



CITY OF West Linn

Memorandum

Date: March 20, 2023
To: Mayor Bialostosky and City Council
From: Darren Wyss, Planning Manager
Subject: AP-23-01 Appellant Testimony

Between the City Council Public Hearing on March 13, 2023 and the March 20, 2023 noon deadline to submit comments, staff received additional testimony (attached) from Russell Axelrod, Appellant, for the appeal of an approved Water Resource Area Permit at 19679 Wildwood Drive.

Please feel free to contact me at dwyss@westlinnoregon.gov or 503-742-6064 with any questions regarding the materials or process.

Interim Mayor Biaolostosky, and Councilors Baumgardner and Relyea,

This document is provided in response to the March 13 Council hearing on WAP-22-02 /AP-23-01 to accept additional final comments by noon on March 20 for Council deliberation. This information supplements my prior written testimony dated March 10, and oral testimony at the March 13 initial (evidentiary) public hearing. These additional comments further detail why Council must deny WAP-22-02.

1. Robin Creek is not “ephemeral.” My earlier testimony clarified how the Consultant did not follow the analyses, procedures, and documentation recommended in the SDAM model they used to claim Robin Creek to be “ephemeral.” SDAM is a simplistic qualitative tool that does not replace the need to evaluate upstream and downstream conditions, seasonal effects, and to assess and document the basic hydrologic features and hydrogeologic setting relevant to a site/project such as this. Such environmental due diligence is critical when proposing to reclassify a stream type, and especially where significant jurisdictional implications are at stake.

Any qualified geologist/hydrogeologist knows that our creek drainages in this area receive a component of their baseflow from shallow groundwater discharging from fractured basalt and interflow zones – these features or processes are also known under the common term’s “seeps” or “springs.” This fact is even reflected in the name for this area of West Linn – Hidden Springs! If the Consultant performed the SDAM method properly, they would have found that Robin Creek is actually “intermittent” in its upper reach and transitions to a “perennial” stream north of the Applicant’s property on the other side of Wildwood Drive. Very importantly, Comment 2 below describes a drainage visit on March 16 which further confirms the Consultant’s analysis and interpretation is absolutely inaccurate.

In addition to the site-specific information presented in Comment 2 below, let’s also clarify this stream type using simple, yet fully defensible documentation from the West Linn Community Development Code (CDC). Below are definitions of “ephemeral” and “intermittent” streams from Chapter 2 of our CDC. These are definitions the City must rely on to administer our WRA Protection Program.

“Ephemeral streams. A stream or reach of a stream which flows only in direct response to precipitation and whose channels are always above groundwater or water table levels. Ephemeral streams typically drain sub basins of under 20 acres, have slopes of less than 10 percent as measured laterally from the stream thread and often traverse surficially with no recognizable drainage channel.”

“Intermittent streams. A stream that flows only during certain times of the year when it receives water from springs or surface sources such as precipitation. The term may be restricted to a stream that flows continuously during periods of at least one month; also may be a stream that does not flow continuously as when water losses from evaporation or seepage exceed the available stream flow. For the purpose of this code, intermittent and perennial streams are protected identically.”

I underlined the CDC text that clarifies without dispute that Robin Creek is not “ephemeral” because it receives a portion of its water from shallow groundwater discharge – noted here as “springs” using the common term for such shallow groundwater discharge. “Seeps” are an equivalent representation of shallow groundwater discharge to a stream or surface water body.

Recognizing that Robin Creek in this reach is actually an “intermittent” stream, the City and Applicant’s underlying assumptions and approach used to approve the permit are fundamentally flawed and incorrect, and the permit must be denied.

2. March 16 field visit finds Robin Creek flowing in channel upstream of the subject property, but below grade along the property. I visited the Robin Creek drainage on March 16, 2023 and observed that at its current low stage it was flowing in its main channel upstream from the subject property (see Photo’s 1 and 2, and short video links, page 7), but at the same time was below grade in the highly disturbed area along the subject property and between the existing houses fronting Wildwood Drive (Photo’s 3 and 4, page 8).

