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January 31, 2025

VIA E-MAIL - hearingsofficeclerks@portlandoregon.gov

City of Portland Hearings Office
Attn: Marisha Childs
1900 SW 4th Avenue, Suite 3100
Portland, OR 97201

Re: Portland General Electric Company ("PGE") Harborton Reliability Project
Case No. LU 24-041109 CU EN GW

Dear Ms. Childs:

Per the discussion at the January 29, 2025 public hearing, enclosed please find another copy of our letter dated January 28, 2025. This letter is identical to the letter first submitted, but the attachments have been abridged to only include the relevant pages. I hope this makes reference to the cited legal authorities easier. Thank you for your patience.

Best regards,

A handwritten signature in blue ink, appearing to read 'David J. Petersen', with a long, sweeping underline.

David J. Petersen

DJP/djp
Enclosures

cc (via e-mail): Client
Zack Schick

001991\00464\18011389v1



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January 28, 2025

VIA E-MAIL HearingsOfficeClerks@portlandoregon.gov
AND HAND DELIVERY¹

City of Portland Hearings Office
Attn: Marisha Childs
1900 SW Fourth Avenue
Suite 3100
Portland, OR 97201

Re: Portland General Electric Company ("PGE") Harborton Reliability Project
Case No. LU 24-041109 CU EN GW

Dear Ms. Childs:

This law firm represents the applicant PGE in this land use matter. In addition to testimony and evidence presented in the application and to be presented at the upcoming hearing, we submit the following arguments and evidence on PGE's behalf in support of the Proposed Project (as that term is defined in PGE's application, submitted October 28, 2024). Specifically, these comments address issues more suitable for written testimony, including arguments that have been raised by staff and opponents of the Proposed Project and which merit further legal analysis.

1. The Proposed Project Has Independent Utility And Therefore Merits Evaluation As A Stand-Alone Project.

PGE initiated the Harborton Reliability Project ("HRP") in 2017 to address five potential, discrete issues that could affect future reliability of its power grid in the Portland metropolitan area. The project was thus conceptualized with five phases. As explained in PGE's application at pp. ii-iii, while all phases share the goal of improving the regional power grid, each phase addresses a distinct issue and, if built, would be independently valuable:

- Phase 1, now complete, rebuilt the Harborton Substation.
- Phase 2 is underway and will upgrade the 115 kV power lines from the Harborton Substation along Highway 30 to serve industrial and urban customers in northwest Portland.

¹ Attachment 1 is included with this letter. Due to the large file sizes, the remaining attachments are submitted separately in electronic format on a flash drive.

- The Proposed Project (Phase 3) focuses on transmission configuration improvements to address transmission vulnerabilities. It will direct an additional source of 230 kV power to the Harborton Substation and resolve the restrictive nature of the current three-terminal line condition by creating three new two-terminal lines connected to the Harborton Substation.
- Phase 4 anticipates a potential future need to replace existing transmission wires running through Forest Park west of the Proposed Project. Whether this need exists or will exist is still under internal review at PGE.
- Phase 5 looks further ahead to when additional energy may need to be transmitted from the north to the Portland area. Although anticipated, no specific routes or designs have been developed.

Staff and other project opponents have alleged, often relying on incorrect facts, that as Phase 3 of the HRP, the Proposed Project has been improperly segmented from Phases 4 and 5. Staff's analysis in particular suffers from similar wrong assumptions.

First, staff improperly raises segmentation as an issue relating to project need. The Proposed Project has a definite purpose and addresses a specific need: to reduce the bottleneck for power deliveries into the Portland area caused by the current three-terminal line condition in Forest Park. The need to fix this problem has not been challenged nor is there any evidence in the record demonstrating that this problem does not exist. As explained in PGE's application, Phases 4 and 5 address very different needs: Phase 4 would increase the capacity of existing power lines in Forest Park if and when needed, and Phase 5 looks ahead to the potential need to further increase power transmission from the north. Both of these problems may arise and require solutions, regardless of whether the Proposed Project is ever built, and conversely the Proposed Project will by itself solve the problem for which it has been designed. The need for the Proposed Project stands on its own; the need for Phases 4 and 5 has no bearing on the issue. Application, p. 43.

Second, staff makes several logical leaps of faith not supported by evidence. On page 25 of its report, staff states (wrongly) that PGE has not provided details on Phases 4 and 5, and then jumps to the conclusion that those phases will "most likely occur within Forest Park within existing easements." On page 26, staff further concludes that "if Phase 3 is constructed, then the future phases can be framed as Forest Park being the only practicable location for transmission line expansion in this area," and "what can be inferred ... is a causal relationship between the three phases and that a high probability exists of the locational interdependence of Phases 4 and 5 on Phase 3."



I question how staff can reach these conclusions with no evidence, if PGE has in fact not provided details, as staff claims. Fortunately, PGE has in fact provided details establishing precisely the opposite: that the existence or absence of the Proposed Project has no bearing whatsoever on either the likelihood of Phases 4 or 5 or their location. As to Phase 4, if it occurs at all it will necessarily be in Forest Park, since the problem it addresses is the potential need to replace lines already existing in Forest Park. Phase 5 may or may not be proposed for Forest Park, but it is too early to reach any conclusions about whether Phase 5 will be needed at all, and if it is, where it would go. But ultimately, the decisions by PGE to move forward on those Phases, and where those Phases occur, are not dependent on whether or not Phase 3 exists.

Staff's conclusions that the Proposed Project adds to the "framing" or "infers ... a high probability ... of locational interdependence" is just evidence-free wish casting. Each of the three phases must stand on its own merit. As to Phases 4 and 5, they have independent utility without regard to whether or not the Proposed Project is built, and in both cases, if proposed those projects will go through full land use review pursuant to the applicable criteria. Staff's conclusions to the contrary, and allegations from other commenters to the same effect, are mere speculation and not based on any evidence in the record. Phase 3 (like Phases 1 and 2 before it) meets the requirements of applicable law to constitute a stand-alone project with independent utility, regardless of the possibility of future phases of the HRP.

This conclusion is not only supported by the evidence, it is also consistent with applicable law. Portland Zoning Code ("**PZC**") 33.700.005 requires permits for "development." The Forest Park Natural Resources Management Plan of 1995 ("**NRMP**") analyzes proposals in Forest Park as "projects." *See* NRMP Chapter 7. PZC 33.910.030 defines a *project* as "an existing or proposed development," *development* as "all improvements on a site" and a *site* as a tract of land under the same ownership unless a single development requires multiple parcels with different ownerships, in which case all ownerships are a single site. A site can also be just a part of single ownership at the applicant's discretion.

Neither the PZC nor the NRMP provide specific rules on the proper or improper segmentation of a development or a project into multiple developments or projects. Improper segmentation of projects has, however, been an issue in other contexts, including energy facility siting. The state Energy Facility Siting Council ("**EFSC**") issues site certificates for certain "energy facilities." Analysis of the impacts of a single energy facility must also include the impacts of all "related or supporting facilities," which are "any structures, proposed by the applicant, to be constructed or substantially modified in connection with the construction of an energy facility." ORS



469.300(25). EFSC interprets "in connection with the construction of" to mean that the structure would not be built "but for" construction or operation of the energy facility. OAR 345-001-0010(27).

The Hearings Officer's decision in Case No. LU 18-100954 EN (Hearings Office Case No. 4200012) (2020)² is also instructive on this issue. In that matter, Portland Parks & Recreation ("**PPR**") sought environmental review approval of Phase 1 of a two-phase project to improve a Forest Park trailhead entry. While originally proposed as one phase, PPR later split the project into two phases "in response to public comments and budget constraints." *Id.* at 3. Phase 1 included (among other things) a 30-space parking lot, which PPR expressly stated was oversized to meet the parking needs of Phase 1 and also "to serve the Phase 2 development when and if it occurs." *Id.* at 12. The Hearings Officer found that "[t]he current Phase 1 project is a first step in implementing the vision for a park trailhead facility at this location." *Id.* at 8.

Despite the obvious linkage and interdependence of the two phases, including the oversized parking lot in Phase 1 that facilitated Phase 2, the proposal was not rejected for improper segmentation or deferral of impacts. Instead, the Hearings Officer wisely deferred to "the Phase 1 project purpose as PPR has defined it." *Id.* at 12. Opponents' argument that the parking lot should be reduced to 20 spaces was rejected because a 20-space lot no longer served PPR's purpose. *Id.*

Considering these authorities in the context of the HRP, Phases 4 and 5 (if they occur at all) would occur in geographically different locations than the Proposed Project. Thus, Phases 4 and 5 would be on different "sites" and therefore would be distinct "developments" or "projects" under the PZC. Phase 3 has independent value because it resolves the existing deficient three-terminal line condition by creating three new two-terminal lines connected to the Harborton substation. To rectify the identified problem, Phase 3 must be completed regardless of whether Phases 4 and 5 ever occur. And, Phases 4 and 5 are not needed to solve the problem that the Proposed Project addresses. They instead solve different potential problems, and the EFSC "but for" approach is not met." If a parking lot admittedly oversized by PPR to facilitate a future phase does not mandate the environmental review of both phases together, then clearly three different projects by PGE in different locations solving different problems, two of which may never occur, have not been improperly segmented.

The Proposed Project is a discrete proposal to solve a discrete problem, the need for which is undisputed. The existence or absence of the Proposed Project has no

² Copy attached.



influence on whether Forest Park might be used for Phases 4 or 5, which will be evaluated on their own merits if and when they ever proceed. Like PPR in the trailhead matter, the applicant is afforded leeway in defining its project. As such, the Proposed Project has independent utility and merits evaluation as a stand-alone project.

2. PGE Is Not Obligated By NRMP Exception Criterion B To Utilize Infeasible Alternatives.

NRMP exception criterion B requires that "no alternative locations exist outside Forest Park for the proposal." Staff and other commenters have argued that because this criterion does not contain qualifying language such as requiring the non-park alternatives to be reasonable or practicable, the existence of any non-park alternative no matter how infeasible prohibits a finding that this criterion is met.³ This interpretation is inconsistent with both past City practice and applicable law.

- a. Past City decisions have found exception criterion B met when the proposed project involves existing utility improvements in the park.*

Two recent, relevant Hearings Office decisions analyze the NRMP's approval criteria for exceptions. In the most recent decision, Kinder Morgan requested approval for the repair or replacement of approximately 1.8 miles of existing pipeline in Forest Park. LU 23-0121553 EN (Hearings Office Case No. 4230005), p. 2 (2023).⁴ The decision approved an NRMP exception for pipeline work that included removal of several native trees and temporary disturbance of 17,271 square feet of area. *Id.* at 3. With respect to exception criterion B, the staff report's proposed finding (which was adopted by the Hearings Officer without change) states: "The proposal is to conduct repair and maintenance activities with an existing pipeline that crosses through Forest Park. Therefore, the proposal cannot be conducted in an alternative location outside of Forest Park. *This criterion is met.*" *Id.*, associated staff report at 12.⁵

In a similar hearing in 2020 for Kinder Morgan to repair sinkholes around their pipeline in Forest Park, the proposal was conditionally approved. LU 20-136055 EN (Hearings Office Case No. 4200011), p. 2, (2020).⁶ The adopted finding for criterion B states: "The proposal is to conduct repair and maintenance activities associated with an existing pipeline easement that crosses through Forest Park. Therefore, the

³ Staff Report at 37.

