



FRIENDS OF THE COLUMBIA GORGE

VIA E-MAIL TO angieb@co.wasco.or.us

June 7, 2016

Angie Brewer, Planning Director
Wasco County Department of Planning and Economic Development
2705 East Second Street
The Dalles, Oregon 97058

Re: Union Pacific Railroad Mosier Area Expansion – PLASAR-15-01-0004

Dear Ms. Brewer:

Friends of the Columbia Gorge and The Lands Council (collectively “Friends”) have reviewed the above-referenced application and submit these comments to augment our initial comments of April 11, 2016. Please place them in the file for this matter, distribute them to the Planning Commission, and recognize us as a party to these proceedings. Friends of the Columbia Gorge is a non-profit organization with approximately 6,000 members dedicated to protecting and enhancing the resources of the Columbia River Gorge. Our membership includes hundreds of citizens who reside in the six counties within the Columbia River Gorge National Scenic Area (CRGNSA or NSA). The Lands Council, with a membership of 1500, has protected thousands of acres of public land and, in the process, worked to preserve the forests, water, and wildlife we all depend on for life.

Union Pacific is proposing construction of over 4 miles of new track in the Columbia River Gorge National Scenic Area. The project would pass through some of the most highly protected lands in the National Scenic Area including Special Management Area (SMA) Open Space, SMA Public Recreation, General Management Area (GMA) Open Space, and GMA Large-Scale Agriculture. It would also create a double-track through the Mosier Urban Area. The project would provide capacity to increase the number of trains passing through the Scenic Area, increase the length of trains passing through the Scenic Area, or both. The increased capacity, when utilized, would impact adjacent land uses such as recreation sites and tribal fishing and would result in significant impacts to protected resources. **Since it does not comply with applicable laws Friends requests that Wasco County deny the application.**

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I. Initial Matters

This section includes background on certain over-arching legal obligations that are required to be considered as part of the Planning Commission’s deliberations.

A. Quasi-judicial Hearings

When acting in a quasi-judicial capacity, such as in the hearing for this matter, the planning commission is sitting in the place of a panel of judges. The applicant has the burden of proof on all matters and the commissioners are legally required to act without prejudging the matter. *Fasano v. Board of County Com'rs of Washington County*, 507 P.2d 23, 264 Or. 574 (1973). Parties “are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter – i.e., having had no pre-hearing or ex parte contacts concerning the question at issue – and to a record made and adequate findings executed.” *Id.* **The political and policy landscapes are not part of the considerations in a quasi-judicial proceeding. Those have already been reflected in the applicable County ordinances. Instead, a Planning Commissioner’s duty is to apply the law to the facts of the matter just as a judge would.**

NSA-LUDO § 2.180(B)(6)(a) contains other procedural requirements for the conduct of Planning Commission hearings such as this one. The applicant goes first followed by other proponents. NSA-LUDO § 2.180(B)(6)(a)(1–2). The County must “[a]llow other parties or witnesses to be heard next in the same manner as in the case of the applicant.” NSA-LUDO § 2.180(B)(6)(a)(3). The requirement that other parties, such as Friends, get to be heard “in the same manner as in the case of the applicant” means that no additional limits – whether time limits or other limits on testimony – can be enforced against other parties unless they were enforced against the applicant. This ensures that there is a level playing field for all.

B. Cumulative Adverse Effects

When Congress passed the Columbia River Gorge National Scenic Act it mandated that development actions not adversely affect the scenic, cultural, recreation, and natural resources of the NSA. 16 USC § 544d(d). It then clarified that “the relationship between a proposed action and other similar actions which are individually insignificant but which may have cumulatively significant impacts” must be considered in cumulative adverse effects analyses. 16 USC § 544(a)(3). However, the management plan and thus the resulting county ordinances failed to adequately require consideration of cumulative effects to certain protected resources. *Friends of the Columbia Gorge v. Columbia River Gorge Comm’n*, 346 Or 366, 213 P3d 1164 (2009) [henceforth *Friends*].

In particular, the Oregon Supreme Court ruled that natural and cultural resources are not adequately protected from cumulative adverse impacts by the version of the Gorge Management Plan that counties used to develop their ordinances. *Id.* Therefore, **the County is required to ensure that the proposed development will not contribute to cumulative adverse impacts to the protected resources of the NSA, regardless of the requirements of the current County ordinance. *Id.* This includes evaluation of past, present, and likely future actions. *Id.* There must be an evaluation of actions that are individually insignificant but cumulatively significant and cumulative adverse impacts must be avoided. *Id.***

The Court also clarified what its interpretation means for scenic resources:

the applicant must accept any conditions – even draconian ones – that are necessary to ensure that the development take place without affecting scenic resources and complies with the [Management Plan] guidelines. If the applicant does not or cannot sufficiently alter the proposal to satisfy the conditions required by the [Management Plan], permission to carry out the proposed activity must be denied. *Id.* (emphasis added).

Instead of conforming to the established federally mandated law that applies in the National Scenic Area, the applicant repeatedly fails in its application materials to comply with the Act, the Management Plan, and County ordinances. This includes, among other things, claiming federal preemption to avoid standards (App. Supp. at 6), attempting to establish a resource baseline that unlawfully excludes past actions (Project Narrative at 5-113), substituting the applicant’s own criteria for species protection (Project Narrative at 5-98), submitting an incomplete alternatives analysis (see Section I.F below), claiming the railroad does not currently have to meet standards because it is an historically water-dependent use (Project Narrative at 5-55), and failing to disclose detailed project actions within the Mosier Urban Area that would contribute to cumulative adverse effects on the protected resources of the Gorge (Project Narrative at 1-2). The entire application must be read with a critical eye and a cumulative impacts evaluation of past, present, and likely future actions, including actions that are individually insignificant but cumulatively significant, must be completed by the County. **Once the cumulative adverse impacts are identified, they must be avoided or the application must be denied.**

C. Incomplete and Inaccurate Application

Approval of a land use proposal not accompanied by a complete and adequate application violates the County’s scenic area ordinance, denies the public any meaningful opportunity to comment on the proposed development, and results in a decision not based on substantial evidence. NSA-LUDO § 2.080(A). Such a decision is subject to reversal, as held by the Gorge Commission unanimously in the *Eagle Ridge* case. CRGC No. COA-S-99-01 (June 22, 2001). It is similarly unlawful for the County to use conditions of approval to defer the submission of complete and adequate application materials. *Eagle Ridge* at 9–10.

While the application is inaccurate and incomplete in many ways, some of which are highlighted in these comments, there are four areas in particular that cry out for a new application that is complete and accurate. The first is the omission of any analysis of the adverse effects that the additional trains resulting from the proposed action would have on the NSA. The second is the reliance of the application on a land transfer that will not take place. The third is the omission of several relevant key viewing areas (“KVAs”) from the application, resulting in an incomplete visual impacts analysis. The fourth is the omission of detailed project components within the Mosier Urban Area from the application. Finally, the County should provide the public with additional time to review and comment on the proposed landscaping plan, which has not yet been publicly released.

The applicant attempts to couch the proposed new facilities as improvements to operational efficiency and ignores in its application the impacts the additional trains will have on the protected resources of the NSA. Regardless of how the project is characterized, it would allow more trains to use the tracks. In fact, UPRR touts the fact that the project would allow 5-7 more trains to pass through the NSA per day. See attached UPRR Fact Sheet titled “Union Pacific To Enhance Infrastructure in Mosier” [henceforth UPRR Fact Sheet]. The applicant also acknowledges that the trains will be longer as a result of the project. App. Supp. at 3–4. The cumulative adverse effects of these additional trains were omitted from the application. Until those effects are disclosed the application is incomplete and inaccurate. See Section I.B above.

The project relies on a land transfer with a state agency that has been denied by that agency; the agency’s denial is not reflected in the application materials. At an April 27, 2016 meeting of the Oregon Parks and Recreation Commission (Parks Commission), **the Parks Commission unanimously voted to reject any proposed land transfer that would provide additional right-of-way to the Union Pacific Railroad for this project. The applicant acknowledges the additional right-of-way is necessary to complete the currently proposed project.** Project Narrative at 5-28, 5-69. The Parks Commission’s rejection of the land transfer is a material change in circumstances that renders the current application incomplete and inaccurate. For example, figures 1-2, pp. 8–9; 2-1, pp. 8–9; 4-1, p. 8 (supplemented), p. 9; 4-2, pp. 8–9; 4-3, pp. 8–9 in Appendix A do not depict realistically possible conditions. Nor do sheet numbers 19–21 in the engineering drawings in Appendix C. The Parks Commission’s action also invalidates portions of the project narrative. *See, e.g.*, Project Narrative at 5-28. **Without the additional right-of-way or significant changes to the project, Union Pacific concedes it cannot comply with federally-mandated railway safety laws.** Project Narrative at 5-28, 5-69. **Given the current inaccuracies in the proposal materials, it is impossible for the public or the Planning Commission to evaluate this proposal. We ask the Planning Commission to deny the application because it does not reflect current conditions.**

Additionally, the applicant acknowledges in its Project Narrative that parts of the project would be visible from multiple KVAs, including Interstate 84, Washington State Route 14, Old Washington State Route 14 (*i.e.*, Klickitat County Road 1230), Columbia River, and the Historic Columbia River Highway. Project Narrative at 5–2. Yet the applicant ignores the scenic impacts from several other KVAs from which large portions of the project would be visible, including Cook-Underwood Road, Rowena Plateau, Washington State Route 141, and Washington State Route 142. **These adverse impacts are not included in the project narrative, and omitting them from the application renders it inaccurate and incomplete.** *See* Project Narrative 5-46–5-53, National Scenic Area Land Use and Development Ordinance for Wasco County Oregon (NSA-LUDO) § 14.020(A)(5). **It also makes it impossible to weigh the cumulative adverse effects of the project. We ask the County to deny the application and to instruct the applicant to submit a new application with a complete and accurate visual impacts analysis.**

Additionally, detailed maps and descriptions of the project components within the Mosier Urban Area are necessary to determine the cumulative adverse effects of the entire project. While the project components within the urban area do not have to meet the same standards as the portions outside the urban area, the required cumulative impacts analysis must review the impacts of the entire project. *See* 16 USC 544(a) (definition of “adversely affect”). **The proposed double-**

tracking through and on both sides of Mosier is a single project. To adequately determine the cumulative adverse effects of the project on the protected resources of the NSA, it is necessary to analyze the project as a whole. Without a detailed look at the complete project, any analysis falls short of that which is required by *Friends*. See I.B above.