I also discovered the presence of what appeared to be an old rock dam or impoundment type structure spanning the *Ravine* bottom near the corner of the subject property just upstream. The impoundment appeared to be associated with City stormwater infrastructure evidenced by a large concrete manhole above grade. I later did a quick scan of City utility maps online and discovered an older (1981) as-built drawing that shows a major storm drain line extending from Derby Court to the bottom of Robin Creek near the corner of the subject property. The drawing (*HiddenSpringsRanch6*) shows a dissipator and rip-rap pilings at this location which is consistent with my field observations (copy of City dwg, page 10). It’s apparent from a precursory walk that previous storm line construction by the City changed the profile of the creek and fundamentally altered the hydrology in the drainages’ lower reach and extending immediately downstream along the subject property to Wildwood Drive.

Water flowing in the Robin Creek channel was observed to seep below ground in the area upstream of the rip-rap impoundment then continues down drainage in the subsurface. At the low flows observed, the creek flow remains below grade underneath the north part of the reach along the subject property, and below the highly disturbed area associated with prior building construction and the City’s past and recent storm drain construction projects through this area (Photo’s 3 and 4). I could also hear reasonably substantial water flow moving below ground level between the houses in this area next to the City culvert.

A rip-rap impoundment across the creek upstream could not be constructed today, however, the City should have known about their infrastructure and prior disturbances made to this drainage system. It’s frankly unacceptable that the City did not reveal this infrastructure in its project/site analysis and did not account for this understanding and its potential impacts and implications to the drainage system in its review of the Applicant/Consultant submittals and in its decision making process. In addition, had the Consultant actually performed their stream analysis following recommended SDAM methods and other expected hydrologic and hydrogeologic professional practice, these facts would have been included in the record and changed their characterization and conclusions on/of the drainage system.

This information further demonstrates that the Consultant’s stream analysis and conclusions are fundamentally flawed, an objective assessment of the creek conditions by the Consultant and City was not performed, and the *conditional uses* the City is relying on are inappropriately based and the permit must be denied.

3. Reclassifying streams on the WRA Map is not allowed by the Planning Director or under the Alternate Review Process (CDC 32.070). I noted in my earlier testimony that the WRA Map (CDC 32.120) is the official authoritative documentation of the WRA features and characteristics protected under CDC Chapter 32. As detailed also on the Map itself, this includes the “...WRA water features (wetlands, streams, ephemeral streams and riparian corridors)...” CDC 32.120 (A). All of these WRA features were established based on review

by technical experts through a Goal 5 inventory and standards review process in accordance with OAR Chapter 660, Division 23. While aspects like protective setback boundaries can be adjusted slightly to account for application of WRA Map features at the project scale, wholesale changes to these WRA Map features, such as reclassifying streams or eliminating designated *Riparian Corridor* protections can only be made in accordance with CDC 32.120 (B) involving a legislative hearing process through our Planning Commission in accordance with CDC Chapters 98 and 99. Neither the Planning Manager or Applicant has the authority to reclassify Robin Creek, or change the locations of ephemeral streams (designated in blue stipple pattern on the official WRA Map), or remove from the Map or otherwise eliminate the fundamental protections of any *Significant Riparian Corridor*, including the *Riparian Corridor* designated for the Robin Creek drainage. Therefore, the permit must be denied.

4. The City's double-standard development framework disqualifies the foundation of its approval action.

The City has dismissed all comments from the Appellant and community regarding WRA code violations of the proposed future development of the property by stating that the application is only for a WRA permit and that future development plans are not yet defined, so they can't be commented on at this time. However, the City is approving a WRA permit relying on "*conditional uses*" which are supposed to be based on an actual future development plan of a property. How can the City establish accurate and complete conditions of approval for a project if the future development is not established/known? This is illogical reasoning and it violates the quasi-judicial land use process in Chapters 98 and 99 and our Comprehensive Plan Goals and Policies requiring fair and objective review involving public engagement in important land use decision-making.

By taking this approach of prematurely permitting a project before it is defined, it effectively removes further public engagement from the future development and construction steps in our planning process. Also, based on the definition of "*conditional use*" in the CDC (Chapter 2), such uses can only be permitted "...upon findings by the authority that the approval criteria have been met or will be met upon satisfaction of conditions of approval." This is not possible if you don't have an actual site development plan to evaluate/compare whether the approval criteria are even appropriate or met. This is backwards' planning, and it is not the land use permitting and approval process our City should follow according to our CDC and Comprehensive Plan.