⁴ Copy attached.

⁵ Note that the same facts also supported a finding that NRMP exception criterion C was met.

⁶ Copy attached.



proposal cannot be conducted in an alternative location outside of Forest Park. *This criterion is met.*" *Id.*, associated staff report at 14.

Similarly here, PGE proposes to upgrade and improve existing transmission lines already present within Forest Park. If repair and maintenance work for an existing pipeline in the park must necessarily take place in the park, then so too must similar work on an existing transmission line in the park. In the Kinder Morgan cases, staff did not suggest (nor did the Hearings Officer find) that exception criterion B required that the pipelines be moved outside the park, regardless of cost or time. Rather, they much more reasonably concluded that improvements to existing utility infrastructure within the park must necessarily take place in the park and therefore the alternatives criteria, including exception criterion B, were met in those cases. The same logic applies equally here.

- b. *Oregon and Federal law imply reasonableness or practicality qualifiers on land use criteria that require an absence of alternatives.*

In *1000 Friends of Oregon v. Land Conservation & Dev. Comm'n*, 302 Or 526, 731 P 2d 1015 (1987), 1000 Friends challenged Tillamook County's plan to construct a marina, motel, recreational vehicle park, restaurant and shops on a 24.25-acre salt marsh called Botts Marsh. Approval required satisfying Estuarine Resources Goal 16, which authorizes dredge and fill operations under the following conditions:

1. If required for navigation or other water-dependent uses that require an estuarine location; and
2. if a public need is demonstrated; and
3. *if no alternative upland locations exist*; and
4. if adverse impacts are minimized as much as feasible.

Id. at 528 (emphasis added). Because the project included non-water dependent components, the County took an exception to criterion (1) and, based on that exception, found that criterion (3) was moot. 1000 Friends disagreed, arguing that criterion (3) still required consideration of upland locations and that the County "did not adequately consider alternative upland sites for the non-water dependent uses and for boat storage." *Id.*

The Oregon Supreme Court agreed with 1000 Friends that the exception to criterion (1) did not render criterion (3) moot. *Id.* at 529. Rather, the exception under criterion (1) excused the County from considering upland alternatives for the water-dependent uses, but it still needed to consider upland alternatives for the non-water dependent uses. *Id.* at 530. However, the Court then concluded that the County had adequately done so by considering and rejecting other sites for the project as a whole. The Court



rejected 1000 Friends' argument that the project should be broken into water-dependent and non-water dependent components, since it would "destroy the integrity of the project and largely defeat the purpose for which it was designed." *Id.* at 532.⁷ Therefore, the county's conclusion that "Botts Marsh was the only *suitable* site for the marina complex" was supported by substantial evidence "that there were no *satisfactory* alternatives." *Id.* (emphases added). Notably, the Court added the words "suitable" and "satisfactory" in its analysis despite no similar qualifying words appearing in the criterion.

Similar issues have arisen regarding projects in national forests under the federal National Forest Management Act ("NFMA"). To comply with NFMA, the acting agency action must be consistent with the local governing forest plan. *Idaho Conservation League v. U.S. Forest Serv.*, No. 1:11-CV-00341-EJL, 2012 WL 3758161 at *19 (D. Idaho Aug. 29, 2012) ("**ICL-Forest Serv.**"); *see also Idaho Conservation League v. Lannom*, 200 F Supp 3d 1077 (D. Idaho 2016), *amended*, No. 1:15-CV-246-BLW, 2017 WL 242474 (D. Idaho Jan. 18, 2017) ("**ICL-Lannom**"); *Gifford Pinchot Task Force v. Perez*, No. 03:13-CV-00810-HZ, 2014 WL 3019165 (D. Or. July 3, 2014).

In both *ICL* cases, opponents of mining projects claimed that the U.S. Forest Service's approval violated the Boise Forest Plan. One part of the Boise Forest Plan stated: "[w]here no alternative to siting facilities in [Riparian Conservation Areas ("RCA")] exists, locate and construct the facilities in ways that avoid or minimize degrading effects . . ." and "[w]here no alternative to road construction in RCAs exists, keep roads to the minimum necessary for the approved mineral activity." *ICL-Forest Serv.*, WL 3758161 at *20. Another part of the Boise Forest Plan stated: "[i]f no alternative to locating mine waste . . . facilities in RCAs exists, then: a) analyze waste material using the best conventional methods and [subpoints b) through e) omitted]." *Id.*

The court in *ICL-Lannom* provided more detailed analysis than in *ICL-Forest Serv.* on these requirements. In *ICL-Lannom*, the Forest Service approved drilling, road reconstruction, and use of heavy equipment in the Frank Church–River of No Return Wilderness Area. *ICL-Lannom*, 200 F Supp 3d at 1080. The Forest Service concluded, and the Court agreed, that there was "no alternative" to 0.7 miles of road reconstruction within the RCA because moving it outside the RCA would "move it from an old existing roadbed to a previously undisturbed region of the wilderness area, a net loss for wilderness values." *Id.* at 1092. The Court made a similar finding regarding the drilling of trenches in the RCAs, where "moving them outside of the RCAs would also move them from an existing roadbed to a previously undisturbed area, again producing a net loss for wilderness values." *Id.*

⁷ In making this finding, the Supreme Court showed substantial deference to the applicant's definition of the project.



The Boise Forest Plan included no express qualifier to its alternative location rules, and alternative locations outside of RCAs were at least theoretically possible. Still, the *ICL* courts upheld the approval of activity within the RCAs because the alternatives had equal or greater impacts than the proposed location.

Similarly here, it is not enough for an outside-the-park alternative to be theoretically feasible regardless of cost, time, comparative impacts or other potential roadblocks. To conclude otherwise would defy common sense, because there is always another alternative if money, time or impacts are no object. Instead, as in the Kinder Morgan cases, *1000 Friends* and *ICL-Lannom*, it is necessarily implied in exception criterion B that an outside-the-park alternative must be reasonable and feasible, as well as "suitable" and "satisfactory" to meet project objectives.⁸

3. Alternative Routes Avoiding Forest Park May Not Qualify For A Certificate Of Public Convenience And Necessity Needed To Condemn Private Property.

Another common theme in the staff report and opposition comments is the supposed viability of routes outside of Forest Park, specifically alternatives 4 and 8 described in the October 24, 2022 *Harborton 230kV Alternatives Analysis* (the "**Toth Report**").⁹ As shown on Figures 2 and 3 of the Toth Report, routes 4 and 8 are different variations of the same route – both would proceed along the east side of Highway 30, with route 4 using the north termination point and route 8 using the south termination point. Both routes have significant flaws, as discussed in PGE's application. Among those flaws, both routes would require private property rights – route 4 would require easements from seven private landowners plus Metro, and route 8 would require easements from four private landowners plus the City of Portland and the State of Oregon.¹⁰ Key affected private landowners have expressed strong opposition to voluntarily granting PGE the necessary rights, thus requiring that any easements be taken by eminent domain.¹¹

⁸ An excellent resource for this is the PZC definition of *practicable*: “capable of being done after taking into consideration cost, existing technology, and logistics in light of project purposes.” PZC 33.910.030.

⁹ The Toth Report is Exhibit A.4 to the Staff Report. While this analysis focuses on routes 4 and 8 as they are the routes most commonly cited by opponents, the analysis applies equally to all 8 alternatives evaluated in the report.

¹⁰ See Attachment 1.

¹¹ Application, p. 16.



When a utility such as PGE needs to condemn private property to construct transmission lines, it must first obtain a Certificate of Public Convenience and Necessity ("CPCN") from the Oregon Public Utility Commission ("OPUC"). ORS 758.015(1). Part of the CPCN review process requires OPUC to determine whether a transmission line is necessary, safe, *practicable*, and in the public interest. ORS 758.015(2) (emphasis added). When assessing practicability, the OPUC evaluates the totality of circumstances including scheduling, costs, construction planning, and feasibility of alternative routes. OAR 860-025-0035(1)(c).

In this case, it is questionable that OPUC would grant a CPCN for either route 4 or 8 of the Toth Report because both fail to meet the "practicability" requirement. OPUC has found routes that require property acquisition, delay projects, and add significant cost are impractical when alternatives that do not require acquisition, are faster and less costly are available. For example, in one case OPUC deemed an alternative route impractical because it "would impact more landowners, increase the length of the route and thereby increase costs, and result in significant project delays and additional costs to seek new approvals for a new route," as compared to another already-available route. *In the Matter of Idaho Power Company, Petition for Certificate of Public Convenience and Necessity*, Docket No. PCN 5; Order No. 23-225 (June 29, 2023), p. 29. Similarly, OPUC found alternatives requiring new infrastructure impractical when existing infrastructure could be used. *In the Matter of Umatilla Electric Cooperative Petition for Certification of Public Convenience and Necessity*, Docket No. PCN 1, Order No. 17-111 (Mar 21, 2017), p. 5.¹²

Any of the Toth Report alternatives, including routes 4 and 8, would severely delay the development and construction timeline. The CPCN process itself introduces a likely delay of at least a year, followed by a 3 to 4 year construction and development timeline,¹³ making project completion before 2028 impossible. Compromised reliability may also possibly create conflict with Federal Energy Regulatory Commission regional transmission planning regulations applicable to PGE.

Additionally, both alternative routes present significant construction challenges as they parallel a buried pipeline on NW Marina Way, requiring extensive mitigation to avoid embedding poles near the pipeline. This mitigation would encroach on the Harborton Conservation Area and require relocation of the Harborton-St. Helens 115 kV line, further delaying construction and increasing costs.¹⁴ Accordingly, PGE anticipates that OPUC would likely reject the significant construction delays and

¹² Copies of both OPUC Orders are attached.

¹³ Application, p. 16.

¹⁴ Toth Report, pp. 28-29.



environmental impacts of routes 4 and 8, particularly in light of the availability of the preferred route which avoids such impacts.

In summary, the existence of PGE's preferred route makes it questionable that OPUC would grant the CPCN necessary for PGE to construct routes 4 or 8. Instead, OPUC may conclude that the preferred route would be faster, utilize existing infrastructure, avoid private property condemnation, and have equal or lesser environmental impacts, and therefore alternative routes 4 and 8 are impractical and do not meet the standard for issuance of a CPCN. As such, routes 4 and 8 do not present feasible alternatives to the preferred route to meet project objectives.

4. PGE's 1971 Easement Has Not Terminated For Non-Use.

A substantial portion of the Proposed Project will occur within a portion of Forest Park subject to a 100-year Electric Transmission Line Easement granted by the City of Portland (the "**City**") to PGE on March 8, 1971, and recorded in Multnomah County at Book 809, Page 558 (the "**Easement**").¹⁵ The express purpose of the Easement (see Section I) is for PGE to "enter and erect, operate, maintain, rebuild and patrol one or more electric transmission lines and appurtenant signal lines, poles, towers, wires, cables, and appliances in connection therewith" on the land burdened by the Easement.

