

1 Petition filed BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 COTTRELL COMMUNITY PLANNING ORGANIZATION,
5 PAT MEYER, RON ROBERTS, KRISTY MCKENZIE,
6 MIKE KOST, RYAN MARJAMA, LAUREN COURTER,
7 and IAN COURTER,
8 *Petitioners,*

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12 MULTNOMAH COUNTY RURAL FIRE
13 PROTECTION DISTRICT NO. 10,
14 and 1000 FRIENDS OF OREGON,
15 *Intervenors-Petitioners,*

16
17 vs.
18

19 MULTNOMAH COUNTY,
20 *Respondent,*

21 and
22
23

24 PORTLAND WATER BUREAU,
25 *Intervenor-Respondent.*

26
27 LUBA No. 2025-043
28

29 FINAL OPINION
30 AND ORDER

31
32 Appeal from Multnomah County.

33
34 Carrie A. Richter filed the petition for review and reply brief and argued
35 on behalf of petitioners. Also on the brief was Bateman Seidel Miner Blomgren
36 Chellis & Gram, PC.

Eve Goldman filed the intervenor-petitioner's brief and reply brief and argued on behalf of intervenor-petitioner 1000 Friends of Oregon.

Carrie A. Richter filed the intervenor-petitioner's brief and reply brief and argued on behalf of intervenor-petitioner Multnomah County Rural Fire Protection District No. 10. Also on the brief was Bateman Seidel Miner Blomgren Chellis & Gram, PC.

June Bradley filed the respondent's brief and argued on behalf of respondent. Also on the brief was Jenny Madkour.

Zoe Lynn Powers filed the intervenor-respondent's briefs and argued on behalf of intervenor-respondent. Also on the brief were Renee France and Radler White Parks & Alexander, LLP.

BASSHAM, Board Member; ZAMUDIO, Board Chair; WILSON, Board Member, participated in the decision.

AFFIRMED 02/11/2026

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

3 Petitioners appeal a hearings officer's decision on remand from LUBA,
4 approving two conditional use permits to construct a regional water filtration
5 facility and related pipelines.

FACTS

7 The proposed water filtration facility is an upgrade to the city's Bull Run
8 water system, which was constructed in the late nineteenth century, carrying
9 water from reservoirs on the Bull Run River via large, gravity-fed conduits.
10 Currently, the Bull Run water system provides drinking water for almost one
11 million people, including a number of smaller cities and rural water districts in
12 the City of Portland metropolitan area.

13 Intervenor-respondent Portland Water Bureau (PWB) purchased the
14 subject 94-acre parcel in 1975. Based on state and federal mandates to upgrade
15 filtration for its water system, in September 2022 PWB filed applications with
16 the county to construct the proposed water filtration facility on the subject
17 property, chosen due to its proximity to the existing conduits and gradients that
18 allow continued gravity-fed delivery. The project includes buried pipelines
19 bringing raw water from existing conduits to the filtration facility and related
20 infrastructure located on the subject property, and finished water pipelines and
21 intertie facilities located down-gradient, which connect back to the existing water
22 system. The new pipelines will be buried along existing rights-of-way, or buried

1 under private property, using boring techniques that do not require trenching. The
2 proposed facility is designed to filter approximately 135 million gallons per day,
3 removing potential disease-causing microorganisms such as cryptosporidium.

4 The subject property is zoned Multiple Use Agriculture-20 (MUA-20), and
5 is part of a larger area that is subject to an exception to Statewide Planning Goal
6 3 (Agricultural Lands). The MUA-20 zone allows a wide range of permitted and
7 conditional uses, including Community Service Uses as conditional uses.
8 Community Service Uses are in fact allowed in all county zones, subject to
9 standards at Multnomah County Code (MCC) 39.7515. PWB argued in its
10 applications, and the hearings officer ultimately concluded, that the proposed
11 facility qualifies as a Community Service Use.

12 The subject property includes approximately 90 acres of high-value farm
13 soils, and until 2021 was used for various commercial agricultural activities,
14 including most recently a commercial nursery operation. The vast majority of the
15 subject property consists of flat, cleared fields, but the northeastern edge includes
16 a strip of an upland forested area, approximately 5.8 acres in size, that is subject
17 to a Significant Environmental Concern (SEC) overlay zone. In addition, the
18 southwestern corner of the property includes a portion of a 200-foot buffer along
19 Johnson Creek that is subject to the SEC overlay zone. The creek itself is located
20 on the adjacent property. Most of this riparian buffer area had previously been
21 cleared for the commercial nursery cropland use, but approximately 0.2 acres of
22 mature riparian trees remain in the southwestern corner.

1 The proposed development plan avoids all SEC-zoned areas, locating the
2 facility on a flat, cleared, 37-acre portion of the property, surrounded by a security
3 fence, that was formerly used as fields for the commercial nursery. To mitigate
4 for trees and vegetation removal necessary to construct the pipelines, PWB
5 proposed that most of the remainder of the 94-acre property, approximately 47.3
6 acres, would be dedicated to wildlife habitat, and planted with thousands of native
7 trees and tens of thousands of shrubs and other vegetation in five distinct habitat
8 areas: a savannah/oak woodland, grassland, wooded and shrubby hedgerows,
9 riparian forest, and upland forest. In addition, 13 linear areas would be planted to
10 provide additional hedgerow function. Other habitat improvements include
11 adding log/brush piles, rock piles, bird and bat boxes, removing English ivy and
12 holly in the upland forest, and removing existing wildlife fencing on the eastern
13 perimeter. PWB also proposed additional off-site mitigation areas on nearby
14 property it owns.

15 Much of the need for mitigation stems from the proposal to bury the
16 finished water line in the right-of-way of Dodge Park Boulevard west of the
17 subject property, for a distance of approximately one mile. Dodge Park
18 Boulevard is designated as a collector road and a freight route. The right-of-way
19 includes a long-established hedgerow that consists of a number of mature trees
20 and shrubbery, totaling approximately 2.9 acres. To protect the pipeline from tree
21 roots, PWB proposed to remove all existing vegetation from the right-of-way,
22 and replant the hedgerow with native shrubs. The pipeline area would be actively

1 maintained to prevent tree growth. With limited exceptions, most of the other
2 proposed raw and finished water pipelines will not require any tree or vegetation
3 removal, or cause post-construction impacts.

4 Much of the soil on the subject property was contaminated with residual
5 pesticide concentrations from the preceding commercial nursery use. PWB
6 proposed to excavate some of the soils on the property to allow construction of
7 the filtration facility, which includes stormwater detention basins. The removed
8 soil would be distributed to landowners in the area, as part of a Department of
9 Environmental Quality (DEQ) beneficial reuse program. The removed soil would
10 be mixed with other soils to vitiate the pesticide contamination. If not reused in
11 this manner, the removed soil would have to be landfilled.

12 The preceding commercial nursery use included no stormwater facilities,
13 allowing stormwater to drain across disturbed soils and into Johnson Creek
14 without flow control or treatment. PWB proposed to construct an extensive
15 stormwater system that collects, detains and treats stormwater from buildings and
16 impervious surfaces to reduce sediment and pollutants, while maintaining
17 discharge rates that are consistent with pre-construction conditions. Johnson
18 Creek is heavily impacted by agricultural runoff in the area, and experiences
19 sediment-loading, as well as thermal-loading during summer heat events. To help
20 reduce thermal-loading in the creek, PWB proposed to purchase and remove
21 Cottrell Pond, an impoundment located 1,000 feet downstream from the

1 southwestern corner of the property, and to restore the natural creek channel and
2 riparian area at the former pond site.

3 On November 29, 2023, the hearings officer approved, with conditions,
4 the conditional use permits for the facility. The 2023 decision was appealed to
5 LUBA. During the appeal, PWB commenced the clearing, grading and
6 construction that was approved in the 2023 decision.

7 On January 22, 2025, LUBA issued a decision that rejected almost all
8 assignments of error directed at the 2023 approval. *Cottrell Community Planning*
9 *Org. v. Multnomah County*, LUBA No 2023-086 (Jan 22, 2025) (*Cottrell I*). The
10 single exception was petitioners' Third Assignment of Error, which argued that
11 the hearings officer had misconstrued MCC 39.7515(B). MCC 39.7515(B)
12 requires a finding that the proposed community service use “[w]ill not adversely
13 affect natural resources.” LUBA rejected the hearings officer’s interpretation that
14 MCC 39.7515(B) requires evaluation only of impacts on significant natural
15 resources within the SEC overlay zones on the property. LUBA remanded,
16 directing the county as follows:

17 “Under a proper construction of MCC 39.7515(B) on remand, the
18 hearings officer should determine whether any of the identified
19 natural resources will be affected by the community service use and
20 must find that the proposed use will not adversely affect those
21 natural resources or explain why the identified natural resources are
22 not subject to the criterion.” *Cottrell I*, LUBA No 2023-086 (slip op
23 at 127).

1 On February 25, 2025, PWB filed a request that the county proceed on
2 remand. The hearings officer conducted a hearing on remand on April 16, 2025,
3 leaving the record open for additional evidence and final argument. On June 23,
4 2025, the hearings officer issued a 278-page final decision, concluding that PWB
5 had demonstrated compliance with MCC 39.7515(B), by avoiding or mitigating
6 adverse impacts on certain natural resources located outside the SEC overlay
7 zones. This appeal followed.

8 **INTRODUCTION**

9 As noted, MCC 39.7515(B) requires a finding that a proposed community
10 service use “[w]ill not adversely affect natural resources.”¹ The parties

¹ MCC 39.7515 provides, in relevant part:

“In approving a Community Service use, the approval authority shall find that the proposal meets the following approval criteria
* * *

“(A) Is consistent with the character of the area;

“(B) Will not adversely affect natural resources;

“(C) The use will not:

“(1) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; nor

“(2) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.

1 profoundly disagree over what those six words mean, and what they require the
2 applicant to demonstrate. As discussed below, MCC 39.7515(B) was adopted in
3 1977 as part of a legislative package of related code and comprehensive plan
4 amendments.

5 On remand, petitioners argued for an expansive interpretation of MCC
6 39.7515(B), such that virtually any natural feature of the property or surrounding
7 properties would be regarded as a “natural resource,” and any impact on those
8 natural features must be viewed as an adverse impact. The hearings officer
9 characterized this proffered interpretation as the “single blade of grass” test.
10 Record 131. The hearings officer adopted a lengthy series of interpretative
11 findings addressing the parties’ arguments regarding MCC 39.7515(B),
12 evaluating the text and context of the criterion, and generally rejected petitioners’

- “(D) Will not require public services other than those existing or programmed for the area;
- “(E) Will be located outside a big game winter habitat area as defined by the Oregon Department of Fish and Wildlife or that agency has certified that the impacts will be acceptable;
- “(F) Will not create hazardous conditions;
- “(G) Will satisfy the applicable policies of the Comprehensive Plan;
- “(H) Will satisfy such other applicable approval criteria as are stated in this Section.”

1 proposed interpretations.² Petitioners' first, second, third and fourth assignments
2 of error challenge the various interpretations of MCC 39.7515(B) adopted by the
3 hearings officer.

4 Petitioners' first assignment of error challenges an alternative
5 interpretation that MCC 39.7515(B) protects only natural resources on adjacent
6 lands, not the subject property. Petitioners' second assignment of error challenges
7 the hearings officer's interpretation that impacts from construction are not part of
8 the community service use, and therefore not subject to evaluation under MCC
9 39.7515(B). The third assignment of error challenges the hearings officer's
10 interpretation limiting the scope of "natural resources" to six types of resources
11 listed in a comprehensive plan policy. The fourth assignment of error challenges
12 the hearings officer's reliance on mitigation to avoid adverse effects under MCC
13 39.7515(B).

14 The issues raised in petitioners' four assignments of error interact and
15 overlap to some extent with those of intervenors-petitioners 1000 Friends of
16 Oregon (1000 Friends) and Multnomah County Rural Fire Protection District No.

² In interpreting the MCC, the hearings officer employed the familiar framework used to interpret statutes described in *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993); *Waste Not of Yamhill County v. Yamhill County*, 305 Or App 436, 457, 471 P3d 769 (2020). Under that framework, the interpreting body considers the text and context and, if helpful, legislative history, in order to identify the governing body's intent. Our review of the hearings officer's code interpretations are guided by the same framework.

1 10 (RFPD10). In organizing this opinion, we attempt to address overlapping
2 issues together. 1000 Friends' first and second assignments of error challenge the
3 hearings officer's conclusions that agricultural lands and soils are not "natural
4 resources" for purposes of MCC 39.7515(B), and that removal of agricultural
5 soils from the property are not evaluated under that criterion, which overlap to
6 some extent with petitioners' third assignment of error. 1000 Friends' third
7 assignment of error focuses on the impacts of facility lighting on wildlife.

8 RFPD10's first assignment of error challenges findings regarding impacts
9 on aquatic habitat. RFPD10's second assignment of error argues that the hearings
10 officer erred in estimating the quantity and quality of pre-construction wildlife
11 habitat. The third assignment of error from RFPD10 challenges the hearings
12 officer's findings regarding mitigation for lost or removed wildlife habitat, which
13 overlaps to some extent with petitioners' fourth assignment of error. RFPD10's
14 fourth assignment of error challenges the findings concluding that no adverse
15 impacts would result from the loss of scenic value provided by wildlife habitat.

16 Complicating resolution of these assignments of error is the fact that the
17 hearings officer adopted a number of alternative findings on a given issue,
18 sometimes multiple alternative findings. Sometimes an assignment of error
19 challenges a primary finding on a certain issue, while a different assignment of
20 error challenges an alternative finding on the same issue. The county and PWB
21 argue that where we affirm a primary disposition, it may be unnecessary to
22 address assignments of error that challenge alternative dispositions, and vice

1 versa. However, in the interests of completeness, we will address all assignments
2 of error, even those where we have affirmed one or more alternative findings.