City Council should simply deny this permit and inform the Applicant that they are welcome to submit a development plan and apply for a WRA permit at the same time in the future. Using this standard procedure the project/development plan can be appropriately assessed by our full code provisions and authorities under Chapters 32, 98 and 99. As part of Council's Authority in its decision-making, please also remember the relevance and value of relying on our Comprehensive Plan Goals and Policies on matters such as this. Council has this authority in its decision-making where the Planning Commission does not. Our Comprehensive Plan states: "*In Oregon, a comprehensive plan is adopted by ordinance, has the force of law, and is the basis for zoning and subdivision ordinances and other regulations.*" Comprehensive Plan Goal 2 under *Natural Environment* is particularly relevant where our community has determined it's important that Council "*Protect sensitive environmental features such as steep slopes, wetlands, and riparian lands, including their contributory watersheds.*"

5. The Robin Creek Significant Riparian Corridor has its own code protections regardless of stream type.

While a process exists under Alternate Review (32.070) to adjust the boundaries of certain qualified protection setbacks for actual water features (i.e., streams, ponds, wetlands) at the project scale, it does not allow the dismissal of protective standards for other WRA features such as the highly valued *Significant Riparian Corridors* in our WRA Program and shown on the official WRA Map (CDC 32.120). These *Riparian Corridors*

were established by experts through an independent Goal 5 process, and they are also not dependent on the type of stream present in the *Corridor/Ravine*. As noted in Comment 3 above, removal of the *Corridor/Ravine* and its associated protective standards can only be done through a legislative process involving our Planning Commission under Chapters 98 and 99. Neither the Planning Manager or Applicant have the authority to reclassify Robin Creek or remove from the Map or otherwise eliminate or not address the fundamental protections of any *Significant Riparian Corridor*, including the *Riparian Corridor* designated for the Robin Creek drainage. Therefore, the permit must be denied.

6. The qualitative SDAM method is not an appropriate analysis or basis to remove the slope and setback requirements established for the *Riparian Corridor/Ravine* which is a separate WRA feature in the WRA Protection Program designated on the official WRA Map (CDC 32.120). As noted in earlier testimony, slope instability and wildfire protection are two critical factors supporting the established slope and setback criteria in our WRA Program – and notably for the *Significant Riparian Corridors* on our official WRA Map (CDC 32.120). However, these critical aspects are not addressed in the qualitative SDAM method, especially as it was used only in a very focused and qualitative manner focused on a single location in a highly disturbed portion of the drainage. The Consultant’s approach reflects an attempt to reclassify the stream type over all other attributes and concerns posed by future development in order to justify the Applicant’s goals for development.

My testimony demonstrated that the slope of the proposed development area above the drainage bottom was misrepresented by the Consultant, and the actual slope is greater than 40%! These slope conditions are unsuitable for residential development and any development on the slope would exceed WRA code criteria for protected *Riparian Corridors/Ravines* (CDC 32.060 (D) and Table 32-2. Credible concerns were also raised about the increased wildfire hazards posed by residential development in the *Ravine* that would be allowed by the permit approval, yet no credible rebuttal of these exceedances or concerns were offered by the City or the Consultant (see related Comment 4 above). The related setback requirements for the steep *Ravine* are also violated by the proposed development (CDC 32.060(D) and Table 32-2), and were similarly not credibly accounted for by testimony from the City or Applicant/Consultant. The City and Consultant have clearly attempted to reclassify the stream to get around these slope and setback requirements for protected *Riparian Corridors/Ravines*, but their approach and analysis is flawed and in violation of these other applicable standards and must be denied on this basis – see CDC 32.060(D) and Table 32-2 and Figures 32-4 thru 32-6 and WRA features designated on our official WRA Map (CDC 32.120).

7. During the March 13 initial hearing, the Consultant did not comment or clarify any one of the many comments the Appellant or public commenters (notably water quality/habitat expert Mike Bonoff) made regarding how the Consultant analysis did not follow SDAM methodology or justify reclassification of the stream or meet other *Riparian Corridor/Ravine* protection standards. At the initial public hearing, the attorney for the Applicant asked her “expert” Consultant (on the phone) to inform the Council about her work and analysis. The Consultant offered only a few brief words about how the SDAM model was considered a generally accepted approach (standard comment previously noted in the record), but did not further describe the Consultant’s work or address any of the specific points made about the model limitations and how the Consultant did not follow many of the SDAM method requirements relevant to her analysis, interpretations, and conclusions – especially the Consultants unsubstantiated interpretation that Robin Creek is “ephemeral” based on very minimal analysis. At a high level, these deficiencies include:

- ✓ Not evaluating to any credible degree the stream, drainage, and watershed characteristics beyond the Applicant’s property.

