously concerning stormwater run-off from the opposed emergency access road, noting it will be built to accommodate 75,000 pound emergency response vehicles. They also refute applicant’s assertions concerning AEZ zones and spray practices, adding construction workers, maintenance workers, and utility workers within existing farmer spray buffer zones impacts these practices. They refute assertions concerning the soils remediation plan, contending there is no clear language concerning where the soil will be stored or how the

farmland will be remediated. They point to the Agriculture Compatibility Report prepared by Globalwise, dispute its findings, and contend that the actual farmers have their experience and opinions should be given more weight than those of Applicant's consultant, who they assert has no practical nursery experience. Nevertheless, they point out that the Applicant acknowledges the necessity of unimpeded use of the farm road, whereas Globalwise's responses limit use of the proposed emergency access road to those portions located on Appellant's own property.

82. Mr. Nerison's October 12, 2023 Collective Nursery Response includes as "Appendix A" a copy of a September 5, 2023 submission to Mr. Rappleyea, Multnomah County Hearings Officer, regarding Case File #T3-2022-16220 PWB Land Use Application for Filtration Plant & Pipes, responsive to submissions by Applicant concerning farming practices, effects of that facility on farming practices, and discussion concerning impacts to farming practices and costs. The materials in "Appendix A" are not responsive to materials submitted by Applicant during the first open-record period, as required for materials submitted during this second open-record period, and therefore not considered part of the record. [Exhibit 107]

Third Open Record Period for Applicant's Final Written Statement [Exhibit 109]

83. Mr. Hultberg submitted a final written statement on behalf of the Applicant during the third two-week open-record period ending 4:00 pm October 26, 2023. Mr. Hultberg points to the requirement by Gresham Fire and Emergency Services for the proposed emergency access road as a secondary access in order to provide emergency services to the PWB water filtration plant. Mr. Hultberg notes that the proposed emergency access road will extend from the water filtration plan to Bluff Road in Clackamas County, and is proposed to be located in the Exclusive Farm Use (EFU) zone. He notes that because the proposed emergency access road is a required component of the PWB water filtration plant, the road is also a "utility facility necessary for public service" which is an allowed use in Clackamas County's EFU zone.

C. FINDINGS AND DISCUSSION

This matter involves the appeal of a Planning Director decision partially approving with conditions a land use application to construct an emergency access road to serve a proposed water filtration facility in Multnomah County. The application was initially process by the County under ZDO 1307 for a land use permit as a utility facility necessary for public service under the required Type II procedure whereby the Planning Director is the initial decision review authority, and the Hearings Officer is the appeal review authority.⁶ The Planning Director⁷ partially approved the application subject to conditions and this appeal followed. The evidence presented is reliable, probative and substantial evidence upon which to base a determination in these matters. The appeal discussed below is reviewed subject to the appeal procedures contained in ZDO 1307.13. These procedures provide for de novo review of the application whereby all issues of law and fact are heard anew, and no issue of law or fact decided by the lower-level review authority is binding on the

⁶ See Table 1307-1: Land Use Permits by Procedure Type.

⁷ ZDO 1307.3(B) provides that the Planning Director includes "Any County staff member authorized by the Planning Director to fulfill the responsibilities assigned to the Planning Director by the [ZDO]." County Planner Joy Fields acted in this capacity.

parties in the hearing. The record of the initial proceedings shall, however, be made a part of the record of the appeal. New parties may participate, and any party may present new evidence and legal argument by written or oral testimony.

SECTION II: FINDINGS (Z0036-23-HO Appeal):

The findings below identify the standards and criteria that are relevant to this decision, state the facts relied upon in rendering the decision, and explain the justification for the decision. *These findings and conclusions were reviewed, modified, and/or adopted by the Hearings Officer, with additional discussion, comments, and changes denoted by boldface type in italics and/or in brackets. There are several issues raised in this matter that are reviewed in additional detail within the relevant sections discussed below. However, there are issues raised by Appellant and others that are not relevant approval criteria, including Appellant's first reason for appeal. In the original appeal submitted to the County, Appellant asserts that the emergency access road requirement could be accommodated on lands that are not zoned EFU by simply locating the PWB water filtration plant facility inside the Metro Urban Growth Boundary. Ms. Richter points to at least one alternative site (Powell Butte, within the City of Portland) that could accommodate the PWB water filtration plant facility as an alternative location. Assuming this is true, however, Applicant points out that the siting for the PWB water filtration plant facility in Multnomah County is zoned MUA-20, which is not an EFU zone. Applicant notes that ORS 215.275(2)'s requirement that reasonable alternatives be considered only applies to property located within the EFU zone, and therefore doesn't apply. Applicant cites case law authority that land use approval criteria that apply in the zone crossed by an accessory use do not by extension also apply to the primary use located in a different zone. I have reviewed this case law and agree that the PWB water filtration plant facility's siting is not subject to these same standards. Here, it is only the siting of the emergency access road (also a utility facility as it is a required component of the PWB water filtration plant facility) that is subject to this reasonable alternatives analysis.*

1. PROJECT OVERVIEW

The Applicant is proposing to construct an emergency access road located on the three subject properties. The site is south of the proposed filtration facility located in Multnomah County. The intent is to provide adequate fire access to the utility facility. The emergency access road includes a water supply line, fire hydrants spaced every 1000 feet as required by the Gresham Fire Department, and a fiber optic cable. While the emergency access road is not in itself a utility facility, it is considered an accessory use of a utility facility and is thus subject to a Type II land use review for a utility facility pursuant to Section 1307 of the Zoning and Development Ordinance (ZDO).

While the narrative provided in the application was for the permanent emergency access road only, the application appendices (see, in particular, Section 2.0 of the agricultural compatibility study in Appendix C) provided information that indicated that the project involved added width for temporary construction easements adjacent to the proposed permanent easement. The degree to which this added width is needed for construction of the emergency access road, as opposed to accommodating construction traffic for the proposed filtration plant, is unclear from the submitted application. In addition, the Applicant proposes a temporary construction access road within a temporary easement that diverges from the

proposed permanent emergency access road near the southern end and crosses the EFU zoned site to intersect Bluff Road west of the proposed permanent emergency access point. The intent is for traffic associated with construction of the water filtration plant to use this alternate access point/road for the estimated 5-year construction period.

2. ZDO SECTION 1307: PROCEDURES

Section 1307 establishes procedures applicable to various types of land use applications. To a large degree, this section is instructive to the County, providing a roadmap for proper processing of applications. In this case, however, Section 1307 presents a substantive issue that must be addressed.

Subsection 1307.07:

- A. *Initiation of Applications: Type I, II, II-E, and III land use permit applications may be initiated by:*
1. *The owner of the subject property;*
 2. *The contract purchaser of the subject property, if the application is accompanied by proof of the purchaser's status as such;*
 3. *The agent of the owner or contract purchaser of the subject property, if the application is duly authorized in writing by the owner or the contract purchaser, and accompanied by proof of the agent's authority; or*
 4. *If the application is for Comprehensive Plan designation or zoning of a Historic District or Historic Corridor, the owners or contract purchasers of at least 60 percent of the property within the area to be so designated or zoned.*
- C. *Application Submittal: Type I, II, II-E, and III land use permit applications are subject to the following submittal requirements:*
1. *The following shall be submitted for an application to be complete:*
 - (a) *A completed application form, such form to be prescribed by the Planning Director, and containing, at a minimum, the following information:*
 - (vii) *Signature(s) of the Applicant(s) and all owners or all contract purchasers of the subject property, or the duly authorized representative(s) thereof, authorizing the filing of the application.*

Staff Finding: ZDO 202 defines owner, as follows:

Person or persons holding fee title to a parcel, lot or tract of land, except in those instances when the land is being sold on contract, the contract purchaser shall be deemed the owner.