Mere non-use of an easement will not lead to abandonment as a matter of law. *Hoffman v Dorris*, 83 Or 625 (1917). Non-use can only terminate an easement if it is an express term of the easement, and easements are (like other contracts) interpreted by looking at the plain meaning of the words used, in the context of the entire document. *Watson v Banducci*, 158 Or App 223, 230 (1999). If the words clearly express the easement's purpose, the analysis ends. *Id.* In this case, Section XV of the Easement states that PGE would have to "fail to use said easement and rights-of-way for the purposes stated herein" for five continuous years for the Easement to terminate for non-use. This has not occurred, as PGE improved the Easement for power transmission shortly after it was granted and has used it continuously for that purpose since then.

While opponents have suggested that portions of the easement area may not have been used for five continuous years, even if true this would not be relevant. First, Section XV expressly requires that the Easement as a whole, as opposed to discreet portions of the burdened land, be abandoned for five continuous years before the Easement would terminate. Moreover, in *Motes v. PacifiCorp*, 230 Or. App. 701, 708 (2009), the Court of Appeals held that, as a matter of law, the existence of power

¹⁵ A copy of the Easement is Appendix F to the Application.



lines over property for ten continuous years was clear and convincing evidence of the continuous use of that property sufficient to prove a prescriptive easement, and the easement included the incidental right to use the easement area for reasonably necessary repair and maintenance activities. *Motes* at 707-08; *see also Baumbach v. Poole*, 266 Or. 154, 157 n.1 (1973). Since power lines have existed continuously in the easement area since shortly after the Easement was granted, PGE maintains its full rights to use the Easement not only for transmission but also for related uses, both implied under law and expressly stated in the Easement such as rebuilding improvements, access and vegetation management (see Sections I, II and III).

Read in context as a whole and consistently with applicable law, it is not a plausible interpretation of the plain language of the Easement that PGE would have to engage in permitted activities every five years, everywhere on the subject property, in order to avoid termination. Rather, the continuous use of the Easement for transmission and the periodic use of portions of the burdened property consistent with the uses authorized by the Easement or implied by law is sufficient to avoid termination of any portion of the Easement for non-use.

Opponents have also suggested that the purpose of the Easement is limited specifically to transmitting energy from the former Trojan nuclear power plant. This argument is based on language in the legislative record for the 1971 City ordinance granting the Easement, but this limitation is nowhere stated in the Easement itself. Oregon's well-developed rules of contract interpretation require that unambiguous language be given its plain meaning, and legislative history or other parol evidence of the parties' intent may not be used to interpret unambiguous language. *Watson* at 230; *see also Tipperman v. Tsiatsos*, 327 Or. 539, 544-45 (1998). In this case the language of the Easement is clear and unambiguous that it may be used for electricity transmission in general, and associated maintenance-related uses. Nothing in the Easement creates an ambiguity suggesting that the electricity transmitted must be from a specific source. As such, language to the contrary that may appear in the legislative history of the City's approval of the easement is irrelevant.

5. PGE May Have A Claim For Inverse Condemnation, Depending On The Outcome Of These Proceedings.

A denial of PGE's application, or the imposition of overly restrictive conditions of approval, could constitute an unconstitutional taking under both state and federal constitutions.¹⁶

¹⁶ Article I, section 18, of the Oregon Constitution provides that “[p]rivate property shall not be taken for public use, . . . without just compensation[.]” The Fifth Amendment to the US



PGE has recognizable private property rights to Forest Park pursuant to the 1971 Easement to "enter and erect, operate, maintain, repair, rebuild, and patrol one or more electric power transmission lines and appurtenant signal lines, poles, towers, wires, cables, and appliances necessary in connection therewith, in, upon, over, under, and across the [easement]." This broad description of PGE's rights includes the Proposed Project, as easements are not required to detail every specific use. Instead, courts interpret the intended purposes of easements and give effect to that purpose practically. *Farrar v. City of Newberg*, 316 Or App 698, 700 (2021) (a city's obligation to "maintain" the easement allowed the city to pave the road). It is a fact-based inquiry based on the circumstances of each case. *Id.*

The Proposed Project involves transmission line routing updates by replacing and moving one existing steel pole and constructing a new 1,400-foot-long segment of transmission corridor that will include two new steel monopoles. Constructing power lines and appurtenances are rights expressly granted to PGE by the Easement. Further, the Easement permits maintenance, a key Proposed Project goal, and allows for "one or more" electric power transmission lines. And given the Easement's express grant of the right to "repair" and "rebuild" those lines, the scope of the Easement also encompasses upgrading existing transmission lines to continue their effective operation. Accordingly, the Proposed Project is within the scope of the private property rights held by PGE pursuant to the Easement.

Requiring a permit before engaging in the use of private property does not per se constitute a taking. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985); *see also Boise Cascade Corp. v. Board of Forestry*, 325 Or. 185, 188 (1997). However, depending on the scope of the denial or the imposition of conditions, by denying or conditioning the Proposed Project, the City could effectively deny PGE all economically viable use of the Easement, which would constitute a taking and thereby expose the City to liability for inverse condemnation. *Id.* PGE thus raises the issue at this time to preserve the possibility of an appeal on takings grounds.

Constitution likewise prohibits the taking of private property for public use without just compensation.



City of Portland Hearings Office
January 28, 2025
Page 13

Thank you for your consideration of these comments.

Best regards,



David J. Petersen

DJP/zas
Attachments

cc (via e-mail): Client
 Zack Schick



Attachment 1

Affected Parcels: Toth Alternatives 4 and 8

Additional Easement Area Estimates for Route 4:

Tax Lot	Owner	Easement Area (Square Feet)	Improvement Impacts
*2N1W34-00200	Miller Creek Holding LLC	47,157	Landscaping
2N1W34-00201	Frevach Land Co	532	Landscaping
2N1W33A-00200	Multnomah Yacht Harbor LLC	37,499	Landscaping; Residential house
2N1W28D-00800	Multnomah Yacht Harbor LLC	9,864	Landscaping
2N1W28D-00700	Ac Holdings LLC	9,978	None
2N1W28D-00600	Marina Way Moorage Inc	18,688	Landscaping
2N1W28D-00500	Double Diamond LLC	28,503	None
2N1W28C-00100	Double Diamond LLC	30,376	None
2N1W28CA-00601	Marx, Arthur III	24,893	Landscaping
2N1W28CA-01500	Metro	24,967	Landscaping

Additional Easement Area Estimates for Route 8:

Tax Lot	Owner	Easement Area (Square Feet)	Improvement Impacts
*2N1W34-00200	Miller Creek Holding LLC	47,157	Landscaping
2N1W33A-01200	State of Oregon (Hwy Commission)	384	Landscaping
2N1W33A-01100	State of Oregon (Hwy Commission)	3,402	Landscaping
2N1W33A-01000	City of Portland	12,499	Landscaping
2N1W33A-00900	McLeod, Michael E Cousins-McLeod, Catherine	8,564	Landscaping
2N1W33AD-01200	City of Portland	15	Landscaping
2N1W33A-00800	Looney, Shawn	47,602	Landscaping
2N1W33A-00600	Lightcap, Brian W	52,116	Landscaping



LU 18-100954 EN
(Hearings Office Case No. 4200012)



Portland City Auditor

Hearings Office

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LU 18-100954 EN Hearings Office 4200012

RECORDER

Please stamp the County Recorder's copy of the recording sheet and return with the attached decision to City of Portland, BDS 299/4500/BDS LUR

Please bill City of Portland, Account #1113

Multnomah County Official Records
E Murray, Deputy Clerk

2020-112875



\$236.00

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Kimberly Tallant, Principal Planner

City of Portland
Bureau of Development Services
1900 SW Fourth Ave, #4500
Portland, OR 97201

Date: 8-29-2020

Representative

Last date to Appeal to LUBA: 9-18-2020 by 4:30 pm
Effective Date: 8-29-2020 Decision may be recorded on this date

***THIS RECORDED DOCUMENT ONLY INCLUDES EXCERPTS FROM THE DECISION.**

***A FULL COPY OF THE DECISION IS LOCATED ON THE BDS WEBSITE AT:**

<https://www.portlandoregon.gov/bds/46429>



Hearings Office

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DECISION OF THE HEARINGS OFFICER ON APPEAL OF ADMINISTRATIVE DECISION

I. GENERAL INFORMATION

File Number: LU 18-100954 EN (Hearings Office 4200012)

Representative: Tim Brooks
Winterbrook Planning
310 SW 4th, 1100
Portland, OR 97204

Owner/Applicant: Portland Parks & Recreation (PP&R)
Contact: Britta Herwig
1120 SW 5th Avenue, Suite 1302
Portland OR 97204

Hearings Officer: Kathryn Beaumont

Bureau of Development Services (BDS) Staff Representative: Morgan Steele

Site Address: 4315 NW St Helens Rd

Legal Description: TL 300 0.97 ACRES, SECTION 19 1N 1E; TL 100 2.31 ACRES, SECTION 19 1N 1E; TL 200 0.60 ACRES, SECTION 19 1N 1E

Tax Account No.: R941190410, R941190770, R941191080

State ID No.: 1N1E19CA 00300, 1N1E19CA 00100, 1N1E19CA 00200

Quarter Section: 2623

Neighborhood: Forest Park, contact Jerry Grossnickle. Linnton, contact Richard Barker

Business District: Northwest Industrial Business Association contact Harold Hutchinson

District Coalition: Neighbors West/Northwest, contact Mark Sieber at 503-823-4212.

Plan District: Northwest Hills Plan District, Forest Park Subdistrict; Guilds Lake Industrial Sanctuary Plan District, Subdistrict A.

Zoning: IH, c-- Heavy Industrial base zone, with Environmental Conservation overlay zone.
Other Designations: DOGAMI Landslide Hazard area; Northwest Hills Resource Protection Plan Site #88.

Land Use Review: Type II, EN: Environmental Review

BDS Administrative Decision: Approval

Public Hearing: The appeal hearing was opened at 9:01 am on July 13, 2020, via Zoom meeting from the third floor hearing room, 1900 SW 4th Avenue, Portland, Oregon, and was closed at 10:59 am. Before the conclusion of the hearing, the Appellant requested to hold the record open for an additional 14-day period of time. The record was held open for the submission of additional evidence until 4:00 p.m. on July 27, 2020, for rebuttal to this new evidence until 4:00 p.m. on August 4, 2020, and until 4:00 p.m. on August 11, 2020 for the Applicant's final written argument. The record was closed at 4:00 p.m. on August 11, 2020.

One document, Exhibit H-54, was sent and received after the 4:00 p.m. deadline on July 27, 2020 and was excluded from the record as untimely. All other documents submitted during the open-record period were timely and are accepted as part of the record.

Testified at the Hearing:

Morgan Steele
Karl G. Anuta
Britta Herwig
Tim Brooks
Will Aitchison
Mary Houle
Thomas Cunningham
Catherine Thompson

Proposal: Portland Parks & Recreation (PP&R), the Applicant, proposes to improve an unimproved trailhead entry to Forest Park located at the south end of the park. As originally proposed, this Forest Park Trailhead project included a nature center building with a connecting plaza and boardwalk, a berm to protect the nature center, and separate bike and pedestrian trails to navigate the site's steep terrain. To accommodate changes in budgeting and priorities, PP&R revised the project and postponed these proposed improvements. This environmental land use review is for the Phase I improvements in what will now be a two-phase project. The future Phase 2 will require separate permits and reviews, and is not part of this environmental land use review.

