



To: Dennis Kessler **Subject:** Open Reservoir Study – Permitting Strategy

From: Becky Crockett **Date:** July 2002

Reviewed By: Kathryn Mallon, Joe Glicker **Reference:** 1530

PURPOSE

The purpose of this document is to facilitate discussion and guide decisions on how best to secure the permits for protecting the City of Portland's Open Reservoirs located at Mt. Tabor and Washington Park. It is expected that this information will be helpful for project permitting, scheduling, public involvement and for coordination between the three City Bureaus (Water, Parks, and Office of Planning and Development Review (OPDR)). This memo focuses on major permits required for project implementation. Minor permits (NPDES, Encroachment permits, Construction Permits, Oregon Health Division Review, etc.) are not described, as they are believed not to impact project strategy decisions. A discussion of these permit requirements and integration of the permitting with the project schedule will be discussed in a separate Technical Memorandum – Project Implementation Plan.

BACKGROUND

The information presented is based on review of applicable regulatory documents (Code, State Statute, Administrative Rules, etc.) as well as discussions with staff from the Water Bureau, Parks Bureau, the Office of Planning and Development Review, and the Planning Bureau. The following persons were consulted during the development of this permitting strategy:

Dennis Kessler, Portland Water Bureau
Brenda Nelson, Portland Water Bureau
Sue Donaldson, Portland Parks Bureau
Duncan Brown, Office of Planning and Development Review
Bob Glascock, Office of Planning and Development Review
Cielo Lutino, Bureau of Planning
Jeff Joslin, Office of Planning and Development Review
Joe Glicker, MWH
Kathryn Mallon, MWH

This assessment of the required project permits is premised on the following engineering concepts:

Mt Tabor Park

There are three open reservoirs on Mt Tabor Park (Reservoirs 1, 5 and 6). Reservoir 1 will be decommissioned. Reservoir 5 will be replaced with two underground, circular reservoirs located within the approximate footprint of the existing reservoir. Reservoir 6 will be replaced with an underground rectangular reservoir located within the footprint of the northern half of the existing reservoir. Further, the majority of the yard piping in Mt. Tabor Park, which includes Reservoir inlet, outlet, overflow, drain, and major distribution piping will be replaced. Most of the yard piping in the Park is old and in need of replacement. Construction of the new reservoirs presents a good opportunity to replace the piping simultaneously to minimize future disruption to the Park.

The Water Bureau also owns and operates a small hydropower facility located in the Inlet Gatehouse of Reservoir 6. The Federal Energy Regulatory Commission (FERC) has jurisdiction at Mt. Tabor through their 1983 issuance of an “Exemption from Licensing” for the small hydropower facility. Alterations to the reservoirs at Mt. Tabor are required to be reviewed by FERC.

Washington Park

There are two open reservoirs at Washington Park (Reservoirs 3 and 4). In the near term, both of these existing reservoirs will be covered with a membrane cover. In the long term, both of these Reservoirs will be replaced with buried storage tanks, similar to Mt. Tabor Park. This permitting assessment evaluates permits for the near term cover project, only. It is not possible to anticipate permit requirements that will be in effect at the time these reservoirs are replaced.

SUMMARY OF FINDINGS

The major permits required to replace or cover the City’s Open Reservoirs potentially include land use, park use permits and FERC authorization (amendment to the Mt. Tabor hydro-facility exemption). Determination of these permit requirements is subject to further interpretation of the proposed project as conceptual engineering evolves.

The primary issues that need to be resolved in the context of the City permit applications include: preservation of historic resources; construction impacts on park use; construction access; park development for the underground reservoirs; consistency of the planned park development with the Open Space designations and Parks Master Plans for Mt. Tabor and Washington Park; and compatibility of the park development with surrounding parks and neighborhoods.

The primary issue that needs to be resolved in the context of the FERC authorization of the project is the role of other Federal and State agencies commenting during the FERC review process. It is expected that FERC’s required amendment to the hydro-facility exemption does constitute a “federal action”. Therefore, commenting federal and state agencies will have the

opportunity to require their desired mitigation objectives be included in project design through the FERC review process. Of significance are the expected inclusion of the SHPO Section 106 Historical Preservation requirements as well as USFW bat mitigation opportunities. It will be prudent for the Water Bureau to be proactive in addressing both these issues early and in coordination with these agencies to keep the project on track.