The Applicant is the Portland Water Bureau, a bureau of the City of Portland. Clearly they are not an “owner” of the subject property as defined by ZDO 202. The records of the Office of Assessment and Taxation demonstrate that tax lots 100 and 200 are owned in fee title by Surface Family Trust, Debra M. Surface, Trustee, and tax lot 4800 is owned in fee title by Nathan and Brittany Burkholder.

When the application was initially deemed complete, all of the property owners had signed the application form, thereby authorizing the filing of the land use application and properly “initiating” the application. Subsequently, however, all of the owners withdrew their

authorizations. Letters to that effect were received from Debra Surface on March 9, 2023, and from Nathan and Brittany Burkholder on March 27, 2023.

By letter dated May 24, 2023, legal counsel for the Applicant notes that the Applicant has the power of eminent domain and is “initiating the condemnation process by serving 40-day statutory offers on the property owners, which is a condition precedent to filing a condemnation action.” Citing an Oregon Attorney General opinion and case law, they argue that the County’s zoning code cannot effectively nullify state condemnation statutes by preventing the Applicant from obtaining land use approval when such approval is needed to demonstrate the public purpose that will allow it to implement its condemnation authority. After consulting with the Office of County Counsel, staff concurs and incorporates the Applicant’s arguments as their own. As agreed to by the Applicant, a condition of approval will require that the Applicant provide proof of the entry of the Orders of Immediate Possession prior to any construction activities commencing on the subject property. **This criterion is met as conditioned.**

Hearings Officer: The Hearings Officer concurs in the above staff analysis and findings, adopting a related condition of approval. I reviewed the authority cited by Applicant and staff, find that the analysis is correct, and adopt the related condition.

3. ZDO SECTION 401 EXCLUSIVE FARM USE DISTRICT (EFU):

The subject property is zoned EFU and thus Section 401 is applicable pursuant to ZDO 401.02.

TABLE 401-1: PERMITTED USES IN THE EFU DISTRICT

Staff Finding: Table 401-1 lists those uses permitted in the EFU zone. This application for an emergency access road has been filed under the category of “utility facility necessary for public service”, which is identified as being subject to review as a Type II land use application. Although the emergency access road itself is not a utility facility, it is planned to provide emergency access to a proposed water filtration plant in Multnomah County. A secondary emergency access is required to satisfy fire code requirements for the proposed filtration plant.

Oregon Administrative Rules (OAR) 660-012-0065(3), in relevant part, provides:

(3) The following transportation improvements are consistent with Goals 3, 4, 11, and 14 subject to the requirements of this rule:

(a) Accessory transportation improvements for a use that is allowed or conditionally allowed by ORS 215.213, 215.283 or OAR chapter 660, division 6 (Forest Lands);

OAR 660-012-0065(4) provides:

(4) Accessory transportation improvements required as a condition of development listed in subsection (3)(a) of this rule shall be subject to the same procedures, standards and requirements applicable to the use to which they are accessory.

A utility facility necessary for public service, a category which includes a drinking water filtration plant, is conditionally allowed by ORS 215.283(1)(c). Therefore, the emergency access road, as an accessory transportation improvement, is subject to the same procedures, standards and requirements as would be applicable to the water filtration plant.

The Applicant has not addressed the criteria applicable to a “utility facility necessary for public service” for the temporary construction easements, either the additional width parallel to the permanent emergency access road easement or the temporary construction road that crosses tax lot 200 to intersect Bluff Rd west of the proposed permanent emergency access point (“the temporary construction road”). It is not, in fact, entirely clear whether the temporary construction road was actually intended to be part of the Applicant’s proposal under this application. However, because it is included in some of the appendices that are part of the application and because, after questions from staff, the Applicant addressed it in a supplemental letter and follow-up email, staff has addressed it in this decision.

The Applicant’s primary contention is that the temporary construction easements adjacent to the emergency access road, as well as the temporary construction road, are not subject to land use regulation. (See the letter from the Applicant’s attorney dated June 15, 2023, and a follow-up email from the Applicant’s land use consultant dated June 23, 2023.) The Applicant cites *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011) for the proposition that “temporary construction activity is not a ‘use in itself [governed by the land use regulations], but rather an accessory function that is necessary to construct the authorized use.” The Applicant further argues that “[t]his is consistent with the fact that virtually every use authorized by a land use decision requires some construction activities – but the fact that construction activities are necessary does not convert the construction activities into the ‘authorized use’ itself.”

Staff concurs that construction activities are a necessary prerequisite to implementing many approved uses of land and often are not subject to land use review. If, for example, a land use approval is issued to construct a dwelling on EFU land, the construction activities associated with implementing that approval (contractor traffic, staging of building materials, framing, roofing, etc.) do not themselves require land use approval. They are simply necessary steps to implement the approved land use. However, those activities are qualitatively different than constructing new improvements to serve construction activities, particularly when those improvements involve alterations to land in the EFU zone, where nonfarm uses are heavily regulated.

In *Citizens Against LNG*, the use at issue was a natural gas line in a Statewide Planning Goal 4-regulated forest zone where state law limited the use to a 50-foot-wide easement. In order to construct the allowed land use within the permanent easement, an additional 22.5 feet of temporary easement on either side was needed to accommodate construction-related activities along the permanent easement.

In the present case, there are two different construction-related issues in play. First, there is the construction of the emergency access road. To the extent that additional width along the permanent access easement is needed, in the form of a temporary construction easement, to accommodate required activities associated with the construction of the emergency access

road, *Citizens Against LNG* is on point. It follows that if the emergency access road is found to comply with the required land use approval criteria, related construction activities adjacent to the permanent easement are allowed.

Second, there is the construction of the filtration plant itself—construction that is anticipated to last five years and generate considerable traffic from construction workers, materials delivery, and materials removal. The temporary construction road is intended to accommodate that traffic. Staff finds that the construction of a road, even if that road will in part follow an existing dirt farm road, is a regulated use in the EFU District, constituting an “accessory transportation improvement” under OAR 660-012-0065, and must be evaluated under the standards for a utility facility necessary for public service.

As accessory transportation improvements, the proposed access roads may only be constructed if the water filtration plant in Multnomah County receives final land use approval. A condition of approval will be applied to that effect for the emergency access road and could be applied for the temporary construction road if it were approved.

401.05(G)

2. *A utility facility necessary for public service may be established as provided in OAR 660-033-0130(16)(a) and ORS 215.275 and 215.276, or, if the utility facility is an associated transmission line, as provided in OAR 660-033-0130(16)(b) and ORS 215.274 and 215.276*

OAR 660-033-0130(16)(a)

A utility facility established under ORS 215.213(1)(c) or 215.283(1)(c) is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service. To demonstrate that a utility facility is necessary, an Applicant must:

(A) Show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:

- (i) Technical and engineering feasibility;*
- (ii) The proposed facility is locationally-dependent. A utility facility is locationally-dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;*
- (iii) Lack of available urban and nonresource lands;*
- (iv) Availability of existing rights of way;*
- (v) Public health and safety; and*
- (vi) Other requirements of state and federal agencies.*

(B) Costs associated with any of the factors listed in paragraph (a) of this subsection may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering

alternative locations for substantially similar utility facilities and the siting of utility facilities that are not substantially similar.