Finally, **construction of the project would require the railroad to remove approximately 12.8 acres of existing trees and shrubs.** Project Narrative at 5-46. Appendix K, which purportedly includes the landscaping plan required by NSA-LUDO § 14.020(D), has been redacted from the application materials. See Project Narrative at 5-42. We submitted a public records request for many documents, including this portion of the application, but we have not yet received it. Until the landscaping plan is released, the public is prevented from reviewing it and commenting on whether it includes, for example, “detailed information [about] the level of individual trees and groupings of vegetation for the proposed development area and all topographically visible corridors between the proposed development area and Key Viewing Areas.” Unless the County releases the portions of the landscaping plan that area a matter of public record and provides the public with sufficient time to review and comment on it, the application must be denied under *Eagle Ridge*.

D. Requirements for Conditional Use Review

As the applicant concedes, this project requires conditional use review. See, e.g., Project Narrative § 5.3.5. This type of application not only requires more scrutiny from the County, but also explicitly allows the County to specify wide-ranging conditions on the project.

NSA-LUDO § 5.010 requires the project to be “compatible with the permitted uses in a zone and consistent with the general and specific purposes of this Ordinance, the Wasco County Comprehensive Plan, and the Management Plan for the Columbia River Gorge National Scenic Area.” The Planning Commission “shall weigh the proposal's appropriateness and desirability or the public convenience or necessity to be served against any adverse conditions that would result from authorizing the particular development at the location proposed.” NSA-LUDO § 5.020. **As you will see below, the project would have massive adverse impacts on the National Scenic Area and is not consistent with the Wasco County NSA-LUDO, the Wasco County Comprehensive Plan, or the Management Plan for the Columbia River Gorge National Scenic Area. As such, the County cannot lawfully approve the application.**

Additionally, to pass conditional use review muster, the entire project must meet the requirements of NSA-LUDO § 5.020. However, it fails to meet at least NSA-LUDO § 5.020(A–D), (F–H), and (L). See, e.g., Sections I.C, II.B.1, II.B.2, II.C, II.C.1, II.C.2, II.C.4, III.A.1, III.A.3, III.A.4, III.A.5, III.B.1, III.B.2, IV.A, and IV.B of this document. These deficiencies are discussed and summarized in Section V below.

E. Temporary Uses

Some aspects of the UPRR proposal are temporary uses. For example, the 5+ acre staging and mineral production area at ~MP 71.6 in the SMA Open Space zone is proposed as a temporary use. Of course, temporary uses within the NSA in Wasco County still must comply with all zoning codes and scenic area review criteria. NSA-LUDO § 8.020. **Except in circumstances under NSA-LUDO Chapter 8 where temporary use requirements are even more restrictive,**

the requirements for temporary uses are identical to the requirements for permanent ones and must be treated as such as part of the conditional use review.

F. Alternatives Analysis

The applicant includes an alternatives analysis that has at least two deficiencies. As discussed below, it does not comport with the Practicable Alternative Test required for scenic area review because the alternatives studied are for the railroad as a whole, rather than for the individual project-area parcels as required by law. *See, e.g.*, Section II.C.2 below. Also, **unidirectional traffic on both sides of the Columbia River was not included as an alternative.** BNSF and UPRR already share trackage rights in other sections of the Pacific Northwest (e.g. on BNSF's I-5 gateway). Changing operations so that trains on the north side of the river travel in one direction and those on the south side travel in the other would likely result in even greater improvements to operational efficiency with a much lower impact on some of the protected resources of the NSA. **The selection of alternatives that does not include the most obvious way to meet the purported purpose and need of the project is arbitrary and baffling. Even if a parcel-by-parcel analysis was not necessary, this would render the railroad's application of the Practicable Alternative Test inadequate. The County should instruct the applicant to come back with an application that includes such an alternative.**

Regardless the County cannot simply cater to the applicant's purported purpose and need. If an applicant approached the County with a project to build a massive landfill on the edge of Mosier in the SMA Open Space zone it could not be lawfully approved even if the applicant demonstrated that building the landfill was necessary for it to fulfill its business plan. The same applies here. The requirements of the law cannot be ignored merely because the applicant professes a purpose and need. Regardless of professed purpose and need, if the applicant cannot meet the requirements of the law the application cannot be lawfully approved.

G. Nonconforming Structure or Use

The railroad is a nonconforming structure or use under the NSA-LUDO. This is defined as “[a] lawful existing structure or use at the time [the NSA-LUDO] or any amendment thereto becomes effective, which does not conform to the requirements of the zone in which it is located.” NSA-LUDO § 1.200. While there are many examples below where the railroad does not meet current standards (all of which are incorporated by reference here), the most obvious is that it is currently visually evident in the SMA and not currently visually subordinate in the GMA. Therefore the railroad is a nonconforming structure or use.

II. Special Management Areas Requirements

The Special Management Areas contain some of the lands most at risk of conversion to uses incompatible with the National Scenic Area Act. Thus, SMA lands have the highest level of protection in the Gorge. 1.24 miles of the proposed new tracks would run through SMA lands, disturbing 20.18 acres in the SMA. This amounts to about two-thirds (65.5%) of the proposed disturbed area. While the alternatives analysis did consider different track configurations, it did not include a parcel-by-parcel study of alternatives for the tracks and other proposed disturbed areas – including staging areas – so as to minimize the impacts to the protected resources in the

Gorge. The following subsections analyze the impacts to the protected resources in the SMA portions of the National Scenic Area and point out numerous proposed violations of pertinent laws.

A. Repair, maintenance and operation of existing structures

Some uses may qualify as allowed uses under County ordinances, but the applicant has not shown that all aspects of its proposal qualify. NSA-LUDO § 3.100(D) regulates “[r]epair, maintenance and operation of existing structures” and allows a legally established railroad use to continue. “Legally established” means that all applicable land use and building permits were obtained, that the use or structure has been operated or constructed in compliance with all applicable land use regulations and other laws, and that the use or structure has not been discontinued or changed for any period of one year or more. NSA-LUDO § 1.200 (definition of “existing use or structure”). The burden is on the applicant to prove that the use or structure qualifies as an existing use.

Not only has the applicant not demonstrated that all aspects of the construction and operation of the railroad since the passage of the NSA-LUDO have been permitted, but this project goes far beyond the “repair, maintenance and operation of existing structures. . . .” NSA-LUDO § 3.100(D). Instead the applicant proposes massive new land disturbances, a new set of tracks, new bridges, new permanent roads, new structures, new signals, new rock crushing facilities, new staging areas, and new culverts. When, for example, a new accessory building is proposed by a homeowner it is considered new development. Since new structures are proposed to be established by the applicant this is new development and should be reviewed as such.

B. General Considerations

This section discusses the requirements of each SMA zoning designation the proposed project would cross.

1. SMA Open Space Zone

The proposal includes a second mainline track, utilities, lighting, a pump house, access roads, variances to setbacks, a large retaining wall, a new blasted area through a mesa, and a very large construction staging and mineral production area in the SMA Open Space zone. **The proposed location of the 5+ acre construction staging and mineral production area on SMA Open Space lands cannot be lawfully permitted and is particularly troubling. The applicant must move this staging and mineral production area to a zone that allows the use.**

NSA-LUDO § 3.180 specifies which uses are allowed in the SMA Open Space zone. All development must be consistent with an adopted open space management plan. NSA-LUDO § 3.180(E)(1) & (2). However, the applicant has indicated in its application that it will not comply with this requirement. *See* Project Narrative at 5-26. The applicant does not provide a valid argument as to why it should be exempted from complying with the Rowena Plan,¹ which is the adopted open space management plan for the area. Though the applicant asserts that

¹ The Forest Service adopted the Rowena Plan in September 2005. It acts as the Open Space Management Plan and the Watershed Plan for the SMA Open Space area that the applicant’s proposal impacts.

“infrastructure improvements to a pre-existing serviceable structure” is exempt from this requirement as an expedited review use, it is not. *See* Project Narrative at 5-26, NSA-LUDO § 3.180(C), NSA-LUDO § 3.110(A). **At the very least, the applicant’s failure to demonstrate compliance with the plan renders the application incomplete.**

As discussed in Section II.A above, the proposed project is new development. **New development cannot be permitted under NSA-LUDO § 3.180(D)(3) – the applicant’s proposed path to permitting the project. Portions of the project may qualify as utility facilities for public service under NSA-LUDO § 3.180(D)(8), however, this requires the applicant to consider alternative sites with less adverse impact on Open Space land. The applicant has refused to do so. *See* App. Supp. at 6, NSA-LUDO § 3.180(D)(8)(a). Additionally, to take advantage of this path to a permit the applicant must show that the size is the minimum necessary to provide the service. NSA-LUDO § 3.180(D)(8)(b). The applicant is already providing rail service so the size is already the minimum to provide the service – or larger.**

Additionally, within the SMA Open Space zone “[a]ny development including but not limited to buildings, structures or excavation, proposed within a FEMA designated flood zone, or sited in an area where the Planning Director cannot deem the development reasonably safe from flooding shall be subject to Section 3.240, Flood Hazard Overlay.” NSA-LUDO § 3.180(G)(6). The applicant acknowledges that 0.78 miles of the length of the project would be in the 100-year floodplain and that the County may ask for more information to ensure that the project is safe from flooding. We urge the County to take all necessary precautions to ensure that safety is achieved. This requirement also applies to the SMA Public Recreation zone.

The applicant has proposed a mineral production area within the SMA Open Space zone – a use that is not allowed in this zone. NSA-LUDO § 3.180(F). “Production of mineral resources means the use of portable crushing, on-site stockpiling, washing, milling, screening, or sorting equipment or other similar methods of initial treatment of a mineral resource to transport to another site for use or further processing.” NSA-LUDO § 1.200. According to the application materials the proposed “staging area” at ~MP 71.6 meets this definition.² This use is not allowed in this zone and must be moved to a zone where it is allowed. Denuding this site also violates NSA-LUDO § 14.100(H) and the staging area is unlawfully proposed within the buffer zone of Wetland 9.

2. SMA Public Recreation Zone

The applicant proposes 3.38 acres of temporary disturbance and 5.57 acres of permanent disturbance in the SMA Public Recreation zone. It also proposes acquisition of lands from Memaloose State Park, the relocation of a pump house, new track, a construction staging area, and a new permanent road.