- ✓ Not accounting for the influences and impacts on the hydrology of the lower reach drainage from past home and City storm drain system construction projects near and along the subject property and extending between the existing homes next to Wildwood Drive.
- ✓ Not understanding and evaluating upstream/downstream potential impacts and influences on water quality for a drainage that has been declared “impaired” for State/Federal Clean Water Act (CWA) violations, and also not addressing potential Best Management Practice (BMP) implications and related non-compliance concerns for the City’s stormwater management program.
- ✓ Not assessing or understanding the basic geologic and hydrogeologic characteristics of the area with direct implication to the drainage system/watershed evaluation and interpretations.
- ✓ Not assessing potential downstream flooding impacts by increasing the impervious surface area and reducing vegetation for a new building and expanded surrounding area to provide a defensible space for increased wildfire hazards posed by intended development in a steep vegetated gully.
- ✓ Not recognizing established slope and setback criteria and their implications to future development in the steep gully/*Ravine* by considering only the need to provide minimum protection for a stream class falsely characterized by inadequate/incomplete analyses.
- ✓ Not sufficiently documenting on SDAM form or report observation notes, explanation of the hydrologic conditions of the stream and watershed, including upstream or downstream conditions and potential limitations critical to substantiate the Consultant’s principle focus and interpretation to reclassify the stream as “ephemeral,” especially considering that only a single site visit was performed in September 2022 after at least three months of no rainfall.

Under the circumstances, our community expects a Consultant to perform a reasonably complete and objective assessment to comply with our CDC. In my professional/expert opinion¹, the Consultant has failed to meet the complete and objective analyses and standards expected.

We expect our City to be similarly objective and thorough in performing its duties, and to honor our Comprehensive Plan Goals and Policies in its decision-making. In my opinion, the Planning Manager has also failed this examination by approving a permit which does not meet sufficient technical rigor and due diligence to demonstrate compliance with key provisions of our WRA Program and code. As one key measure, the Planning Managers’ assessment should have recognized critical influences on the hydrology of the upper Robin Creek drainage resulting from the City’s own stormwater management infrastructure. Collectively, these factors led to a flawed permit approach and an incomplete and unacceptable interpretation/use of the Alternate Review Process (CDC 32.070), especially violating the protective setbacks for our *Riparian Corridors* and the non-degradation code criteria fundamental to our WRA Program – notably CDC 32.010 (B thru H, F and I), 32.020 (A and B), 32.060 (A, B and D) and Table 32-2 and Figures 32-4 thru 32-6, 32.080 (A and B), and 32.120 (B).

8. During the March 13 public hearing the City Attorney gave inappropriate advice to Council which precluded relevant testimony being provided in a fair and impartial decorum under the quasi-judicial process. During the City’s testimony a Council member asked the Planning Manager if he had used the Alternate Review Process (CDC 32.070) in a similar manner on other projects. The Planning Manager indicated the City had approved 5 or 6 other similar projects. Later in rebuttal I asked the Planning Manager to clarify if the City had actually used this same process to remove the protections of a *Significant Riparian Corridor* on another project in our City. The City Attorney then stepped in to say the requested information was “not

¹ See note on qualifications at end of document.

relevant to this application” and “not part of the hearing record.” The Interim Mayor added that it seemed unreasonable to be able to provide this information in a timely manner. I contested the City Attorney’s determination because the City’s testimony is directly relevant as it was offered in response to Council’s inquiry in order to demonstrate or imply that the application reflected a normal standard of conduct or routine handling of this type of application by the planning department.

Under the circumstances, I find it disrespectful for our City Attorney to try and block this information from being disclosed under the pretense stated. It’s also disturbing that our Planning Manager could not clarify for the record where he had approved the removal of environmental protections from one of our *Significant Riparian Corridors* as this would/should have been a very significant action for our planning department and City. In the end the Planning Manager said he could only provide a list of prior project/permit applications within the week, but even this information was not provided in time to respond before the March 20 noon deadline Council established for these final additional comments. With all due respect, this demonstrates a lack of accountability by our Planning Manager/Department.