3 We begin with petitioners' interpretative challenges.

4 **PETITIONERS' FIRST ASSIGNMENT OF ERROR**

5 As noted, the county code allows community service uses as conditional
6 uses in all county zones. Both community service uses and other types of
7 conditional uses are subject to identically worded standards requiring that the use
8 "will not adversely affect natural resources." The hearings officer listed the many
9 different kinds of community service uses and conditional uses allowed in county
10 zones subject to these standards, and observed that under petitioners' expansive
11 "single blade of grass" test, none of the listed conditional uses could be developed
12 on any site with natural resources.³ For several alternative reasons, the hearings

³ The hearings officer stated:

"What is clear from a review of this list is that it contains many uses that, of necessity, will adversely affect natural resources on the site of the development of the proposed Community Service uses regardless of what conditions of approval might be imposed. All listed uses would likely fail Cottrell/RFPD1[0]'s 'single blade of grass' test (discussed later) and my findings provide a basis for rejection of that argument and arguments that tree removal violates MCC 39.7515(B). As a result, I conclude that the natural resource protections of [MCC 39.7515(B)] were intended in 1977 to apply to protect neighboring and area properties; not to prohibit the development of a site containing natural resources. * * * To be clear, however, this finding is an alternative finding—one that is necessary only if LUBA finds that my understanding of its construction

1 officer rejected the “single blade of grass” test. One alternative reason cited was
2 an interpretation that MCC 39.7515(B) applies only “to protect neighboring and
3 area properties; not to prohibit the development of a site containing natural
4 resources.” Record 131.

5 In the first assignment of error, petitioners challenge that interpretation,
6 arguing that the hearings officer’s interpretation improperly inserts text into
7 MCC 39.7515(B), and is inconsistent with caselaw and comprehensive plan
8 context. The county responds by emphasizing that the above-quoted
9 interpretation is explicitly framed as only one of multiple alternative
10 interpretations or applications of MCC 39.7515(B), and that if LUBA affirms one
11 of the other alternative dispositions, then any error the hearings officer made in
12 interpreting MCC 39.7515(B) to apply only to protect natural resources on
13 neighboring or area properties is not reversible error. The county also argues that,
14 properly understood, the hearings officer’s interpretation is narrow, and was
15 intended to reject petitioners’ proffered maximalist interpretation, under which
16 any conditional use development that impacts any natural resource on the
17 development site could not be approved. We understand the county to argue that

impacts holding is incorrect. The effect of the construction impacts analysis has the same effect—that alterations of the natural environment that occur on the development site to construct the facilities associated with the use are not relevant to a determination whether the community service use complies with MCC 39.7515(B).” Record 131.

1 the hearings officer construed MCC 39.7515(B) to avoid that absurd result, by
2 construing it in a manner that does not effectively prohibit site development
3 simply because the development could impact natural resources on the site.

4 We agree with petitioners that the hearings officer misconstrued MCC
5 39.7515(B) in finding that it applied only “to protect neighboring and area
6 properties[.]” That interpretation inserts a qualification into the text that is simply
7 not there. Nothing cited to us in the text or context of MCC 39.7515(B) suggests
8 that it is not also concerned with protecting natural resources that are located on
9 the property on which a conditional use is proposed. We generally agree with the
10 county that the 1977 commissioners almost certainly did not intend MCC
11 39.7515(B) to be interpreted in a manner that renders it impossible to gain
12 approval for any and all conditional uses allowed in county zones, if development
13 of such uses would impact any natural resource to any degree. But the hearings
14 officer’s interpretation that the regulatory scope of MCC 39.7515(B) is limited
15 to protecting natural resources on neighboring lands in the area misconstrues that
16 standard.

17 That said, we agree with the county that the hearings officer’s
18 interpretation is explicitly framed in the alternative, and that if LUBA affirms one
19 or more alternative interpretations or applications of MCC 39.7515(B), then the
20 hearings officer’s misconstruction of law challenged in this assignment of error
21 may not constitute reversible error. As discussed below, the hearings officer’s
22 alternative approaches did evaluate impacts of the proposed facility on natural

1 resources on the subject property. We affirm at least one such alternative
2 approach to satisfying MCC 39.7515(B) that the hearings officer adopted.
3 Accordingly, the petitioners' arguments under this first assignment of error do
4 not provide a basis for reversal or remand.

5 **PETITIONERS' SECOND ASSIGNMENT OF ERROR**

6 In *Cottrell I*, we affirmed the earlier hearings officer's conclusion that
7 temporary construction activity and associated impacts are not part of the "use"
8 and therefore the impacts of temporary construction activities are not subject to
9 evaluation under MCC 39.7515(B). *Cottrell I*, LUBA No 2023-086 (slip op at
10 20-21) (quoting the interpretation affirmed).

11 On remand, petitioners argued that "construction" necessarily ends when
12 development of the use is completed, but that the impacts of temporary
13 construction activities may be permanent or continue long past the date
14 construction ends. For example, petitioners argued that site grading during
15 construction made permanent alterations in the topography, changing the
16 drainage patterns for stormwater into nearby protected aquatic habitat, and that
17 such permanent impacts should not be immune to evaluation under MCC
18 39.7515(B), simply because they were the result of construction. In short,
19 petitioners argued that *Cottrell I* should be limited to its holding, which involved
20 temporary impacts from temporary construction activities.

1 The hearings officer disagreed, extended the holding in *Cottrell I* to
2 include all impacts caused by construction, even if those impacts are permanent
3 or remain after the community service use is completed and becomes operational:

4 “LUBA’s decision [in *Cottrell I*] holds that impacts caused by
5 construction activities are not subject to the ‘natural resources’
6 criterion. LUBA’s decision does not limit construction impacts to
7 those impacts that terminate upon commencement of the approved
8 community service use. Consequently, only the impacts caused by
9 the approved community service use after it has been constructed
10 must be found to comply with MCC 39.7515(B). This post-
11 construction use is the only ‘use’ that MCC subjects to the analysis
12 of MCC 39.7515(B).” Record 138.

13 We held in *Cottrell I* that temporary construction activities are not part of
14 the “use” for purposes of MCC 39.7515, citing in part *McLaughlin v. Douglas*
15 *County*, LUBA No 2020-004 (Apr 13, 2021) and *Citizens Against LNG, Inc. v.*
16 *Coos County*, 63 Or LUBA 162 (2011). *Cottrell I*, LUBA No 2023-086 (slip op
17 at 24-26). Both *McLaughlin* and *Citizens Against LNG* involved installation of a
18 pipeline within a narrow 50-foot corridor, installation that required removing
19 trees outside the corridor in order to construct a temporary access road and
20 staging area. Post-installation, the temporary road and staging area would be
21 reforested. We held in both cases that such temporary construction activities and
22 associated impacts are not subject to the criteria applicable to the pipeline itself,
23 *i.e.*, they may be allowed even though not located within the 50-foot-wide utility
24 corridor.

1 Citing this line of cases, the hearings officer concluded that the impacts of
2 removing trees in order to install pipelines should be viewed as impacts of
3 temporary construction activity, not the impacts of the community service use
4 itself, and therefore not subject to evaluation under MCC 39.7515(B). Record
5 136-38, 297. We understand the hearings officer to conclude that MCC
6 39.7515(B) applies only to post-construction impacts that arise from the post-
7 construction existence or operation of the community service use itself. Such
8 post-construction impacts may include, for example, maintaining the soil above
9 a buried pipeline free of tree growth in perpetuity, or the operation of stormwater
10 facilities that collect stormwater from the community service use buildings and
11 impervious surfaces, and discharge that stormwater into aquatic habitat. But such
12 post-construction impacts, apparently, would not include any impacts arising
13 from any activities to construct the facility, such as tree removal or site grading,
14 even if the conditions created by those activities and the associated impacts were
15 permanent.

16 On appeal, petitioners argue that the distinctions drawn by the hearings
17 officer are not compelled by *Cottrell I* or the cases cited, and are contrary to MCC
18 39.7515(B). We agree with petitioners that the hearings officer significantly
19 expanded our holding in *Cottrell I*, which was based on a detailed text and context
20 analysis of MCC 39.7515(B). *Cottrell I*, LUBA No 2023-086 (slip op at 18-29).
21 Nothing cited to us from *Cottrell I* supports the hearings officer's expansion of

1 our holding, or the corresponding restriction in the regulatory scope of MCC
2 39.7515(B).

3 The county argues that LUBA had before it in *Cottrell I* arguments that not
4 all construction impacts are temporary or short-term, and LUBA could have
5 chosen to limit its holding to exclude permanent impacts from construction
6 activities. The county argues that the hearings officer reasonably inferred from
7 LUBA's failure to limit its holding that all impacts of all construction activities,
8 whether temporary or permanent, are not subject to evaluation under MCC
9 39.7515(B). However, the focus of our analysis in *Cottrell I* was on challenges
10 to the earlier hearings officer's conclusions that temporary construction activities
11 and associated temporary impacts were not part of the community service "use"
12 for purposes of MCC 39.7515(B). To resolve those challenges, we did not need
13 to determine whether permanent impacts of construction activities were part of
14 the "use," and made no such determinations, even in *dicta*.

15 The county also argues that the hearings officer noted that MCC
16 39.7515(B) speaks of impacts in the future tense, "will not adversely affect
17 natural resources." The hearings officer concluded that MCC 39.7515(B) is
18 "future facing," which supports an interpretation that the criterion is concerned
19 with "what the operating use will, or will not cause." Record 138. While it is true
20 that MCC 39.7515(B) is future facing, we see nothing in the criterion or
21 elsewhere indicating that it applies only to impacts caused by the physical
22 operations of the community service use, once it is up and running. If some

1 construction activity, such as site grading that alters the topography, becomes a
2 permanent aspect of the subject property, part of the background conditions for
3 the community service use and its stormwater facility, we see no reason why that
4 permanently altered topography should not be viewed as part of the “use,” or why
5 the permanent impacts of that altered topography, if any, should not be evaluated
6 under MCC 39.7515(B).

7 ~~and~~ Nonetheless, the county argues that the hearings officer correctly relied on
8 ~~the~~ *McLaughlin* to support a conclusion that impacts caused by temporary
9 construction activity did not become part of the “use” simply because those
10 ~~the~~ impacts (tree removal, followed by post-construction replanting and a period of
11 regrowth) extended beyond the construction phase. Petitioners attempt to
12 distinguish *McLaughlin* on the grounds that the tree removal and staging area in
13 that case was located within a temporary construction area, outside the 50-foot
14 utility corridor, and caused no physical changes to the land within the corridor to
15 accommodate the facility itself. In the present case, petitioners argue, the site
16 grading and tree removal at issue were all necessary to accommodate the facility
17 itself and its pipelines, not merely to accommodate temporary construction
18 activities. The county responds that *McLaughlin* did not turn on the *location* of
19 the temporary construction activities, but the fact that those activities and
20 associated impacts had no relationship to the post-construction *operation* of the
21 pipeline installed within the utility corridor. The county argues that the salient
22 holding of *McLaughlin* is that construction impacts such as tree removal that

1 persist beyond the end of construction do not necessarily become part of the “use”
2 simply because there is a period of regrowth.

3 In our view, the key to both *McLaughlin* and *Cottrell I* is the temporary
4 duration of the construction activities *and* the associated impacts. Temporary
5 construction activities that result in permanent alterations to the land, or
6 otherwise cause permanent impacts to protected resources, may be viewed as part
7 of the use and subject to regulations governing the use. Contrary to the county’s
8 understanding, such permanent alterations are not immune from review simply
9 because they result from temporary construction activities, or excluded from
10 review because they do not result solely from post-construction “operation” of
11 the filtration facility. However, as discussed in our resolution of petitioners’
12 fourth assignment of error, temporary impacts from construction that extend past
13 the construction phase, for example, tree removal followed by mitigatory
14 replanting and a period of regrowth, are not necessarily inconsistent with MCC
15 39.7515(B).

16 In sum, we agree in part and disagree in part with each of the parties’
17 views. With respect to the impacts of site grading, we agree with petitioners that
18 any site grading that permanently altered the topography is subject to evaluation
19 under MCC 39.7515(B). As we understand it, the altered topography plays a role
20 in the functioning of the stormwater facilities for the site. However, that point of
21 agreement does not assist petitioners in this assignment of error because, as
22 discussed under our resolution of RFPD10’s first assignment of error, the

1 hearings officer did in fact evaluate the impacts of the stormwater facility under
2 MCC 39.7515(B), and we affirm those findings for reasons explained below.

3 With respect to tree removal for pipeline installation, such impacts are
4 permanent in the sense that PWB will not allow any tree regrowth over the
5 pipelines, but temporary in the sense that PWB proposed, and the hearings officer
6 approved, mitigation in the form of replanting trees at nearly an 8 to 1 ratio on
7 the subject property. Under petitioners' fourth assignment of error, below, we
8 address challenges to the hearings officer's alternative findings regarding
9 mitigation for tree removal, and affirm those findings. Accordingly, any error the
10 hearings officer might have made in concluding that tree removal was a
11 temporary construction activity, and therefore the impacts of such construction
12 activity were not subject to evaluation under MCC 39.7515(B), do not provide a
13 basis for reversal or remand.

14 Petitioners' second assignment of error is denied.

15 **PETITIONERS' FOURTH ASSIGNMENT OF ERROR**

16 The hearings officer relied heavily on proposed mitigation, primarily the
17 planting of thousands of trees and tens of thousands of shrubs, to support the
18 ultimate conclusion that the proposed filtration facility will not adversely affect
19 wildlife habitat and other natural resources. On appeal, petitioners initially
20 dispute that mitigation is an available tool to ensure compliance with MCC
21 39.7515(B). Petitioners argue that MCC 39.7515(B) does not mention mitigation,
22 and therefore the hearings officer cannot take mitigation into account in

1 determining whether the proposed facility causes adverse impacts to the natural
2 resources that were present pre-construction.

3 The hearings officer concluded otherwise, citing several contextual
4 provisions and supporting case law. Record 159. On appeal, we do not understand
5 petitioners to challenge those findings. To the extent they do, we agree with PWB
6 that petitioners have not demonstrated that the hearings officer erred in
7 concluding that mitigation is an available tool to ensure compliance with MCC
8 39.7515(B). *See Cottrell I*, LUBA No 2023-086 (slip op at 75-76) (citing MCC
9 39.7510 as allowing the approving authority to attach conditions to mitigate
10 adverse effects on adjoining properties, for purposes of MCC 39.7515(A)).⁴
11 Petitioners offer no persuasive reason to conclude that mitigation is also not an
12 available tool for purposes of ensuring compliance with MCC 39.7515(B).