All of these permitting issues will require public input and discussion prior to deciding how best to manage these issues. Therefore, the permitting approach needs to be effectively integrated into the Public Involvement (PI) program. It will be critical for the public to feel that they have had meaningful opportunities to help steer the course of decisions on this project to ensure the success of the project. It will also be important for the City to “manage” the PI process in a way that doesn’t significantly delay the City’s ability to protect its municipal water supply. In essence, effective PI is absolute for project success and it must balance meaningful public input while maintaining the Water Bureau’s construction schedule.

Mt. Tabor

It is recommended that permits be obtained for placing Reservoirs 5 and 6 underground after an initial PI process to solicit neighborhood and other stakeholder input. This should include interface with the Landmarks Commission, SHPO, FERC and USFW to solicit their ideas on resources that could be impacted by locating the reservoirs underground.

Reconstruction and burying of new facilities at Mt. Tabor Park is allowed as an outright land use. However, land use development above the buried reservoirs could be subject to a Type II (Administrative Approval) or Type III (Conditional Use) review depending on the selected park development. Therefore, it is recommended that design and construction of the new reservoirs be conducted in parallel with the Public Involvement and subsequent Land Use Permit application process. This will allow time for a meaningful PI process while maintaining the Water Bureau’s construction schedule to expeditiously secure the drinking water supply. With the engineering and public involvement processes moving forward concurrently, it will be important to submit all engineering constraints to park development opportunities very early in the PI process.

Discussions with SHPO, FERC and USFW should occur early in the project to establish a cooperative working relationship with the agencies to facilitate expedited and reasonable review and comment on resource issues of concern.

Washington Park

It is recommended that that the Water Bureau proceed with obtaining any required building permits for placing covers on the reservoirs at Washington Park after an initial PI process to solicit neighborhood and other stakeholder input. The project does not require any local land use, state or federal permits.

MAJOR PERMITS POTENTIALLY REQUIRED

The project will require both land use, parks permits and a FERC amendment to the hydro-facility exemption. However, determination of these permit requirements is subject to further interpretation of the proposed project as conceptual engineering evolves. The details of these permits are discussed below.

Land Use

Mt. Tabor. The area in and around Reservoirs 1, 5 and 6 at Mt. Tabor Park is zoned Open Space (OS) and the Reservoirs are classified as “basic utilities”. Basic utilities within the OS zone are allowed through a Type III, Conditional Use process. However, the existing reservoirs have “approved conditional use status” because of their historical use.

The purpose of the Open Space zone is to preserve and enhance public and private open, natural, and improved park and recreational areas identified in the Comprehensive Plan. These areas serve many functions including: providing opportunities for outdoor recreation; providing contrasts to the built environment; preserving scenic qualities; protecting sensitive or fragile environmental areas; and preserving the capacity and water quality of the stormwater drainage system (Code Section 33.100.010).

A major change to a basic utility (reservoirs) within the OS zone requires a conditional use permit. However, according to OPDR staff (Duncan Brown, April 4, 2002), placement of the reservoirs underground is considered a permitted outright use if the park development is temporarily designated open space for the purpose of moving forward with design and construction. The interpretation of the Code in this scenario would be the creation of additional open space in the OS zone. The creation of more open space is allowed outright.

Ultimately, alternative park development above the underground reservoirs may require a Type II (Administrative Approval) or Type III (Conditional Use) review depending on the type of use proposed. Park uses that are low impact such as viewing areas, open space or trails would be allowed outright or through a Type II process. However, high impact recreational uses including ball fields or tennis courts would require a Type III CU Permit. Further, the high impact recreational uses would require review of related park impacts such as on-site parking and traffic impacts in the local area.

Piping construction associated with the reservoir project is allowed outright in the OS zone as and accessory to the reservoirs provided they are considered to be “serving residents in the local area”.