This also represents unacceptable conduct by our City Attorney for ensuring proper due process and a fair and impartial decorum on a quasi-judicial matter. Frankly I find the City’s mishandling this issue to be disrespectful to our community and to the dedicated efforts myself and others have provided in years of volunteer service to the City to improve its operations and ensure fair and impartial deliberations during such public engagements. Because the City has not reasonably responded with the applicable information requested, I am reluctantly including this comment to establish in the record this concern for impartial due process, and lack of disclosure of pertinent and relevant information, before the record is closed and in case further appeal action is necessary.

In summary, this permit application is technically flawed and demonstrates professional incompetence in aspects of scientific practice resulting in unsubstantiated interpretations. The permit should be denied outright based on these factors in addition to its numerous violations of our Community Development Code. Approving this permit would undermine foundational elements of our WRA Protection Program, and put our City and residents at risk from inappropriate development in our steep *Ravines*. Its approval would also further damage the community’s faith and trust in our City and the unbiased, quasi-judicial planning process it is responsible for.

As one valued outcome of this experience, I recommend the Council put a temporary ban on all further uses of the Alternate Review Process (CDC 32.070) pending review by our Planning Commission to recommend minimal code revisions to Chapter 32 to eliminate or minimize unintended uses of the protection standards as they were originally envisioned and established.

Respectfully,

Russell B. Axelrod, RG/LG-LHG
19648 Wildwood Drive, West Linn, OR 97068
rbaxelrod@yahoo.com / (503) 312-8464

Photo's 1 and 2. Examples of active stream flow in Robin Creek above the drainage impoundment for City storm drain structures just upstream from the subject property. March 16, 2023



The links here provide brief video clips of active stream flow on Robin Creek (on March 16, 2023) above the rip-rap rock impoundment discovered across the drainage and later determined to be associated with the City's storm drain infrastructure, and located near the southern corner of the subject property:

<https://www.youtube.com/shorts/DtPcCwgs4dw>

<https://www.youtube.com/shorts/O5p4xcVbljE>

Photo's 3 and 4 showing no active surface flow in highly disturbed area from past home construction and City storm drain and culvert construction projects between existing homes on Wildwood Drive. March 16, 2023



Photo 4



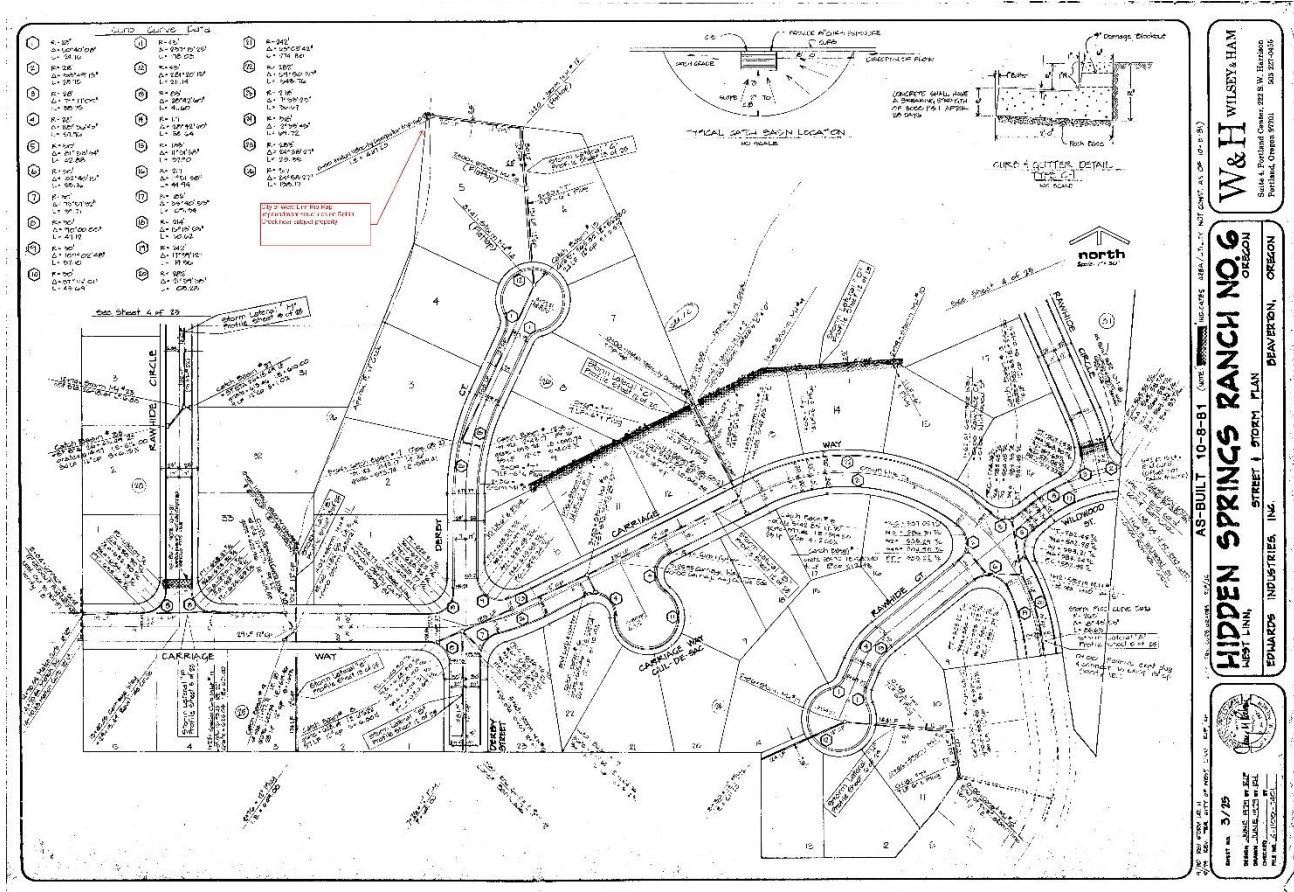
Photo 5 showing rocky (rip-rap) impoundment across Robin Creek drainage above subject property near City's concrete storm drain structures (middle back right) discovered on March 16, 2023