13 The bulk of petitioners' argument is directed at the hearings officer's
14 conclusion that the proposed mitigation with respect to mature trees removed for

⁴ MCC 39.7510 provides, with respect to community service uses allowed as conditional uses:

“The approval authority may attach conditions and restrictions to any community service use approved. Conditions and restrictions may include a definite time limit, a specific limitation of use, landscaping requirements, parking, loading, circulation, access, performance standards, performance bonds, and any other reasonable conditions, restrictions or safeguards that would uphold the purpose and intent of this Chapter and mitigate any adverse effect upon the adjoining properties which may result by reason of the conditional use allowed.”

1 construction of the pipelines is sufficient to ensure compliance with MCC
2 39.7515(B). Petitioners argue that substituting mature trees for saplings that are
3 only five to eight feet in height is not sufficient mitigation for the lost habitat
4 along Dodge Park Boulevard and other pipeline routes. According to petitioners,
5 the hearings officer erred in concluding that the full mitigation need not be
6 available on “day one,” the day that the facility is approved for occupancy, but
7 that a period of regrowth is permissible, such that an adequate level of mitigation
8 may not be achieved until years after the facility begins operating.

9 On this point, petitioners cite to *West Hills & Island Neighbors, Inc. v.*
10 *Multnomah County*, LUBA No 83-018 (June 29, 1983), *aff'd*, 68 Or App 782,
11 683 P2d 1032, *rev den*, 298 Or 150 (1984). *West Hills* involved another
12 community service use, a regional landfill, on a treed 853-acre parcel with
13 significant wildlife habitat. The county found compliance with the MCC
14 39.7515(A) requirement (then codified as MCC 11.15.7015(A)) that the proposal
15 be “consistent with the character of the area,” based in part on a finding that once
16 the landfill reached the end of its planned 30-year life and was capped and
17 revegetated, it would then be consistent with the rural character of the area.
18 Similarly, with respect to the MCC 39.7515(B) requirement (then codified as
19 MCC 11.15.7015(B)) that the use “will not adversely affect natural resources,”
20 the county found compliance in part based on mitigation in the form of replanting
21 the landfill with commercial timber, once it closed after 30 years of operation.
22 We rejected that approach with respect to both criteria, stating:

1 “We reject the argument that the county may measure consistency
2 of the use with the character of the area against the day when the
3 landfill no longer is operating and is covered over and replanted.
4 Were that the case, consistency would not be measured against a use
5 but against bare land after the use has gone.” *West Hills*, LUBA No
6 83-018 (slip op at 14).

7 “Whether or not the land will be returned to commercial forest
8 production begs the question of the impact of the use now. The
9 ordinance does not allow the county to rest its conclusion about
10 adverse effect on timberland on the eventual end of the proposed
11 use.” *Id.* (slip op at 18).

12 In this appeal, petitioners argue that *West Hills* teaches that, where
13 mitigation is relied upon to satisfy the MCC 39.7515(B) criterion for a
14 community service use, the mitigation must be sufficient, on “day one” of
15 operational use and throughout the life of the use, to fully replace the value of all
16 pre-existing natural resources lost or damaged. Petitioners argue that the
17 mitigation relied upon by hearings officer falls far short of that measure, because
18 the pre-existing wildlife habitat included stands of mature trees along Dodge Park
19 Boulevard and other pipeline locations, trees that PWB removed and will not be
20 replaced *in situ*. Petitioners argue that substituting mature trees for saplings that
21 are only five to eight feet in height, even thousands of such saplings, is not
22 sufficient mitigation for the lost habitat along Dodge Park Boulevard and other
23 pipeline routes, because mature trees offer a qualitatively and quantitatively
24 different type of habitat than mere saplings.

25 The hearings officer adopted extensive findings regarding upland wildlife
26 habitat and mitigation for impacts on that habitat. Record 247-300. With respect

1 to trees, the hearings officer noted that the project removed 433 trees, 396 of
2 which were located in rights-of-way. Record 291. Approximately 90 percent of
3 the removed trees were less than 20 inches in diameter, and only three trees were
4 taller than 40 feet. Record 292. To replace the lost trees, PWB proposed to plant
5 3,418 native trees, for a replacement ratio of 7.9 trees for every tree removed.⁵
6 *Id.* The hearings officer cited evidence that, within 10 years of replanting, the tree
7 canopy would be 2.5 times greater than the tree canopy removed, replacing 4.4
8 acres of tree cover with 11.4 acres of tree cover. Record 293. The hearings officer
9 also cited evidence that, given the types and diversity of the native plantings, the
10 post-construction habitat will quickly become structurally complex and provide
11 a variety of habitat functions, including shade, food, nesting sites, and shelter for
12 a wide range of wildlife. *Id.*

13 With respect to petitioners' "day one" arguments based on *West Hills*, the
14 hearings officer limited *West Hills* to its facts, where the applicant proposed no
15 mitigatory revegetation at all until the landfill closed after 30 years of operation.
16 According to the hearings officer:

17 "In *West Hills*, the cutting of trees was not just necessary for
18 construction, instead maintaining the absence of trees was necessary
19 for the operation of the landfill itself. In other words, maintaining
20 the absence of trees was not a construction impact, it was inherent

⁵ As the findings note, the figure of 3,418 trees is a conservative estimate. It excludes trees planted at the intertie site and along the raw water alignment, and the 680 trees that will be planted at the Cottrell Pond site. Record 292.

1 in and necessary for the use itself. In this case, PWB is not able to
2 plant trees over the top of the pipeline in Dodge Park, but, in stark
3 contrast to *West Hills*, PWB is not resting its conclusion on the
4 eventual end of the use or the removal of the pipeline to avoid an
5 adverse effect. Instead, PWB is restoring nearly half of the total
6 project area as a dedicated wildlife habitat area and replacing all
7 trees removed at a ratio of nearly 8 to 1. As discussed above, there
8 is substantial evidence that the trees will achieve and then quickly
9 exceed the complexity and cover lost during construction. This
10 period of regrowth is expected and allowed.” Record 298.

11 We agree with the hearings officer and PWB that *West Hills* does not
12 establish that revegetation relied upon as mitigation for purposes of MCC
13 39.7515(B) must be fully grown or precisely replicate the pre-construction
14 condition of natural resources on the day the doors to the community service use
15 open. We agree with the hearings officer that, given the nature of any mitigation
16 that relies on planting trees, an initial period of regrowth is almost certainly
17 inherent and unavoidable. Were MCC 39.7515(B) interpreted to disallow
18 consideration of an initial period of regrowth in evaluating mitigation for
19 removed trees, as petitioners urge, then it is likely that few, if any, community
20 service uses could ever be approved under that standard. As the hearings officer
21 found, community service uses are allowed in all county zones, and include a
22 number of land-intensive uses, such as hospitals, golf courses and racetracks, that
23 in almost all cases would require removal of some mature trees or vegetation in
24 order to construct or maintain the community service use. Under petitioners’
25 preferred interpretation of MCC 39.7515(B), where existence or maintenance of
26 a community service use would cause the loss of even one mature tree, the use

1 could not satisfy MCC 39.7515(B) unless it were somehow possible to plant
2 mature trees, which no party argues is possible. *West Hills* does not support that
3 interpretation, or that result.

4 Even if an initial period of regrowth is deemed impermissible, and MCC
5 39.7515(B) were interpreted to require that lost habitat values be fully mitigated
6 on day one, PWB argues that the hearings officer adopted alternative findings
7 concluding that the required tree plantings provide sufficient mitigation on day
8 one. The hearings officer cited evidence that it is a common approach in natural
9 resource mitigation to compensate for the amount of time needed for trees to
10 grow by increasing mitigation ratios to greater than 1:1, *i.e.*, beyond mere
11 replacement or no net loss. Record 296. In the present case, PWB proposed and
12 the hearings officer conditioned approval on providing significant over-
13 mitigation with respect to trees, far beyond the level of replacement or no net
14 loss. The hearings officer discussed several means to measure mitigation ratios
15 and compare pre- and post-mitigation conditions. One approach cited is to
16 compare aggregate “caliper inches” of the removed trees and planted trees. Under
17 that approach, the hearings officer noted that the proposed mitigation would, on
18 day one, represent approximately 255 percent more total “caliper inches” than
19 would be needed to replace the caliper inches of the removed trees. Record 196.
20 PWB argues, and we agree, that that approach or similar approaches cited by the
21 hearings officer provide objective and quantifiable means to confirm that the
22 proposed tree planting mitigates for the loss of removed trees, even on day one.

1 Nonetheless, petitioners insist that no amount of tree replanting can
2 replicate, on day one, all the habitat values provided by mature trees. With respect
3 to habitat values, the hearings officer discussed evidence related to a
4 methodology designed to quantify and compare habitat values pre- and post-
5 construction, referred to as a Habitat Evaluation Procedure, or HEP.⁶ Based in
6 part on the HEP analysis, the hearings officer concluded that

7 “the post-construction wildlife habitat value of the Project areas will
8 be higher than the pre-construction value on day one of the Filtration
9 Facility operation based upon the size and location of the habitat
10 areas; the volume, size and diversity of the plantings; and the non-
11 vegetative habitat enhancements depicted on the landscape plan and
12 required by conditions of approval.” Record 308.

13 The HEP analysis was not specific to trees, but rather evaluated all types of
14 habitat and all types of proposed mitigation. Nevertheless, it provides some
15 quantifiable support for the conclusion that the sheer scale and diversity of the
16 required mitigation will improve overall habitat values, even on day one. As
17 discussed elsewhere, MCC 39.7515(B) does not require that the applicant
18 precisely replicate the pre-construction habitat types or values, or provide
19 replacement habitat for any particular species.

20 In sum, petitioners have not demonstrated that the hearings officer
21 misconstrued MCC 39.7515(B) in concluding that a period of regrowth is

⁶ The second assignment of error for intervenor-petitioner RFPD10 challenges the hearings officer’s reliance on the HEP evaluation. We address and reject that assignment of error, below.

1 permissible in evaluating mitigation for removed trees under that code provision.
2 The record shows that PWB proposed and the hearings officer approved as a
3 condition a robust mitigation plan that, even on day one, significantly exceeds
4 the vegetative quantity and quality that existed pre-construction. Neither MCC
5 39.7515(B) nor *West Hills* requires more.

6 Petitioners' fourth assignment of error is denied.

7 **RFPD10'S THIRD ASSIGNMENT OF ERROR**

8 Intervenor-petitioner RFPD10 argues that the hearings officer
9 misconstrued MCC 39.7515(B), and adopted findings not supported by
10 substantial evidence, with respect to the hearings officer's reliance on mitigation
11 to offset impacts from tree removal along Dodge Park Boulevard and other
12 locations. We addressed and rejected petitioners' interpretational challenges to
13 the hearings officer's reliance on mitigation, above, under their fourth assignment
14 of error. RFPD10's third assignment of error states that it advances
15 interpretational challenges, but includes no arguments regarding misconstruction
16 of law, only evidentiary challenges to the hearings officer's findings on
17 mitigation. RFPD10 states:

18 "The interpretational defects that allowed the hearings officer to
19 accept mitigation in the first instance, whether it occurs on day one,
20 and the failures of the HEP assumptions are discussed in greater
21 detail elsewhere. This assignment explains why each of these
22 conclusions lack substantial evidence." RFPD10 Petition for
23 Review 29.

1 RFPD10's evidentiary challenges appear to be at least somewhat independent of
2 the interpretational challenges advanced by petitioners regarding mitigation, and
3 can be read in the alternative, assuming that mitigation of some kind is
4 permissible. Accordingly, we address here RFPD10's evidentiary challenges, to
5 the extent not already effectively resolved elsewhere in this opinion.

6 **A. Waiver**

7 PWB agrees that objections to the proposed mitigation of planting trees
8 were preserved. However, PWB argues that most of RFPD10's evidentiary
9 objections under this assignment of error do not challenge mitigation directly, but
10 instead challenge the wildlife habitat values generated by the HEP analysis.⁷

⁷ PWB describes the HEP methodology as follows:

“A HEP is habitat-based methodology for comparing the relative quality and quantity for a range of wildlife species known or expected to occur in the Project area. Rec[ord]-1159. The modified HEP applied to the Project assigned post-construction and pre-construction Habitat Suitability Index ('HSI') values for 13 representative species across the identified Project areas, resulting in corresponding Wildlife Habitat Units ('WHU'). *Id.* Tallying the total WHUs pre- and post-construction was used to inform habitat enhancement measures and support the conclusion on the overall post-construction wildlife habitat value. *Id.*” PWB Response Brief 25, n 9.

PWB's expert explained the HEP methodology in more detail:

“[V]isual estimation of suitability index values based on reconnaissance site visits or review of aerial imagery can be combined with vegetation data and/or understanding of the

1 PWB contends that no party raised below any issues regarding the HEP analysis,
2 or the wildlife habitat values generated by that analysis. Accordingly, PWB
3 argues that issues raised on appeal questioning the wildlife habitat values in the
4 HEP analysis, or the integrity of the HEP analysis, are waived, pursuant to ORS
5 197.797(1).⁸

6 RFPD10 replies that having raised general issues regarding mitigation
7 below, opponents were not obligated to also raise specific arguments regarding
8 wildlife habitat values generated by the HEP analysis. We disagree with
9 RFPD10. The hearings officer found that no party, including the opponents'
10 expert, had challenged any of the pre-construction or post-construction wildlife
11 habitat values generated by the HEP analysis. Record 256. Had such challenges

dominant species and plant structures within the cover types (such as grassland, mature forest, etc.) to assign habitat values for the focal species in order to quantify habitat units (HUs). The modified HEP conducted for the PWB, used a similar approach of combining site reconnaissance / visual estimation with a review of relevant literature and best professional judgment to inform the assigning of habitat quality ratings for each focal species and cover type of pre- and post-construction conditions.” Record 1037.

⁸ ORS 197.797(1) provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 been raised below, PWB could have responded and the hearings officer could
2 have adopted responsive findings addressing the issue. Raising objections to
3 mitigation that was based in part on the wildlife habitat values generated by the
4 HEP analysis did not give other parties “fair notice” that opponents also
5 challenged the underlying HEP-generated wildlife habitat values. *Boldt v.*
6 *Clackamas County*, 107 Or App 619, 622, 813 P2d 1078 (1991). Accordingly,
7 issues challenging the accuracy or validity of the wildlife habitat values, the
8 HSI/WHU values generated by the HEP analysis, are waived.