As discussed above, the Parks commission has refused to complete any land transfer to enable the project. Even if it had been approved it is unclear how the applicant would

² “The rock crushing process will involve short range transport of excavated rock material to a stockpile at the crushing site. Stockpiled material will be fed into a mobile crusher to be staged near the material source. Processed material will be stockpiled at the crushing site until access is available to fill locations on the project at which point the processed aggregate will be transported to those locations and used as fill.” App. Supp. At 6.

propose to accomplish the property acquisition since neither property line adjustments nor land divisions are allowed in the SMA Public Recreation zone. See NSA-LUDO § 3.170(E)(33) (property line adjustment are only allowed in this zone if they are within the GMA). This alone renders the application incomplete.

The applicant also proposes “rock excavations” in this zone. See Figure 4-1, p. 8 (supplemental). While exploration, development, and production of sand, gravel, and crushed rock are a conditional use in the SMA Public Recreation zone, that use is “subject to that material being used only for the construction, maintenance, or reconstruction of roads used to manage or harvest commercial forest products on lands within the SMA.” NSA-LUDO § 3.170(E)(26). Since the crushed rock would not be used on forest roads, but rather on a railroad, the development of mineral resources is not allowed in this zone. *Id.*

3. SMA Agriculture Zone

The applicant proposes 1.85 acres of land disturbance in the SMA Agriculture zone. It also proposes a new mainline track, construction of a retaining wall, lighting, and ancillary structures. These are also conditional uses in the zone and require similar review as discussed in Section I.D above. NSA-LUDO § 3.120(E)(18).

C. Resource Impact Review

Since the project will be reviewed as a conditional use under NSA-LUDO § 3.170(E)(27) it must comply with Chapter 5 - Conditional Use Review, Chapter 11 - Fire Safety Standards, and Chapter 14 - Scenic Area Review, as well as all other standards. Conditional use review is discussed in Section I.D above and Section V below. **The project application does not address the fire safety standards in Chapter 11. Given the history of wildfires started by railroads in the Gorge, this omission is particularly glaring and requires denial of the application.** Also, the new track would allow longer, faster, and more frequent trains carrying highly volatile Bakken crude oil. See UPRR Fact Sheet. The failure of the applicant to address Chapter 11 is a basis to deny the application.

The additional trains that would be enabled by the efficiency improvements proposed by the applicant – no matter the train contents – would have impacts on the NSA. The Rowena Plan describes the fire conditions through this stretch of tracks:

Given the slope class, flashy fuel load, predominant wind patterns and wildland/urban interface any fire within the planning area between late May and late October is potentially significant. Light flashy fuels such as cheat grass coupled with steep slopes and strong west winds combine to generate explosive fire behavior characterized by rapid rates of spread. Such fire behavior within the wildland/urban interface generates significant public and firefighter safety concerns. *Rowena Plan* at 20.

The Rowena Plan also describes the incidence of wildfires in only this small part of the NSA:

A review of fire statistics from 1992 through 2004 indicates that some 34 fires burned in the planning unit within that time period. These fires were

all human caused and ranged in source from fireworks and cigarettes to rail road, farm equipment and power lines. Of these 34 fires, nine fires would be classified as significant (based on size and/or complexity). *Id.*

The new facilities proposed by UPRR would allow 5-7 longer trains to pass through the National Scenic Area per day. See UPRR Fact Sheet, App. Supp. at 3–4. This would necessarily result in more fires started through the length of the National Scenic Area. Fires often result in degradation of the scenic, natural, cultural and recreation resources of the NSA and damage to property. A permit cannot be lawfully issued without taking these cumulative adverse effects on the protected resources of the CRGNSA into account. See Section I.B & I.C above.

1. Scenic Resource Protection

NSA-LUDO §§ 14.100 through 14.400 contain the scenic resource protection standards for the Special Management Areas. This subsection discusses some of those impacts.

The proposed new structures would be topographically visible from multiple key viewing areas including Interstate 84, Washington State Route 14, Old Washington State Route 14 (*i.e.*, Klickitat County Road 1230), the Columbia River, and the Historic Columbia River Highway and Trail. It appears that large portions of the project area may also be seen from the Cook-Underwood Road, Rowena Plateau, Washington State Route 141, and Washington State Route 142 KVAs. The following rules, denoted by bullets, apply:

- **The County is legally obligated to evaluate the potential cumulative visual effects of proposed new development in order to ensure that scenic resources would not be adversely affected. NSA-LUDO § 14.200(L). This includes evaluation of past, present and likely future actions. In addition, the County is required to evaluate individually insignificant but cumulatively significant actions and avoid cumulative adverse effects. 16 USC 544(a)(3), *Friends*.**

The application acknowledges that the applicant does not even attempt to meet this legal standard and even endeavors to use past impacts – like the blasted area through the mesa – to bootstrap approval of this application. Project Narrative at 5-57, 5-116 (“The cumulative effects analysis did not include an analysis of past actions.”). Therefore, the application cannot be lawfully approved. Even if past actions were considered, the application fails to demonstrate that cumulative visual effects on scenic resources will not occur.

- As viewed from key viewing areas, new development must be either visually subordinate to the adjacent natural landscape or not visually evident within the adjacent natural landscape, depending on the applicable landscape setting. NSA-LUDO § 14.200(R)(1).

NSA-LUDO § 14.210 specifies the standards for compatibility of development within the landscape settings in the SMA. Generally, new development in all landscape settings must be compatible with the general scale (height, dimensions, overall mass) of similar development in the vicinity. However, the general scale of this proposal is massive – much larger than surrounding development. Therefore, it does not meet this standard.

In the SMA Open Space zoned areas the “not visually evident” standard applies in both of the affected landscape settings. The proposal includes a new track, a portion of a mesa that the applicant proposes blasting through, other rock excavations, and a very large construction staging and mineral production area in the SMA Open Space zone. The new track would be visible from multiple KVAs including, at least, the Columbia River and SR-14. The new development – including the new rock excavations at MP 71.7 – would be highly visible from the Columbia River, SR-14, and Klickitat County Road 1230 KVAs and would fail to meet the required standards of “not visually evident”. Additionally, the expansion of the blasted area in the rock mesa, especially when considered along with the existing blasted area, would be visually evident from each of these KVAs. Finally, the large new staging and mineral production area at ~MP 71.6 would be visually evident from multiple KVAs, including from long distances away. Simply put, the applicable standard will not be met, requiring denial of the application or conditions of approval – even draconian ones that lead to the withdrawal of the application.

The visual subordination standard applies to the other SMA zoned areas. The applicant proposes 3.38 acres of temporary disturbance and 5.57 acres of permanent disturbance in the SMA Public Recreation zone. It also proposes acquisition of lands from Memaloose State Park, the relocation of a pump house, new track, a construction staging and mineral production area, and a new access road within this zone. The applicant also proposes 1.85 acres of land disturbance in the SMA Agriculture zone. This includes new track, construction of a retaining wall, lighting, and ancillary structures within the zone. Cumulatively, these impacts cannot achieve visual subordination.

This development is proposed partially in an Oak Woodland landscape setting. New development and land uses in this setting must meet the overall appearance of a woodland landscape. NSA-LUDO § 14.400(C)(3). **However, the proposed new development of a 5+ acre staging and mineral production area would denude the existing oak woodland. Regardless of claims by the applicant that this is a temporary use, it still must meet the same scenic area review requirements as a permanent use. See Section I.E above. Moreover, mineral production sites must meet the heightened “not visually evident” standard if they are within 3 miles of a KVA, as this site is. The application does not meet this requirement. One or more conditions of approval requiring the project to meet the standard is legally required or the application cannot be lawfully approved.**

- New development must be sited to avoid the need for new landscaping wherever possible. NSA-LUDO § 14.200(K)(1).
- New development must be designed to fit the natural topography and to take advantage of vegetation and landform screening. NSA-LUDO § 14.200(R)(4).
- New development must be designed to minimize visible grading and other modifications of landforms, vegetation cover, and natural characteristics. NSA-LUDO § 14.200(R)(4).

The proposed siting of the large staging and mineral production area near MP 71.6 within a stone’s throw of the Columbia River is particularly egregious. It is clear from the siting of this staging area that the applicant disregards the outstanding scenic resources of the National Scenic Area. **This aspect of the development is not designed to minimize visible grading and other modifications to landforms, vegetation, and natural characteristics. It would not meet the**

not visually evident standard and it would contribute greatly to cumulative adverse scenic impacts on scenic resources in the NSA. We ask that the County deny the application or condition approval upon relocating the proposed staging and mineral production area to an area where it is allowed.

- Exterior colors must be dark earth-tones found at the specific site or in the surrounding landscape. Actual specific colors meeting this standard must be proposed in the land use application. Colors that are not expressly approved by a land use decision may not be used. NSA-LUDO § 14.200(I).

While the County has requested the use of darker colors on the equipment buildings, the applicant has refused. App. Supp. at 5.

- Exterior lighting must be sited, limited in intensity, and shielded and hooded as viewed from key viewing areas. NSA-LUDO § 14.100(F).

Conditions of approval must be included to meet this requirement.

New development must be sited on the parcel in the location that best meets the applicable scenic standard, using existing topography and vegetation for screening before requiring new screening measures. While the applicant indicates that the signal buildings would be small in scale, it does not assert that they would be sited in the location that best meet the applicable standard as seen from KVAs. Other project components, like the blasting/mineral development area, the staging and mineral production area, the pump house, the utilities and the lighting are similarly not sited based upon visibility from KVAs. For these reasons, the project cannot be lawfully permitted as proposed.

2. Natural Resource Protection

When reviewing these requirements it is important to remember that the Oregon Supreme Court has determined that the provisions of the county implementations of the Gorge Management Plan do not adequately meet the requirements of the Scenic Area Act. *Friends*. Therefore, a cumulative impacts evaluation of past, present, and likely future actions, including actions that are individually insignificant but cumulatively significant, is required by the Act and must be completed by the County. Once the cumulative adverse impacts are identified, they must be avoided or the application must be denied. In short, this analysis must go above and beyond the requirements of the Wasco County Ordinance.

Water Resources

NSA-LUDO § 14.610(A) contains the standards for projects that may affect streams, ponds, lakes, wetlands, or other riparian areas in the Special Management Areas. The applicant must determine the exact location of the water resource boundary. NSA-LUDO §§ 14.610(A)(2)(d)(3), 14.610(A)(2)(e). In addition, the following buffer zones apply:

- Wetlands, lakes, and ponds: 200 feet minimum. NSA-LUDO § 14.610(A)(2)(a)(2)(a).
- Perennial streams: 200 feet. NSA-LUDO § 14.610(A)(2)(a)(2)(a).
- Fish-bearing streams: 200 feet. NSA-LUDO § 14.610(A)(2)(a)(2)(a).