Staff Finding: The Applicant provided evidence that the proposed emergency access for the water filtration plant is locationally-dependent because the proposed location limits impact to lands zoned Exclusive Farm Use (EFU), is direct, and avoids river and stream conservation areas and wetlands that are located on lands not zoned Exclusive Farm Use (EFU) to the west of the proposed utility facility. The emergency access requirement cannot be satisfied on other lands that are not zoned Exclusive Farm Use (EFU) without significantly impacting wetlands or having multiple turns, resulting in indirect and slower access during emergencies. Areas to the east of the filtration facility are also zoned EFU and have steep topography that would not meet the maximum 10% slope required by the Gresham Fire Department.

Although there is no *public* right of way connecting the proposed filtration facility site to Bluff Road, the Applicant proposes to minimize disturbance to agricultural lands by co-locating the proposed 20- to 26-foot-wide roadway “on that existing access road serving another utility facility (solar farm) and farm (nursery).” As shown in the aerial images provided and statements in the original application and supplemental material submitted on June 15, 2023, the “access road follows the alignment of an existing dirt farm road located at the edge of a field used for nursery stock as it exits the filtration facility site. It then crosses onto an existing road on the neighboring solar farm that is not devoted to farm use.”

In addition, the Applicant identifies that the proposed emergency access road is needed to protect public health and safety by providing the emergency access required by the Gresham Fire Department to the filtration facility proposed in Multnomah County, a facility that is needed to “continue providing reliable, safe drinking water to nearly one million people.” The analysis for the emergency road location involved separating the emergency access from Carpenter Lane by 1,630 feet to reduce the likelihood that an event causing compromised access using Carpenter would also compromise the emergency access.

The Applicant acknowledges that cost of constructing the emergency access road was considered; however, as discussed above, several other factors were determinative in selecting the preferred location.

In describing the temporary construction road, the Applicant states, “Prior to reaching SE Bluff Road, the temporary construction route follows an existing farm road that allows construction traffic to avoid the intersection of SE Bluff Road, SE Proctor Road, and SE 362nd Road.” In addition, the all-weather “gravel surface will also support the construction vehicles and will minimize dust generated by construction trucks.” Based on information provided by County Development Engineering, having the construction traffic access west of the existing Bluff/Proctor/362nd intersection provides a safety benefit over using the proposed emergency access road, and appropriate intersection spacing is met. This may support a finding that the temporary construction road is locationally dependent and contributes to public safety. However, the Applicant did not analyze OAR 660-033-0130(16)(a) for the proposed temporary construction road, relying instead on an argument that the access is not subject to land use review. That argument has been discussed and rejected above.

The record does not demonstrate that a secondary construction access (i.e., in addition to the proposed site access in Multnomah County) is required. If a secondary access is required, the record does not demonstrate that it must be developed on EFU land. Because construction traffic is not responding to life threatening emergencies, potentially it can access the site in a more indirect way than emergency vehicles. In summary, the Applicant has not sustained their burden of proof for a finding of compliance.

Staff Finding: These criteria are met for the permanent emergency access road and not met for the temporary construction road.

Hearings Officer:The Hearings Officer concurs in the staff finding and analysis with respect to the permanent emergency access road, but only partly with staff findings and analysis concerning the temporary construction road. Specifically, the analysis above that links the temporary construction road to OAR 660-033-0130(16)(a) analysis is unclear. In my view, the use of the temporary construction road is related to the allowed primary use of the emergency access road. The proposed temporary construction road is not related to the PWB water filtration plant, and may not be used for construction purposes related to the PWB water filtration plant. However, the proposed temporary construction road is related to and necessary to the construction of the primary underlying land use: the emergency access road.

With respect to the siting of the emergency access road, Appellant and several commentators assert that the Applicant failed to consider reasonable alternatives and/or inappropriately selected the proposal site here based upon the lower cost. They suggest an emergency access road could be sited along Dodge Park Blvd. However, the Applicant submitted a geotechnical engineering analysis by Rhino One (Exhibit 2 at p. 64) concluding that any access to the northeast along Dodge Park Blvd. is not feasible for technical and engineering reasons, citing steep slopes of approximately 40%, geologic, and seismic hazards, challenging constructability requirements, and cited slope stability analysis, geotechnical borings, soil characteristics, and historic landslide records noting a history of shallow slope failures. The Rhino One study considered two possible sub-alternatives for routing an access (straight down the slope, and more transverse to the slope) and stated: The GTAC concluded that these risks cannot be mitigated with any reasonable certainty and should be avoided due to technical and engineering feasibility factors.”

The Applicant also evaluated alternate access in the southwest corner of the site from SE Cottrell Road. The Applicant submitted Technical Memorandum by Stantec engineering noting that:

“Wetlands and waters are identified in and along Johnson Creek and its tributaries, extending across all land located between the site and public roads. Therefore, any emergency access road to the west of the site must cross wetlands or waters. Such road will trigger a Joint Permit Application (JPA) process that must address design alternatives to avoid and minimize impacts to Johnson Creek and associated wetlands. Alternatives that avoid any impact to wetlands and waters are available to the south, including the proposed access alternative to Bluff Road.”

The Applicant also noted that there is no reasonably direct route route for emergency vehicles between the site and Cottrell Road. The Applicant asserts that the proposed route provides a direct connection south to Bluff Road in Clackamas County using the existing solar/farm access road through EFU land. The Applicant also notes that this farm access road is located outside of the Clackamas County River and Stream Conservation Areas (RSCAs) and will have no impact to natural resource lands.

As discussed above, although the assertions by Appellant and others that the Applicant could avoid these EFU lands altogether by the simple alternative of selecting another site for the PWB water filtration facility are true, the Applicant is not required to consider such alternatives.

With respect to the temporary construction easement, Appellant notes that land use law regulates the proposed use of the land after construction and not the construction itself, quoting LUBA's holding that temporary construction activity is not a "use in itself [governed by the land use regulations], but rather an accessory function that is necessary to construct the authorized use." Citizens Against LNG v. Coos County, 63 Or LUBA 162 (2011). In this proposal, the authorized use is the permanent emergency access road and not the construction activity along the road within the required temporary construction easement. Although the facts in the LNG case involved a temporary construction easement alongside the pipeline being built, the principle is the same: the temporary easement is necessary for the construction of the allowed use.

Here, the temporary construction easement includes an access that will route the temporary construction traffic away from the intersection of SE Bluff Road, SE Proctor Road, and SE 362nd Road, where the existing farm access road currently exits next to the Oregon Trail Academy School. As noted in findings by Mr. Kent, County Development Engineering, the location of the proposed emergency access road at the interseccion of SE Bluff Road/SE Proctor Road/SE 362nd Avenue does not meet minimum spacing for a rural minor arterial roadway, finding the location acceptable only as a gated emergency access with limited use. Further, in making his findings, Mr. Kent expressly discussed the proposed temporary construction access road located approximately 310 feet west of the proposed emergency access road, noting: "Construction Engineering has worked with the applicant on a suitable location for a construction access, providing adequate separation from the SE Bluff Road/SE Proctor Road/SE 362nd Avenue intersection." In addition, Mr. Kent cited the Applicant's Traffic Impact Analysis by Global Transportation Engineering, dated June 2, 2023, and its findings that the temporary construction access and nearby intersection will perform within County mobility standards, and will have adequate intersection sight distance.