An Environmental Conservation (EC) overlay zone is designated on areas surrounding the reservoirs. Discussions with OPDR staff (Duncan Brown, March 21, 2002) indicate that these EC designations were intended to apply to the densely forested areas of Mt. Tabor Park. Based on the engineering concepts noted above, it does not appear that the underground reservoir project will encroach on any areas designated as EC. However, routing of new Yard Piping and vault installation in Mt. Tabor Park will likely encroach on the EC overlay boundaries. A Type II environmental review will be required for piping construction within the EC overlay area. A

tree survey of trees impacted by the construction will also be required. Based on review of the EC boundary near the Mt. Tabor Reservoirs, it appears that the Water Bureau may desire to amend the EC boundary to more closely reflect the actual tree line. An amendment to the EC boundary requires a letter submittal to the Planning Director with evidence to support the boundary change. The Planning Bureau amends the boundary if they feel it is justified.

Washington Park. The area in and around Reservoirs 3 and 4 in Washington Park is also zoned as Open Space (OS) and the reservoirs are classified as “basic utilities”. The reservoirs at Washington Park also have “approved conditional use status” because of their historical use.

Placement of covers on top of the reservoirs at Washington Park is an allowed outright use within the OS zone. This would be considered a minor alteration to an approved conditional use. Therefore, no land use permit is required to place covers on top of the Washington Park reservoirs.

Environmental Conservation (EC) and Environmental Protection (EP) overlay zones are designated on areas near the reservoirs at Washington Park. However, they do not include the reservoirs and the immediate areas surrounding the reservoirs. The placement of covers on the reservoirs would not encroach on these environmental overlay zones.

A small portion of Reservoir 3 (northern section) contains a Scenic “s” overlay designation. The Scenic Resource zone establishes height limits within view corridors to protect significant views and establish landscaping and screening standards to preserve and enhance identified scenic resources. Planning staff (Duncan Brown) conducted a site visit to the “s” area at Reservoir 3 to access potential impacts of the covers within this scenic area. Based on site review, OPDR determined that no land use permit review is required to address the “s” overlay designation. Site review concluded that the immediate area between the scenic road and the reservoir is currently landscaped and that the reservoir sits too far off the scenic road to create an impact to the designated viewing area.

Parks Requirements

Mt. Tabor and Washington Park. The proposed reservoir projects are located within two public parks, Mt. Tabor and Washington Park which are operated by Portland Parks and Recreation. The Water Bureau owns the reservoirs and the land surrounding them except for a small portion of Reservoir 4 and all of Reservoir 3 in Washington Park.

There are two regulatory actions that may be required through Portland Parks and Recreation. They include a permit for “Non-Park use of Park Land” and an easement for the placement of any structure such as underground piping within property owned by Portland Parks and Recreation. The determination of where these Park regulatory actions apply should be based on review of design drawings showing exact locations of development/improvements and existing ownership/easement documents. It is anticipated that a substantial amount of replacement yard piping will be located outside of the Water Bureau’s property boundaries which surround each of the Reservoirs.

Review of the Parks and Recreation Policies and Procedures Governing Non-Park Use of Park Property (Adopted by Ordinance No. 171001) indicate that the “Non Park Use of Park Land” permit would apply only to land owned by Portland Parks. Therefore, if the construction of underground reservoirs is contained on Water Bureau property, then it would appear that a “Non-Park Use of Park Land” permit would not be required. This would be consistent with Water Bureau construction activities on Powell Butte. However, discussions with Portland Parks staff (Sue Donaldson, April 24, 2002) indicate that since the project has the potential to disrupt park activities and uses, a “Non-Park Use of Park Land” permit is required regardless of ownership. Sue Donaldson identified areas of potential concern to include construction management, staging areas, and construction access on park roads and the need to follow the Parks “Public Involvement Procedure for Capital and Policy Development Projects and Planning Initiatives”. She also indicated that the Parks permit review process would include evaluation of the entire project as it could impact park users and activities.

A first step to resolve the question of the potential need for a Parks permit or easement would be to assess the ownership/easement documents to determine the existing Water Bureau vs. Park Bureau ownership at Mt. Tabor and Washington Parks. This information could be used to assess the potential impacts to Parks’ property. An important element in reviewing this information would be to consider underground piping alignments, construction staging areas and construction access requirements. If the areas of construction impact are owned exclusively by the Water Bureau or are governed through existing easements held by the Water Bureau, then it would appear that a “Non-Park Use of Park Land” permit is not required. This may be the situation at Mt. Tabor and would be consistent with Water Bureau development activities on Powell Butte.