- Intermittent streams not used by anadromous or resident fish: 50 feet. NSA-LUDO § 14.610(A)(2)(a)(2)(b).

Water resource buffer zones must be untouched and maintained in their natural condition. NSA-LUDO § 14.610(A)(2)(a)(1) & (A)(2)(g). However, the applicant proposes to intrude on both water resources and their buffer zones.

The applicant attempts to inject ambiguity into the clear requirement within NSA-LUDO § 14.610(A)(2)(g)(2) that, within the SMA, wetlands and aquatic and riparian areas can only be disturbed when a public safety hazard exists or when the disturbance is for a restoration/enhancement project. Project Narrative at 5-97. **With the exception of a scrivener’s error, this requirement was lifted verbatim from the Management Plan.** Compare NSA-LUDO § 14.610(A)(2)(g) with Management Plan at I-3-36. **Only unavoidable impacts from public safety hazards and restoration/enhancement projects can be allowed (and they must be mitigated with a complete mitigation plan). All other disturbances are simply not lawfully permitted under NSA-LUDO § 14.610(A)(2)(g) and the Management Plan at I-3-36. Even though a variance is not available the applicant has requested variances for three delineated wetlands or waterbodies within the SMA. These requested variances cannot be lawfully granted.**

The applicant has also requested a variance for nine wetland or waterbody buffer zones. To grant a buffer zone variance the Practicable Alternative Test must show that there is no practicable alternative and NSA-LUDO Chapter 6 (Variances) must be followed. NSA-LUDO § 14.610(A)(2)(g)(1) & (5). NSA-LUDO Chapter 6 requires that all setbacks and buffer zones be undisturbed unless there are no practicable alternatives and all adverse effects would be fully mitigated. NSA-LUDO § 6.020(D). Both NSA-LUDO § 6.020(D) and NSA-LUDO § 14.610(A)(2)(g)(1) require the completion of a Practicable Alternative Test. **The applicant has not adequately completed a Practicable Alternative Test.**

The Practicable Alternative Test is laid out in NSA-LUDO § 14.610(D) and discussed at 5–102 through 5–104 of the applicant’s Project Narrative. As an initial observation, the Project Narrative does not address the requirement that the applicant request a Management Plan amendment to meet the test. NSA-LUDO § 14.610(D)(3). This alone requires the application to be denied. The Practicable Alternative test requires the applicant to show that the basic purpose of the use cannot be accomplished on a site with less adverse effects.

The applicant also has not demonstrated for each area to be impacted that it has complied with the requirements to assess other sites (e.g. other parcels that would still meet the purported need) while reducing adverse impacts as required by NSA-LUDO § 14.610(D)(1) and (D)(2). Instead, there is the assertion that there is no other way than to do the entire project exactly how the railroad wants. **Unless the Practicable Alternative Test is applied to each impacted resource on a parcel-by-parcel basis, NSA-LUDO § 14.610(D) has not been met and the application cannot be lawfully approved.**

The Practicable Alternative Test also requires the applicant to show that it cannot meet the basic purpose of the use – rather than the basic purpose of the project – in a way that produces less adverse effects. NSA-LUDO § 14.610(D)(1). This analysis must include “reducing its proposed

size, scope, configuration, or density, or by changing the design of the use.” NSA-LUDO § 14.610(D)(2). The basic purpose of the use is to increase the speed and volume of rail transportation. The applicant is already providing rail transportation in a less impactful way. Therefore, this portion of the test is also not met. Even if the County accepts that the basic purpose of the use is to improve operational efficiency, reducing the size, scope, configuration, or density of the use (e.g. scaling back the amount of efficiency to be attained by reducing the proposed length of the double track) was not considered as part of the applicant’s Practicable Alternative Test analysis. Without such an analysis the test is not met and the application cannot be lawfully approved.

While it was not discussed as part of the Practicable Alternative Test, reducing the length of the double track was included as Alternative C in Section 3.13. However, the alternative was not fully developed, the target metrics for operational efficiency improvements were not discussed, and there was no discussion of why the project must intrude on SMA resources when a double track of ~4.9 miles could be achieved on GMA and urban area zoned lands. Until such practicable alternatives are developed and included in the Practicable Alternative Test, the application of the test is incomplete.

The proposed buffer zone variance also violates NSA-LUDO § 6.020(D)(2). That provision requires that the natural resources mitigation plan “ensures that the development can be mitigated to ensure no adverse effects would result.” NSA-LUDO § 6.020(D)(2). However, the applicant concedes that the water resources mitigation plan is incomplete. Appendix D at 1. Additionally, the update to the mitigation proposal does not “ensure no adverse effects will result.” NSA-LUDO § 6.020(D)(2).

The updated mitigation proposal supplied by the applicant is dependent on a change in water rights to assure the wetland has sufficient surface water. Appendix D Supp. The proposed use of pumped groundwater to maintain wetland conditions creates a long-term management responsibility and proposes to establish an artificial wetland system to compensate for existing biological systems that do not rely on such mechanisms. *Id.* There is no assurance that either the water right will be transferred or the permit to appropriate ground water will be granted. Even if they are granted, there is no assurance that the applicant would be interested in committing to perpetual management of a pumped water system to maintain a wetland of no economic use to the railroad. A major deficiency of the mitigation proposal is the real possibility of having a winter ponding site that dries out in the spring and summer and is an invasion site for wind-borne seeds from invasive species. The supplemented plan simply does not “ensure no adverse effects will result.” NSA-LUDO § 6.020(D)(2).

Most new development and land uses may not be approved within wetland buffer zones unless numerous restrictive approval criteria are met. See NSA-LUDO §§ 14.610(E)(4) & (6). These criteria are designed to ensure that impacts to buffered areas will be minimized and adequately mitigated and that rehabilitation and enhancement efforts will be professionally designed and properly implemented. **Unfortunately, the applicant’s mitigation plan is speculative and incomplete and it would require ongoing maintenance. These criteria are not met.**

Sensitive Wildlife and Plants

NSA-LUDO § 14.610(B) contains the standards for projects in the SMAs that may affect sensitive wildlife/plant resources. The following wildlife and plant protection standards apply to all projects in the SMAs:

- All sensitive plant species must be surrounded by an undisturbed 200-foot buffer zone. NSA-LUDO § 14.610(B)(2)(c)(4).
- Buffer zones for sensitive wildlife sites must be determined by the Forest Service in consultation with other state and federal agencies. NSA-LUDO § 14.610(B)(2)(c)(4).
- Projects must not interfere with fish and wildlife passage. NSA-LUDO § 14.610(B)(2)(d)(8).
- Projects must not interfere with the existing condition of the wildlife/plant area or site and the surrounding habitat and useful life of the area or site. NSA-LUDO § 14.610(B)(2)(d)(4).
- Projects must be timed to occur during periods when fish, wildlife, and plants that might be affected are least sensitive to activities. NSA-LUDO §§ 14.610(B)(2)(c)(3), 14.610(B)(2)(d)(6).
- Projects must maintain, protect, and enhance the integrity and function of priority habitats (such as old growth forests, talus slopes, oak woodlands, aspen stands, prairies, steppes, snags and logs, cliffs, caves, and dunes), including a consideration of cumulative impacts. NSA-LUDO § 14.610(B)(2)(d)(9).
- In areas of big game winter range, habitat components such as forage and thermal cover must be maintained. NSA-LUDO § 14.610(B)(2)(d)(5).

None of these criteria are met in the project narrative – the applicant instead pledges to avoid sensitive species and priority habitats to the extent practicable, which falls far short of the required standard – and there is no way to determine if they have been met without access to Appendix J. We have submitted a public records request for Appendix J, which was redacted entirely from the application materials. However, the fact that the applicant has substituted its own standard (avoid to the extent practicable) and requested a variance to these requirements indicates an admission that some or all of the provisions will not be met. Friends requests detailed information about how the applicant proposes to meet each legal requirement. Without that information and a copy of the landscaping plan, the public does not have a meaningful opportunity to review and comment on the application, and it should therefore be denied pursuant to *Eagle Ridge*.

To receive a variance, the applicant must prove that there are no practicable alternatives and all adverse effects would be fully mitigated. NSA-LUDO § 6.020(D). There is no evidence that either of these criteria is met. As discussed in the Water Resources discussion above, the practicable alternative test is inadequate. The application also violates NSA-LUDO § 6.020(D)(2). That provision requires that the natural resources mitigation plan “ensures that the development can be mitigated to ensure no adverse effects would result.” NSA-LUDO § 6.020(D)(2). The applicant claims that a compliant plan exists in Appendix J. But that appendix has been redacted from the provided materials. We have submitted a public records request for that appendix but have not yet received it. The public has the right to evaluate whether the applicant has demonstrated that “no adverse effects would result.” NSA-LUDO § 6.020(D)(2). As above, the public must be provided with a meaningful opportunity to review and comment on the portions of Appendix J that are a matter of public record, or the application must be denied.

Soil Productivity

Projects must control all soil movement within the area shown on the site plan map. The disturbed soil area must not exceed 15 percent of the project area. Within one year of completion, 80 percent of the disturbed area must be restored using effective native ground cover species. NSA-LUDO § 14.610(C). Conditions of approval must be included to ensure that this work is done.

3. Cultural Resource Protection

Due to its location along the Columbia River and near Memaloose Island there is a high likelihood of cultural resources within the project area. For most uses and developments in the Special Management Areas, NSA-LUDO § 14.500 contains the standards for the protection of cultural resources. *See* NSA-LUDO § 14.510(C). **The cultural resource reconnaissance survey and report must be prepared to meet NSA-LUDO § 14.500(K) and (L). It is unlikely that an adequate survey was produced since the applicant acknowledges that it did not survey “large patches of blackberry bushes or poison oak.”** App. Supp. at 5. In addition, all provisions of NSA-LUDO § 14.500 must be met. There is no way to determine if they have been met without access to Appendix L. We submitted a public records request for the portions of Appendix L that are a matter of public record, but we have not yet received it. As above, the public must be provided with a meaningful opportunity to review and comment on Appendix L or the application must be denied. At the very least, it would be appropriate to continue the hearing and hold the public record open until the public has an opportunity to review the portions of the appendix that do not contain sensitive information.