9 Nonetheless, in the interest of resolving all issues, and because the issues
10 regarding the HEP-generated wildlife habitat values are intermingled with
11 broader mitigation challenges, we will address all issues raised in RFPD10’s third
12 assignment of error

13 **B. Acres of Wildlife Habitat**

14 RFPD10 first argues that, according to the HEP analysis, pre-construction
15 wildlife habitat totaled 117.07 acres, including 89 acres of fields used for
16 commercial nursery purposes, while post-construction PWB proposes to provide
17 only a total of 93.2 acres of wildlife habitat. Because post-construction habitat
18 acreage is less than post-construction habitat acreage, RFPD10 argues that no
19 reasonable person could conclude, as the hearings officer did, that the proposed
20 use does not adversely impact wildlife habitat.

21 PWB responds that the hearings officer’s conclusion rests not on a simple
22 comparison of acreage, but on overall wildlife habitat values, which are a mix of

1 quantity and quality of habitat.⁹ According to PWB, the record supports the
2 hearings officer's finding that the post-construction overall habitat value far
3 exceeds the pre-construction habitat value. Further, PWB argues that the
4 evidence shows that the 89 acres of cleared fields used for the preceding
5 commercial nursery was not dedicated to wildlife habitat, but subject to an array
6 of human disturbances, including soil disturbance, crop rotation, irrigation,
7 machinery, pesticides, worker presence and wildlife fencing. Similarly, the
8 Dodge Park Boulevard hedgerow and other pipeline sites were not dedicated

⁹ The hearings officer's findings state, in relevant part:

“I find the wildlife habitat value of the Project areas under the post-construction use will be higher and therefore, the Project will not adversely affect the natural resource of wildlife habitat. This conclusion is fully supported by, but does not exclusively rely upon the HEP conclusion that the post-construction Project will result in positive wildlife habitat units when compared to the wildlife habitat in the pre-construction Project areas. I further find that the post-construction wildlife habitat value of the Project areas will be higher than the pre-construction value on day one of the Filtration Facility operation based upon the size and location of the habitat areas; the volume, size and diversity of the plantings; and the non-vegetative habitat enhancements depicted on the landscape plan and required by conditions of approval. I also find that a conclusion that the post-construction wildlife habitat value of the Project areas will be higher than the pre-construction value on day one is not necessary to meet the MCC 39.7515(B) approval criterion, and that based upon the substantial evidence in the record, over time, the wildlife habitat value of the Project areas will not only be higher than the pre-construction wildlife habitat value, but will be significantly higher.”
Record 308.

1 wildlife habitat areas, but narrow strips of vegetation growing within public rights
2 of way, dedicated to other primary purposes. PWB argues that pre-construction
3 only 5.8 acres of land on the facility site were dedicated to wildlife habitat, while
4 post-construction over 93 acres are dedicated to habitat. According to PWB, the
5 dramatic increase in dedicated, high-quality wildlife habitat on the site supports
6 the hearings officer's finding that, with mitigation, the project will not adversely
7 impact wildlife habitat.

8 We agree with PWB that a simple comparison of raw acreage totals does
9 not undermine the hearings officer's conclusion, based in part on the HEP-
10 generated wildlife habitat values, that post-construction wildlife habitat values
11 significantly exceed pre-construction habitat values. The HSI/WHU habitat
12 values are derived from evaluation of both quantity and quality of pre-
13 construction and post-construction habitat, among other factors. A reasonable
14 person could rely on that evidence to reach the conclusion the hearings officer
15 did.

16 **B. Day One Habitat Values**

17 RFPD10 repeats petitioners' arguments that, on day one, the proposed
18 mitigation for trees removed along Dodge Park Boulevard and other pipeline sites
19 will not be tall enough or diverse enough to replicate the pre-construction
20 hedgerow habitat, especially for large birds of prey. RFPD10 argues that it will
21 take decades for planted trees to obtain the height and complexity necessary to
22 completely replicate the removed hedgerow tree habitat. However, MCC

1 39.7515(B) does not require replication of the specific types of pre-existing
2 vegetation or habitat, and a limited period of regrowth is consistent with that
3 standard, particularly given the robust over-mitigation required as a condition of
4 approval, which, in any event, the record indicates will result in higher habitat
5 values on day one. We reject RFPD10's arguments for the same reasons set out
6 above, in discussing petitioners' fourth assignment of error.

7 **C. Miscellaneous Arguments**

8 The remainder of RFPD10's third assignment of error is a grab-bag of
9 arguments, most of which have been addressed to some extent elsewhere or are
10 insufficiently developed for review. We address only those we can discern and
11 that have not been fully addressed elsewhere.

12 RFPD10 notes that PWB proposes to plant trees to expand the existing
13 upland forest area that is zoned SEC, but argues that the newly planted trees will
14 not provide additional perching, nesting or breeding opportunities for some
15 undetermined period of years. RFPD10 faults the hearings officer for not
16 adopting findings predicting how long it will take for the newly planted area to
17 provide such functions. However, as explained, some period of regrowth is
18 permissible under MCC 39.7515(B) for newly planted vegetation, and the
19 standard does not require replications of species-specific functions, or provision
20 of all habitat functions on day one.

21 Similarly, RFPD10 argues that newly planted trees will not for some years
22 provide "dead wood" functions with cavities that some species require for nesting

1 opportunities, or forage opportunities for insect-eating birds like woodpeckers.
2 RFPD10 faults the hearings officer for not adopting findings addressing the needs
3 of specific species. However, as explained, MCC 39.7515(B) does not require
4 protection of habitat for particular species. In addition, PWB cites to findings that
5 recite evidence that small diameter younger hardwood trees develop cavities
6 within a relatively short time period, and that the five log/brush piles to be placed
7 on site are intended in part to provide forage opportunities for insect-eating birds
8 such as woodpeckers. Record 293, 283.

9 RFPD10 also argues PWB removed an unknown number of trees at the
10 intertie site on SE Lusted Road, and no effort was made to evaluate habitat in the
11 area or to replace habitat lost at that site. However, PWB cites to findings and
12 evidence that evaluate pre-construction conditions and describe post-construction
13 plantings at the intertie site. Record 288-89; *see also* RFPD10's Petition for
14 Review, App 7 (schematic of plantings at the intertie site). PWB cites to evidence
15 that no trees were removed at the intertie site.¹⁰ We agree with PWB that RFPD10
16 has not demonstrated that the findings regarding habitat at the intertie site are not
17 supported by substantial evidence.

¹⁰ Although it is not entirely clear, construction of a pipeline leading to the intertie site apparently required removal of 29 trees, which PWB argues were included in the 7.9 to 1 replacement ratio and mitigated elsewhere. The record cites provided by RFPD10 may be referring to these 29 trees. The intertie location itself was formerly a farm field and apparently had no trees on site. Record 288, 3796.

1 RFPD10’s third assignment of error is denied.

2 PETITIONERS’ THIRD ASSIGNMENT OF ERROR

3 The hearings officer concluded that the scope of “natural resources” as
4 used in MCC 39.7515(B) is limited to the six types of natural resources listed in
5 Multnomah County Comprehensive Plan (MCCP) Natural Resources Policy 16
6 (Policy 16), which was adopted in 1977 on the same date as the ordinance
7 adopting MCC 39.7515(B).¹¹ The hearings officer focused her analysis on the
8 natural resources listed in Policy 16, but also adopted findings addressing impacts
9 on other resources identified by the parties.¹² In a portion of the third assignment

¹¹ MCCP Natural Resources Policy 16 states:

“The county’s policy is to protect natural resources areas and to require a finding prior to approval of a legislative or quasi-judicial action that the long range availability and use of the following will not be limited or impaired:

- “a. Mineral and aggregate sources;
- “b. Energy resource areas;
- “c. Domestic water supply watersheds;
- “d. Fish habitat areas;
- “e. Wildlife habitat areas; and
- “f. Ecologically and scientifically significant natural areas.”

¹² The hearings officer stated:

“Policy 16 is the strongest indication that the 1977 Board intended this list of ‘natural resources’ to inform the meaning of ‘natural

1 of error, petitioners challenge the primary findings that the only “natural
2 resources” that must be addressed under MCC 39.7515(B) are the six natural
3 resources listed in MCCP Policy 16. Other portions of the third assignment of
4 error challenge findings that agricultural resources are not among the “natural
5 resources” protected by MCC 39.7515(B). Those arguments overlap significantly
6 with arguments under 1000 Friends’ first and second assignments of error. We
7 will address that portion of petitioners’ third assignment of error regarding
8 agricultural resources along with 1000 Friends’ first and second assignments,
9 below.

10 **A. Natural Resources Listed in MCCP Policy 16**

11 Petitioners first argue that the natural resources subject to MCC
12 39.7515(B) include not only the six resources listed in MCCP Policy 16, but also
13 include resources mentioned in other immediate contextual provisions,
14 specifically (1) educational, recreational, research and aesthetic values embodied
15 in forest, wildlife and riparian habitat, and (2) greenspaces and vegetation.

resources’ in the quasi-judicial approval criterion it adopted the same day. Given that the context provided by the ‘Natural Resources Policy’ is the best evidence of the Board’s intent that exists, and because it is generally consistent with the plain text analysis above looking at dictionary definitions * * *, I find that ‘natural resources’ in MCC 39.7515(B) has the scope of the categories in a. through f. above that the 1977 Board sought to ensure ‘will not be limited or impaired’ in ‘approval of a . . . quasi-judicial action[.]’ Record 151.

1 Petitioners first argue that the introduction to the MCCP Natural Resources
2 section, set out immediately prior to Policy 16, includes an abbreviated list of
3 natural resources types compared to the policy, prefaced by the phrase “for
4 example.” The first paragraph of the introduction states:

5 “The purpose of the natural resource policy is to protect[] areas
6 which are necessary to the long term health of the economy or a
7 community: *for example*, mineral and aggregate sources, energy
8 resource areas, domestic water supply watersheds, wildlife habitat
9 areas, and ecologically significant areas.” Record 2681 (emphasis
10 added).

11 Petitioner argues that the phrase “for example” suggests that the list of five
12 resources that follow that phrase is a non-exclusive list. If so, petitioners argue,
13 then the more expansive list of six resources in Policy 16 must also be non-
14 exclusive.

15 From that premise, petitioners point to the second paragraph of the
16 introduction, arguing that the second paragraph identifies additional resources
17 that the 1977 county commissioners also intended to protect:

18 “The intent of the policy is to protect these areas for their natural
19 resource value. Mineral, aggregate, energy, and watershed areas are
20 limited, and inappropriate land uses can destroy their future use.
21 Significant habitat and ecological areas are important to the public
22 for their *educational, recreational and research value*, and they
23 often function to balance the effects of other land uses. The benefits
24 gained by the preservation of wildlife habitat range from *aesthetic*
25 *enhancement of the landscape to improvement of community health*.
26 *Greenspaces and vegetation* significantly affect such factors as air
27 flow, temperatures, oxygenation, travel patterns and pollution.”
28 Record 2681 (emphasis added).

1 Read in this context, petitioners argue, “natural resources” as used in Policy 16
2 and MCC 39.7515(B) must be broadly understood to include all naturally
3 occurring resources, including but not limited to greenspaces, vegetation, and
4 aesthetic views of wildlife habitat.

5 The hearings officer’s text/context analysis of the phrase “natural
6 resources” as used in MCC 39.7515(B) is set out at Record 145-59. As noted, the
7 hearings officer concluded that Policy 16 provides the strongest contextual
8 indication of the types of resources that comprise “natural resources” for
9 purposes of approval criteria such as MCC 39.7515(B), and rejected petitioners’
10 contextual arguments that “natural resources” must include other types of
11 resources. In the alternative, the hearings officer adopted findings addressing the
12 resources identified by petitioners, and concluded that the proposed use would
13 not adversely affect those resources. Record 316-27, 345-53.

14 We generally agree with the hearings officer’s text/context analysis with
15 respect to Policy 16, and the conclusion that the resources listed in Policy 16 are
16 the strongest candidates in the 1977 MCCP for what types of natural resources
17 the 1977 commissioners intended land use criteria such as MCC 39.7515(B) to
18 address. Policy 16 is expressly linked to application of quasi-judicial approval
19 criteria, such as MCC 39.7515(B).

20 The context of Policy 16 includes the two introductory paragraphs quoted
21 above. With respect to the first paragraph, we agree with the hearings officer that
22 the phrase “for example,” which precedes a list of most but not all of the same

1 six resources listed in Policy 16, is not fairly read to suggest that the list of natural
2 resources in Policy 16 is an open-ended list. Neither that phrase nor any similar
3 phrase appears in Policy 16 itself. The most plausible contextual reading of the
4 phrase “for example” in the introduction is that it is citing a subset of examples
5 from the fuller list set out in Policy 16.

6 ~~but~~ The second introductory paragraph cited by petitioners identifies some
7 benefits of protecting the resources listed in Policy 16, but those identified
8 benefits are not fairly read to constitute new or independent types of natural
9 resource categories protected under conditional use standards such as MCC
10 39.7515(B). For example, the second paragraph states that one benefit of
11 protecting wildlife habitat is “aesthetic enhancement of the landscape.” That
12 identified benefit is clearly an aspect of wildlife habitat, and is not framed as a
13 distinct natural resource category on its own. If the 1977 commissioners intended
14 protection of aesthetic views as a distinct type of natural resource for purposes of
15 Policy 16, the most straightforward way to express that intent would have been
16 to separately list aesthetic views as a resource in Policy 16. For the same reasons,
17 the other identified benefits of wildlife habitat, education, recreation, research,
18 community health, etc. are not fairly read as independent types of natural
19 resources, distinct from wildlife habitat.

20 With respect to greenspaces and vegetation, it is similarly clear that the
21 introduction is describing the secondary benefits of “[s]ignificant habitat and
22 ecological areas,” and the 1977 commissioners did not intend to describe

1 greenspaces and vegetation as distinct categories of natural resources for
2 purposes of criteria such as MCC 39.7515(B).