It should be noted that Parks’ policies and procedures governing non-park use of park property identify two clauses (#3 and 5) that could support this approach of not requiring a Parks permit. Policy 3 - Policy Subject to Prior Commitments, identifies that Parks’ policy shall not serve to terminate legally existing non-park uses or to invalidate prior commitments to allow non-park uses; and Policy 5 - Uniformity in Administration, states that this policy shall be administered as uniformly as practicable with respect to all non-park uses of similar nature.

Based on review of the regulations governing non-park uses, it would appear that a “Non-Park Use of Park Land” permit or easement from Portland Parks and Recreation is only required on land not owned by the Water Bureau or for which the Water Bureau does not have an easement.

Park development For Underground Reservoir. Portland Parks and Recreation recently completed a Master Plan Report for Mt. Tabor (Walker Macy, 2000). The Master Plan recommends park improvements including additional viewing areas, improved restroom accommodations, parking alterations and other park amenities. The Master Plan does not include an evaluation of park uses or activities for the land areas which contain the open reservoirs.

The Master Plan was developed through an extensive public involvement program that included a Citizens Advisory Committee and various neighborhood associations including the Mt. Tabor Neighborhood Association. The evaluation and ultimate determination of the appropriate park development over the underground reservoirs should be conducted in partnership between the Water and Parks Bureau and would be expected to follow the same type of public process as was

conducted for the Master Plan. This type of process can be lengthy; however, determining the eventual park development does not need to delay the construction schedule. The public process to determine the park development can be initiated at the beginning of the design process for the reservoir project and proceed during construction with a final decision reached prior to reservoir completion. It would not be desirable for the decision or land use permitting for the park development to drag beyond the completion of reservoir construction. This kind of delay will likely dampen public support for the entire project and cause areas of the park to be unusable for longer periods of time than necessary. The most desirable scenario would be for the construction of the park development activities to commence as soon as the underground reservoir construction is completed.

Potential constraints to “ideas” the public may have in regards to the park development over the reservoirs needs to be factored into public discussions. These constraints could include park development with significant load bearing requirements that impact the cost/design of the underground reservoirs.

The required permits for the park development would likely include either a Type II or Type III Conditional Use as described above depending on the park development to be constructed.

FERC Requirements

FERC has jurisdiction at Mt. Tabor through their 1983 issuance of an “Exemption From Licensing” for the small hydropower facility located in the Reservoir #6 gatehouse. During their review of this small hydro facility they determined that the reservoirs were “high hazard dams” and therefore needed their oversight also. There was never an identification of a FERC jurisdictional boundary on Mt. Tabor associated with these action and the letters issued by FERC for these actions are very skimpy in regards to the extent of their jurisdiction related to structural changes. In recent years FERC oversight has increased via direction from Washington D.C. staff to insure the safety of all FERC regulated facilities.

Discussion with FERC staff (Kirk Cover, Washington D.C.) indicates that the proposed underground reservoir project at Mt. Tabor will require an amendment to the “Exemption From Licensing”.

The amendment to the exemption is considered a federal action. Agencies and the public are notified of the action. Kirk said that their administrative rules guiding public notification are very strict – they give notice on about everything. He also said that since SHPO and USFW submitted comment letters on the first action (original exemption), then FERC would definitely notify them about the amendment to the exemption.

SHPO would likely review the project pursuant to Section 106 Historical Review. This can be a lengthy process if SHPO staff have concerns regarding the approach taken for preservation or demolition of identified historical resources. FERC does not have the discretion to “manage” or “sway” SHPO’s approach to the Section 106 process. FERC is required to “hold” the amendment to the exemption until all historical resource issues are resolved through the Section 106 process.

The USFW services may recommend mitigation for resources of interest. To date we are aware that USFW is studying the utilization of the reservoirs by bats. If USFW determines that ESA protected bat species are dependent on the reservoirs, they may require mitigation through the FERC review process. USFW may also recommend additional mitigation measures for non-protected species. FERC has the discretion to determine if these additional mitigation measures are warranted. FERC does not have the discretion to disregard USFW recommended mitigation for ESA protected species.

A letter request for an amendment to the “Exemption From Licensing” is required to initiate the FERC review process. Information about the project is required to supplement the letter request. FERC recommends that the Water Bureau contact the agencies that are likely to comment in the review process. Specifically, SHPO and USFW should be contacted to determine what issues need to be resolved regarding resources of concern. A proposal to address these agency issues should be included with the letter request for an amendment.