Supporting the many safety concerns of the community I also note that the intersection of SE Bluff Road/SE Proctor Road/SE 362nd Avenue is described in the June 30, 2023 Technical Memorandum and Traffic Impact Analysis review by Michael Ard, PE, of Ard Engineering, who stated: "The crash rate at this intersection was far above the 90th percentile crash rate for any intersection classification in Oregon." Even if my analysis of the LNG holding is incorrect, I also find that: routing the temporary construction

traffic away from this intersection is required due to these several public health and safety factors, and there are no reasonable alternatives. As discussed, these criteria are met for the permanent emergency access road and, with conditions proposed by Mr. Kent, can be met for the temporary construction road.

(C) The owner of a utility facility approved under this section shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this paragraph shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.

(D) The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on surrounding farmlands.

Staff Finding: The Applicant provided evidence that the farmland disturbed by the temporary construction road and adjacent to the proposed emergency access road will be restored, except to the extent that the temporary construction road is converted to farm use by the owner of tax lots 100 and 200 (currently in nursery use by Surface Nursery). The Soil Restoration Plan provided by the Applicant was intended to be agreed upon between the Surface Nursery manager and the Portland Water Bureau, with the indication that the nursery would use a portion of the temporary construction road as a farm road. Although this would result in more than 0.6 acre being removed from farm production, farm roads are allowed outright in the EFU zone. With the owner of the Surface Nursery property having revoked authorization for the land use application, Staff is unsure if the conversion of the temporary construction road to farm use is still planned. The Soil Restoration Plan identifies how soil compaction will be ameliorated after the construction of the roads and after the construction of the filtration facility is complete. The Applicant identified existing farm uses and improvements, including crops, fences, irrigation systems, and drainage facilities will be returned to pre-construction conditions. A condition of approval will require the Applicant to comply with the Soil Restoration Plan, except to the extent that any of the temporary construction easement adjacent to the emergency access road is converted to farm road use.

Based upon the submitted application materials, the permanent emergency access will receive minimal use, thereby preventing impacts to surrounding lands devoted to farm use. In their analysis of the potential impact to farm use, the Applicant states, “The use of the emergency access road by the Water Bureau will be minimal. A reasonable estimate is fewer than 20 times per year.” The Applicant further states that the emergency access road “will only be used under emergency conditions or when Carpenter Lane is not accessible”.

Despite arguing that the temporary construction road is not subject to land use review, the Applicant has provided an analysis of the farm impacts potentially generated by it (see letter dated June 15, 2023) and has agreed to conditions of approval intended to mitigate any

potential impacts. These conditions are equally warranted during construction of the emergency access road as they would be for filtration plant construction traffic.

Staff Finding: As conditioned, these criteria are met for the emergency access road. By condition, these criteria could be met for the temporary construction road.

Hearings Officer: I concur with this staff analysis and these findings. This proposal affects EFU properties in two distinct ways: first, by taking property the Applicant has reduced the amount of available land. This taking, however, is not among the effects the Farm Impacts Test contemplated here, and cannot be mitigated or minimized. Rather, as with any taking, the property owner is compensated directly for the loss. That valuation is not part of this hearing. Second, the proposed use must be analyzed under ORS 215.275(5), which states:

“The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting under ORS 215.213 (Uses permitted in exclusive farm use zones in counties that adopted marginal lands system prior to 1993) (1)(c)(A) or 215.283 (Uses permitted in exclusive farm use zones in nonmarginal lands counties) (1)(c)(A) to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farmlands.

Applicant correctly states the required analysis:

“Oregon law recognizes that utility facilities necessary for public service may impact farm practices and the costs of accepted farming practices. Friends of Parrett Mt, 336 Or at 115. “Thus, [ORS 215.275(5)] assumes that some impact on EFU land is permissible.” In Friends of Parrett Mt., the supreme court specifically rejected an interpretation of ORS 215.275(5) which would have construed “mitigation” to mandate avoidance of the impact. Id. Instead, the court held that when construing the terms “mitigate” and “minimize” “together, they demonstrate that ORS 215.275(5) requires the general reduction in the intensity and frequency of an impact, not, as Farm Bureau petitioners suggest, the absolute avoidance or elimination.” Under the ORS 215.296(1) “farm impacts” test, a “‘significant’ change or increase in cost is one that will have an important influence or effect on the farm. . . if the applicant cannot prove both of those elements without conditions of approval, the local government must consider whether, with conditions of approval, the applicant will meet the farm impacts test.” Stop the Dump Coal. v. Yamhill County, 364 Or at 458. While the relevant standards of ORS 215.296(1) and 215.275(5) are similar, they are not the same. Under ORS 215.296(1), applicants must demonstrate a lack of significant impact, and, if they are unable to do so, the local government must determine whether conditions would avoid significant impacts. On the other hand, under ORS 215.275(5), the local government must first find that the use will cause significant impacts, and if it so finds, only then is it required to impose conditions to “minimize and mitigate.” “We agree with petitioner that ORS 215.275(5) requires the county to consider whether the imposition of clear and objective conditions on the facility would prevent a significant change in accepted farm practices or prevent a significant increase in the cost of farm practices, and to approve the proposed facility with those

clear and objective conditions if the conditions would minimize or mitigate the impacts.” Falcon Heights Water and Sewer Dist. v. Klamath County, 64 Or LUBA 390, 400 (2011).” [Exhibit 109]

Appellant asserts several impacts to farming practices, and contends these impacts result in significant changes and/or increased costs. First, Appellant points to use of the farm road itself, contending that the conditions in the County’s decision approving this application fail to require unrestricted access across and along the permanent and temporary construction easement for the emergency access. Mr. Nerison described the many uses Appellant makes of the current farm road, including transporting equipment and farm workers to his own fields, and across the farm road to the neighboring fields on the other side of the farm road that he leases from the neighboring property owners, the Burkholders, who share the farm access road with him. Without access to the farm road, therefore, Appellant would be required to find some alternative means of obtaining access to the Burkholder fields. Appellant disputes the adequacy of the license agreement offered by Applicant, noting that it required prior written consent to use the proposed emergency access road, appeared to contravene requirements of the Sandy Fire Department that the: “Secondary emergency access road off of Bluff Rd. is to be used for emergency services only by emergency services.... The Fire Department has concerns with the use of the secondary emergency access road by non-emergency vehicles entering and exiting at the intersection of Bluff Rd. and Proctor Rd.” Appellant also expressed concerns with damage to the road by his equipment while crossing it, increased dust from a gravel as opposed to a dirt road, fumes/air emissions and contaminants from PWB equipment, potential stormwater runoff, or discharge from PWB supply pipeline, noise, security, worker safety/interference with his spraying and irrigation, restoration of disturbed farm land within the area of the temporary construction easement. Appellant contends that the effect of these cumulative impacts significantly impact the Surface Nursery farm.