The Bureau of Development Services Administrative Decision (BDS Decision) (Exhibit H-4) describes the Phase I project as follows:

"Portland Parks & Recreation (PP&R) proposes to provide facilities for park visitors, including improved pedestrian and bike access, and a trailhead parking area with school bus drop-off. Additional features of the project include Firelane 1 improvements, right of way improvements, stormwater management, clearing of invasive species, and replanting of native vegetation.

The revised project includes the following key features:

- Trailhead access drive and 30-space parking lot with ADA parking and bus drop off;
- Firelane 1 improvements;
- Stormwater treatment and conveyance; and
- Street frontage improvements.

The proposed NW St. Helens Road street improvements, and a portion of the access driveway and parking lot are located outside of the environmental conservation zone. These areas are therefore outside the scope of this environmental review. The remaining features of the project are within, or partially within, the environmental conservation zone and subject to Environmental Review.

The applicant describes proposed street and sidewalk improvements along NW St. Helens Road to provide safe access for visitors travelling by foot, bicycle, bus or car. After a gentle climb adjacent to wetlands and forest, visitors will arrive at the trailhead parking area at an upper level, some twenty feet above the level of NW St. Helens Road. Here, there is a drop-off area for buses and parking for 30 cars (including 2 accessible spaces). Next to the drop off area is the main trailhead to access Firelane 1 bicycle and pedestrian path. Firelane 1 will be repaired and its original 12-foot width reestablished to allow improved access and eliminate the rutted and eroded condition of the existing road. Pedestrian, bicycle, and vehicular circulation is intended to reduce disturbance to the forest and wetlands on site.

The applicant proposes to offset environmental impacts by planting 97 trees, 107 vine maples, 1,370 native shrubs, 475 ferns, and 1,270 herbaceous rushes, sedges, grasses, and forbs. The applicant also proposes removing invasive English ivy and Himalayan blackberry. "

Site: The BDS Decision describes the site in extensive detail, including these key features:

"The project will be located at 4315 NW St. Helens Road, in an area of mixed industrial uses. The property is on the eastern edge of Forest Park, at the intersection of NW St. Helens Road, NW Yeon Avenue (Highway 30), and Kittridge Avenue. The site includes the three properties identified as Tax Lots 100, 200 and 300. The combined site area is approximately four acres.

The property is currently accessed by Firelane 1, a gravel driveway that provides fire and powerline maintenance access into Forest Park from NW St. Helens Road and also serves as an informal point of entry for park users. Firelane 1 enters the property from St. Helens Road, crosses a flat low-lying area then turns north, climbing to a slightly elevated terrace central on the site. The firelane then curves west and climbs steeply to a switchback at the southern end of a PGE powerline corridor at the west property line of the site."

* * * * *

"The site currently is vacant. Artifacts of the site's past use include a remnant catch basin and a support structure for a former billboard sign. The site is crossed from east to west by PGE high-voltage power lines. There is a 100-foot wide easement centered on the power lines that restricts development and within which tree heights are managed. In addition, PGE holds an easement to use Firelane 1 as an access road to service the power lines.

The lower portion of the site has a history of disturbance, contamination, and remediation. A 2009 Phase II Environmental Site Assessment (ESA) indicates that Tax lot 100 (the large southern parcel) was purchased by Portland General Electric (PGE) in 1952 but was never developed. It is not clear when the site was excavated and graded to form the existing terraces, but an aerial photo from 1952 shows the site mostly denuded. Neighboring land owners stored transformers on the property, contributing to contamination of surface soils. Cleanup activities occurred in the late 1990's and early 2000's. After the property was transferred to City of Portland ownership additional cleanup ensued. Oregon's Department of Environmental Quality (DEQ) is reviewing the current proposal and final remediation measures."

The BDS Decision also describes the site's topography, a stream flowing across the property, and existing vegetation. These descriptions are referenced and included below in the discussion of the relevant approval criteria.

Zoning: The three tax lots comprising this site are: TL 300, TL 200, and TL 100. Approximately two thirds of the western portion of the site is subject to the "c" (Environmental Conservation) overlay zone. Additionally, Tax Lot 300 lies within the Forest Park Subdistrict of the Northwest Hills Plan District. Tax Lots 100 and 200 lie within Subdistrict A of the Guilds Lake Plan District.

The BDS decision further describes the zoning applicable to the site:

"The zoning designation on the site includes the Heavy Industrial base zone, with the Environmental Conservation ("c") overlay zone. The site is also within the Guild's Lake Industrial Sanctuary, and the Northwest Hills Plan Districts, Forest Park Subdistrict (see

zoning on Exhibit B). Note that the zoning on the southern portion of the site changed from Open Space to Heavy Industrial. Further, the original application included portions of Forest Park which is Zoned Open Space and lies within the Forest Park NRMP area—the application no longer includes any work in the Open Space zone or within the Forest Park NRMP area.

The Heavy Industrial (IH) zone is one of the three zones that implement the Industrial Sanctuary map designation of the Comprehensive Plan. The zone provides areas where all kinds of industries may locate including those not desirable in other zones due to their objectionable impacts or appearance. Parks and Open Area uses are allowed outright in the IH zone. Such uses include park trailheads, outdoor activity areas, and parking. The provisions of this base zone are not specifically addressed through this Environmental Review.

The Guild's Lake Industrial Sanctuary plan district fosters the preservation and growth of this premier industrial area adjacent to Portland's central city.

The Northwest Hills plan district protects sites with sensitive and highly valued resources and functional values. The portions of the plan district that include the Balch Creek Watershed and the Forest Park Subdistrict contain unique, high quality resources and functional values that require additional protection beyond that of the Environmental overlay zone.

Environmental overlay zones protect environmental resources and functional values that have been identified by the City as providing benefits to the public. The environmental regulations encourage flexibility and innovation in site planning and provide for development that is carefully designed to be sensitive to the site's protected resources. They protect the most important environmental features and resources while allowing environmentally sensitive urban development where resources are less sensitive. The purpose of this land use review is to ensure compliance with the regulations of the environmental zones.

* * * * *

Both the Guild's Lake and Northwest Hills plan districts limit the timing of soil disturbing activities and impose additional approval criteria for environmental reviews – pertaining to the protection of wildlife habitat and parks and open space values."

Relevant Approval Criteria: The environmental overlay and plan district regulations trigger this Type II review of PP&R's proposal as explained in the BDS Decision:

"The site is within the City's Environmental overlay zones, and environmental development standards must be met to allow the work to occur by right. If the standards are not met, an Environmental Review is required. In this case, the February 27, 2020 Forest Park Trailhead plans depict approximately 25,705 square feet of

disturbance area and removal of 49 trees within the resource area of the environmental zone. Construction activities will occur closer to wetland areas and creeks than allowed by standard, and more than 225 diameter inches of trees will be removed. Environmental development standards 33.430.140 A, C and J are not met by the proposal; therefore, the work must be approved through an Environmental Review.

The site is also within the Forest Park Subdistrict of the Northwest Hills Plan District and must meet the additional approval criteria for that subdistrict.

The regulations for Subdistrict A of the Guilds Lake Plan District also require sites within this subdistrict to comply with the additional approval criteria for the Northwest Hills Plan District and the requirements of PCC 33.563.210 when proposed development requires environmental review. The BDS Decision identifies these approval criteria and requirements as:

- *"Portland Zoning Code* Section 33.430.250 E, Approval Criteria for "Other Development in Environmental Zones;"
- *Portland Zoning Code* Sections 33.531.130 and 33.563.210 require compliance with 33.563.210 A, B, and C, Approval Criteria for "Environmental Review within the Forest Park Subdistrict" in the Northwest Hills Plan District. The proposal is also subject to the prohibition of clearing between October 1 and April 30 in section 33.563.200."

II. ANALYSIS:

A. Preliminary Issue

A preliminary issue concerns the relevance of the Forest Park Natural Resources Management Plan (FP NRMP). The City Council adopted this NRMP by ordinance in 1995. It applies to the City-owned Forest Park abutting the Phase 1 project site. The FP NRMP includes vision statements, goals, policies, recommended projects, procedures, and review criteria for required land use reviews of development or projects within the park. (Exhibit H-35)

The Appellant and opponents assert a portion of this project lies within the boundaries of the FP NRMP and should have been reviewed using the procedures and criteria in the NRMP rather than the zoning code's Type II environmental review procedures and criteria. (Exhibits F-6, H-11, H-19, H-29) They also contend PP&R's Phase I project is inconsistent with the project envisioned for this site in the FP NRMP. Specifically, opponents contend Project PI-8S in the plan describes a "regional trailhead" with a smaller parking lot, drinking fountains, restrooms, and multi-use trails, rather than the "park entrance" for which PP&R seeks approval in this land use review. (Exhibit H-15) Based on this perceived inconsistency, the Appellant and

opponents contend the proposed Phase 1 project impermissibly amends the FP NRMP, which only the City Council can do. (Exhibits H-14, H-29; Anuta testimony)

In 2018 PP&R originally proposed a more extensive project that included both the current site and a small portion of TL 200 located within the FP NRMP boundary. In response to public comments and budget constraints, PP&R revised the project by splitting it into two phases: the Phase 1 project that is the subject of this land use review and a future Phase 2. PP&R also reduced the Phase 1 project site by excluding the portion of TL 200 within Forest Park and the FP NRMP boundary. (Exhibit A-1, p. 3)

Based on the fact that the revised project includes no property within the FP NRMP boundary, BDS concluded the procedures, criteria, and other elements of the NRMP are inapplicable to this review. (Exhibits F-3, G-4, H-4, H-5, H-55) However, the Appellant asserts some of PP&R's drawings or statements "appear to show" that some work on Fire Lane #1 in the Phase 1 project is within the FP NRMP. In support of this argument, the Appellant relies on an email from a PP&R representative that states "this project will repair the firelane within the project site (up the hill to the first power pole)" and a PP&R project diagram with an arrow identifying "the first power pole" as within the NRMP boundary. The Appellant also states that the zoning map that is Exhibit B "seems to show, upon magnification, that Forest Park boundary extends onto the parcel at issue." (Exhibit H-29)

Based on my review of the record, I find the most relevant and credible evidence shows the Phase I project site is not within the FP NRMP boundary. Neither the zoning code in Map 430-11 nor the project map in Exhibit H-6 show any portion of this Phase 1 project as encompassing property within the NRMP. Similarly, the PP&R application materials, oral testimony, and responses submitted during the post-hearing open record period affirm the project site is not within the NRMP's boundary. (See Exhibits H-15, H-30, H-58) In particular, a site diagram entitled "Mitigation and Enhancement Plan" (Exhibit H-6) PP&R displayed at the hearing clearly shows the project site is located outside of Forest Park and the NRMP area. The same is true of the approved "Proposed Development Site Plan" attached to the BDS Decision. (Exhibit H-4) BDS staff and PP&R's project consultant all confirmed this is the case in testimony presented at the hearing. (Steele, Brooks testimony) This constitutes substantial evidence and is more persuasive than the one-line project characterization in the PP&R email and the Appellant's speculative statements to the contrary. I find this evidence supports BDS's conclusion that the revised Phase 1 project site is located outside of FP NRMP boundary. As a result, the FP NRMP review procedures and criteria do not govern this review and BDS properly processed PP&R's application as a Type II environmental review.