Significant Cultural Resources

If a cultural resource is identified, it must be evaluated for significance. NSA-LUDO § 14.500(D)(2). If the resource is determined to be significant, the County must determine whether the project is likely to adversely affect the resource. NSA-LUDO § 14.500(D)(4). If the County concludes that the project would have an adverse effect on a significant cultural resource, then a mitigation plan must be prepared and reviewed pursuant to section 14.500(F).

Historic Resources

NSA-LUDO § 14.500 contains the standards for protection of historic resources. Historic surveys are required for all proposed uses that would alter the exterior architectural appearance of buildings and structures that are at least 50 years old. NSA-LUDO § 14.500(B)(2). Historic surveys must contain the following elements:

- a documentation of the location, form, style, integrity, and physical condition of historic buildings and structures
- photographs and maps
- a description of any uses that would alter or destroy the exterior architectural appearance of the historic buildings or structures or compromise features of the site that are important in defining the overall historic character of the historic buildings or structures
- detailed architectural drawings and building plans that clearly illustrate all proposed alterations

NSA-LUDO § 14.500(M).

4. Recreation Resource Protection

The ordinance requires that “[r]ecreation sites shall be protected from adjacent uses that would detract from their use and enjoyment.” NSA-LUDO § 14.710(M). However, the applicant concedes that “[d]uring construction, there may be temporary impacts to recreational uses associated with construction noise.” Keeping in mind that temporary uses must comply with scenic area review requirements (*See* Section I.E above), the project cannot be lawfully permitted. The project proposal includes rock crushing, road building, blasting, grading, track construction, and additional train traffic on lands adjacent to Memaloose State Park and the Columbia River. In addition, the project would allow 5-7 longer trains a day to pass through the park. UPRR Fact Sheet. The applicant also sought a land transfer that would make Memaloose State Park smaller. This is diametrically opposed to the provisions of NSA-LUDO § 14.710(M) and cannot be lawfully permitted.

Further, new buildings and structures “may detract from the use and enjoyment of established recreation sites on adjacent parcels.” A new pump house would be constructed along with new track directly adjacent to the camping area at Memaloose State Park. In response, the ordinance requires that “an appropriate buffer shall be established between the building/structure and the parcel.” NSA-LUDO § 14.710(M). Rather than creating an appropriate buffer, the applicant proposes to reduce the area between the tracks and the camping area. Reducing the current buffer is the exact opposite of establishing a buffer. The project cannot be lawfully permitted as long as the buffer will not be established.

County ordinance also requires that “[n]ew developments and land uses shall not displace existing recreational use” NSA-LUDO § 14.710(B). Reducing the size of the park, as the applicant proposes in its application, would result in de facto displacement of existing recreational uses.

Finally, “[m]itigation measures shall be provided to preclude adverse effects on the recreation resource.” NSA-LUDO § 14.710(E). The applicant concedes that there would be adverse effects on the recreation resource and yet does not propose any mitigation measures to preclude these effects. Project Narrative at 5-109. **Permanent degradation of the resource would also occur due to more frequent train traffic waking campers and detracting from the recreational experiences at Memaloose State Park and at other parks and recreation areas in the NSA.** *See* UPRR Fact Sheet. In fact, *The Oregonian* reported that “When camping in the Gorge, it pays to be a little deaf” and singled Memaloose State Park out as already being impacted by excessive train noise.³ http://blog.oregonlive.com/terryrichard/2008/05/when_camping_columbia_gorge_it.html. Cumulative adverse impacts of increased train traffic to the recreation resource of the NSA must be considered and impacts caused by past actions must be included. *Friends*. **Due to these reasons, the project cannot be lawfully permitted.**

³ “The park has about 105 sites, split evenly between full hookups for RVs and tents campers. It has a beautiful setting, with good views of the river, but there goes the train again. The railroad also blocks access to the river. The freeway isn't too noisy, if you camp close to the trains. The trains aren't too noisy, if you camp close to the freeway. You get the picture. The walls of an RV help block out the noise a bit better than the nylon of a tent.”

III. General Management Area Requirements

This section discusses the legal requirements for development in the General Management Area of the NSA and identifies various violations of these requirements.

A. General Considerations

1. GMA Large-Scale Agriculture Zone

The project would pass through 0.74 miles in the GMA Large-Scale Agriculture zone and would disturb 3.30 acres in this zone. In addition to new track in this zone, there would also be a new signal building as well as a construction staging area and a temporary access road. NSA-LUDO § 3.120 specifies which uses are allowed in Large-Scale Agriculture zones. All uses and structures must be sited to minimize the loss of land suitable for producing agricultural crops or livestock, must be compatible with agricultural uses, and must not force a change in or significantly increase the cost of accepted agricultural practices on nearby lands devoted to agricultural use. NSA-LUDO § 5.020(J) & (K).

The applicant relies on NSA-LUDO § 3.120(E)(20) as the permitting mechanism for the area that crosses the GMA Large-Scale Agriculture zone. However, that provision requires an analysis of practicable alternatives that would have fewer adverse effects on the protected resources of the NSA and also requires the size to be the minimum necessary to provide the service. *Id.* As discussed above, the applicant, while purporting to have performed a large-scale analysis and asserting that it must build new tracks through the NSA for an undefined amount of operational efficiency, has not studied practicable alternatives on a parcel-by-parcel or zone-by-zone basis. Until it does so, NSA-LUDO § 3.120(E)(20)(a) is not met. *See also* Section I.F.

Additionally, NSA-LUDO § 3.120(E)(20)(b) requires a project to be the minimum size necessary to provide the service. UPRR already provides rail service through the area and it asserts in its application that the project is for efficiency improvements, rather than to provide additional service. *See* Project Narrative Section 2. Based on the applicant's own words, the size is already the minimum necessary (or larger) to provide train service, so NSA-LUDO § 3.120(E)(20)(b) is not met. For this reason alone, this massive new project cannot be permitted through the GMA Large-Scale Agriculture zone under NSA-LUDO § 3.120(E)(20).

It is unclear from the proposal if mineral production would take place in this zone. "Production of mineral resources means the use of portable crushing, on-site stockpiling, washing, milling, screening, or sorting equipment or other similar methods of initial treatment of a mineral resource to transport to another site for use or further processing." NSA-LUDO § 1.200. If such uses are to take place in the GMA Large-Scale Agriculture zone then the requirements in NSA-LUDO § 10.300 must be met. The application provides no evidence that any of the criteria would be met. **Any permit issued for this project must either be conditioned on no mineral production in this zone or the application cannot be lawfully issued.**

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2. GMA Small-Scale Agriculture Zone

The project would pass through 0.26 miles in the GMA Small-Scale Agriculture zone, disturbing 0.90 acres in this zone. In addition to the proposed new track, there would also be a new signal building as well as construction staging and a temporary access road in this zone. NSA-LUDO § 3.130 specifies which uses are allowed in Small-Scale Agriculture zones.

The applicant relies on NSA-LUDO § 3.130(E)(14) as the permitting mechanism for the portions of the project that would cross the GMA Small-Scale Agriculture zone. NSA-LUDO § 3.130(E)(14) mirrors NSA-LUDO § 3.120(E)(20). That provision is discussed in Section III.A.1 above. Rather than repeating that analysis, it is incorporated by reference here.

3. GMA Open Space Zone

The proposal includes new track, construction staging, temporary and permanent roads, a signal building, two signal lights, 3,615 feet of un-weathered guardrail, a new culvert and two new culvert taps in the GMA Open Space zone. This would disturb 6.41 acres of land and account for 1.34 miles of new track.

NSA-LUDO § 3.180 specifies which uses are allowed in the GMA Open Space zone. The applicant does not propose a path for permitting the new culvert in the GMA Open Space zone. This is probably because there is no path to permit this new use. **It is a prohibited use and cannot be lawfully permitted.** NSA-LUDO § 3.180(F). **The County must deny the proposed new culvert.**

New guardrails are a permitted use within the zone if they will be within the disturbed right-of-way of the road and they are weathered or meet the I-84 corridor strategy. NSA-LUDO § 3.180(B)(2)(e). The applicant has proposed two-thirds of a mile of new, un-weathered guard rail in GMA Open Space. **Un-weathered guardrail would significantly contribute to the cumulative scenic impacts of the project. If the County approves the application, we ask the County to include a condition of approval to require weathered guardrails.**

The applicant has proposed a mineral production area within the GMA Open Space zone – a use that is not allowed in this zone. NSA-LUDO § 3.180(F). “Production of mineral resources means the use of portable crushing, on-site stockpiling, washing, milling, screening, or sorting equipment or other similar methods of initial treatment of a mineral resource to transport to another site for use or further processing.” NSA-LUDO § 1.200. According to the application materials a proposed staging area meets this definition.⁴ This use is not allowed in this zone and must be moved to a zone where it is allowed.

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⁴ “The rock crushing process will involve short range transport of excavated rock material to a stockpile at the crushing site. Stockpiled material will be fed into a mobile crusher to be staged near the material source. Processed material will be stockpiled at the crushing site until access is available to fill locations on the project at which point the processed aggregate will be transported to those locations and used as fill.” App. Supp. At 6.

4. *GMA Water Zone*

A temporary construction area is proposed in the GMA Water zone. Temporary uses are subject to the same standards as permanent uses. *See* Section I.E above. **There are no zoning regulations for uses in the GMA Water zone. Where a use is not allowed outright, allowed through expedited development review, or allowed through conventional development review, it is prohibited. Thus, this use cannot take place and the County cannot lawfully approve the application.**

5. *GMA Agriculture Special Zone*

The County has identified a parcel zoned GMA Special Agriculture that the project would affect – Tax Lot 3N12E31-00000700, owned by Orchard View Farms LLC. **Although this zone appears both on the notice provided by the County and on the pre-application conference report, the applicant chose to ignore this zone in its analysis. NSA-LUDO § 3.190 specifies which uses are allowed in GMA Agriculture Special zones. “Utility facilities, public use facilities, and roads” are expressly prohibited. NSA-LUDO § 3.190(E)(7). Allowed review uses include “Replacement or minor expansion of existing and serviceable structures within a dedicated site. Expansion shall be limited to the dedicated site.” NSA-LUDO § 3.190(D)(4). The proposed new railroad track would not be a “minor expansion” of an existing track and would not be limited to the dedicated site.**

It is difficult to discern from the engineering drawings what is proposed for this zone. Rock blasting and equipment staging have been proposed right up to the edge of the zone and the drawings indicate that the rock blasting may enter the zone. In addition, the required agricultural setbacks do not appear to be adhered to. However, the applicant has not requested a variance to these setbacks. **Conditions of approval must ensure that the proper agriculture setbacks will be adhered to and that no rock blasting will take place in this zone.**

It is curious that the applicant discussed this zone with the County during the pre-application hearing – and the County has included it in its approval criteria – but the applicant does not address it at all in the actual application. **This is another example where the application is incomplete and inaccurate. The County cannot lawfully approve the application if any part of the development, whether temporary or permanent, would be sited in the Agriculture Special zone or disturb the agricultural setbacks provided in County ordinance.**

B. Resource Impact Review

This section discusses the legal requirements for protection of scenic, natural, cultural, and recreation resources within the GMA and identifies various deficiencies in the project application.