3 **B. Conclusion**

4 In sum, we disagree with petitioners that the introductory paragraphs to
5 Policy 16 identify additional types of natural resources, in addition to the six
6 types listed in the policy itself, that must be evaluated for adverse impacts under
7 MCC 39.7515(B). The strongest reading of Policy 16, in context, is that it
8 identifies the six types of natural resources that the 1977 commissioners intended
9 criteria such as MCC 39.7515(B) to address.

10 This portion of petitioners' third assignment of error is denied.

11

12 **REMAINING PORTION OF PETITIONERS' THIRD ASSIGNMENT OF**
13 **ERROR AND 1000 FRIENDS' SECOND ASSIGNMENT OF ERROR**

14 As noted, a portion of petitioners' third assignment of error challenges the
15 hearings officer's conclusion that "agricultural resources" are not among the
16 natural resources protected by MCC 39.7515(B). 1000 Friends' second
17 assignment of error advances similar arguments. We address these challenges
18 together.

19 **A. Agricultural Resources**

20 Policy 16 does not include agricultural resources in the list of natural
21 resources subject to the policy, and the two introductory paragraphs to Policy 16
22 do not mention agricultural resources. Nonetheless, petitioners argued below that
23 other provisions in the 1977 MCCP and 2016 MCCP amply demonstrate that it

1 is county policy to protect agricultural resources. Based on those provisions,
2 petitioners argued that MCC 39.7515(B) should be broadly interpreted to include
3 agricultural resources within the scope of “natural resources.” Under this
4 approach, conversion of any agricultural land to a non-agricultural use, for
5 example, constructing the filtration facility, or converting farm fields to wildlife
6 habitat, must be evaluated under MCC 39.7515(B) and allowed only if the
7 applicant shows that the conversion from farm use to a non-farm use would not
8 adversely affect the agricultural resource.

9 The hearings officer generally rejected the contextual arguments that the
10 1977 commissioners intended agricultural resources to constitute “natural
11 resources” for purposes of MCC 39.7515(B). Record 145-56. In doing so, we
12 understand the hearings officer to make a distinction between “agricultural
13 resources” in the sense of the use of land for farm use and farm practices, and the
14 natural materials, such as soils, that make farm uses and other uses possible. The
15 hearings officer stated:

16 “There is a reoccurring theme in public testimony where various
17 commenters conflate the *use* of soils as a resource with the resource
18 *itself*. See, e.g., Exhibit U.15, page 1 (‘agriculture itself is designated
19 a natural resource’); Exhibit W.3a, page 10n3 (‘farm and forest uses’
20 are natural resources). However, the words ‘natural resources’ in
21 MCC 39.7515(B) focus on the materials produced by nature (the
22 ‘resources’) that humans can use, not the use itself.” Record 317-18
23 (emphasis in original).

24 The hearings officer generally rejected arguments under the first sense, that the
25 1977 commissioners intended MCC 39.7515(B) to preserve land for agricultural

1 use. We understand the hearings officer to conclude that, to the extent MCC
2 39.7515(B) protects “agricultural resources,” the resources protected are the
3 agricultural soils, the natural materials, not the ability to use those soils for farm
4 use. The hearings officer adopted alternative findings addressing impacts to soils
5 on the property, and concluded that the proposal does not harm or adversely affect
6 those soils. Record 316-19.

7 On appeal, this portion of petitioners’ third assignment of error and 1000
8 Friends’ second assignment of error focus primarily on the hearings officer’s
9 rejection of the broad sense of “agricultural resources,” to include preserving land
10 for farm use. 1000 Friends’ first assignment of error, addressed below, primarily
11 challenges the hearings officer’s alternative findings that soils on the property are
12 not “adversely affected” by the proposed use.

13 **B. 1977 MCCP Provisions Regarding Agricultural Resources**

14 The parties argue that context for MCC 39.7515(B) includes
15 contemporaneously adopted MCCP provisions that generally call for
16 preservation of agricultural land. Petitioners note that the 1977 MCCP identifies
17 three broad “areas:” Urban Areas, Rural Areas, and Natural Resource Areas. The
18 1977 MCCP states with respect to the Natural Resource Area:

19 “The purpose of the Natural Resource Area is to provide for the
20 retention of natural resource uses in various areas of the County, and
21 in particular, to maintain agricultural and forest lands and to
22 encourage their intensive management. In areas which are not
23 predominately suited to agriculture or forestry, other uses will be

1 permitted in a manner which is consistent with the character of the
2 area and the natural resource base.” Record 2659.

3 Thus, petitioners argue, the 1977 MCCP describes agricultural and forest lands
4 as a form of natural resource, and circumscribed other uses not consistent with
5 the natural resource base.

6 The 1977 MCCP further divided the Natural Resource Area into four broad
7 “land use classifications:” Agriculture, Multiple-Use Farm, Forest, and Multiple-
8 Use Forest. Each of these classifications have policies associated with them. For
9 the Multiple-Use Farm classification, MCCP Policy 10 states that it is county
10 policy to designate lands Multiple-Use Agriculture that are predominantly in soil
11 capability classes Class I, II or III, in areas “where topography or parcelization
12 limit the size of tracts to be farmed and thereby conflict with the economic
13 viability of full-time commercial farming.” Record 2661. The MUA-20 zone is
14 one of the zones that implement the Multiple-Use Agriculture plan designation.
15 Petitioners argue that this context suggests that the phrase “natural resources” as
16 used in the MCCP is intended to broadly include agricultural use of the high-
17 value agricultural soils found on land designated MUA, including the subject
18 property, and that MCCP usage should therefore inform the meaning of “natural
19 resources” as used in MCC 39.7515(B) to include protection of agricultural land
20 for agricultural uses.

21 The hearings officer considered the context provided by the 1977 MCCP
22 amendments. Record 147-52. Consideration of that context led to the hearings
23 officer’ conclusion that Natural Resources Policy 16 provides the most direct

1 evidence available regarding what types of natural resources the 1977
2 commissioners believed that land use approval criteria such as MCC 39.7515(B)
3 should protect. As noted, Policy 16 and its immediate context do not mention
4 agricultural resources at all. We agree with the hearings officer that the more
5 general 1977 MCCP provisions cited by petitioners do not demonstrate that the
6 1977 commissioners intended to expand the list of natural resources in Policy 16
7 to include protection of agricultural soil for farm use, or to expand the scope of
8 “natural resources” subject to MCC 39.5715(B), beyond those listed in Policy 16.

9 The hearings officer also noted that where the county intends to protect
10 land for agricultural use, the county expressly does so through operation of plan
11 and zoning designations, and a host of land use regulations. Because the subject
12 property is within a Goal 3 exception area, the statutory and goal-based
13 requirements applicable to agricultural land, and the implementing
14 comprehensive plan provisions and land use regulations, do not apply to the
15 subject property. While the MUA-20 and similar Goal 3 exception zones are
16 intended in part to protect agricultural land for agricultural use, those zones also
17 allow a wide array of non-agricultural uses, including a number of conditional
18 uses and community service uses. Relatedly, the hearings officer rejected claims
19 that the purpose and policies underlying the MUA-20 zone are relevant to
20 interpreting MCC 39.7515(B), noting that MCC 39.7515 and other community
21 service use criteria apply throughout the county, in all zones. Record 323. In any
22 case, the hearings officer noted that where the county wishes to prevent certain

1 conditional uses from being located on high-value agricultural soils in the MUA-
2 20 zone, and similar zones, and thus preserve those soils for agricultural uses, it
3 knows how to do so. Record 142. Community service uses are not among the
4 conditional uses prohibited on high-value soils in the MUA-20 zone. We agree
5 with the hearings officer that this context does not support the conclusion urged
6 by petitioners, that the 1977 commissioners intended criteria such as MCC
7 39.7515(B) to protect farm use of agricultural soils from community service uses.

8 Finally, the hearings officer noted that the immediate context of MCC
9 39.7515(B) includes subsection (C). MCC 39.7515(C), when originally adopted
10 in 1977, required a finding that a proposed community service use “will not
11 conflict with farm or forest uses in the area.” Record 320. MCC 39.7515(C) was
12 subsequently amended to reflect statutory language at ORS 215.296(1), which
13 requires that conditional uses in exclusive farm use zones not “force a significant
14 change in accepted farm or forest practices on surrounding lands devoted to farm
15 or forest use,” or significantly increase the cost of such practices. *See n 1.* Citing
16 this immediate context, the hearings officer concluded:

17 “[A]gricultural and forest resources are separately protected by
18 MCC 39.7515(C); not by MCC 39.7515(B). The fact that MCC
19 39.7515(C) imposes a different, more specific standard to protect
20 farm and forest resources from adverse impacts evidences the
21 County’s view that agricultural and forest resources are not ‘natural
22 resources’ for purposes of MCC 39.7515(B). MCC 39.7515(C)
23 would be almost superfluous if farm and forest uses were protected
24 by MCC 39.7515(B). The County’s remanded decision [in *Cottrell*
25 *I*] made a final determination that agricultural and forest resources
26 are protected to the extent required by MCC 39.7515(C) and I find

1 that this is all that is required by MCC 39.7515. Even if farm and
2 forest uses are considered ‘natural resources’ for purposes of MCC
3 39.7515(B), the findings of compliance with MCC 39.7515(C) also
4 satisfy MCC 39.7515(B) because MCC 39.7515(C) explains how
5 those resources are to be protected from adverse impacts and the
6 County has already determined compliance with that subsection.”
7 Record 153-54.¹³

8 The hearings officer reasoned that, to the extent the 1977 commissioners intended
9 conditional use approval criteria for community service uses to protect
10 preservation of land for farm uses and farm practices, it embodied that intent in
11 MCC 39.7515(C).

12 Petitioners and 1000 Friends argue that MCC 39.7515(C) in its original
13 1977 wording was directed at avoiding conflicts with “farm or forest uses in the
14 area,” suggesting the focus was on protecting farm uses external to the subject

¹³ The hearings officer made a similar distinction in adopting alternative findings addressing impacts on agricultural resources:

“MCC 39.7515(C) expressly protects farm and forest practices from adverse impacts and LUBA affirmed the conclusion, in the 2023 Decision, that PWB had established compliance with MCC 39.7515(C). The doctrine of law of the case precludes me from revisiting that issue. Additionally, the identification of farm and forest practices as distinct from natural resources in [2016 MCCP] Policy 2.45 and MCC 39.7515 and in the 1977 Framework Plan and Ordinance No. 148 makes it clear that the term ‘natural resources’ in MCC 39.7515(B) does not include farm and forest practices or farm and forest resources. Both farm and forest resources are comprehensively and separately protected by State law and by the County’s land [use laws] as such; not as ‘natural resources.’” Record 318.

1 property. That external focus is explicit in MCC 39.7515(C) as currently worded.
2 In contrast, petitioners argue that MCC 39.7515(B) is focused on prohibiting
3 adverse impacts on natural resources, no matter where those resources are
4 located, including the subject property. Thus, petitioners argue, reading MCC
5 39.7515(B) to include farm use of agricultural soil within the scope of “natural
6 resources” would not necessarily duplicate MCC 39.7515(C) or render it nearly
7 superfluous, as the hearings officer suggested.

8 However, we agree with the hearings officer that, had the 1977
9 commissioners intended the MCC 39.7515 criteria to embody a broader level of
10 protection for farm uses, the commissioners could have expressed that intent most
11 clearly by wording subsection (C) to say so, which is the community service use
12 criterion explicitly directed at protecting farm uses. Reading that broader intent
13 into MCC 39.7515(B), which does not mention farm or agricultural uses, renders
14 the two criteria somewhat duplicative, and that duplication is not clearly
15 supported by any text or context.

16 In sum, we agree with the county and PWB that the context provided by
17 the 1977 MCCP does not support petitioners’ argument that MCC 39.7515(B)
18 must be interpreted expansively to protect farm uses of agricultural soil on the
19 subject property.

20 **C. 2016 MCCP Provisions**

21 Petitioners also contend that an expansive view of “natural resources,” to
22 include preserving agricultural use of land, is consistent with the definition of

1 that same phrase in a Glossary of Terms that the county adopted in 2016, when
2 adopting the current version of the MCCP. The Glossary of Terms is Appendix
3 B to the 2016 MCCP. One of the terms in the glossary is “natural resource,”
4 defined as:

5 “Generally, a functioning natural system, such as a wetland or a
6 stream, wildlife habitat or material in the environment used or
7 capable of being used for some purpose, also including minerals and
8 fuels, *agricultural resources* and forests.” MCCP App B, at 7
9 (Emphasis added).

10 The hearings officer noted that the terms in the Glossary are intended for the
11 “convenience of the reader, in conveying a general idea of the meaning of the
12 terms used in this Plan” and does not prohibit the county from “previously or
13 subsequently defining any term[.]”¹⁴ Based on these qualifications, the hearings

¹⁴ The introduction to the Glossary states:

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

1 officer concluded in several places that the Glossary did not provide a controlling
2 definition as to the scope of “natural resources” for purposes of MCC 39.7515(B),
3 or illuminate what the 1977 commissioners intended when they adopted the land
4 use regulation 40 years prior to adoption of the Glossary. Record 126, 136, 152-
5 54.

6 On appeal, petitioners do not argue that the Glossary definition of “natural
7 resources” is controlling in this case, but argues that the definition is another
8 contextual indication, consistent with the 1977 MCCP provisions discussed
9 above, that both the 1977 MCCP and the 2016 MCCP treat agricultural resources
10 as a type of natural resource.

11 The Glossary certainly indicates that, in adopting the 2016 MCCP, the
12 2016 commissioners viewed “agricultural resources” as a type of “natural
13 resource,” for at least some purposes set out in the 2016 MCCP. However, that
14 context does not, either alone, or combination with context cited from the 1977
15 MCCP, demonstrate that the hearings officer erred in concluding that MCC
16 39.7515(B), which has remained unchanged since 1977, was not intended to
17 protect farm use or practices on agricultural soils as a “natural resource.” Again,
18 the strongest textual and contextual indicators support the hearings officer’s
19 conclusion that MCCP Policy 16 sets out the six types of natural resources
20 protected by criteria such as MCC 39.7515(B).

or otherwise, in a manner that may or does conflict with the meaning
of any term used in this Plan.” MCCP App B, at 1.