One question also raised is what consideration should be given to the FP NRMP in this review, if any. The Appellant and opponents argue that because the Phase 1 project doesn't precisely match Project PI-8S as described in the FP NRMP, it violates the NRMP. (Exhibits H-12, H-15) For example, some testified that the NRMP describes a project with a multi-use trail, restrooms, and drinking fountain at this location and that none of this is included in this

proposed park entrance project. Others testified that PP&R intends to build a 4-foot mountain bike trail as part of the overall project, which violates the NRMP's standards for bike trails. (Exhibits H-10, H-12, H-15) The Appellant contends that approving a project with these variances from the plan's description of PI-8S unlawfully amends the NRMP. (Exhibits H-14, H-29; Anuta testimony)

BDS staff testified that at most the NRMP can be characterized as offering guidance and sketching a vision for a desired trailhead entrance to Forest Park at the project location. BDS staff noted that PP&R bought the project site for the purpose of building a park entrance and the Phase 1 project is the first step in fulfilling this vision. PP&R echoes this view and notes that much has changed since the NRMP was adopted in 1995. The current Phase 1 project is a first step in implementing the vision for a park trailhead facility at this location described in PI-8S and is consistent with this vision. (Exhibit H-58; Brooks testimony)

The excerpt of the FP NRMP submitted into the record includes both the plan's description of PI-8S and a vision for the south unit of Forest Park. The plan describes PI-8S in relevant part as a "new park trailhead on US 30 at Yeon." It recommends the development of a "regional trailhead with parking for 20 cars, drinking fountain,***seasonal restrooms [and a]***a multi-use trail up to Leif Erikson and Fire Lane 1 - to handicap standards if possible" with separated pedestrian and bicycle trails from this point onward. The plan's discussion of PI-8S also references the discussion of plan project PI-7S, a proposed "new trailhead at US 30 and 30th," which notes the heaviest recreational use occurs at the south end of Forest Park. Elsewhere the plan calls for building "entrances developed with improved parking and other facilities including facilities for handicapped" and notes the need to acquire land to "develop other public access."

After reviewing the evidence in the record, I agree with BDS and PP&R that at most the FP NRMP serves as a guide with recommendations for a proposed trailhead entry into Forest Park at this site, rather than a rigidly defined project. At the time the FP NRMP was adopted, PP&R did not own the Phase 1 project site. The Council has not amended the NRMP boundary to include it following PP&R's acquisition of the site in 2005 and, as explained above, the NRMP does not apply directly to this site. (Exhibit A-1) The Phase 1 trailhead project here does not include all of the elements envisioned in the PI-8S project. However, it will implement at least part of that vision: improving a park trailhead entryway with a parking area and ADA access and a better entrance to the Firelane 1 trail. Firelane 1 is now and will remain a multi-use trail as described in the FP NRMP; the Phase 1 project will not change that. Overall, the proposed Phase 1 project reflects and implements the FP NRMP guidance and does not unlawfully amend--either implicitly and explicitly--the NRMP.

B. Environmental Review Approval Criteria

1. 33.430.250.E.1

To be approved under criterion E.1, PP&R must demonstrate that the proposed Phase I project "minimizes the loss of resources and functional values consistent with allowing those uses generally permitted or allowed in the base zone without a land use review." As explained in the BDS Decision, the project site is located within Resource Site #88 (Firelane 1 - East Bluff) of the Northwest Hills Natural Areas Protection Plan. The inventoried natural resources and functional values described for Site #88 and present on the Phase 1 project site are:

" Resources and functional values of concern on the project site include seasonal creeks, wildlife habitat, sensitive fauna, forest, open space, groundwater resources, scenic resources, recreational resources. Five of these exist at the project site: seasonal creek, wildlife habitat, forest, open space, groundwater, and recreational resources."
(Exhibit H-4)

This approval criterion expresses a balance between permitting uses allowed by the underlying base zone and minimizing the loss of any resources and functional values for a particular development site. Uses allowed outright in the base industrial (IH) zone on this site include a range of industrial uses and Parks and Open areas uses, including trailheads and parking. Both PP&R and the BDS Decision note that the IH zone permits 100% lot coverage. The proposed Phase 1 project will result in permanent development that covers 19,712 square feet of this 4-acre (174,240 square feet) site -- that is, slightly more than 10% of the site. (Exhibits A-1, H-4)

The Appellant and opponents assert the Phase 1 project does not satisfy this approval criterion for a variety of generally stated reasons: no wildlife surveys or baseline data have been collected for Forest Park so there is no basis for evaluating compliance with this criterion (Exhibits H-14, H-18); the project design has no relationship to the functional values of Forest Park, such as the enjoyment of peaceful, unspoiled natural setting; the site is inappropriate for an entry to Forest Park because it is next to a highway with a deafening noise level and an industrial area; and it will increase mountain bicyclists' access to Forest Park. (Exhibit H-19, Cunningham testimony)

In the revised application, PP&R explains the ways the Phase 1 project will minimize the loss of the resources and functional values found on the project site and in the adjacent edge of Forest Park. The project's access road will use an existing firelane that is near existing street access (US 30). The parking area will also be built on a terrace that was previously excavated and used for industrial equipment storage. By concentrating development in these areas, PP&R states it will minimize impacts to wetland areas and trees onsite and avoid altogether an identified creek in the northern portion of the property. It characterizes the site location as at an edge of Forest Park with relatively low wildlife habitat and forest resource values. The project will address stormwater runoff and erosion across the steeply sloped area of the site and adjacent Forest Park by installing underground piping to collect stormwater. (Exhibits A-1, H-15, H-32, H-58)

As detailed in the discussion of approval criteria E.3 and E.4 below, the Mitigation Plan, Construction Management Plan, and Tree Protection Plan will address unavoidable impacts of the Phase 1 project. These plans indicate wetlands on the site will be enhanced to improve habitat value by removing nonnative vegetation and replanting with trees and native vegetation in amounts greater than the zoning code requires. Forested areas on the western portion of the site and the creek in the northwestern corner will remain undisturbed. The project will repair and improve the portion of Firelane 1 on site and the Firelane 1 trailhead access. PP&R argues this will create a better access point into Forest Park where members of the public may enjoy the park's natural setting by foot or bike, as currently permitted on this multi-use trail. According to PP&R's application and supporting materials, the Phase 1 project will improve access to open space and recreational resources and functional values on the site and in adjacent Forest Park. (Exhibit A-1; See also, Exhibits H-15, H-55, H-57, H-58, Brooks testimony)

Most of the Appellant's arguments fault PP&R's impact analysis and compensatory mitigation plans, which are addressed below in the discussion of approval criteria E.3 and E.4. The general arguments offered do not address the language of Criterion E.1 and the balance it seeks between permitting the development of this site with a Park and Open areas use, an allowed use in the IH zone, and minimizing the loss of resources and functional values development necessarily entails. The language of this approval criterion contains no explicit requirement for an inventory. To the extent one is required, that inventory was done as part of the Northwest Hills Natural Areas Protection Plan (NHNAPP) and was the basis for applying the "c" environmental overlay to Site #88 in which the project site is located. The BDS Report, PP&R application and supporting materials all discuss the relevant resources and functional values to be considered. PP&R's efforts to minimize the loss of these resources and values are described in the Impact Evaluation, Construction Management Plan, and Tree Protection Plan, which the Appellant does not counter with any specificity. The Appellant's critique of PP&R's choice of this site for the Phase 1 project and speculation about the impact of future additional mountain bike use of the Firelane 1 trail are not relevant to this approval criterion.

Based on credible and substantial evidence submitted by PP&R and for the reasons stated here and in the discussion of Criteria E.3 and E.4 below, I concur with the BDS Decision that PP&R has demonstrated the Phase 1 project complies with Criterion E.1 (Exhibit H-4)

2. 33.430.250.E.2

For environmental review to be approved, Criterion E.2 requires PP&R to show the proposed Phase 1 development is less environmentally harmful than other potential development alternatives. Specifically, the PP&R must compare the Phase 1 development proposal with "other practicable and significantly different alternatives" and show that its proposal is "less detrimental to identified resources and functional values" than the other alternatives considered.

The language and context for this approval criterion are relevant for several reasons. First, it uses the word "practicable," which the code defines to mean "capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." (PCC 33.910.030) As BDS staff and PP&R stated, PP&R's project purpose is to build what is permitted outright by the applicable IH zoning: a trailhead entrance into Forest Park and associated parking. (Exhibits A-1, H-4, H-58) In considering the positive and negative environmental effects of PP&R's proposal and other possible alternatives, the realistic cost, technological, and logistical impacts of all alternatives is part of the practicability equation. Second, PP&R's site has a "c" (conservation) overlay, rather than a "p" (protection) overlay. The "c" overlay is not a no-build zone. Rather, as BDS Staff testified, it anticipates that development is possible. This overlay's purpose is to achieve a balance by allowing "environmentally sensitive urban development" while conserving "important resources and functional values" in areas where they can be protected. (PCC 33.430.017)

Relying on PP&R's revised application, the BDS Decision describes the three project alternatives PP&R considered: (1) a 73-space parking lot that would have required filling most of the lower wetland on the site; (2) a smaller parking lot that would also have used a portion of the lower wetland; and (3) a 30-space parking lot on the upper terrace only with access provided by a road built in the existing firelane footprint. (Exhibits A-1, H-4) The third option is the preferred alternative and the Phase 1 project under review here.

The BDS Decision and project application further explain that PP&R also considered alternative alignments to some of the project features - preferred firelane access, stormwater piping and erosion control. PP&R concluded any road alignment other than the existing firelane roadbed would require disturbing more of the site. Similarly, a previous option that would have discharged stormwater into a small topographic draw was rejected in favor of piping stormwater under the firelane, parking area, and related disturbance areas to minimize disturbing resources and erosion. (Exhibits A-1, H-4; Steele testimony)

In its application materials and in testimony at the hearing, PP&R explained the proposed Phase 1 design has less of an impact on resource functions and values than other alternatives because the access road and parking area make use of existing disturbed areas, rather than creating new disturbance areas. Improvements to Firelane 1 are limited to a modest amount of gravel resurfacing to repair eroded areas and reestablish its original 12-foot width. A slight realignment of the firelane where it connects with the new parking area is also proposed. Higher quality resources, such as the creek, are protected, and development in the lower wetland area is avoided. (Exhibit H-6, H-15) Additionally, higher quality habitat on forested slopes to the west of the disturbed terrace areas will be preserved, including an Oregon White Oak tree. (Exhibits H-57, H-58) BDS concurred in this analysis and concluded in its decision that criterion E.2 is satisfied because the preferred parking lot, firelane, and stormwater piping all reduce or minimize impacts to resource functions and values over the other alternatives PP&R considered. (Exhibit H-4)

The Appellant argues PP&R's alternatives analysis is "completely inadequate" because it failed to consider off-site alternatives in addition to onsite alternatives. (Exhibit H-29) Specifically, the Appellant and opponents asserted PP&R should have explored: (1) a smaller parking lot consistent with the description of Project PI-8S in the FP NRMP (Exhibit F-3,H-29); (2) a "virtual visitor center" (Exhibit H-14); (3) putting this park entrance somewhere else where there is less noise (Exhibit H-28, H-29); and (4) some of the alternatives the Forest Park Nature Center project advisory committee identified in 2016 (Exhibit H-24).