1. *Scenic Resource Protection*

NSA-LUDO §§ 14.100 and 14.200 contain the scenic resource protection standards for the General Management Area. Whether or not the parcel is visible from KVAs, new buildings and roads must be sited and designed to retain existing topography and to reduce grading to the maximum extent possible. NSA-LUDO § 14.100(B). New buildings must be compatible with the

general scale of existing nearby development. For purposes of determining compatibility, the height, dimensions (*i.e.*, length, width, and footprint), and visible mass of the proposed building must each be evaluated. NSA-LUDO § 14.100(C). **The length, width, and footprint of this project and the overall visible mass are extremely large. The siting is proposed for the railroad's convenience rather than to retain existing topography or reduce grading. The application fails in this area.**

Key Viewing Areas

- New buildings and roads must be sited so that they are visually subordinate to their settings as seen from KVAs. In determining the least visible site, existing topography and vegetation must be given priority over artificial means of screening. NSA-LUDO § 14.200(R)(4).
- The existing tree cover screening the development area on the subject parcel from KVAs shall be retained except as necessary for site development or fire safety purposes. NSA-LUDO § 14.200(H).
- New buildings and roads must be sited and designed to minimize grading activities and visibility of cut banks and fill slopes from KVAs. NSA-LUDO § 14.200(D).
- The County must evaluate all aspects of the development, including size, height, shape, color, reflectivity, landscaping, and siting, to ensure that the development will be visually subordinate. NSA-LUDO § 14.200(A)(2).
- Exterior colors must be dark earth-tones found at the specific site or in the surrounding landscape. Actual specific colors meeting this standard must be proposed in the land use application. Colors that are not expressly approved by a land use decision may not be used. 14.200(I).
- The County must evaluate the number of KVAs from which the development site is visible; the amount of area of the building site exposed to KVAs; the degree of existing vegetation providing screening; the distance from the building site to the KVAs; and, for linear KVAs such as roads, the linear distance along which the site is visible. NSA-LUDO § 14.200(A)(1).
- The County must evaluate the potential cumulative visual effects of the proposed development. NSA-LUDO § 14.200(L). This includes evaluation of past, present and likely future actions. Individually insignificant but cumulatively significant actions must be evaluated and cumulative adverse impacts must be avoided. 16 USC 544(a)(3).

As discussed in Section I.C above, the development would apparently be visible from several more KVAs than the applicant identified. The number of KVAs and the large scale of the proposal must be considered. The new access roads and signal buildings must be sited to achieve the applicable scenic standard as seen from KVAs. There is no evidence this was even a consideration of the applicant. Furthermore, the County is required to consider the cumulative adverse visual impacts of the project including the impact of past actions. This must extend to the existing railroad. We ask that the County deny the application based on these criteria.

If the County were to approve the application, it must require landscaping to make the development visually subordinate when viewed from KVAs. NSA-LUDO § 14.200(K). This applies, for example, to the portion of the development from MP 67 eastward that can be seen from the I-84, Klickitat County Road 1230, Columbia River, Cook-Underwood Road,

Historic Columbia River Highway, Rowena Plateau, SR-14, and SR-141 KVAs. The screening must also meet the requirements of NSA-LUDO Chapter 11.

- Unless the building site is fully screened from all key viewing areas by existing topography, building materials must be nonreflective or low-reflective. NSA-LUDO § 14.200(J).

The County should include a condition of approval to ensure that all surfaces, including the rails, meet this requirement.

2. Natural Resource Protection

Section II.C.2 above discusses the requirements for natural resource protection in the SMA and identifies deficiencies in the project application. That discussion is incorporated here by reference to the extent that standards are the same in the GMA and the SMA.

The applicant has requested a variance to the sensitive plant buffer zones and the water resources setbacks in the GMA. Section II.C.2 above discusses the SMA requirements for a natural resources variance. The GMA requirements are the same. We incorporate the discussion of the variance standards from Section II.C.2 here. As discussed in that section, the variance standards are not met. Therefore a variance cannot be issued.

NSA-LUDO § 14.600(A) & (B) contain the standards for projects in the GMA that may affect water resources. The applicant acknowledges that the project would result in permanent disturbance of three delineated wetlands and disturbance of five wetland buffer zones within the GMA. By requesting a variance, the applicant further acknowledged that the standards would not be met. As discussed in the previous paragraph, a variance cannot be legally granted for this buffer. Since these standards would not be met, the application cannot be lawfully approved.

In its analysis of NSA-LUDO § 14.600(A)(6), the applicant attempts to skirt the requirements by claiming the project is historically water-dependent and that it has no practicable alternatives. Project Narrative at 5-71. As discussed in Section II.C.2 above and in Section IV.A below, neither contention is accurate so the applicant again does not meet the applicable criteria. The applicant also unconvincingly argues that “[d]ue to the nature of the railroad as a pre-existing, interstate transportation system, there are no portions of the proposed project which do not meet these criteria.” Project Narrative at 5-72. No such exception to the criteria exists. The railroad must meet the criteria in NSA-LUDO § 14.600(A)(6). It fails to do so.

While the applicant acknowledges that the proposed mitigation plan is “conceptual,” the applicant also claims that “[t]he final Mitigation Plan will satisfy all requirements of Section 14.600(A)(6)(h).” The production of a final mitigation plan that is compliant with all applicable standards is necessary before the application can be approved. Compliance cannot be deferred through conditions of approval. *Eagle Ridge*.

NSA-LUDO § 14.600(C) contains the standards for projects in the GMA that may affect sensitive wildlife resources. The first step is for the County to determine whether the project is proposed within 1,000 feet of a sensitive wildlife area or site. This includes the following areas:

- habitat for wildlife species that are listed as endangered, threatened, sensitive, or candidate by the federal government or by the State of Oregon
- habitat for elk, mountain goat, great blue heron, osprey, golden eagle, or prairie falcon
- deer and elk winter range
- pika colony areas
- waterfowl areas
- shallow water fish habitat in the Columbia River
- sturgeon spawning areas
- tributary fish habitat
- streams that are primary water supplies for fish hatcheries or rearing ponds
- wetlands, mudflats, shallow water, or riparian vegetation that have high values for waterfowl, shorebirds, raptors, songbirds, upland game, and reptiles

NSA-LUDO §§ 1.200 (definition of “sensitive wildlife species”), 14.600(C)(1)(b).

Since the proposed project is within 1,000 feet of one or more of these areas, the County is required to transmit the application to the Oregon Department of Fish and Wildlife, which will review the application to determine the precise locations of wildlife habitat and activities, as well as potential impacts to wildlife areas or sites. As part of its review, ODFW may in its discretion conduct site visits. NSA-LUDO § 14.600(C)(3).

If the County, in consultation with ODFW, concludes that the proposed project is likely to adversely affect a sensitive wildlife area or site and that the impacts cannot be eliminated through site plan modifications or project timing, then the applicant must prepare a wildlife management plan. NSA-LUDO § 14.600(C)(5). The plan will provide a basis for the applicant to redesign the project in a manner that protects sensitive wildlife areas and sites, maximizes its development options, and mitigates temporary impacts to the wildlife area or buffer zone. *Id.* A wildlife management plan, prepared by a professional biologist hired by the applicant, must include the following:

- relevant background, such as biology of the species, characteristics of the subject parcel, and regulatory protection and management guidelines
- delineation of core habitat
- wildlife buffer zones
- an indication of the size, scope, configuration or density, and timing of all new uses within core habitat
- rehabilitation and enhancement actions
- a 3-year monitoring plan for federal or state listed species

Id.

NSA-LUDO § 14.600(D) contains the standards for projects in the GMA that may affect sensitive plant resources. By requesting a variance, the applicant has acknowledged that these standards would not be met. As discussed in the first paragraph of this subsection, a variance cannot be legally granted for this buffer. Since these standards would not be met, the application cannot be lawfully approved.

As discussed above, Appendix K, which must contain the wildlife management plan required by NSA-LUDO § 14.600, has been redacted from the application materials. *See* Project Narrative at 5-81. We have submitted a public records request for this portion of the application but we have

not yet received it. To preserve standing, we assert that it does not meet the requirements of NSA-LUDO § 14.600.

3. Cultural Resource Protection

For uses and developments in the General Management Areas, NSA-LUDO § 14.500 contains the standards for the protection of cultural resources. These are the same standards as apply to this development in the SMA. Section II.C.3 is therefore incorporated here by reference.

IV. Other Requested Variances

This section discusses two variances requested by the applicant that do not neatly fit into the previous sections. Neither variance can be lawfully granted.

A. Columbia River Development Setback Variance

The applicant requests a variance to the Columbia River development setback. Such a variance can only be granted when enforcement of the setback would render the property unbuildable. NSA-LUDO § 14.200(G). The property is, in fact, already built upon so it does not qualify as unbuildable. Thus, a variance cannot be lawfully granted.

The applicant also argues that the railroad is an historically water-dependent use and points out that a variance is not necessary for water-dependent development. Project Narrative at 5-55, NSA-LUDO § 14.200(G). At the same time, the applicant acknowledges that railroads have not been a water-dependent use since the 1920s when diesel locomotives became available. Project Narrative at 5-55. The applicant also tries to bootstrap water-dependence by noting that the grade near rivers is often gentler. *Id.* This does not somehow make railroads a water-dependent use; railroads are often built far away from water sources and are not water-dependent in 2016. And even assuming railroads are grade-dependent, that would not meet the legal criteria for water-dependence. Additionally, by requesting a variance the applicant tacitly acknowledges that one is necessary to lawfully approve the application. **The prerequisites to getting a variance are not met and the application cannot be lawfully approved unless conditions of approval require a setback from the Columbia River of 100 feet in the GMA and 200 feet in the SMA.** NSA-LUDO § 14.200(G), *Friends*.