I reviewed the responses to Appellant’s concerns by Applicant’s team of consultants and experts, including: Bruce Prenguber, M.S., Agricultural Economist, Allan Felsot, Professor, WSU Dept. of Entomology, Dr. Denny Mengel, Certified Professional Soil Scientist, Spencer Adams, P.E. (Jacobs), Roy R. Martinez, Construction Engineering Inspection Manager for PWB and Certified Inspection Sediment and Erosion Control, State of Oregon, Mark Graham, P.E., Project Manager of Stantec, Rafael Gaeta, P.E., of Emerio Design, and Roy Hankins, P.E. of Emerio Design, Roy Hankins, P.E. of Emerio Design, Tom Bailey, P.E. of Stantec. Each of these individuals reviewed the contentions by Mr. Nerison, Ms. Richter, and others, providing responses reproduced above concluding there would be little or no impact, that I found persuasive. I noted, however, as did Appellant/Ms. Richter, that while each of these factors may result in little or no individual impact, the impact becomes cumulative the more PWB uses the emergency access road. Ms. Richter and Mr. Nerison point out that the Applicant’s narrative consistently refers to anticipating that the emergency access road will be used fewer than 20 times per year.

Ms. Richter suggested a condition limiting use of the emergency access road to 20 times per year, consistent with the analysis performed by Appellant’s team of experts leading to their conclusions of little or no impact. Mr. Nerison essentially points to unforeseen

circumstances, and the requirement that the emergency use itself be unrestricted. To balance these needs while imposing the restriction Ms. Richter and her client are seeking, I find the following additional condition required to ensure there will be no cumulative effects significantly impacting Surface Nursery's farm or other uses potentially impacted by the emergency access road on EFU land:

“Use of the emergency access road by Applicant for purposes other than emergency access shall be consistent with the description in the Applicant's agriculture impact analysis and limited to no more than 20 trips per year. Notwithstanding, use of the emergency access road by Applicant at the request of an adjacent or affected property owner, such as a request for maintenance, repair, or similar, shall not count towards the 20 yearly trips.”

With respect to the license to use the emergency access road, however, Mr. Nerison and Ms. Richter make a compelling argument that Surface Nursery will be forced to make significant changes to its farming practices and/or incur increased costs without use of the access road being seized by the Applicant, particularly with respect to accessing the fields on the other side. I considered Appellant/Ms. Richter's argument that the revocable license offered by Applicant is insufficient to mitigate the impact. I noted (as did Mr. Hultberg) that it appears Appellant only has an informal agreement (revocable license) to use the portions of the access road on the Burkholder property now. I also noted (as did Appellant/Ms. Richter) that the license originally offered by PWB required prior written consent, and was revocable upon “material breach” without defining the term. In his Final Written Statement, Mr. Nerison suggested a condition requiring language making the license recordable and only revocable upon a finding of a violation of the terms of the easement by a court of competent jurisdiction. I find this proposed condition sufficient to mitigate this potential impact.

E) Utility facilities necessary for public service may include on-site and off-site facilities for temporary workforce housing for workers constructing a utility facility. Such facilities must be removed or converted to an allowed use under oar 660-033-0130(19) or other statute or rule when project construction is complete. Off-site facilities allowed under this paragraph are subject to 660-033-0130(5). Temporary workforce housing facilities not included in the initial approval may be considered through a minor amendment request. A minor amendment request shall have no effect on the original approval.

(F) In addition to the provisions of paragraphs (a) to (d) of this subsection, the establishment or extension of a sewer system as defined by oar 660-011-0060(1)(f) in an exclusive farm use zone shall be subject to the provisions of oar 660-011-0060.

(G) The provisions of paragraphs (a) to (d) of this subsection do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the federal energy regulatory commission.

Staff Finding: The proposal does not include temporary workforce housing, a sewer system, or natural gas pipelines. **These criteria are not applicable.**

Hearings Officer: *The Hearings Officer concurs in this staff finding.*

ORS 215.275

215.275 Utility facilities necessary for public service; criteria; rules; mitigating impact of facility. (1) *A utility facility established under ORS 215.213 (1)(c)(A) or 215.283 (1)(c)(A) is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service.*

(2) *To demonstrate that a utility facility is necessary, an Applicant for approval under ORS 215.213 (1)(c)(A) or 215.283 (1)(c)(A) must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:*

(a) *Technical and engineering feasibility;*

(b) *The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;*

(c) *Lack of available urban and nonresource lands;*

(d) *Availability of existing rights of way;*

(e) *Public health and safety; and*

(f) *Other requirements of state or federal agencies.*

(3) *Costs associated with any of the factors listed in subsection (2) of this section may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities. The Land Conservation and Development Commission shall determine by rule how land costs may be considered when evaluating the siting of utility facilities that are not substantially similar.*

(4) *The owner of a utility facility approved under ORS 215.213 (1)(c)(A) or 215.283 (1)(c)(A) shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this section shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.*

(5) *The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting under ORS 215.213 (1)(c)(A) or 215.283 (1)(c)(A) to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farmlands.*

(6) *The provisions of subsections (2) to (5) of this section do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission. [1999 c.816 §3; 2009 c.850 §9; 2013 c.242 §5]*

Staff Finding: *These criteria are substantively the same as those in OAR 660-033-0130(16)(a), which are addressed above, and do not require a separate finding.*

Hearings Officer: *The Hearings Officer concurs in this staff finding.*

ORS 215.276

ORS 215.276 Required consultation for transmission lines to be located on high-value farmland. (1) *As used in this section:*

- (a) *“Consult” means to make an effort to contact for purpose of notifying the record owner of the opportunity to meet.*
 - (b) *“High-value farmland” has the meaning given that term in ORS 195.300.*
 - (c) *“Transmission line” means a linear utility facility by which a utility provider transfers the utility product in bulk from a point of origin or generation, or between transfer stations, to the point at which the utility product is transferred to distribution lines for delivery to end users.*
- (2) *If the criteria described in ORS 215.275 for siting a utility facility on land zoned for exclusive farm use are met for a utility facility that is a transmission line, or if the criteria described in ORS 215.274 for siting an associated transmission line are met, the utility provider shall, after the route is approved by the siting authorities and before construction of the transmission line begins, consult the record owner of high-value farmland in the planned route for the purpose of locating and constructing the transmission line in a manner that minimizes the impact on farming operations on high-value farmland. If the record owner does not respond within two weeks after the first documented effort to consult the record owner, the utility provider shall notify the record owner by certified mail of the opportunity to consult. If the record owner does not respond within two weeks after the certified mail is sent, the utility provider has satisfied the provider’s obligation to consult.*
- (3) *The requirement to consult under this section is in addition to and not in lieu of any other legally required consultation process.*

Staff Finding: No transmission lines are proposed as part of this application. The proposed fiber optic cable and water line are intended to serve only the filtration plant and the fire hydrants adjacent to the emergency access road, respectively. **These criteria are not applicable.**

Hearings Officer: The Hearings Officer concurs in this staff finding.