While the Appellant and opponents have identified these theoretical alternatives, they have not explained why they are practicable. A virtual visitor center and building a park entrance elsewhere are not consistent with PP&R's asserted project purpose, which is to build a trailhead entrance at the Phase 1 site location. Given the evolution in funding and design concepts over time for the proposed trailhead entry and the current scaled-back nature of the Phase 1 project, the options the advisory committee explored in 2016 reflect a different project purpose than the project under review here. As PP&R explained, Phase 1 includes some improvements, such as the 30-space parking lot, that are intended to be functional now and able to serve the Phase 2 development when and if it occurs. The suggestion that the FP NRMP requires PP&R to build exactly what is envisioned as project PI-8S is addressed in the discussion of criterion E.1 above and, again, is not consistent with the Phase 1 project purpose as PP&R has defined it. PP&R explained that "the project purpose has expanded since 1995 to include the planned programming at the [future] Nature Center, which led PP&R to increase the parking area to a minimum of 30 spaces" and "the original NRMP recommendation of a 20-car parking area*** does not meet PP&R's project purposes, and therefore was not considered a practicable alternative." (Exhibit H-58)

Finally, the environmental zoning regulations contain no explicit requirement for an applicant to explore off-site as well as on-site alternatives. Among the materials an applicant for environmental review must submit is a supplemental narrative that evaluates the impact of development alternatives "for a particular site." Other required elements of this impact evaluation refer to "the site." (PCC 33.430.240.B.1) As the BDS staff noted in its response to new evidence submitted after the hearing, this approval criterion focuses on "the proposed development at the subject site" and does not evaluate "whether other more suitable sites could have been chosen by the applicant." (Exhibit H-55) While consideration of both off-site and on-site alternatives may be required for projects governed by federal and state regulations, that is not a requirement the city's environmental regulations impose here.

I find the evidence PP&R submitted to demonstrate compliance with criterion E.2 is substantial, credible, and persuasive. Although the description of alternatives PP&R considered could be more detailed, it is adequate to identify and explain what practicable and significantly different alternatives PP&R evaluated and why this preferred Phase 1 project will have less of an environmental impact than other alternatives. Based on this evidence, I agree with the BDS Decision that PP&R has satisfied criterion E.2.

LU 20-136055 EN
(Hearings Office Case No. 4200011)



Hearings Office

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DECISION OF THE HEARINGS OFFICER

I. GENERAL INFORMATION

File Number: LU 20-136055 EN (Hearings Office 4200011)

Applicant: Nicole Rodriguez
Kinder Morgan
1001 Louisiana Street, Suite 1000
Houston, TX 77002

Applicant's Representative: Paige Anderson
Aecom
111 SW Columbia Street #1500
Portland, OR 97201

Property Owner: Portland Parks & Recreation
Attn: Dylan Paul
1120 SW 5th Avenue, Room 858
Portland, OR 97204

Hearings Officer: Fred Wilson

Bureau of Development Services (BDS) Staff Representative: Morgan Steele

Site Address: Forest Park (near the intersection of NW Leif Erikson Drive and the Wiregate Trail)

Legal Description: TL 600 157.63 ACRES, SECTION 14 1N 1W

Tax Account Number: R961140030

State ID Number: 1N1W14 00600

Quarter Section: 2219, 2318, 2319 2418, 2419, 2320

Neighborhoods: Forest Park, Linnton

Business District: None

District Neighborhood Coalition: Neighbors West/Northwest

Zoning: *Base Zone:* Open Space (OS); *Overlay Zones:* Environmental Conservation (c), Environmental Protection (p)

Land Use Review: Type III, EN – Environmental Review

BDS Staff Recommendation to Hearings Officer: Approval with conditions.

Public Hearing: The hearing was opened at 9:01 a.m. on June 22, 2020 in the third floor hearing room, 1900 SW 4th Avenue, Portland, Oregon, and was closed at 9:28 a.m. The record closed at the end of the hearing.

Testified at the Hearing:

Morgan Steele
Noah Herlocker

II. ANALYSIS

The Staff Report provides an excellent summary of the proposed use and the subject property:

“The applicant, Kinder Morgan, is requesting approval for the repair and maintenance of an existing pipeline in Forest Park. SFPP, L.P., a subsidiary of Kinder Morgan, owns and operates an existing 115-mile refined petroleum products pipeline (Oregon Pipeline - Line Section 14 [LS 14]) that runs from Portland to Eugene, Oregon. Near pipeline milepost (MP) 1.45 and approximately 250 feet northwest of the intersection of NW Leif Erikson Drive and the Wiregate Trail, the pipeline crosses a steep valley, which contains the upper tributary to Doane Creek. Three voids (sinkholes) around the pipeline on a section of steep slope above Doane Creek have been identified and are in need of repair and maintenance.

“A combination of earth movement, groundwater, and surface drainage has caused erosion and resulted in the sinkholes around and below the pipeline in this area. The voids were first identified in 2015 and have been monitored since that time annually, which indicates that groundwater seepage is continually eroding the backfill/native material below the pipeline.

“Maintenance and repair of the pipeline and its vicinity, including site access, will require a total of 17,087 square feet of temporary and 16 square feet of permanent disturbance. Four native trees, totaling 48 inches diameter breast height (DBH), are proposed for removal as a result of this project. To mitigate for these temporary and permanent impacts, the applicant is proposing to plant a total of nine trees, 416 shrubs, and a native hydroseed mix in all temporarily disturbed areas.” Staff Report, page 2.

The Staff Report gives a thorough and compelling explanation as to how all of the applicable approval criteria are satisfied. There was no opposition to the application. Therefore, it would be a waste of the City’s money and resources to review and repeat all of the unchallenged findings. I have reviewed the findings in the Staff Report, and I agree with those findings. I therefore adopt and incorporate the findings in the Staff Report in this decision.

Although there was no opposition to the application, one person did express concern regarding the survival of mitigation plantings. The planner included a condition of approval (“F.”) that requires the applicant to be responsible for maintaining the survival of landscaping plants for two years (and to replace any dead plants).

All of the applicable approval criteria are satisfied.

III. CONCLUSIONS

The applicant has satisfied all of the applicable approval criteria. Therefore, the application is **APPROVED** with the following conditions of approval.

IV. DECISION

Approval of an Environmental Review for:

- Removal of four native trees over 6 inches dbh;
- Installation of biodegradable slope armor (GreenArmor System), five trench plugs, one subsurface porous drainpipe, and one riprap apron; and
- 17,087 square feet of temporary and 16 square feet of permanent disturbance;

all within the Environmental Conservation and Environmental Protection overlay zones, and in substantial conformance with Exhibits C.1 through C.9. Approval is subject to the following conditions:

<p>NOTE: Activities which expose soil to direct contact with stormwater between October 1 and April 30 are prohibited.</p>



City of Portland, Oregon
Bureau of Development Services
Land Use Services
 FROM CONCEPT TO CONSTRUCTION

Ted Wheeler, Mayor
 Rebecca Esau, Director
 Phone: (503) 823-7300
 Fax: (503) 823-5630
 TTY: (503) 823-6868
www.portlandoregon.gov/bds

STAFF REPORT AND RECOMMENDATION TO THE HEARINGS OFFICER

CASE FILE: LU 20-136055 EN
 PC # 19-252423
 REVIEW BY: Hearings Officer
 WHEN: June 22, 2020, 9:00 AM

Due to the City’s Emergency Response to COVID19, this land use hearing will be limited to remote participation via Zoom. The instructions to observe and participate can be accessed online:

[www.https://zoom.us/join](https://zoom.us/join) or <https://zoom.us/j/97997414440>
 Meeting ID: 979 9741 4440

It is important to submit all evidence to the Hearings Officer. City Council will not accept additional evidence if there is an appeal of this proposal.

BUREAU OF DEVELOPMENT SERVICES STAFF: MORGAN STEELE / MORGAN.STEELE@PORTLANDOREGON.GOV

GENERAL INFORMATION

Applicant: Nicole Rodriguez | Kinder Morgan
 1001 Louisiana Street, Suite 1000 | Houston, TX 77002

Owner: Portland Parks & Recreation | Attn: Dylan Paul
 1120 SW 5th Avenue, Room 858 | Portland, OR 97204

Representative: Paige Anderson | Aecom
 111 SW Columbia Street, #1500 | Portland, OR 97201
paige.anderson@aecom.com

Site Address: Forest Park (near the intersection of NW Leif Erikson Drive and the Wiregate Trail)

Legal Description: TL 600 157.63 ACRES, SECTION 14 1N 1W
Tax Account No.: R961140030
State ID No.: 1N1W14 00600
Quarter Section: 2219, 2318, 2319 2418, 2419, 2320

Neighborhood: Forest Park, contact Jerry Grossnickle at 503-289-3046, Linnton, contact at chair@linntonna.org

Business District: None
District Coalition: Neighbors West/Northwest, contact Mark Sieber at 503-823-4212.

Plan District: Northwest Hills - Forest Park

report (pages 4 through 6) and shown graphically in Exhibit C.7. The method of bank repair and pipeline maintenance with the least environmental impact whilst meeting all project objectives (purpose), is the combination of groundwater management and slope armoring, as shown in Table-1 on page 6 of this report.

While the applicant's Preferred Alternative requires permanent disturbance (16 square feet) and tree removal (four native trees) within the Environmental Protection overlay zone, it also allows for the mitigation and restoration of the project area and vicinity. As shown on Exhibit C.5, 10,931 square feet of site area will be restored by planting native vegetation including the creation of coarse woody debris piles to be placed adjacent to the riparian corridor. The Preferred Alternative not only satisfies the project purpose, it minimizes impact, to the greatest extent practicable, to identified resources and functional values and *this criterion is met*.

D. A construction management plan and a mitigation plan will minimize impacts on resources and restore adjacent disturbed areas.

Findings: The applicant provided a detailed description of proposed construction practices to minimize environmental impacts on Exhibit A.1. Construction management practices proposed are summarized in this report on pages 7 and 8 and shown on Exhibit C.3. The Construction Management Plan will be effective because it provides realistic limits to disturbance while containing the necessary elements (e.g. sediment fencing, drainageway and wetland protection, tree protection fencing) to effectively protect resources and functional values outside of designated disturbance areas. Further, upon construction completion, the applicant's onsite stormwater will be managed in conformance with City of Portland Stormwater Management Manual standards, preventing impacts to the drainageway and to water resources downstream.