Finally, even if the parcels were determined to be unbuildable without a variance, the Columbia River development setback variance can only be granted in the SMA when the practicable alternative test has been completed and all adverse effects will be mitigated. NSA-LUDO § 6.020(D). As discussed above, the applicant has not adequately completed the practicable alternative test. *See* Section II.C.2 above. While the applicant has submitted an incomplete Water Resources Conceptual Mitigation Plan, it has not submitted an adequate final mitigation plan. **Until the applicant shows that the land is unbuildable without a variance, completes an adequate practicable alternative test, and produces an adequate water resources mitigation plan, the County cannot lawfully issue a variance to the required setback from the Columbia River.**

/// /// ///

B. Scenic Travel Corridor Setback Variance

The proposed development is located within one-quarter mile of Interstate 84 and thus is in the foreground of a scenic travel corridor. NSA-LUDO § 14.300(B)(1). As discussed below, the applicant seeks a variance to the required 100-foot setback and fails to demonstrate compliance with NSA-LUDO § 14.300(B)(5).

Under the County ordinance, a scenic travel corridor setback variance can only be granted in an SMA when the Practicable Alternative Test has been completed and all adverse effects will be mitigated. NSA-LUDO § 6.020(D). **In addition to not completing an adequate Practicable Alternative Test, the applicant has not proposed any mitigation for the adverse effects of the new development. A condition that the applicant cannot build in the scenic travel corridor setback area is necessary.**

In addition, NSA-LUDO § 14.300(B)(5) requires railroads to “prioritize those areas specifically recommended as extreme or high priorities for undergrounding in the Columbia River Gorge National Scenic Area Corridor Visual Inventory, prepared in April, 1990.” The applicant incorrectly argues that this standard does not apply to the project because it would relocate existing utility and signal lines rather than construct new ones. *See* Project Narrative at 5-60. The applicant is wrong; the requirement in NSA-LUDO § 14.300(B)(5) is not limited to new signal lines and powerlines. The applicant has failed to demonstrate compliance with this standard. =

V. Conditional Use Review

As discussed in Section I.D above, to pass conditional use review muster, the entire project must meet the requirements of NSA-LUDO § 5.020. However, it fails to meet at least NSA-LUDO § 5.020(A–D), (F–H), and (L).

NSA-LUDO § 5.020(A) requires a proposed conditional use to be “consistent with the goals and objectives of the Management Plan for the Columbia River Gorge National Scenic Area, and consistent with the provisions of the County's implementing ordinances.” **As discussed at length above, the proposal is not consistent with the Wasco County NSA-LUDO, the Wasco County Comprehensive Plan, or the Management Plan for the Columbia River Gorge National Scenic Area. As such, the County cannot lawfully approve the application.**

The applicant’s proposal also does not meet the requirements in NSA-LUDO § 5.050(A)(4). The applicant’s Project Narrative entirely skips this requirement, not addressing how “[t]he project includes provisions for bicycle and pedestrian access and circulation.” **To meet this requirement, much-needed improvements to river access should be required by the County.**

Under NSA-LUDO § 5.020(C) & (L), the proposed use must not significantly burden fire facilities and available services, nor significantly increase fire hazards, fire suppression costs, or risks to fire suppression personnel. **Section II.C above discusses the significant increase in fire hazards that the project will bring, which are likely to further burden fire facilities and services.** Despite requirements that it do so, the applicant does not address the Fire Safety standards in Chapter 11 of the NSA-LUDO in its application. **The application fails on these criteria.**

NSA-LUDO § 5.020(D) requires that “[t]he proposed use will not unduly impair traffic flow or safety in the area.” **With at least five at-grade street crossings in the County and the increase in train traffic that the applicant projects, there will be an impairment of traffic flow in the area.** UPRR Fact Sheet. The increase in trains will likely include an increase in oil trains through the National Scenic Area. Such trains severely threaten public safety and will increase the dangers of driving along I-84 and city streets in Mosier, Rowena, and The Dalles. **This criterion is also not met.**

NSA-LUDO § 5.020(F) requires that “[t]he proposed use will not significantly reduce or impair sensitive wildlife habitat, riparian vegetation along streambanks and will not subject areas to excessive soil erosion.” **The portion of the project area that has been disclosed in the application crosses three wetlands and waterbodies and nine buffer zones, plus it will require work in the Columbia River. This will result in significant impairment of riparian vegetation and sensitive wildlife habitat. The fact that the applicant has requested variances to the sensitive plant buffer zone, the wetland buffer standard, and the Columbia River development setback shows that significant impairment will result. This criterion is not met.**

NSA-LUDO § 5.020(G) requires that “[t]he proposed use will not adversely affect the air, water, or land resource quality of the area.” Simply put, spills happen. The more trains that travel the tracks, the higher the likelihood that there will be a large-scale spill that will affect the surrounding area. This legal requirement does not have a threshold like “unduly” or “significantly.” Thus, **any adverse effect on the air, water or land resource quality makes the application fail these criteria.** While the applicant asserts that diesel emissions will be reduced due to fewer idling trains in Mosier, the NSA-wide impact is entirely different. **Faster, longer, and more frequent trains can only mean that additional particulate matter (PM 2.5) will be emitted and that it will negatively affect the air resources of the NSA. PM 2.5 has been tied to cancer, cardiovascular disease, neurodevelopmental disorders, and pulmonary problems. See attachment. This degradation of air resources is justification to deny the application. The adverse effects discussed in the previous paragraph and in the sections above show the impacts on water resources. The massive excavations, grading, and other land development will impact land resources in the area. These criteria are also not met.**

NSA-LUDO § 5.020(H) requires that “[t]he location and design of the site and structures for the proposed use will not significantly detract from the visual character of the area.” As discussed in sections II.C.1 and III.B.1 above, there will be both temporary and permanent significant changes to the visual character of the area. **From the rock excavations, to the removal of several acres of vegetation, to the proposed new permanent road – not to mention the additional buildings, track, signals, and trains – the project will result in significant adverse effects to the visual character of the area. This criterion is not met.**

Finally, NSA-LUDO § 5.020(B) requires the County to take “into account location, size, design and operational characteristics of the proposed use” when determining whether “the proposal is compatible with the surrounding area and development of abutting properties by outright permitted uses.” The surrounding area includes Mosier; Memaloose State Park; and the scenic, natural, cultural and recreation resources of the Columbia River Gorge National Scenic Area. In addition to the new track, bridges, buildings, roads, excavations, culverts, signals, guardrail,

staging areas, and intrusions into wetlands and floodplains, the proposed use would allow 5-7 more trains to travel through the area each day and all trains could be longer. *See* UPRR Fact Sheet, App. Supp. at 3–4. **The location of this enormous development along with the additional trains next to the Columbia River in designated open space is not compatible with the surrounding area. Instead it is intrusive and dominates the area. The project fails on these criteria and a permit cannot be lawfully issued.**

VI. Conclusion

The applicant has proposed to build 4.02 miles of new mainline track, new bridges over Rock Creek and Mosier Creek, and other associated facilities including new buildings. Earth-disturbing work outside of the Mosier Urban Area would involve 11.22 acres of temporary disturbance and 19.58 acres of permanent disturbance, the installation of a new rock retaining wall, and construction of new temporary and permanent access roads. A cut through a mesa would be greatly expanded and the rock would be stored and crushed on a new 5+ acre site within SMA Open Space. The applicant also requests four variances of greater than 50% of standards. They include a variance to the Columbia River development setback standard, to the scenic travel corridor setback standard for I-84, to the wetland buffer standard, and to the sensitive plant buffer zone development standard. Twelve wetlands, five lakes, and the Columbia River would be affected with a total of 0.41 acres of permanent open water disturbance, 0.75 acres of permanent disturbance to vegetated wetlands, and 8.75 acres of permanent disturbance to buffer areas. Simply put, the proposed project would harm resources in the NSA.

The following are initial matters to be considered during review of the application:

- One legal requirement for the review of this project is that it must be evaluated for cumulative adverse effects including past, present, and likely future actions. This must include an evaluation of actions that are individually insignificant but cumulatively significant and cumulative adverse effects must be avoided. If they cannot be avoided, the permit must be denied. Section I.B.
- The application is incomplete and inaccurate. It omits any analysis of the adverse effects on the NSA from the additional trains resulting from the proposed action, it relies on a land transfer that will not take place, it omits several relevant key viewing areas (KVAs) from review, and it omits detailed project components within the Mosier Urban Area from the application. Section I.C.
- Temporary uses and structures in the NSA are subject to the same review requirements as permanent uses and structures. Section I.E.
- The alternatives analysis produced by the applicant is incomplete because it omits an analysis of unidirectional rail operation on both sides of the Columbia River and because it does not address site-specific impacts with a parcel-by-parcel alternatives analysis. Section I.F.
- The railroad itself is already a nonconforming structure or use. Section I.G.

The following are some of the legal defects with the application. All of them must be corrected or the application cannot be lawfully approved:

- The large new construction staging and mineral production area is not an allowed use in SMA Open Space and cannot be lawfully permitted. Section II.B.1.

- All portions of the proposal that qualify as new development (e.g. the new tracks) cannot be approved in SMA Open Space. Section II.B.1.
- The application fails to demonstrate that the project complies with the Rowena Plan. Section II.B.1.
- The rock excavations cannot be lawfully permitted within the SMA Public Recreation zone. Section II.B.2.
- According to the applicant, it has insufficient right-of-way to meet to meet rail safety standards. The current landowner has refused to transfer additional right-of-way to the applicant and, if it had transferred the right-of-way, the land could not be legally partitioned or transferred through a lot line adjustment. Section II.B.2.
- The application does not address the fire safety standards in NSA-LUDO Chapter 11 as required by County ordinance. Section II.C.
- The applicant downplays the visual impacts of the project and fails to meet the “not visually evident” standard in SMA Open Space as required by law. Section II.C.1.
- The proposed mineral production and staging area in SMA Public Recreation zone fails to meet the “not visually evident” standard required of mineral operations. Section II.C.1.
- The mineral production and staging area within the SMA Public Recreation zone does not minimize grading. Section II.C.1.
- The applicant has refused the County’s request to use darker colors on signal buildings. Section II.C.1.
- The development has not been sited on each parcel so as to use the existing topography and vegetation for screening or to minimize visibility from KVAs. Section II.C.1.
- The applicant proposes to intrude on both water resources and their buffer zones. Section II.C.2.
- The applicant has failed to adequately complete the Practicable Alternative Test which is a prerequisite to obtaining the requested variances. Section II.C.2.
- The applicant’s water resources mitigation plan is speculative and incomplete. Section II.C.2.
- The applicant substitutes its own standards for the legal standards that it is required to follow for the protection of sensitive wildlife and plants. Section II.C.2.
- The applicant acknowledges that the cultural resource reconnaissance survey and report did not include large areas with blackberry and poison oak cover. Section II.C.3.
- The applicant acknowledges that the recreation resource of the NSA will be temporarily degraded but does not propose the necessary mitigation measures. Permanent degradation without the required mitigation would also take place. Section II.C.4.
- The applicant has not completed the alternatives analysis required for the project to be constructed in the GMA Agriculture zones. Section III.A.1.
- The project is not the minimum size necessary to provide the service as is required in the GMA Agriculture zones. Section III.A.1.
- The application does not demonstrate that the necessary standards have been met to allow mineral production in the GMA Large-Scale Agriculture zone. Section III.A.1.
- A new culvert cannot be legally placed in the GMA Open Space zone. Section III.A.3.
- The proposed 3,615 feet of new un-weathered guardrail in GMA Open Space would significantly contribute to the cumulative adverse effects of the railroad on the scenic resource of the NSA. Section III.A.3.