3. ZDO SECTION 1000 DEVELOPMENT STANDARDS:

ZDO 202 defines “institutional use” and includes “utility facilities” as a type of institutional use. Table 1001-1 identifies the sections within the 1000 series that are applicable to institutional uses. Due to the nature of the proposed development (i.e., access roads only) and its location, many of the 1000 series sections are not applicable to this specific institutional use. Sections that were reviewed as potentially applicable are addressed below:

1002 PROTECTION OF NATURAL FEATURES

Staff Finding: Staff reviewed the application materials, the 2022 aerial imagery of the subject property, and publicly available electronic records of the site, and concurs with the Applicant that the emergency access road will be built in a location that is predominantly an access road for a farm and solar facility and that the adjustment to the road alignment avoids impacts to the wooded area located to the north of the solar facility. No tree removal is

proposed for the siting or construction of the access roads. The proposed access roads are not on, or near, steep slopes, wooded areas, streams/rivers, or significant landforms, and the site is outside the deer and elk winter range. Therefore, none of the natural features regulated by ZDO 1002 will be impacted by the proposed project. **These criteria are not applicable.**

***Hearings Officer:** The Hearings Officer concurs in this staff finding. I did note that a commentator submitted photos and a description of a culvert near the farm road, and a statement asserting the existence of a spring. I do not find evidence of a “natural feature” within the meaning of this section.*

1003 HAZARDS TO SAFETY

Staff Finding: Staff reviewed the application materials along with publicly available electronic records of the site that contain slope and landslide data. The access roads are proposed in an area where the slope is 10% or less. There are no known landslide deposits or mass movement hazards on or adjacent to the proposed site. Therefore, none of the hazards to safety regulated by ZDO 1003 will be impacted by this project. Additionally, having an emergency access road with fire hydrants may reduce fire hazards in the area. **These criteria are not applicable.**

***Hearings Officer:** The Hearings Officer concurs in this staff finding.*

1004 HISTORIC PROTECTION

Staff Finding: Staff reviewed the application materials along with publicly available electronic records of the site and found no evidence of historic resources on the subject properties or on nearby properties. Therefore, known historic resources regulated by ZDO 1004 will not be impacted by this project. **These criteria are not applicable.**

***Hearings Officer:** The Hearings Officer concurs in this staff finding.*

1006 UTILITIES, STREET LIGHTS, WATER SUPPLY, SEWAGE DISPOSAL, SURFACE WATER MANAGEMENT, AND EROSION CONTROL

Staff Finding: The proposed utility facility emergency access road with associated fire hydrants and water line under the road will be served by the Pleasant Home Water District until the Water Bureau facility is constructed. The subject site is in the Sandy-Boring Groundwater Limited Area, and the water district service is required for the hydrants. The Applicant indicates both of the water districts have capacity for this emergency use and provided preliminary statements of feasibility confirming this. No street lights, sanitary sewer service, or onsite wastewater treatment is proposed with this development. The Applicant proposes to “water” the temporary construction road to reduce dust for adjacent farmland. The proposal includes an easement for fiber optic cable and a waterline to serve proposed fire hydrants. No additional utility easements are indicated. **These criteria are met.**

***Hearings Officer:** The Hearings Officer concurs in this staff finding.*

1006.06 SURFACE WATER MANAGEMENT AND EROSION CONTROL

The following surface water management and erosion control standards apply:

- A. Positive drainage and adequate conveyance of surface water shall be provided from roofs, footings, foundations, and other impervious or near-impervious surfaces to an appropriate discharge point.*
- B. The requirements of the surface water management regulatory authority apply. If the County is the surface water management regulatory authority, the surface water management requirements of the Clackamas County Roadway Standards apply.*
- C. Approval of a development shall be granted only if the Applicant provides a preliminary statement of feasibility from the surface water management regulatory authority. The statement shall verify that adequate surface water management, treatment and conveyance is available to serve the development or can be made available through improvements completed by the developer or the system owner.*

Staff Finding: As noted in the application, an existing culvert will be replaced with a culvert that can handle the weight of 75,000 pounds gw. In addition to the narrative, the Applicant provided a Stormwater Drainage Report for the 2,650-foot-long emergency access road that identifies existing and proposed conditions along the proposed route from the Multnomah County border to SE Bluff Road. The Stormwater Drainage Report proposes to meet the water quality, detention, and infiltration requirements by dispersing stormwater from the emergency access road across adjacent farmland and other surrounding undeveloped acreage using Clackamas County Roadway Standards section 420.2. The northern 1,070 feet of the proposed emergency access road drains to the Sandy River Basin while the southern 1,580 feet drains westerly to the Johnson Creek Basin.

Clackamas County Department of Transportation and Development is the surface water management authority for the subject property. Development of the proposed emergency vehicle access and, if approved, the temporary construction access will be required to be in conformance with the rules and regulations of Clackamas County Roadway Standards, Chapter 4. The Applicant has provided a Stormwater Drainage Report by Emerio Design, dated January 20, 2023, that demonstrates that it is feasible to construct the roads in compliance with the County's stormwater standards. Coordination with the Clackamas County Development Engineering staff will ensure the surface water management requirements are met. **As conditioned, these criteria are met for the emergency access road. By condition, these criteria could be met for the temporary construction road.**

Hearings Officer: *The Hearings Officer concurs in this staff finding, adopting the proposed condition. While the Appellant expressed concerns with respect to stormwater drainage from the emergency access road affecting his fields, I noted that the January 20, 2023 Stormwater Drainage Report by Emerio Design concludes that the emergency access road will not alter existing drainage patterns and that runoff will continue to follow existing flow paths across adjacent acreage.*

1007 ROADS AND CONNECTIVITY

Staff Finding: County Development Engineering staff reviewed the submitted application and provided detailed findings and suggested conditions. The following analysis is substantially consistent with that input.

SE Bluff Road is a minor arterial roadway under the jurisdiction of Clackamas County. The proposed emergency access road is located on the north side of the SE Bluff Road/SE Proctor Road/SE 362nd Avenue intersection.

The proposed development is subject to the provisions of Clackamas County Zoning and Development Ordinance (ZDO) Section 1007 pertaining to roads and connectivity and Clackamas County Roadway Standards, Chapter 4 pertaining to surface water management. ZDO Subsection 1007.01 specifies that the location, alignment and capacity of roads are developed consistent with the county Roadway Standards.

A portion of the emergency access road extends from SE Bluff Road north approximately 850 feet, and serves as the access to a recently developed solar power generation facility. The remaining approximately 1,750 feet of the proposed road is currently a dirt farm access road. The Applicant has proposed to improve the emergency access road to include a 20-foot wide gravel road, with 6 feet of additional width around the fire hydrants, located within a 40-foot wide access easement. The Applicant will be required to obtain a Development Permit, as specified in Roadway Standards, Section 130 and 130.4 to construct the emergency access road to minimum county standards, per Roadway Standards Drawing R100.

As noted by the Applicant, the location of the proposed emergency access road at the intersection of SE Bluff Road/SE Proctor Road/SE 362nd Avenue, does not meet minimum access spacing for a rural minor arterial roadway, per Roadway Standards Section 220. However, as proposed by the Applicant as a gated emergency access with limited use, the location is acceptable.

The Applicant's narrative indicates that the purpose of the access road is to meet fire district standards for a second access to the water treatment facility, based on the size of the site and square footage of the proposed buildings. The Applicant also notes that the emergency access road allows for continued operation of the treatment facility if an emergency results in the primary access road, SE Carpenter Lane, not being "reasonably available." The Applicant indicates that under that scenario, vehicle access necessary to continue operations of the water treatment facility, including delivery of chemicals, maintenance vehicles and staff vehicles would occur through the emergency access road onto SE Bluff Road. It is recognized that this would be a rare occurrence, but if access is necessary other than for emergency vehicles from SE Bluff Road, the Applicant will be required to coordinate with Clackamas County on a traffic management plan.