Historical Resources

Reservoirs 1,3,4,5 and 6 are considered historically significant, and are eligible for inclusion in the National Register of Historical Places and for local landmarks designation. They are also identified on the Portland Historical Resources Inventory as Rank I, the highest ranking given to a resource within the City. Several features of the reservoirs are considered historically important and include the gatehouses, concrete retaining walls, cast iron fencing, sidewalks around the reservoirs, original gatehouse equipment and weir houses.

Currently, the only local regulatory requirement governing the historical features of the reservoirs is the City of Portland Code Section 33.445 (Historical Resource Protection). However, if Federal funding is provided for the project or if a Federal action is required (FERC), it automatically initiates a State Historical Preservation Organization (SHPO) review, which could be time consuming and limit the Bureau’s flexibility in locating the new Reservoirs and Yard Piping.

Code Section 33.445 states that that all Rank I properties are subject to a 120-day demolition delay period. The intent to demolish must be publicly posted and include the following wording, “Structure to be demolished. Demolition of this structure has been delayed to allow time for consideration of alternatives to demolition. Alternatives to demolition might include restoration, relocation, or architectural salvage.” The address for the structure must be displayed as well as telephone numbers and names of owner(s) and contact person(s), dates of demolition and the ending date of the delay period. The Portland Landmarks Commission, Neighborhood Associations, and SHPO must be notified in writing of the planned demolition. The proposed demolition of any of the significant features of the reservoirs would be subject to the 120-day demolition delay period.

The Planning Bureau is currently in the process of amending the Code Section addressing protection of the City’s Historic Resources. At this time, it does not appear that the suggested Code amendments will change the 120-day demolition delay requirements significantly. However, this amendment process should continue to be monitored in case additional requirements are adopted that may affect the project.

It should be noted that it has been the past understanding of the Water Bureau that a proposed designation for inclusion in the National Register of Historic Places requires owner consent. However, discussions with Planning Staff (Ceilo Lutino) indicate that owner consent may not be required. Ms. Lutino identified OAR 736-05-02250 which states

“.....under federal rule, a statement of objection will not automatically preclude listing in the National Register of a property that is in public ownership.”

It may be appropriate to have the City’s legal council follow up on this question of whether or not anyone can cause the reservoirs to be included in the National Register of Historic Places. The process of obtaining Federal Register status may take too long to place additional restrictions on replacing Reservoirs 5 and 6. However, it could produce difficult regulatory hurdles for replacing Reservoirs 3 and 4 in the future.

It is also anticipated that the public does have a desire to preserve many of the reservoirs’ key historical features to the extent practicable. Therefore, it is recommended that the PI process include opportunities to encourage the public to provide input on which historic features are important to preserve. Also, an opportunity exists to gain the City’s Landmark’s Commission insight on which historic reservoir amenities are appropriate to preserve. While the Landmarks Commission would have no legal authority to direct specific preservation actions, they are very knowledgeable and could prove helpful in making good suggestions based on their experience.

SEQUENCE OF ACTIVITIES

The discussion above identified issues related to permitting, public involvement, project engineering and parks. It is clear that these issues are interrelated and will require a coordinated effort between the City Bureaus for the project to be successful. For the purpose of obtaining project permits, it is recommended that the following key project actions be pursued within the sequence identified.

1. Identify engineering constraints to potential park development
2. Conduct initial PI activity which includes discussion about historic resources and park development
3. Discuss historic resources with the Landmark’s Commission
4. Meet with SHPO and USFW to determine resource issues of concern and method to resolve them
5. Post 120-day demolition delay notice
6. Finalize preliminary design of Reservoir 5 and 6
7. Complete FERC letter request for amendment to the “Exemption From Licensing”
8. Conduct PI activity that gives project update and initiates focus on deciding park development
9. Determine ownership/easements based on preliminary design
10. Secure permits for Reservoir 5 and 6 construction with open space as the planned park development
11. Secure any required building (none may be required for public works project on City owned property) permits for reservoir covers at Washington Park (Reservoirs 3 and 4)

12. Complete design, select contractor, initiate construction
13. Conduct PI activity that discusses construction activities and resolves park development decision
14. Secure land use/park permits for the selected park development above reservoirs
15. Complete reservoir construction
16. Initiate Park development construction