- The mineral production and staging area within GMA Open Space is not an allowed use. Section III.B.3.
- The temporary construction area in the GMA Water zone is not an allowed use. Section III.B.4.
- The GMA Agriculture Special zone is not addressed in the application. Section III.B.5.
- Siting standards for the new road and signal buildings do not appear to have been addressed or even considered. Section III.C.1.
- A final water resources mitigation plan must be produced before the application is complete and legally ready for review. Section III.C.2.
- The applicant does not meet the standards for a Columbia River development setback variance so no development within 100 of the river in the GMA or within 200 feet of the river in the SMA can be lawfully approved. Section IV.A.
- The applicant does not meet the standards for a scenic travel corridor setback variance so construction cannot take place within 100 feet of I-84. Section IV.B.
- The proposal does not meet conditional use review because of the fire and traffic safety issues it would cause. Section V.
- The proposal does not meet conditional use review because it would significantly impair sensitive wildlife habitat and riparian vegetation. Section V.
- The proposal does not meet conditional use review because there will be adverse effects on air, water, and land. Section V.
- The proposal does not meet conditional use review because of the visual impacts that it will cause. Section V.
- Faster, longer, and more frequent trains can only mean that additional particulate matter (PM 2.5) will be emitted and that it will negatively affect the air resources of the NSA. PM 2.5 has been tied to cancer, cardiovascular disease, neurodevelopmental disorders, and pulmonary problems. See attachment. This degradation of air resources alone is justification to deny the application. Section V.

For the reasons above, the applicant's proposal cannot be lawfully permitted. Thank you for this opportunity to comment.

Sincerely,



Steven D. McCoy
Staff Attorney
Friends of the Columbia Gorge



Laura Ackerman
Organizer and Oil Policy Director
The Lands Council

CC: Audie Huber, Confederated Tribes of the Umatilla Indian Reservation
Carl Merkle, Confederated Tribes of the Umatilla Indian Reservation
Brent Hall, Confederated Tribes of the Umatilla Indian Reservation
Brady Kent, Confederated Tribes and Bands of the Yakama Nation
Elizabeth Sanchez, Confederated Tribes and Bands of the Yakama Nation
Dave Cummings, Nez Perce
Clay Penhollow, Confederated Tribes of Warm Springs
Julie Carter, Columbia River Inter-Tribal Fish Commission

Rob Lothrop, Columbia River Inter-Tribal Fish Commission



Union Pacific To Enhance Infrastructure in Mosier

Union Pacific's Mosier rail siding sits in the middle of a 20-mile section of railroad track where trains do not have a passing lane. The Mosier siding is a bottleneck for Union Pacific in the Pacific Northwest.

The company's shortest siding in the Portland metropolitan area at 6,300 feet, Union Pacific plans to replace the siding with 5 miles of double track, creating a passing lane for trains.

Public Benefits

The new track will allow two trains to pass one another on parallel track without stopping in a siding, creating public benefits for Mosier residents by:

- Reducing noise and emissions from idling locomotives.
- Eliminating the need to hold and meet trains on the existing siding.
- Reducing horn blowing as train traffic passes stationary trains parked in the siding.
- Improving the movement of Oregon products to market using the safest, most environmentally responsible mode of ground freight transportation.

Project Details

The east and west ends of the new double track will be located approximately 2 miles outside Mosier. We estimate the new track will be built in 12-15 months once the permitting process is complete. Union Pacific applied for permits from the US Army Corps of Engineers and Wasco County. The new track will be constructed on the north side of the existing main track in Mosier.

In addition to the new track, two new bridges will be constructed at Mosier Creek and Rock Creek. Approximately 15 to 20 feet of new embankment will be built as part of the new track. The cost of the project is estimated at \$25 million. No public funds will be used.

Union Pacific needs temporary construction access to its right-of-way to build the new track, specifically in the Rock Creek area, downtown Mosier, and off of Interstate 84 east and west of Mosier. The Federal Railroad Administration speed limit on the new track will be 35 mph. Union Pacific currently moves about 25 to 30 trains per day through Mosier. The new double track will allow us to move 5 to 7 more trains per day through Mosier.

SPECIFIC DISEASES ASSOCIATED WITH EXPOSURE TO HIGHER LEVELS OF PARTICULATE MATTER IN AIR POLLUTION

Cancer—Studies relating cancer risk and particulate matter:

- exposure to ozone and PM correlated with development of and mortality from lung cancer (Beeson, Dockery, Pope)
- increased biological markers associated with risk of lung cancer (Demetriou)
- increased oxidative DNA damage predictive of cancer risk (Avogbe)
- increased rates of breast cancer (Crouse, Wei)

Cardiovascular—Studies have linked increased particulate matter with increased cardiac disease:

- increased cardiovascular disease mortality and morbidity in both short term and long term exposures to PM 2.5 (Brook)
- increased hospital admissions for serious cardiac arrhythmias (Peters 2000)
- increased probability of admission for acute myocardial infarction (Mustafic, Peters 2001)
- increased ischemic heart disease, arrhythmias, congestive heart failure (Dominici) and bio markers (HRV) associated with increased cardiac morbidity and mortality (Pieters)
- increased hospital admissions and death from heart failure (Shaw)
- increased risk of congenital cardiac anomalies in children (Vrijheid)

Cerebrovascular – Studies have shown links between particulate matter and adult brain effects:

- increased hospital admissions for strokes (Dominici, Lue, Wellenius 2005)
- significant increase in stroke mortality associated with increase in PM (Chen, Qian)
- increased risk of stroke associated with increased exposure to small PM, black carbon, and nitrous dioxide (Wellenius 2012)
- increased risk of stroke and death from stroke for post menopausal women (Miller)
- structural brain damage and cognitive deficits in middle-aged and older adults (Wilker)

Neurodevelopmental—Studies associating in-utero exposure to particulate matter and:

- increased incidence of autism spectrum disorder (ASD)—(Becerra, Kalkbrenner, Raz, Roberts, Volk 2013, Volk 2011)
- increased incidence of behaviors associated with attention deficit hyperactivity disorder (ADHD) (Chiu, Newman, Perera 2014, Peterson)
- lowered IQ (Calderón-Garcidueñas, Perera 2009, Jedrychowski)
- increased behavioral symptoms of anxiety, depression, social problems, rule

- breaking, and aggression (Perera 2013)
- neurobehavioral development in children benefited from the shutdown of a coal-burning plant (Perera 2008, Tang)

Pulmonary—Studies have demonstrated the effects of particulate matter on the lungs:

- decreased lung function (WHO 3)
- inhibited lung development in children and adolescents and measurable airway inflammation (Gauderman)
- increased asthma rates and worsening of preexisting asthma and chronic obstructive pulmonary disease (COPD), resulting in increased hospitalization (Carlsten et al., Gowers, Delamater, 2012; HEI Panel, Pandya, Trasande)

General—

- increased mortality from cardiac, respiratory and kidney disease in all members of communities with coal exposure (15,16,17,18 Hendryx 2007, Hendryx 2010, Hendryx 2008, Hendryx 2009)
- long term exposure linked to decreased life expectancy from cardiopulmonary mortality (Krishnan, WHO 4)
- prenatal exposures linked to altered immune system development (Hertz-Picciotto)

KEY AMERICAN MEDICAL SOCIETIES AND THE WORLD HEALTH ORGANIZATION HAVE ISSUED POSITIONS ON REDUCING AIRBORNE PARTICULATE MATTER (LARGELY COMPOSED OF DIESEL EXHAUST):

The *American Heart Association's* 2010 Scientific statement updated and summarized its 2004 position: "It is the opinion of the (AHA) writing group that the overall evidence is consistent with a *causal* relationship between PM2.5 exposure and cardiovascular morbidity and mortality. This body of evidence has grown and has been strengthened substantially since publication of the first AHA scientific statement and, ... because the evidence reviewed supports that there is no safe threshold, it appears that public health benefits would accrue from lowering PM2.5 concentrations even below present-day (EPA standards), if feasible, to optimally protect the most susceptible populations." (Brook, see references above)

The American College of Obstetricians and Gynecologists (ACOG) together with the American Society of Reproductive Medicine (ASRM) in October 2013 issued a statement, "The evidence that links exposure to toxic environmental agents and adverse reproductive and developmental health outcomes is sufficiently robust, ...

individuals alone can do little about exposure to toxic environmental agents, such as from air and water pollution, ... calling for timely action to identify and reduce exposure." (ACOG, see references above)

The *American Academy of Pediatrics* (AAP) issued a policy statement linking ambient air pollution to adverse health outcomes in children and recommended the National Ambient Air Quality Standards (NAAQS) be promptly reviewed and revised to protect children. (AAP, 2004, reaffirmed 2009, see references above)

In October 2013, *WHO's International Agency for Research on Cancer (IARC)*, classified both outdoor air pollution, as a whole, and particulate matter, on its own, as carcinogenic. Therefore, it is vital to implement efficient policies to reduce exposure to pollution worldwide. (World Health Organization (WHO 2) and American Cancer Society, see references above).

Local Washington agencies and medical professionals have taken positions on oil transportation:

In September 2015, the Washington State Medical Association in a unanimous vote by the House of Delegates passed a resolution (C-8) in opposition to coal exports and the transport and storage of oil in Washington State.

The Washington Department of Health has issued a request that an environmental impact study on the Tesoro Vancouver Terminal include "an analysis of potential impacts on the health of people in Washington State."

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(Includes all illnesses associated with airborne particulate matter in air pollution)

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