The proposed temporary construction access road is located approximately 310 feet west of the proposed emergency access road, using an existing driveway entrance serving the adjacent farm use. County Engineering has worked with the Applicant on a suitable location for a construction access, providing adequate separation from the SE Bluff Road/SE Proctor Road/SE 362nd Avenue intersection.

The Applicant has provided a Traffic Impact Analysis (TIA) by Global Transportation Engineering, dated June 2, 2023, that evaluates construction traffic for the water treatment facility. A number of roadways and intersections were evaluated, with the majority within Multnomah County, but also including the proposed temporary construction access onto SE Bluff Road. The construction TIA finds that the temporary construction access and nearby intersection will perform within county mobility standards. The TIA also found that the proposed temporary construction access will provide adequate intersection sight distance. County Engineering concurs with the TIA findings.

If the temporary construction road were approved and based on the duration of construction and number of trucks and other vehicle trips using the temporary construction access, there is potential for damage to SE Bluff Road at the approach. Without a paved approach onto SE Bluff Road, damage to the edge of the roadway may occur during construction access. To assure any damage to the roadway caused by construction access is maintained and repaired as necessary to as good or better condition, a minimum \$10,000 financial surety would be required. The Applicant also would be required to control dirt and gravel tracking onto SE Bluff Road. **As conditioned, these criteria are met for the emergency access road. By condition, these criteria could be met for the temporary construction road.**

Hearings Officer: The Hearings Officer concurs in this staff finding, adopting related conditions of approval.

1009 LANDSCAPING

1009.09 Erosion Control

- A. Graded areas shall be re-vegetated with suitable plants to ensure erosion control.
- B. Netting shall be provided, where necessary, on sloped areas while ground cover is being established.

Staff Finding: Staff reviewed the application materials and aerial images that show the subject property predominantly used to access farmland and a solar power generation facility. The primary farm use around the site grows landscape nursery stock. The proposal includes no buildings, no walkways, and no parking facilities, and the EFU District does not have a minimum area required for landscaping as seen in Table 1009-1. Therefore, additional landscaping is not needed or required. The majority of criteria in ZDO 1009 are, therefore, not applicable to the project. However, Subsection 1009.09 applies to the construction of an emergency access road, and the Applicant proposes to comply with those criteria by limiting grading, revegetating graded areas with a seeding mix during the construction period, and reestablishing certain areas for farm use as shown in Soil Restoration Study. **As conditioned, these criteria are met for the emergency access road. By condition, these criteria could be met for the temporary construction road.**

Hearings Officer: The Hearings Officer concurs in this staff finding.

SECTION II: CONDITIONS OF APPROVAL

The conditions listed are necessary to ensure that approval criteria for this land use permit are satisfied. The Clackamas County Land Use and Zoning staff recommended approval of this permit application in part subject to the following conditions, consistent with the County Planning Director's July 5, 2023 decision approving this application in part, reviewed, adopted and/or modified by the Hearings Officer as denoted by boldface type in italics:

1. ***Approval of this land use permit is based on the submitted written narrative and plan(s) filed with the County on January 20, 2023, and the additional documents provided on February 17, 2023; May 24, 2023; June 15, 2023; and June 23, 2023, August 17, 2023 (Exhibit 96); September 14, 2023 (Exhibit 100), October 12, 2023 (Exhibit 104) and the final written argument submitted on October 26, 2023 (Exhibit 109). No work shall occur under this permit other than which is specified within these documents, unless otherwise required or specified in the conditions below. It shall be the responsibility of the property owner(s) to comply with this document(s) and the limitation of any approval resulting from the decision described herein. Temporary construction easements adjacent to the emergency access road are limited to those needed to accommodate construction of the emergency access road. This land use decision neither considers nor authorizes use of the emergency access road (also referred to as "Access Road" or "emergency vehicle access road") by filtration plant construction traffic.***
2. Prior to commencing any construction activities, the Applicant shall provide proof of the entry of Orders of Immediate Possession for the subject property, ***a court order or a recorded easement for the subject property.***
3. Construction activities shall not commence ***until*** the water filtration plant in Multnomah County receives final land use approval ***from Multnomah County.*** ***No construction of the emergency access road may occur during any period of time in which the Multnomah County land use decision is subject to a stay pursuant to OAR 661-010-0068 or is subject to remand or reversal pursuant to OAR 661-010-0071.***
4. ***Prior to, during, and following*** completion of construction of the emergency access road, the Applicant shall comply with the Soil Restoration Plan, except to the extent that any of the temporary construction easement adjacent to the emergency access road is converted to farm road use ***at the direction of the property owner.***
5. During construction of the emergency vehicle access road:
 - a. Vehicle speeds along the access road shall be limited to 10 mph.
 - b. If a precipitation event resulting in 1/10 of an inch of rain has not occurred within a consecutive three-day period, the Applicant shall use water trucks on the access road at least twice daily and more frequently as dictated by surface conditions.
 - c. Water truck passes shall be conducted in a manner that applies enough water to control dust but not to an excess that will cause runoff and erosion.
 - d. All construction vehicles shall comply with City of Portland Clean Air Construction standards.
6. All frontage improvements in, or adjacent to Clackamas County right-of-way, and providing on-site access shall comply with the ***Clackamas County Roadway Standards.***

7. Prior to commencement of site work, a Development Permit shall be obtained from Clackamas County Engineering for the proposed emergency access road.
8. The emergency access road shall be developed subject to the following conditions:
 - a. The emergency access road shall be constructed with a minimum gravel width of 20 feet, per Clackamas County Roadway Standards Drawing R100. The roadway shall support a fire apparatus, per fire district standards.
 - b. A minimum 20-foot wide, paved driveway approach shall be constructed at the intersection with SE Bluff Road, per Roadway Standards Drawing D500.
 - c. Adequate storm drainage facilities shall be provided, per Chapter 4 of the Roadway Standards.
 - d. ***Except for use by the underlying owners and maintenance by the Portland Water Bureau, the emergency access road shall be gated and limited to emergency access only. If an emergency results in closure of the primary access to the water treatment facility from SE Carpenter Lane, resulting in vehicle access necessary to continue operations of the facility using the emergency access road onto SE Bluff Road, the Applicant shall coordinate with Clackamas County DTD on a traffic management plan.***
 - e. ***Use of the emergency access road by Applicant for purposes other than emergency access shall be consistent with the description in the Applicant's agriculture impact analysis and limited to no more than 20 trips per year. Notwithstanding, use of the emergency access road by Applicant at the request of an adjacent or affected property owner, such as a request for maintenance, repair, or similar, shall not count towards the 20 yearly trips.***
9. ***Joint Access Road Use During Construction.***
 - a. ***During construction of the emergency access road, the Applicant shall ensure that at least one farm crossing identified on Ex. 100 at page 397 to the leased fields to the east remains open at all times and that the lessee has access to the crossing through the emergency access road or existing farm roads located on the landowner property.***
 - b. ***Prior to construction, the Applicant shall provide a construction schedule to Surface Nursery, updated weekly throughout construction, which identifies the construction schedule, construction methods to be employed and identifies any portions of emergency access road or adjacent farm road which will be closed, and the duration of any such closure.***
 - c. ***Prior to construction, the Applicant shall provide Surface Nursery with the contact information of the party responsible for construction. After construction is complete, the Applicant shall provide Surface Nursery with contact information of the party responsible for maintenance of the emergency access road.***
 - d. ***During construction of the emergency access road, to maintain use of the farm road by Surface Nursery, the Applicant shall provide flaggers during peak construction times (defined as any time that more than 20 truck trips to the property are expected during any***

day during construction).