The proposed mitigation plan is described in detail in Exhibit A.1, as well as summarized in this report on page 9. It will offset 16 square feet of permanent disturbance area and mitigate the removal of 4 native trees. The mitigation plan will compensate for both temporary and permanent impacts at the site for the following reasons:

- ❖ Mitigation plantings will be installed in temporary disturbance areas covering 10,931 square feet.
- ❖ The mitigation plantings will increase species diversity to improve wildlife habitat in areas that currently have invasive and monoculture species.
- ❖ The plantings will aid with pollution and nutrient retention and removal, sediment trapping and erosion control.
- ❖ Invasive species will be replaced with native species along the Wiregate Trail.

To confirm installation of the required plantings, the applicant will be required to have the plantings inspected upon installation. Then, to confirm maintenance of the required plantings for the initial establishment period, the applicant will be required to have the plantings inspected two years after plantings are installed.

With conditions to ensure that Best Management Practices are installed per the Erosion Control Plan (Exhibit C.3) and that plantings required for this Environmental Review are installed, maintained, and inspected, *this criterion can be met*

B. The proposal is a park-related development, or no alternative locations exist outside of Forest Park for the proposal.

Findings: The proposal is to conduct repair and maintenance activities associated with an existing pipeline easement that crosses through Forest Park. Therefore, the proposal cannot be conducted in an alternative location outside of Forest Park. *This criterion is met*.

LU 23-0121553 EN
(Hearings Office Case No. 4230005)



Hearings Office

City of Portland

1900 SW 4th Avenue, Room 3100, Portland, OR 97201

www.portland.gov/omf/hearings

email: HearingsOfficeClerks@portlandoregon.gov

phone: 503.823.7307

fax: 503.823.4347



DECISION OF THE HEARINGS OFFICER IN UNCONTESTED CASE

File Number: LU 23-0121553 EN (Hearings Office Case Number 4230005)

Applicant: Melissa Cowan
Sfpp., L.P., A Subsidiary of Kinder Morgan
1001 Louisiana Street, Suite 1000
Houston, TX 77002

Property Owner: City of Portland – Bureau of Parks & Recreation
Attn: Kendra Petersen-Morgan
1120 SW 5th Avenue #1302
Portland, OR 97204-1912

Representative: Paige Anderson - AECOM
111 SW Columbia Street, #1500
Portland, OR 97201

Hearings Officer: Marisha Childs

Bureau of Development Services (BDS) Staff Representative: Morgan Steele

Site Address: Multiple locations throughout Forest Park

Legal Description: TL 700 80.00 ACRES, SECTION 14 1N 1W; TL 500 40.00 ACRES,
SECTION 14 1N 1W

Tax Account Number: R961140080, R961140090

State ID Number: 1N1W14 00700, 1N1W14 00500

Quarter Section: 2418 & 2419

Neighborhood: Forest Park, contact Jerry Grossnickle at landuse@forestparkneighbors.org & Linnton, contact Sarah Taylor at sarahsojourner@mac.com

Business District: None

District Neighborhood Coalition: Neighbors West/Northwest, contact at admin@nwnw.org

Plan District: Northwest Hills - Forest Park

Other Designations: Forest Park Natural Resource Management Plan; Forest Park and Northwest District Natural Resources Inventory – Resource Site FP16; Landslide Hazard Area; Wild Lands Fire Hazard

Zoning: Base Zone: open Space (OS)

Land Use Review: Type III, Environmental Review

BDS Staff Recommendation to Hearings Officer:

Public Hearing: The hearing was opened at 1:30 p.m. on Wednesday, May 10, 2023 via the Zoom platform, and was closed at 2:09 p.m. The applicant waived the applicant's rights granted by Oregon Revised Statute (ORS) 197.763 (6)(e), if any, to an additional seven-day time period to submit written rebuttal into the record. The record was closed to all testimony and/or written submissions at the end of the hearing.

Testified at the Hearing:

Morgan Steele

Jan Reed

Proposal:

The applicant, Kinder Morgan, is requesting approval for the repair or replacement of joint sites at 11 different locations along an existing pipeline right-of-way in Forest Park. Kinder Morgan owns and operates an existing 115-mile refined petroleum products pipeline that runs from Portland to Eugene, Oregon. Approximately 1.8 miles of the pipeline runs through Forest Park and adjacent right-of-way. The pipeline maintenance activities are proposed to occur in Spring/Summer 2023 after the close of the Northwest Hills Plan District annual soil disturbance moratorium (May 1).

The proposed pipeline work will require the removal of several native trees (15-33 depending on final construction work areas) and temporarily disturb a total of 17,271 square feet of area within the Environmental Protection overlay zone. The applicant proposes to restore temporary disturbance areas and compensate for vegetation clearing caused by the construction activities by spreading native seed mix as well as planting native shrubs upon project completion. Further, the applicant intends to fully mitigate for the permanent impact of tree removal and is continuing to work with Bureau of Development Services and Parks & Recreation staff on the structure and implementation of compensatory mitigation within Forest Park.

All joint sites are within the City's Environmental Conservation and Environmental Protection overlay zones within the City's *Forest Park Natural Resource Management Plan* (Forest Park NRMP). The Forest Park NRMP includes a list of certain projects/actions that are in conformance with the NRMP, and which are allowed without a land use review. The NRMP does not specifically address the repair and replacement of the Kinder Morgan pipeline. Therefore, this proposal is considered an "exception" to the NRMP and is required to go through a Type III Environmental Review.

All sites are also within the Forest Park Subdistrict of the Northwest Hills Plan District and must meet the additional approval criteria for that subdistrict.

Relevant Approval Criteria:

To be approved, this proposal must comply with the approval criteria of Title 33, Portland Zoning Code. The applicable approval criteria are:

- ❖ The "**Approval Criteria for Exceptions**" including criteria **A through E in Section B** on page 217 of the [Forest Park Natural Resources Management Plan](#)
- ❖ Approval Criteria for Environmental Review within the Forest Park Subdistrict in the [Northwest Hills Plan District](#) in Zoning Code section **33.563.210 A, B, and C**.
- ❖ The proposal is also subject to the prohibition of clearing between October 1 and April 30 in section 33.563.200.

Decision of Hearings Officer:

Approval of an Environmental Review for:

- An Exception to the Forest Park Natural Resources Management Plan to allow repair and maintenance of 11 joints along an existing underground pipeline within Forest Park; and
- Removal of 15 to 33 native trees over 6 inches dbh;
- 17,271 square feet of temporary disturbance;



City of Portland, Oregon
Bureau of Development Services
Land Use Services
FROM CONCEPT TO CONSTRUCTION

Carmen Rubio, Commissioner
Rebecca Esau, Director
Phone: (503) 823-7310
TTY: (503) 823-6868
www.portland.gov/bds

STAFF REPORT AND RECOMMENDATION TO THE HEARINGS OFFICER

CASE FILE: LU 23-021553 EN
PC # 22-209240
REVIEW BY: Hearings Officer
WHEN: May 10, 2023, 1:30PM

This land use hearing will take place online using the Zoom platform. See the instructions on how to participate remotely (online or by phone) at this link: <https://www.portlandoregon.gov/bds/article/811963> or contact the Hearings Office at HearingsOfficeClerks@portlandoregon.gov or 503-823-7307. Additional Hearings Office information is available at www.portland.gov/omf/hearings/land-use.

It is important to submit all evidence to the Hearings Officer. City Council will not accept additional evidence if there is an appeal of this proposal.

BUREAU OF DEVELOPMENT SERVICES STAFF: MORGAN STEELE / MORGAN.STEELE@PORTLANDOREGON.GOV

GENERAL INFORMATION

Applicant: Melissa Cowan | Sfpp., L.P., A Subsidiary of Kinder Morgan
1001 Louisiana Street, Suite 1000
Houston, TX 77002

Owner: City of Portland | Bureau of Parks & Recreation
Attn: Kendra Petersen-Morgan
1120 SW 5th Avenue, #1302 | Portland, OR 97204-1912

Representative: Paige Anderson | AECOM
111 SW Columbia Street, #1500 | Portland, OR 97201
971.323.6264 | Paige.Anderson@aecom.com

Site Address: Multiple locations throughout Forest Park

Legal Description: TL 700 80.00 ACRES, SECTION 14 1N 1W; TL 500 40.00 ACRES, SECTION 14 1N 1W
Tax Account No.: R961140080, R961140090
State ID No.: 1N1W14 00700, 1N1W14 00500
Quarter Section: 2418 & 2419

Neighborhood: Forest Park, contact Jerry Grossnickle at landuse@forestparkneighbors.org & Linnton, contact Sarah Taylor at sarahsojourner@mac.com

Business District: NONE
District Coalition: Neighbors West/Northwest, contact at admin@nwnw.org

Plan District: Northwest Hills - Forest Park
Other Designations: *Forest Park Natural Resource Mangement Plan; Forest Park and Northwest District Natural Resources Inventory – Resource Site FP16; Landslide Hazard Area; Wild Lands Fire Hazard*

The applicant indicates that the full scope of excavation and related tree removal will not be known until the work is complete. Based on the potential range of mitigation that will be required and the estimated per acre cost and planting density as provided by PP&R (Exhibit G.4), the applicant would provide mitigation in the form of funding for restoration of between 6 and 29 acres, including planting of between 2,400 and 11,600 native trees and shrubs.

With conditions to ensure that Best Management Practices are installed per the Construction Management Plan (Exhibits C.17 to C.33), that tree protection is followed per the Tree Protection Plan (Exhibit A.4), that restoration plantings required for this Environmental Review are installed, maintained, and inspected, and that the payment for mitigation is paid in full, *this criterion can be met*

B. The proposal is a park-related development, or no alternative locations exist outside of Forest Park for the proposal.

Findings: The proposal is to conduct repair and maintenance activities associated with an existing pipeline that crosses through Forest Park. Therefore, the proposal cannot be conducted in an alternative location outside of Forest Park. *This criterion is met.*

C. There are no practicable alternative locations within Forest Park suitable for the use in which the development will have less adverse impact on resource values.

Findings: The proposed activities are associated with an existing pipeline. Therefore, the proposal cannot be conducted in an alternative location within Forest Park. *This criterion is met.*

D. Any long-term adverse impacts of the proposed action on resource values are fully mitigated within the Management Unit.

Findings: The short and long-term impacts of the project were analyzed by the applicant and included as part of this report on pages 5 and 6. Short-term impacts include disturbance to wildlife habitat, sensitive fauna, nesting/brooding areas, vegetation, and soil stability on the slope around the pipeline repair area. Potential long-term impacts of pipeline repair and maintenance resulting from vegetation clearing, tree removal, and ground disturbance include a reduction in tree canopy cover, shade, microclimate regulation, wildlife refuge, and nesting/brooding areas associated with deciduous forest cover.

As noted above under Minor Amendment Criterion D, the proposed plan for mitigation for permanent impacts will compensate for lost resources by providing funding for PP&R managed restoration and enhancement activities within the Central Management Unit of Forest Park where the work will occur.