1 The remainder of petitioners' third assignment of error, and 1000 Friends'
2 second assignment of error, are denied.

3 **1000 FRIENDS' FIRST ASSIGNMENT OF ERROR**

4 In one of the hearings officer's many alternative findings, they concluded
5 that even if the agricultural soils on the property are "natural resources" subject
6 to MCC 39.7515(B), the proposed facility did not "adversely affect" those soils.
7 As noted, much of the soils on the property are contaminated with pesticides from
8 prior commercial nursery activities. During construction, some of the soils were
9 excavated and removed off-site, to be mixed with soils on other properties in farm
10 use, as part of a beneficial reuse program. The unexcavated soils on the property
11 are used to support non-agricultural uses, including landscaping and wildlife
12 habitat.

13 Opponents argued below that employing agricultural soils for non-farm
14 uses, and removing some soils for reuse on other properties, "adversely affects"
15 those soils, for purposes of MCC 39.7515(B).¹⁵ The hearings officer concluded
16 otherwise. Record 316-25. The findings rely heavily on PWB's agricultural
17 expert, Prenguber. Based in part on Prenguber's report, the hearings officer first
18 concluded that soils, not the agricultural *use* of soils or farm uses in general, are

¹⁵ Earlier in the decision, the hearings officer concluded that "adversely affects" means that the proposed use "will cause a change that produces actual harm to natural resources that is more than de minimis." Record 144. No party challenges that conclusion.

1 the “natural resources” at issue. Record 317. The hearings officer found, citing
2 the report, that soils serve many purposes besides agricultural use, including
3 foundational support for structures, landscaping and wildlife habitat. Record 318-
4 19. The hearings officer found that these soils “continue to serve natural resource
5 functions as support for structures and for providing habitat, and that the soils
6 have not been adversely affected in their ability to provide those functions, and
7 therefore the on-site soils will not be adversely affected by the Project.” Record
8 323.

9 With respect to the excavated and removed soils, the hearings officer found
10 that due to contamination with pesticides the soils would otherwise have to be
11 disposed in a landfill, but instead will be beneficially reused to support
12 agricultural uses on other lands.¹⁶ The hearings officer found that this beneficial
13 reuse will not adversely affect the soils as a natural resource. Record 325.

¹⁶ On the removed soils, the hearings officer stated:

“I also note that the contaminated soils removed from the Project sites will continue to serve natural resource functions pursuant to DEQ’s Beneficial Use Determination (BUD) process. The BUD allows a farmer to apply the minimally contaminated soils on their field in a manner that ‘involves mixing with non-contaminated soils to reduce the aggregate level of pollution below DEQ levels of concern.’ Exhibit U.20.e, page 2. The BUD authorizes beneficial reuse by the farmer ‘to develop the land for farm use’ by the soil from the Project being ‘blended with existing topsoil so that the land could be used to grow grasses and other agricultural crops.’ Exhibit S.34, pages 2-3. While, as opponents point out, Exhibit W.2a, page 9, Exhibit W.3a, page 34, the number of agricultural acres will not

1 **A. Adequate Findings**

2 On appeal, 1000 Friends first challenges the adequacy of the hearings
3 officer findings that the on-site and removed soils are not adversely affected by
4 the project, as required by MCC 39.7515(B). With respect to the on-site soils,
5 1000 Friends contends that converting the use of those soils from agricultural to
6 non-agricultural uses, to support structures and wildlife habitat, itself represents
7 an adverse impact on those soils. With respect to the removed soils, 1000 Friends
8 similarly argues that the removed soils will never be again applied to a farm use,
9 which means that the project adversely affects those soils.

10 However, 1000 Friends does not explain why non-agricultural use of soils
11 that have agricultural potential necessarily must be viewed as *harming* those
12 soils, for purposes of MCC 39.7515(B). As the hearings officer found, MCC
13 39.7515(B) does not protect farm practices or farm uses *per se*. It only protects
14 natural resources. To the extent agricultural soils on the subject property are
15 protected by MCC 39.7515(B), the protected resource is the soil, not agricultural
16 use of those soils. As PWB argues, a change in how soil is used does not, in itself,

increase as a result of the blended topsoil, it will make the receiving farm more productive. ‘The addition of this soil will improve the productive capacity of a sizeable farm field and, through mixing with other soils, residual pesticide concentrations will be lower in the blended soils and below DEQ levels of concern. Amending topsoil for long-term soil improvement is a widely used best management practice to increase the productivity of lower quality soil to boost results and a conservation measure (particularly here, where the alternative is sending the soil to a landfill).’ Exhibit U.20.e, pages 8-9.” Record 324.

1 necessarily cause harm to the soils. 1000 Friends does not explain how using soil
2 to support structures or wildlife habitat represents a change to the soil that causes
3 harm to the soil.
4 Further, under 1000 Friends' apparent view that any non-agricultural use
5 of agricultural soils necessarily harms the soil, no conditional use could ever be
6 sited on any land with agricultural soils, notwithstanding that the MUA-20 zone
7 and many other zones allow a wide range of conditional uses, including
8 community services uses.¹⁷ The hearings officer correctly rejected any
9 interpretation of MCC 39.7515(B) that would render it impossible to site a
10 conditional use in the MUA-20 zone.

11 With respect to the removed soils, 1000 Friends argues only that the
12 removed soils will not be used again for farm use, which constitutes adverse
13 impacts, but without acknowledging findings that the removed soils will be
14 mixed with other agricultural soils and used for agricultural purposes. Record

¹⁷ Friends repeatedly emphasizes that the soils on the property are high-value agricultural soils, rated Agricultural Capability Class I-III. However, as the hearings officer found, the 1977 commissioners deliberately chose to prohibit certain conditional uses from placement on lands with predominantly Class I-III soils, but did not include other conditional uses, such as community service uses, in the list of conditional uses that are prohibited on such high-value soils. Record 321. Based in part on this context, the hearings officer rejected arguments that a community service use that entails use of high-value agricultural soils for non-agricultural functions adversely impacts those soils or otherwise is inherently inconsistent with MCC 39.7515(B).

1 324. In any case, 1000 Friends offers no suggestion as to how such beneficial
2 reuse would harm the soil.

3 Adequate findings must identify the relevant approval standard, the
4 evidence relied upon, and explain how the evidence leads to the conclusion that
5 the standard is or is not met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556
6 (1992). Findings must also address specific issues related to the approval
7 standards raised in the proceedings below. *Norvell v. Portland Area LGBC*, 43
8 Or App 849, 853, 604 P2d 896 (1979). Here, 1000 Friends have not demonstrated
9 that the hearings officer's findings regarding adverse impacts on soils are
10 inadequate. The findings set out the applicable criterion, discuss at length the
11 evidence relied upon, and explain how the evidence supports the conclusion that
12 the proposed non-agricultural use of soils on the property, and removal of soils
13 under the DEQ beneficial use program, do not adversely affect those soils. Those
14 findings are adequate. The findings also discuss at length the issues raised below
15 regarding impacts on the soils, including arguments that non-agricultural uses
16 should not be allowed on agricultural soils, and rejected those issues. Record 316-
17 22. *Norvell* does not require more. 43 Or App at 853.

18 **B. Reliance on the Prenguber Report**

19 1000 Friends argues that the Prenguber Report is not “relevant” evidence
20 supporting the hearings officer’s conclusion that the proposed facility will not
21 adversely affect the soils on the property. 1000 Friends argues that:

1 “The Code makes no exceptions or allows for discretion if the soils
2 are used for agricultural purposes. The hearings officer has
3 established that agricultural soils are a ‘natural resource.’ Rec[ord]
4 319. Therefore, Mr. Prenguber’s testimony relating to soils is not
5 relevant to establish that the project will not adversely impact
6 ‘natural resources’ under MCC 39.7515(B). Further, Mr.
7 Prenguber’s testimony does not provide evidence relevant to
8 establish that the Project will have no adverse impact on ‘natural
9 resources.’” 1000 Friends Petition for Review 11-12.

10 PWB responds that, first, the hearings officer did not “establish” that
11 agricultural soils are a natural resource. PWB argues that, in the challenged
12 alternative findings, the hearings officer concluded that soils on the property
13 could be viewed as a natural resource for purposes of MCC 39.7515(B), but that
14 agricultural *use* of those soils was not a “resource.” The hearings officer cited the
15 Prenguber Report, as well as United States Department of Agriculture (USDA)
16 testimony, to the effect that agricultural soils support many functions, including
17 foundations for farm and other structures, as well as landscaping and wildlife
18 habitat. Based on that expert evidence, the hearings officer concluded that
19 changing the use of soil from agricultural to non-agricultural use would not cause
20 any harm to the soil itself, and therefore would not “adversely affect” the soil for
21 purposes of MCC 39.7515(B). We concluded above that those findings are
22 adequate. The Prenguber Report, as well as other evidence PWB cites, directly
23 supports those findings. We reject 1000 Friends’ contention that the Prenguber
24 report is not “relevant” evidence supporting the hearings officer’s findings on this
25 issue.

1 **C. Other Expert Evidence**

2 Finally, 1000 Friends cites to opposing expert testimony opining that the
3 proposed change in the use of soils on-site, and the removal of soils and reuse
4 elsewhere, “adversely affects” agricultural use of the subject property, and thus
5 violates MCC 39.7515(B). 1000 Friends argues that the overwhelming expert
6 evidence on this point so undermines the hearings officer’s reliance on the
7 Prenguber report that the hearings officer’s findings on this point are not
8 supported by substantial evidence.

9 Substantial evidence is evidence in the whole record that a reasonable
10 person would rely upon to reach a decision. *Dodd v. Hood River County*, 317 Or
11 172, 179, 855 P2d 608 (1993). Where there is conflicting expert testimony, the
12 question becomes whether the opposing expert testimony so undermines the
13 expert testimony relied upon by the decisionmaker that a reasonable person
14 would not rely on the latter to conclude that the standard is met. *Tonquin*
15 *Holdings, LLC v. Clackamas County*, 64 Or LUBA 68, 83 (2011), *aff’d*, 247 Or
16 App 719, 270 P3d 397 (2012).

17 PWB responds that 1000 Friends have not established that either set of
18 expert testimony actually conflicts, because they address different subjects. PWB
19 argues that the experts cited by 1000 Friends are focused on impacts to the
20 agricultural *use* of the property, while the Prenguber Report is focused on harm
21 to the soil itself, consistent with the hearings officer’s finding that MCC
22 39.7515(B) protects resources, such as agricultural soils, but not particular uses

1 such as farm use of agricultural soil. Even if there is conflicting expert testimony
2 on this point, PWB argues, 1000 Friends have not demonstrated that the opposing
3 testimony so undermines the evidence relied upon that a reasonable person could
4 not rely on the latter to find that MCC 39.7515(B) is satisfied.

5 We agree with PWB that 1000 Friends have not established that the expert
6 testimony they cite undermines the Prenguber Report and USDA testimony that
7 the hearings officer relied upon to conclude that agricultural soils have many
8 functions, and changing how the soils on the property are used from an
9 agricultural function to a non-agricultural function does not harm or adversely
10 affect those soils, for purposes of MCC 39.7515(B). 1000 Friends has not
11 demonstrated that there is any conflicting expert testimony on this point. To the
12 extent the cited opposing testimony on this point conflicts with the evidence cited
13 by the hearings officer, 1000 Friends has not demonstrated that no reasonable
14 person could rely on the evidence the hearings officer relied upon to support the
15 challenged conclusion. In sum, 1000 Friends has not demonstrated that the
16 hearings officer's findings on this point are not supported by substantial evidence.

17 1000 Friends' first assignment of error is denied.

18 **1000 FRIENDS' THIRD ASSIGNMENT OF ERROR**

19 The filtration facility consists of a 37-acre developed area that includes
20 buildings and other infrastructure, surrounded by a fence. Most of the remainder
21 of the subject property outside the fence will be managed for wildlife habitat.

1 PWB commissioned an illumination report that found, in relevant part, that
2 the facility lighting will meet or exceed county Dark Sky Lighting standards. The
3 illumination report explains that the “default lighting condition during nighttime
4 hours will be a dimmed mode with full light output only triggered manually or
5 via motion sensor when needed for a task.” Record 3791. The report discussed
6 two graphics, one showing full light output, and the other the dimmed mode. The
7 report states that full light mode is highly unlikely to occur, because that would
8 entail circumstances where every motion sensor and every light be fully
9 energized. The report states that under either lighting scenario “the light at grade
10 is primarily contained within the Filtration Facility fence and has limited if any
11 spill into the habitat areas outside the Filtration Facility fence.” *Id.*

12 Based on the illumination report, the hearings officer adopted findings that
13 “the lighting systems for Filtration Facility and Intertie Sites have
14 been designed to avoid impacts to areas outside of the fence lines
15 surrounding those facilities. Therefore, I find that the Project lights
16 will not adversely affect wildlife habitat.” Record 310.

17 On appeal, 1000 Friends challenges the above-quoted finding, arguing that the
18 full light mode illuminates many areas outside the fence reserved for habitat, and
19 that there is no evidence that the dimmed mode will operate all night. According
20 to 1000 Friends, it must be assumed that lights on a motion sensor will be
21 regularly tripped by animals, thereby triggering full light conditions and
22 disrupting migrating bird patterns and the cycles of predator and prey. 1000
23 Friends argues that the record includes no evidence or findings regarding how

1 often full light mode will be triggered by motion sensors and the impacts of such
2 full light conditions on surrounding wildlife habitat outside the fence.

3 PWB responds, initially, that while general issues were raised below
4 regarding impacts of lighting on wildlife, no issue was raised below with any
5 specificity regarding lighting design, motion sensor protocols, or the frequency
6 or scope of lighting for manual operations. ORS 197.797(1). According to PWB,
7 no opponents raised any specific issues regarding whether facility lighting, if
8 triggered by motion sensor, would spill out onto the ground outside the fence,
9 how often motion sensors would trip lights, and the impacts of sensor-driven or
10 manually operated lights on surrounding habitat. In any case, PWB notes, the
11 findings in fact address that potential issue, citing to the statement in the
12 illumination study that, even under worst case full light conditions, the facility
13 lighting system “has limited, if any, spill outside of the fence line into the
14 surrounding habitat areas.” Record 309.