10. Pesticide Application

- a. During construction, upon notice from Surface Nursery that it plans to apply pesticides within 150 feet of any construction activity, regardless of whether such construction activity is within a recognized AEZ, the Applicant shall cease construction prior to application, remove all construction workers out of the 150-foot exclusion area until 15 minutes after completion of the pesticide application within such 150-foot area.*
- b. Upon completion of the emergency access road, upon notice from Surface Nursery that it plans to apply pesticides within 150 feet of the emergency access road, the Applicant shall remove all maintenance workers and Water Bureau staff workers out of the 150-foot exclusion area until 15 minutes after completion of the pesticide application within such 150-foot area.*

11. Joint Road Use. The “Sample Memorandum” included at page 402 of Exhibit 100 shall be modified as follows:

- a. It shall be entitled “Memorandum of Easement Use” and be in recordable form.*
- b. If Surface Nursery provides the Water Bureau with a copy of a written and recorded agreement between Surface Nursery and the Burkholders (or their predecessors in interest), with an effective date prior to January 20, 2023 , which grants Surface Nursery the right to use the Joint Use Area, the Water Bureau shall revise the Sample Memorandum identified as Ex. 100 at 403, to include the Joint Use Area as an area of the Access Road to which Surface Nursery shall have the right to use on the same terms and conditions as set forth in the Sample Memorandum. For purposes of this condition, the “Joint Use Area” shall be area of the Access Road located on the Burkholder property directly west of the solar farm as shown on Ex. 100 at 397-398.*
- c. The last sentence of the Sample Memorandum shall include the following: “For purposes of this memorandum, the term ‘material breach’ shall mean that Surface Nursery has been found in violation of the terms of the easement by a court of competent jurisdiction.*

12. The temporary construction entrance onto SE Bluff Road shall be developed subject to the following conditions:

- a. The road shall be constructed to the minimum standards of Drawing R100, no less than 20 feet in width.*
- b. A gravel approach shall be constructed onto SE Bluff Road, per Standard Drawing D400. The minimum driveway width at the approach shall be 20 feet.*
- c. The intersection with SE Bluff Road will be required to provide intersection sight distance of 500 feet to the east (based on 45 MPH), and 610 feet to the west (based on 55 MPH), consistent with Roadway Standards Section 240.*
- d. The applicant shall control dirt and gravel tracking onto SE Bluff Road. The applicant shall provide photo/video evidence of the existing condition of SE Bluff Road at the proposed temporary construction access, prior to initiation of construction. Any damage to*

the public road at or near the construction access as a result of construction traffic will require repairs to as good or better condition. A minimum \$10,000 financial surety shall be provided to assure adequate maintenance and operation of the construction access, and repairs as necessary to return the roadway to as good or better condition.

- e. Adequate storm drainage facilities shall be provided, per Chapter 4 of the Roadway Standards.*

D. DECISION

Based on the findings, discussion, conclusions, and record in this matter, the Hearings Officer APPROVES application Z0036-23 to construct an emergency access road to serve a proposed water filtration facility in Multnomah County, and related temporary construction easements, subject to conditions of approval.

Dated: November 20, 2023



Carl D. Cox
Clackamas County Hearings Officer

ADVISORY NOTES

Advisory notes are not a part of the decision on this land use permit. The items listed below are not conditions of land use approval and are not subject to appeal. They are advisory and informational only but may represent requirements of other agencies/departments. As such, they may be required by these other agencies/departments in order to complete your proposed development.

Sandy Fire District had the following comments:

The scope of this review is typically limited to fire apparatus access and water supply, although the applicant shall comply with all applicable OFC requirements. References, unless otherwise specified, include provisions found in the Metro Code Committee's Fire Code Applications Guide, OFC Chapter 5 and Appendices B, C and D.

Comments regarding the proposed easement to construct a secondary emergency access road.

General Requirements

1. Secondary emergency access road off of Bluff Rd. is to be used for emergency use only by emergency services. For staff, maintenance equipment, and deliveries, the primary access to the facility off of Carpenter Ln. is to be used. The Fire District has concerns with the use of the secondary emergency access road by non-emergency vehicles entering and exiting at the intersection of Bluff Rd. and Proctor Rd.
2. All construction activities shall comply with the applicable Oregon Fire Code and the [Fire Code Application Guide](#).

3. Where fire apparatus access roads or a water supply for fire protection are required to be installed, such protection shall be installed and made serviceable prior to and during the time of construction except where approved alternative methods of protection are provided.
4. A KNOX padlock or KNOX key override switch will be required for any gates crossing the secondary emergency access road. To order a KNOX padlock, or key switch that is keyed for the Sandy Fire District, please visit Sandy Fire's website (<https://www.knoxbox.com/Products> for ordering information.
5. An emergency vehicle access and maintenance agreement shall be deeded and recorded as a condition of approval. A copy of the completed agreement to be provided to the Sandy Fire District.

Fire Apparatus Access

1. The secondary emergency access grades shall not exceed 10 percent. Intersections and turnarounds shall be as level as possible and have a maximum of 5 percent grade with the exception of crowning for water run-off.
2. Fire apparatus access roads shall have an unobstructed driving surface width of not less than 20 feet and an unobstructed vertical clearance of 13 feet 6 inches is to be maintained.
3. The inside turning radius and outside turning radius for fire apparatus access roads shall be not less than 28 feet and 48 feet respectively, measured from the same center point.
4. The installation of security gates or barricades across a fire apparatus access road shall comply with the following:
 - a. Gates to have a minimum unobstructed width of 16-feet, or two 12-foot sections with a center post or island.
 - b. Gates or barricades shall be set back a minimum of 30 feet from the intersecting roadway.
 - c. Gates shall be of the swinging or sliding type. Barricades using cables or similar methods may be approved.
 - d. Construction of gates or barricades shall be of materials that allows manual operation by one person.

Firefighting Water Supplies

1. Fire flow testing of new fire hydrants will be required to determine available fire flow. Testing will be the responsibility of the applicant. Applicant to contact the City of Sandy Public Works for information and requirements and notify the Sandy Fire Marshal prior to fire flow testing.
2. Fire hydrants installed within the Sandy Fire District shall comply with the following requirements:

- a. **Each new fire hydrant installed shall be ordered in an OSHA safety red finish and have a 4-inch non-threaded metal faced hydrant connection with cap installed on the steamer port (4 ½-inch NST x 4-inch Storz Adaptor).**

APPEAL RIGHTS

ZDO 1307.10(F) provides that, with the exception of an application for an Interpretation, the Land Use Hearings Officer's decision constitutes the County's final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules promulgated by LUBA prescribe the period within which any appeal must be filed and the manner in which such appeal must be commenced. Presently, ORS 197.830(9) requires that any appeal to LUBA "shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final." This decision is "final" for purposes of a LUBA appeal as of the date of the decision appearing by my signature.