Photo 6 showing Robin Cr *Riparian Corridor/Ravine* above drainage impoundment. Drainage channel occurs approximately 2-4 ft deep beneath overgrown vegetation across drainage bottom. This protected *Riparian Corridor* is what the Applicant's attorney refers to as "only a storm ditch." March 16, 2023



Copy of 1981 City dwg (hiddenspringsranch6) from City utility maps available online.



¹ Note on Qualifications: For the benefit of Council’s review in weighing my opinion, I have summarized below my principal academic degrees and a sampling of some projects relevant to my background and experience to comment on the subject permit application.

BA / Earth Science with Highest Honors – University of California, Santa Cruz, CA (1982)

MS / Geology – University of Montana, Missoula MT (1984)

40 years’ experience in property and watershed characterizations, environmental cleanup of soil, sediment, surface water, and groundwater media, and stream restoration projects.

Registered Professional Geologist in Oregon, RG No. G1641 (retired 2023)

Licensed Geologist and Hydrogeologist in Washington, LG/LHG No. 1654 (active)

A Sampling of Relevant Project Experience:

Drainage characterization and sediment sampling across the Northern Sierra Nevada and Klamath Mountain Ranges in California; employed by Milchem Inc.

Mapping geology and salient features of the Tendoy Mountain Range in Southwest Montana and Eastern Idaho; employed by Applied Geologic Sciences.

Sediment and water quality characterization of Clark Fork River system used to substantiate one of largest Superfund cleanup sites in Western U.S. at Milltown, MT and the upstream drainage, for U.S Environmental Protection Agency (EPA); employed by U.S. Geological Survey.

Groundwater protection plan for City of Tacoma, Tacoma-Pierce Co. Health Department; employed by Hart Crowser Inc.

Water investigation and protection planning for the 200 Area at Hanford Nuclear Reservation (most contaminated area of national reservation), Central Washington, for U.S. Department of Energy; employed by CH2M Hill.

Site characterizations and human health and ecological risk assessment evaluations addressing surface water drainages and river/wetland settings at various rural industrial sites across the U.S., for 3M Corporation, General Electric Co., and other Fortune 100 companies; employed by Exponent Inc.

Characterization and stream/meadow restoration planning for numerous major watersheds around Lake Tahoe, CA to restore montane meadows and creek function and reduce sediment loading to Lake Tahoe from Comstock impacts (logging, mining, grazing, and hydrologic diversions), for U.S. Forest Service; employed by Swanson Hydrology & Geomorphology.

Willamette River sediment investigations across portions of Portland Harbor Superfund Site, for Oregon Department of Environmental Quality (DEQ) thru Groundwater Solutions Inc. (GSI); self-employed.

Site characterization and cleanup of former MGP Site impacts involving groundwater/surface water interaction and ecological risk assessment implications to Willamette River, for Eugene Water & Electric Board; self-employed.