15 1000 Friends responds that the issue raised in this appeal was adequately
16 raised below and preserved on appeal. The preservation statement in the Petition
17 for Review cites to testimony beginning at Record 2430, where an opponent
18 raised issues regarding “security lighting” impacting the forest and riparian
19 environment and disrupting “wildlife behavior,” including birds and animals.
20 Record 2431. 1000 Friends argue that raising that general issue was sufficient to
21 give fair notice to the hearings officer and others of the more specific issues raised
22 in this assignment of error.

1 We agree with PWB that 1000 Friends has not established that the issues
2 presented in this assignment of error were raised below with the specificity
3 required by ORS 197.797(1). The hearings officer adopted findings addressing
4 the issues raised, at the level of generality those issues were presented below.
5 Had opponents raised the more specific issues presented on appeal, the hearings
6 officer would have had the opportunity to adopt more specific responsive
7 findings.

8 In any case, we also agree with PWB that the general finding that in the
9 worst case full light scenario there is limited, if any, light spill outside the fence
10 line is sufficient to encompass the specific scenarios 1000 Friends raises on
11 appeal, involving speculation that animal movement will trigger one or more
12 sensors, resulting in one or more lights shining into the habitat area. The
13 illumination report is evidence that a reasonable person could rely upon to
14 conclude that, even if motion sensors trigger some or all area lights, the lights
15 will not adversely impact the surrounding habitat areas.

16 1000 Friends' third assignment of error is denied.

17 **RFPD10'S FIRST ASSIGNMENT OF ERROR**

18 RFPD10 challenges the hearings officer's conclusion that the facility will
19 not adversely affect nearby aquatic habitat. RFPD10 contends that the hearings
20 officer adopted inadequate findings with respect to impacts on aquatic habitat,
21 that are not supported by substantial evidence.

1 **A. Stormwater**

2 The hearings officer found, initially, that the project's stormwater systems
3 are the only aspect of the project that has the potential to adversely impact aquatic
4 habitat. Record 201. Stormwater runoff from the subject property historically
5 drains to two nearby creeks, Johnson Creek and Beaver Creek. PWB proposed
6 stormwater drainage facilities designed to significantly reduce sedimentation and
7 other stormwater-conveyed impacts to the two creeks, compared to pre-
8 construction stormwater drainage conditions. The proposed stormwater drainage
9 system is designed to collect, detain and treat stormwater, and discharge the
10 treated stormwater off-site at rates and locations consistent with pre-development
11 flows and conditions. The hearings officer's findings regarding impacts on
12 aquatic habitat are found at Record 196 to 229.

13 The hearings officer first noted that MCC 39.7515(B) does not specify any
14 particular approach or methodology to determining whether stormwater drainage
15 from a proposed use adversely impacts aquatic habitat, but accepted the approach
16 taken by PWB experts that compared pre-construction and post-construction
17 stormwater drainage impacts to the two creeks. *See also* Record 166 (explaining
18 that the "determination of adversity of impacts is inherently comparison based,"
19 and evaluating the pre-construction conditions on the subject property, including
20 sedimentation from uncontrolled stormwater discharge). The principal PWB
21 experts submitted what is referred to in the record as the "Biohabitats Report,"
22 which evaluated pre-construction and post-construction conditions, and

1 ultimately concluded post-construction stormwater discharge would have fewer
2 adverse impacts on aquatic habitat, compared to pre-construction stormwater
3 discharge.

4 On appeal, RFPD10 does not dispute that comparison between the impacts
5 of stormwater drainage on aquatic habitat from the prior commercial nursery and
6 the proposed facility is a valid approach to establishing compliance with MCC
7 39.7515(B). However, RFPD10 argues that the Biohabitats Report does not
8 support the hearings officer's conclusion that the proposed stormwater facility
9 will improve water quality conditions in the two creeks, compared to pre-
10 construction conditions. That is because, RFPD10 argues, no empirical efforts
11 were made to determine what those pre-construction conditions were, or how
12 much sediment and pollution entered the two creeks from pre-construction
13 agricultural operations on the property.

14 RFPD10 explains that PWB did not learn of its obligation to evaluate
15 impacts on natural resources other than those within the SEC zone until well after
16 construction had started, and that prior to construction and *Cottrell I* PWB's
17 experts had not conducted any detailed field surveys of aquatic habitat to
18 determine exactly what species exist in the two creeks, or the pre-construction
19 condition of that habitat. Instead, RFPD10 argues, the Biohabitats Report simply
20 made a series of assumptions about the pre-construction condition of aquatic
21 habitat, and the impacts of pre-construction agricultural operations, based largely

1 on third-party sources addressing aquatic habitat in the general area or in portions
2 of the two creeks not immediately impacted by stormwater from the property.

3 PWB responds that all nearby aquatic habitat is within SEC zones, and that
4 starting in 2021 its expert, Alsbury, conducted field reviews of the site and
5 prepared an initial 2023 report evaluating conditions in the SEC areas. That 2023
6 report was superseded by the more extensive Biohabitats Report submitted after
7 remand in *Cottrell I*, and relied upon by the hearings officer. Thus, PWB argues,
8 it is not the case that no field evaluations of aquatic habitat conditions were
9 conducted prior to construction, as RFPD10 argues. PWB concedes that the 2023
10 report did not conduct specific types of field observations, such as “snorkel
11 surveys” in the creek that opponents argued below are standard aquatic habitat
12 evaluation methods that could have been employed. However, PWB argues that,
13 as the hearings officer found, more detailed field surveys of pre-construction
14 conditions were not necessary in order to determine whether the facility’s
15 stormwater discharges would adversely affect aquatic habitat. Record 204-05.¹⁸

¹⁸ The hearings officer’s findings state:

““[I]t was not necessary to conduct detailed species surveys because Biohabitats made the conservative assumption that fish, amphibians, and other aquatic species are or historically were present in these habitats, and that any externality of the project that would degrade aquatic habitat could impact aquatic species now or in the future. Notably, the species assumed to be present or historically present are the same as those identified by [opponents]. * * * Biohabitats made the conservative assumption that any species shown by

1 We agree with PWB that RFPD10 has not established that empirical
2 surveys of pre-construction aquatic habitat, using the specific longitudinal
3 evaluation tools identified by opponents, is necessary in order to determine
4 whether the facility's stormwater system will adversely affect aquatic habitat. As
5 the hearings officer found, MCC 39.7515(B) does not prescribe any particular
6 methodology and, as applied in the present case, the focus is on impacts of the
7 proposed use on aquatic habitat, specifically post-construction stormwater
8 drainage impacts compared to pre-construction stormwater drainage impacts.
9 RFPD10 has not demonstrated that empirical evidence of the pre-construction
10 condition of the aquatic habitat, for example, exactly which aquatic species

official sources, scientific studies, Biohabitats' own experience and in-field reviews for this project, and any findings of opponents were present or were historically present, and thus taken into account in review of project externalities that could affect aquatic habitat.'

* * *

"In this light—that 'the focus of the report [was] on the externalities of the project and those externalities' potential to adversely affect aquatic habitat for any species' * * * —it is clear that [opponents'] claim that Biohabitats' conclusions were made 'without empirical data' is false. * * * '[Biohabitats' report] was based on extensive empirical data in the stormwater management report [which] has 668 pages of analysis and data.' * * * Additionally, as noted above, Biohabitats' report is based on 'widely relied upon, public, scientific information on the distribution of aquatic life in area streams.' (including the extensive and authoritative information from the 24K Project). Overall, it cannot be said that Biohabitats' review was done 'without empirical data.'" Record 204-05 (citations and footnotes omitted)

1 existed in the two creeks prior to construction, is necessary in order to answer the
2 question posed by MCC 39.7515(B). The Biohabitats Report assumed,
3 conservatively, that all historically present species were present pre-construction
4 (with the exception of salmon, which no party argues is found in this stretch of
5 either creek), and identified those species based on a host of cited sources,
6 including opponents' own expert testimony. But even if that assumption is
7 incorrect, and fewer species than assumed were actually present pre-construction,
8 RFPD10 does not explain why that circumstance would undermine the critical
9 finding that stormwater drainage impacts from the facility are less adverse than
10 the uncontrolled and untreated pre-construction stormwater drainage from the
11 prior commercial nursery operation.

12 On that point, RFPD10 does not dispute findings and evidence that the
13 treated stormwater discharged from the facility will be cleaner, less laden with
14 sediment and pollutants, compared to pre-construction stormwater discharges.
15 Nor does RFPD10 appear to dispute findings that discharge rates and locations
16 from the facility will match pre-development rates and locations, and reduce the
17 potential and intensity of high-volume “flashy flows” from storm events that are
18 associated with turbid runoff. The only argument that RFPD10 makes on this
19 point is to cite to testimony that aquatic species “are adapted to natural flow
20 variations, and the sudden daily influx of water caused by human activity can
21 disrupt their habitat.” RFPD10 Petition for Review 12 (citing Record 4774). The
22 cited testimony states that aquatic insects are sensitive to changes in flow and

1 water chemistry, while amphibians depend on stable water conditions. *Id.* The
2 hearings officer adopted various findings that aquatic species, including
3 amphibians and aquatic insects, would not be adversely impacted by facility
4 stormwater discharges and, in fact, would be benefited by the cleaner, less turbid
5 water, compared to previous untreated and uncontrolled discharges.¹⁹ We
6 understand RFPD10 to argue that the findings are inadequate, because they do
7 not address issues raised below regarding whether modulating discharges to

¹⁹ For example, the hearings officer quoted, apparently as findings, the following testimony from the Biohabitats Report and other sources:

“Amphibians. ‘In addition to fish species known to be present in the Johnson and Beaver Creek watersheds, several amphibian species are present in wetland and riparian habitats near the Filtration Facility, Intertie Site, and along the Pipeline alignments. There are 63 observations of amphibians (including northern red-legged frog, Pacific chorus frog, Oregon slender salamander, Dunn’s salamander, northwestern salamander, roughskinned newt, Pacific giant salamander, and western painted turtle) reported within the upper Johnson Creek and Beaver Creek watersheds based on data collected from iNaturalist (iNaturalist, 2025) and surveys conducted for BES in reaches of Johnson Creek downstream of the Filtration Plant.’ * * * ‘Amphibians rely on healthy, intact riparian areas where they can forage and seek refuge from predators, with many species being dependent on waterbodies to breed. Red-legged frogs are a state sensitive / strategy species in Oregon that use riparian vegetation, moist forests, and woodlands, as well as dense brush and logs during summer months. The project will enhance the existing riparian and upland areas compared to the previous agricultural land use, which directly negatively impacted habitats required by amphibians to survive. * * *.’” Record 207-08 (citations omitted).

1 avoid erosive volumes of stormwater might alter stream flow in a manner that is
2 adverse to amphibians, aquatic insects and other aquatic species.

3 PWB responds that, as the hearings officer concluded at multiple points in
4 the decision, MCC 39.7515(B) protects in relevant part *habitat* from the adverse
5 impacts of the proposed use, not particular species. PWB argues that the hearings
6 officer found and the record shows that the cleaner stormwater discharged from
7 the facility, along with riparian vegetation and other measures, will improve
8 habitat conditions and thus benefit all aquatic species, compared to prior
9 conditions. *See, e.g.*, Record 208 (citing evidence that the project will improve
10 all sources of impairment (sedimentation, pollution, etc.) when compared to pre-
11 development conditions, improving conditions for all aquatic species). With
12 respect to sedimentation from “flashy flows,” PWB argues that the hearings
13 officer adopted extensive findings regarding erosion and sedimentation arising
14 from the prior commercial nursery operation, operations that involved removal
15 of riparian vegetation, planting crops in tilled bare soil, and exposing soils to
16 erosion from strong rain events. Record 205-07; *see also* Record 225-26 (findings
17 addressing hydrologic changes caused by flashy flows). PWB argues that, given
18 these findings and the supporting evidence, the hearings officer was not required
19 to adopt specific findings evaluating whether aquatic species such as amphibians
20 and aquatic insects might be adversely affected by changes in flow variation
21 resulting from fewer or less intense “flashy flows.”

1 We agree with PWB. RFPD10 cites testimony indicating that amphibians
2 and aquatic insects benefit from relatively stable conditions, but that testimony
3 does not suggest that *reducing* the intensity of flashy flows from storm events
4 could adversely affect aquatic habitat for any species, including amphibians and
5 aquatic insects. If anything, that testimony seems to suggest the opposite, that
6 reducing the intensity of flashy flows and releasing water from storm events more
7 slowly over time would tend to make flows more stable and consistent. The
8 testimony cited on this point does not raise a legitimate issue of compliance with
9 MCC 39.7515(B), and the hearings officer was not obligated under *Norvell* to
10 adopt responsive findings. 43 Or App at 853.

11 Relatedly, RFPD10 cites to findings that the proposed stormwater facility
12 is designed to limit the two-year post-development peak flow to half of the two-
13 year pre-development peak flow. Record 225. RFPD10 apparently understands
14 this to mean that the facility will halve the amount of water in the creeks during
15 non-peak flows, and thus potentially harm aquatic species who rely on a certain
16 level of flow. However, as we understand the findings and supporting evidence,
17 the facility is designed to reduce the intensity of peak flows from storm events,
18 but after storm events the water retained will be released slowly to the creeks,
19 maintaining a more consistent flow. RFPD10 has not established that, under this
20 approach, the overall amount of water flowing in the creeks would be reduced.