With conditions to ensure that the restoration required for this Environmental Review is installed, maintained, and inspected, and the payment for mitigation is paid in full, *this criterion will be met.*

E. The proposal is consistent with the purpose of the Environmental Zones

Findings:

33.430.015 Purpose of the Environmental Protection Zone

The Environmental Protection zone provides the highest level of protection to the most important resources and functional values. These resources and functional values are identified and assigned value in the inventory and economic, social, environmental, and energy (ESEE) analysis for each specific study area. Development will be approved in the environmental protection zone only in rare and unusual circumstances.

33.430.015 Purpose of the Environmental Conservation Zone

The Environmental Conservation zone conserves important resources and functional values in areas where the resources and functional values can be protected while allowing environmentally sensitive urban development.

The preferred pipeline repair and maintenance approach has been determined to be the most environmentally sensitive of the practicable alternatives that provides the greatest protection of existing resource functions and values while conducting necessary repair and maintenance of components of an existing pipeline. The site restoration has been designed specifically to protect and enhance these functions and values over time, and *this criterion is met.*

**In the Matter of Umatilla Electric
Cooperative Petition for Certification of
Public Convenience and Necessity,
Docket No. PCN 1, Order No. 17-111
(March 21, 2017)**

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

PCN 1

In the Matter of

UMATILLA ELECTRIC COOPERATIVE,

Petition for Certification of Public
Convenience and Necessity.

ORDER

DISPOSITION: PETITION GRANTED

I. INTRODUCTION

In this order, we grant the petition filed by Umatilla Electric Cooperative (Umatilla) for a certificate of public convenience and necessity as required for the construction of a five mile overhead transmission line from a breaker in the McNary Substation, owned by the Bonneville Power Administration (BPA), to Umatilla's existing Hermiston Butte Substation.

II. BACKGROUND

Umatilla provides electric service to its Oregon members in Morrow, Umatilla, Union, and Wallowa counties. Umatilla's service territory is located west of Boardman in Morrow County and covers much of Umatilla County, surrounding the cities of Hermiston and Pendleton and into the Blue Mountains.

As a consumer-owned utility, Umatilla is not subject to our jurisdiction with regard to its rates, service, and financial matters. However, under ORS 758.015, Umatilla is required to obtain from this Commission a certificate of public convenience and necessity (CPCN) in order to condemn property for purposes of building a transmission line.

The proposed 115 kV transmission line would run approximately five miles from BPA's McNary Substation to Umatilla's Hermiston Butte Substation. It would become the main feed to the Hermiston Butte Substation and provide backup to the existing feed from the McNary Substation into the Hermiston area. The transmission line is needed to adequately provide service to existing and new loads in the City of Hermiston and Umatilla's surrounding service territory.

On September 22, 2016, we held a public comment hearing and prehearing conference in this matter in Hermiston, Oregon. Umatilla and the Commission Staff made presentations at the hearing and answered questions. No petitions to intervene have been

C. Safety of Proposed Transmission Line**1. Position of the Parties**

Umatilla and Staff contend that the project will be executed in a manner that protects the public from danger and is therefore safe. Umatilla states that safety is a priority for the cooperative in its operation and maintenance of its system, and it has substantial experience constructing, operating and maintaining transmission lines in a safe, efficient manner. Umatilla explains that the proposed line will be constructed, operated, and maintained to meet or exceed all National Electric Safety Code standards, as well as all applicable federal, state and local laws, regulations, and ordinances. Moreover, Umatilla adds that it designs and maintains all of its electrical facilities in conformance with State of Oregon⁵ and United States Department of Agriculture service standards.

Staff is satisfied that Umatilla will comply with applicable standards for construction, operation, and maintenance of the transmission line. Staff responds to concerns from land owners which it finds are not relevant or have been fully addressed by the project design. Staff investigated potential environmental harm and exposure to electromagnetic fields. Staff found minimal environmental impacts and exposures well below the applicable standard.

2. Commission Resolution

We find that Umatilla has demonstrated that the proposed transmission line will be constructed, operated, and maintained in a manner that protects the public from danger. The company commits to meet or exceed all applicable safety standards and rules. These standards and rules ensure that the line is constructed, operated, and maintained in a manner that protects the public.

D. Practicability**1. Position of Parties**

Umatilla and Staff contend that the proposed transmission line is practical. Umatilla notes that the proposed line will use an existing transmission corridor and take a relatively straight route between the McNary Substation and the Hermiston Butte Substation. Any alternate route would require new easements, the potential condemnation of more private property, and potential impacts to resource lands, such as agricultural parcels.

Staff describes Umatilla's planning process and compares the estimated cost of the proposed line to the costs of the alternatives which are more expensive. Staff notes that due to the significant growth forecast for the service territory, the rate impact of the project on the utility's customers is not significant. Umatilla has been granted

⁵ OAR 860, Division 024 (Safety Standards).

preliminary approval for financing the project through the Department of Agriculture, Rural Utilities Service (RUS), which requires a showing that the project is justified.

Given the number of landowners involved, Staff finds it reasonable to assume that Umatilla would have to resort to condemnation regardless of the route chosen. Thus, the project is not practicable without a CPCN because the cooperative otherwise would be unable to initiate the condemnation proceedings to acquire the necessary land or interests in land.

2. *Commission Resolution*

We find that Umatilla has established that the proposed transmission line is feasible and will be effectively and efficiently constructed. Umatilla has the experience and resources necessary to effectively and efficiently complete the project. The proposed line is the most cost-effective solution to the utility's need for new transmission into its Hermiston Butte Substation.

E. *Justification*

1. *Position of Parties*

Both Umatilla and Staff agree that the proposed transmission line is justified. In terms of benefits, Umatilla anticipates the proposed line will help meet its obligation to provide sale and reliable service to its customers. Umatilla states that reliability is essential, because the load center to be served has several critical loads, including hospital and medical facilities, large merchandise outlets, and industrial processes.

In terms of costs, Umatilla reports that the cost of the line is estimated to be \$5.74 million. The average impact on a residential member's bill is \$0.37 per month.

Umatilla adds that it plans to receive financing for the line from RUS. As part of receiving RUS financing Umatilla must demonstrate that the line is justified, and an environmental analysis must be performed.

Staff did not engage in a traditional cost/benefit study because most of the benefits of the line, including improved reliability, reduced outages, flexibility in serving load, and increased load serving capabilities are not readily quantifiable. To assess justification, Staff examined the alternate routes and the upgrade option and found the project to be justified by comparison. Staff also considered the impact to customers and businesses and found that the improved reliability benefits all affected persons.

2. *Commission Resolution*

Based on Staff's independent analysis, we find that Umatilla has shown sufficient reason for the proposed transmission line to be built. We agree that many of the economic benefits of the line are not readily quantifiable, but they are tangible and cannot be

**In the Matter of Idaho Power Company,
Petition for Certificate of Public
Convenience and Necessity, Docket No.
PCN 5; Order No. 23-225
(June 29, 2023)**

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

PCN 5

In the Matter of

IDAHO POWER COMPANY,

Petition for Certificate of Public
Convenience and Necessity.

ORDER

DISPOSITION: CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
GRANTED

I. INTRODUCTION

This order addresses Idaho Power Company's petition for a certificate of public convenience and necessity (CPCN) for its proposed Boardman to Hemingway Transmission Line Project (B2H or B2H Project). We appreciate the robust participation in this docket from intervening organizations and individuals. We recognize that a proceeding that could lead to the taking of private property represents an extremely concerning event for the individuals involved. In light of the potentially significant impacts of the B2H project on individuals' property and their economic and personal well-being, we deeply appreciate that engagement with Staff, Commissioners, and other parties was so constructive, considerate, and well-informed. We are thankful for the time and effort to voice concerns and help us conduct the comprehensive review of Idaho Power's proposal that it deserves.

The legislature has delegated us the duty of determining whether transmission lines requiring condemnation, like the B2H project, are necessary, safe, practicable, and justified in the public interest. Where we find that a transmission line meets those criteria, we are to grant a CPCN for the benefit of the greater public interest, despite the private properties that are implicated in its construction and operation. We take this obligation seriously and recognize the importance of scrutinizing such proposals. We make our decision only after carefully weighing the interests involved.

We conclude that the B2H project meets the necessity, safety, and practicability standards set forth in ORS 758.015 and our rules, that it is justified in the public interest, and that it complies with Statewide Planning Goals and local land use regulations. Idaho Power and its partners have demonstrated through robust analysis of increasing customer electricity loads a need for additional transmission capacity that will be served by B2H, which we find will be constructed, operated, and maintained safely according to best practices and subject to ongoing scrutiny in wildfire mitigation plans. We recognize that Idaho Power considered and received feedback on

impacts, our task is to ensure that Idaho Power selected a practicable and feasible route for the B2H project. We conclude that it has.

The record indicates that Idaho Power worked with local governments, community groups, and individual landowners to develop the proposed route for the B2H project. Idaho Power used a community advisory process to obtain input and hear issues and concerns with different alternative routes. After initiating the site certificate process, ODOE held public meetings to discuss siting the project in a proposed corridor. Idaho Power incorporated feedback from government agencies to avoid or minimize impacts to resources such as sage grouse habitat. The BLM considered multiple alternatives for the different segments of the B2H project in a federal NEPA process and, later, EFSC considered route alternatives. We understand that the proposed route alternatives were adjusted as Idaho Power progressed through the different processes, but such adjustments are to be expected as the process generated more information to guide route development. Further, the federal and state processes are bound by different legal requirements, and parity between federal and state processes is not a requirement. We also note that a federal district court determined that changing proposed routes did not necessitate additional consideration under NEPA, and the Oregon Supreme Court affirmed EFSC's alternatives process and analysis.⁸⁶

Several intervenors oppose that the proposed route passes near Morgan Lake and through several specific land parcels in the vicinity. While the City of La Grande originally opposed this proposal, the record shows La Grande removing its opposition after Idaho Power agreed to mitigate the effects of its proposed route by paying \$100,000 for recreational improvements at Morgan Lake and altering the tower height within the viewshed of the lake. Although several intervenors suggest that the Glass Hill Alternative is a better route that avoids impacts to Morgan Lake, the record shows that opposition to that route also exists, including from the Confederated Tribes of the Umatilla Indian Reservation. The Confederated Tribes are not a party in this docket, and we decline to consider arguments hypothesizing about their views on the current proposed route beyond the evidence in the record.

Several intervenors also suggest alternative routes to avoid impacts to farmland in Morrow County. While additional route alternatives may exist in Morrow County, we do not agree that their existence alters our conclusion that Idaho Power's proposed route is practicable, feasible, and commercially reasonable. In particular, we determine that the proposed alternative route using the Wheatridge interconnection corridor would impact more landowners, increase the length of the route and thereby increase costs, and result in significant project delays and additional costs to seek new approvals for a new route. Idaho Power analyzed potential routes that would avoid exclusive farm use lands but concluded it could not route the project in eastern

⁸⁶ See *STOP B2H Coal. v. U.S. Bur. of Land Mgmt.*, 552 F. Supp. 3d 1101 (D. Or. 2021); *STOP B2H Coal. v. Or. Dep't of Energy (In re Site Certificate)*, 370 Or 792, 525 P. 3d 864 (2023) (correct Mar. 11, 2023).