1 **B. Water Temperature**

2 RFPD10 next argues that the findings regarding impacts on water
3 temperature are inadequate and not supported by substantial evidence. The
4 hearings officer noted that warm water temperatures in Johnson Creek and
5 Beaver Creek during summer is a widespread existing problem, deriving mostly
6 from loss of riparian shade and vegetation, leading to solar radiation heating.
7 Record 231. The hearings officer noted evidence that stormwater runoff is not a
8 significant contributor to thermal loading of surface waters. *Id.* Nonetheless, to
9 avoid the facility contributing to existing thermal loading, PWB proposed two
10 measures: (1) planting shade trees and covers over detention basins and
11 employing best management practices in operating the facility, to reduce thermal
12 loading of stormwater stored in the basins, and (2) planting riparian vegetation
13 and shade trees along Johnson Creek. The hearings officer concluded that these
14 measures alone would prevent adverse thermal impacts from the facility under
15 historic climactic conditions. Record 232. However, the hearings officer noted
16 testimony that, given the uncertainty of climate change, there is a low risk of
17 unprecedented severe heat/storm events in the near future, before riparian
18 plantings are grown enough to provide significant shade. To mitigate that
19 potential risk, late in the proceeding PWB proposed a third measure: to drain
20 Cottrell Pond, a 0.73-acre impoundment located approximately 1,000 feet
21 downstream of the facility, restore the original streambed, and plant the riparian
22 area with shade trees and vegetation. The hearings officer cited evidence that

1 Cottrell Pond warms stream temperatures more than any other Johnson Creek
2 pond studied, with increases up to 15 degrees above and below the impoundment.
3 The hearings officer quoted with approval testimony that removing Cottrell Pond
4 would dramatically reduce thermal loading in that stretch of Johnson Creek, and
5 mitigate the already low risk of thermal loading from stormwater released from
6 the facility prior to full establishment of the planned riparian vegetation. Record
7 233.

8 RFPD10 disputes that the record includes any demonstration that removing
9 Cottrell Pond, restoring the streambed, and planting new riparian vegetation
10 would, in fact, reduce temperatures in any part of the creek. According to
11 RFPD10, the record on this point is so deficient that the hearings officer
12 essentially deferred any evaluation of effectiveness to subsequent county review,
13 but without providing for public participation, contrary to *Gould v. Deschutes*
14 *County*, 216 Or App 150, 171 P3d 1017 (2007) and *Rhyne v. Multnomah County*,
15 23 Or LUBA 442 (1992). In any case, RFPD10 argues that even if removing
16 Cottrell Pond would, in fact, reduce creek temperatures downstream of the
17 subject property, doing so would not cool water temperatures upstream close to
18 the filtration facility.

19 PWB responds, and we agree, that the record includes evidence that a
20 reasonable person would rely upon to conclude that removing Cottrell Pond
21 would significantly reduce creek temperatures. Record 236-45 (citing expert
22 testimony that pond removal would significantly reduce creek temperatures). The

1 hearings officer did not defer necessary determinations on this point to non-
2 public reviews, contrary to *Gould* and *Rhyne*, as RFPD10 argues.

3 RFPD10 may be correct that reducing creek temperatures downstream
4 would not itself reduce temperatures upstream near the facility. However, as
5 PWB argues, the proposal is not intended to prevent potential thermal loading
6 from facility stormwater, as are the first two measures, but rather to *mitigate* any
7 impacts that might arise in the event of unprecedeted heat/storm events in the
8 near future, before riparian vegetation can fully establish itself. In response to
9 objections raised below that Cottrell Pond is too distant from the facility to
10 qualify as mitigation, the hearings officer adopted findings that the pond site is
11 within the project impact area and, even if considered “off-site,” there is no
12 prohibition in the county code or elsewhere on employing mitigation off-site. On
13 appeal, RFPD10 renews those objections, but we agree with PWB that RFPD10
14 has not established that the proposal is too distant from the facility to qualify as
15 mitigation, or any other error or inadequacy in the findings or evidence relied
16 upon with respect to the proposal to remove Cottrell Pond.

17 RFPD10 next challenges the findings regarding the first proposed measure,
18 reducing solar warming of stormwater in the detention ponds on-site by a
19 combination of planting, artificial shade and operational adjustments. One of the
20 operational adjustments is to minimize drawdown times and maintain standing
21 water depth (because, as we understand, shallow water heats faster from solar
22 radiation than deep water). RFPD10 argues that these measures are inconsistent

1 with other findings that water will be detained on-site and released slowly to
2 reduce peak flows. However, RFPD10 does not explain why there is any
3 inconsistency between the identified adjustments and the proposed detention and
4 discharge rates, or cite to any evidence suggesting conflict between the thermal
5 reduction adjustments and other detention/discharge strategies.

6 RFPD10's first assignment of error is denied.

7 **RFPD10'S SECOND ASSIGNMENT OF ERROR**

8 Under the second assignment of error RFPD10 argues that in order to
9 adequately evaluate adverse impacts on wildlife habitat, PWB must first establish
10 a baseline for the pre-construction condition of wildlife habitat, based on surveys
11 of actual pre-construction conditions, rather than rely on other methods such as
12 HEP (Habitat Evaluation Procedure), discussed under petitioners' fourth
13 assignment of error. RFPD10 argues that PWB failed to conduct any empirical
14 surveys of pre-construction habitat, and instead chose to commence construction
15 after the county's initial approval, destroying habitat such as the Dodge Park
16 hedgerow in the process. RFPD10 contends that it is now too late, on remand
17 from *Cottrell I*, for PWB to accurately determine the pre-construction baseline
18 for wildlife habitat, and that work-arounds such as the HEP analysis are legally
19 and factually insufficient.

20 Opponents argued below that a multi-year inventory of wildlife habitat,
21 using traditional survey techniques such as night cameras and scent stations to
22 determine which animals are present, was required in order to adequately assess

1 pre-construction habitat conditions. The hearings officer disagreed, noting that
2 MCC 39.7515(B) requires no particular methodology, and that it is unlikely that
3 the 1977 commissioners intended that conditional uses such as the proposed
4 community service use be subject to the delay and expense of a longitudinal,
5 multi-year habitat study. Record 254. The hearings officer noted other code
6 provisions that, in fact, do require specific wildlife plans and studies, but no such
7 similar requirement is found in MCC 39.7515(B). Record 255. The hearings
8 officer described the HEP methodology in detail, and addressed opponents'
9 specific objections to that methodology. Record 256-62. The hearings officer
10 ultimately concluded that

11 "the modified HEP methodology used in this case was appropriate
12 to quantify impacts on wildlife habitat across all pre- and post-
13 construction habitat types and to confirm that the extensive wildlife
14 habitat enhancements proposed, with conditions in place for long-
15 term monitoring and maintenance, provides the necessary evidence
16 to demonstrate that the Project operation will not adversely affect
17 wildlife habitat or wildlife habitat areas." Record 262.

18 On appeal, RFPD10 repeats the argument that only pre-construction
19 surveys, using traditional survey methods, are appropriate methodologies for
20 evaluating pre-construction habitat conditions. PWB responds, and we agree, that
21 RFPD10 has not established that the hearings officer erred in rejecting that
22 argument. As the hearings officer correctly noted, nothing in the text or context
23 of MCC 39.7515(B) specifies any particular methodology for demonstrating that
24 a proposed use will not adversely affect natural resources. The county knows how

1 to specify use of an inventory or similar habitat assessment method, and has not
2 chosen to require such methods in applying MCC 39.7515(B).

3 Nonetheless, RFPD10 argues that the HEP methodology applied by
4 PWB's experts and accepted by the hearings officer is flawed in several respects,
5 and does not provide substantial evidence supporting the conclusion that post-
6 construction habitat values are higher than pre-construction habitat values, and
7 thus the proposed use will not adversely affect wildlife habitat.

8 RFPD10 first notes that the HEP analysis initially included only eight
9 representative species, and was later supplemented with other species identified
10 by opponents, including bald eagles, northern spotted owl, the short-eared owl,
11 the streaked horned lark and the Oregon slender salamander. RFPD10 suggests
12 this supplementation demonstrates that the original HEP analysis was
13 insufficient. However, even if so, what matters is whether the supplemented list
14 is representative, not whether the original list was representative. RFPD10 does
15 not argue that the supplemented list is unrepresentative. RFPD10 has not
16 demonstrated that any insufficiency in the original list of representative species
17 was not remedied by the supplemented list.

18 RFPD10 next argues that the HEP analysis associated representative
19 species with specific habitat types, for example, associating bald eagles and owls
20 with open fields and riparian and upland forest, but ignored testimony that bald
21 eagles and owls have been observed perching near the Dodge Park hedgerow.
22 RFPD10 argues that mature trees in the 2.3-acre linear strip of hedgerow

1 provided perching sites for bald eagles and owls, and the HEP analysis is flawed
2 for failure to associate hedgerow habitat with those species.

3 PWB argues that RFPD10 does not cite any evidence that eagles or owls
4 have perched in the hedgerow, only that they were observed nearby. In any case,
5 PWB disputes RFPD10's premise that MCC 39.7515(B) requires precise
6 replication of perching opportunities, noting that the hearings officer rejected
7 similar claims that the standard protects particular species or even particular
8 habitats. Record 248 (MCC 39.7515(B) does not favor one type of wildlife
9 habitat over another type of habitat, or habitat for one species over habitat for
10 another species). Further, PWB argues that the HEP model assigns habitat values
11 based on foraging and breeding/nesting suitability, and that RFPD10 does not
12 cite any evidence suggesting that the linear hedgerow provided suitable habitat
13 for foraging or nesting for these species.

14 We agree with PWB that RFPD10 has not established that HEP analysis
15 was flawed in failing to associate the hedgerow with bald eagles and owls as
16 habitat for those representative species. Even if the hedgerow provided perching
17 opportunities to eagles and owls, something RFPD10 has not established, we
18 agree with PWB and the hearings officer that MCC 39.7515(B) does not require
19 replication of specific types of pre-construction habitat or habitat features. The
20 HEP analysis assigned a relatively low habitat value to the hedgerow with respect
21 to eagles and owls, because it did not offer forage or nesting/breeding

1 opportunities, and RFPD10 has not established any evidentiary insufficiency in
2 doing so.

3 RFPD10's second assignment of error is denied.

4 **RFPD10'S FOURTH ASSIGNMENT OF ERROR**

5 Opponents argued below that removal of the Dodge Park hedgerow and
6 other vegetation along pipeline routes would cause adverse scenic and aesthetic
7 impacts on members of the public who formerly enjoyed wildlife in the pre-
8 construction hedgerow and linear vegetation. Record 734-35. The hearings
9 officer rejected those arguments, concluding first that aesthetics and scenic value
10 are not natural resources for purposes of MCC 39.7515(B), but rather one of the
11 benefits of natural resources, as described in MCCP Policy 16. Record 345-47.
12 In the alternative, the hearings officer adopted findings concluding that the
13 project will not adversely impact aesthetic or scenic natural resources. Record
14 347-53.

15 On appeal, RFPD10 argues that aesthetic and scenic values are natural
16 resources for purposes of MCC 39.7515(B). But even if not independent natural
17 resources on their own, RFPD10 argues that aesthetic and scenic values are
18 nonetheless benefits of wildlife habitat, as indicated in MCCP Policy 16, and
19 therefore a protected "component" of wildlife habitat. RFPD10 argues that
20 implicit in any evaluation of aesthetics or scenic values is the ability of the public
21 to access and view the wildlife habitat at issue. In the present case, RFPD10
22 argues, the Dodge Park hedgerow and other linear habitats along pipeline routes

1 that PWB removed was wildlife habitat that area residents enjoyed when walking
2 or driving along the rights-of-way. However, RFPD10 argues that the replanted
3 hedgerow along Dodge Park Boulevard will consist only of shrubbery, which
4 does not replicate the mature trees that residents formerly enjoyed. Further,
5 RFPD10 argues that PWB proposed to mitigate much of the removed hedgerow
6 functions by planting new hedgerows and other habitat plantings at the facility
7 site, which is inaccessible from public access or view. ~~argued that it is important to~~

8 We affirmed above the hearings officer's primary interpretation that the
9 natural resources protected by MCC 39.7515(B) are limited to the six resources
10 listed in MCCP Policy 16, which do not list aesthetic or scenic views as resources.

11 The introduction to MCCP Policy 16 does describe aesthetics or scenic views as
12 one of the "benefits" of protecting wildlife habitat. However, PWB argues
13 initially that no party raised below RFPD10's theory on appeal that aesthetic and
14 scenic values are essential "components" of wildlife habitat, and that preserving
15 "public access" to a habitat mitigation site is an integral part of protecting wildlife
16 habitat. PWB argues that the "component" and "public access" issues are waived,
17 under ORS 197.797(1). ~~argued that it is important to~~

18 The preservation section of the fourth assignment of error cites Record 733
19 to 734, which includes arguments that aesthetic and scenic values are natural
20 resources and that removal of the Dodge Park hedgerow causes aesthetic and
21 scenic harm to nearby residents. But the cited pages do not argue that aesthetic
22 or scenic values are "components" of wildlife habitat, or that MCC 39.7515(B)

1 requires the developer to provide public access or viewing opportunities to
2 wildlife habitat at a mitigation site. In its reply brief, RFPD10 argues that the
3 “component” and “public access” issues were raised at Record 910 and 1497-98.
4 However, neither cite fairly raises either the “component” or “public access”
5 issues raised in the fourth assignment of error. The cited testimony essentially
6 argues that residents along Dodge Park hedgerow were aesthetically harmed by
7 removal of the hedgerow habitat. We conclude that the “component” and “public
8 access” issues were not preserved. ORS 197.797(1).

9 In the interest of completeness, we will nonetheless address the merits of
10 RFPD10’s fourth assignment of error. We generally agree with PWB that, as the
11 hearings officer found, MCC 39.7515(B) enjoins adverse impacts against wildlife
12 habitat itself, that is, actual harm to habitat, and does not protect against harm
13 caused *to the public* from loss of aesthetic or scenic enjoyment of wildlife habitat.
14 Said differently, while aesthetic or scenic enjoyment may be one of the secondary
15 “benefits” of preserving wildlife habitat, mitigating habitat loss at a location that
16 provides reduced or limited public access and views, and thus limits opportunities
17 for aesthetic or scenic enjoyment of the mitigation site, does not “harm” the
18 wildlife habitat itself. Because harm to the habitat is the focus of MCC
19 39.7515(B), RFPD10’s arguments that other societal interests are harmed by the
20 proposed mitigation do not provide a basis for reversal or remand.

21 RFPD10’s fourth assignment of error is denied.

1 **DISPOSITION**

2 In addressing petitioners' first and second assignments of error, we agreed
3 with some of petitioners' arguments that the hearings officer erred, in two
4 respects. However, as explained, the identified errors do not provide a basis for
5 reversal or remand, given that the hearings officer adopted alternative findings,
6 and we have rejected all challenges to the remaining primary and alternative
7 findings presented by petitioners and intervenors-petitioners. Accordingly, the
8 county's decision is affirmed.