

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

COTTRELL COMMUNITY PLANNING ORGANIZATION, PAT
MEYER, MIKE COWAN, PAT HOLT, RON ROBERTS, KRISTY
MCKENZIE, MIKE KOST, RYAN MARJAMA, MACY AND TANNER
DAVIS, AND LAUREN AND IAN COURTER,
Petitioners,

and

PLEASANT HOME COMMUNITY ASSOCIATION, ANGELA
PARKER, dba HAWK HAVEN EQUINE, MULTNOMAH COUNTY
RURAL FIRE PROTECTION DISTRICT NO. 10, OREGON
ASSOCIATION OF NURSERIES, MULTNOMAH COUNTY FAR
BUREAU, GRESHAM-BARLOW SCHOOL DISTRICT 10J, and
1000 FRIENDS OF OREGON
Intervenor-Petitioners,

v.

MULTNOMAH COUNTY,
Respondent,

and

PORTLAND WATER BUREAU,
Intervenor-Respondent.

LUBA No. 2023-086

Intervenor-Petitioner 1000 Friends of Oregon's
Corrected¹ Petition for Review

¹ The petition was corrected to include a complete table of authorities. The petition was also corrected to include a color version of the image from Rec-2874 that appears on page 29, and a typo in a case name that appeared in the body of the petition was corrected.

Continued on next page

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Exhibit M.6

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Table of Contents

I. Standing to Appeal 1

II. Statement of The Case 1

 A. Nature of The Land Use Decision and Relief Sought..... 1

 B. Summary of The Arguments 1

 C. Statement of Material Facts..... 2

III. Jurisdiction 2

IV. Argument 2

 A. First Assignment of Error..... 2

 1. Preservation of Assignment of Error..... 2

 2. Standard of Review..... 3

 3. Argument..... 4

 B. Second Assignment of Error 12

 1. Preservation of Assignment of Error..... 12

 2. Standard of Review..... 13

 3. Argument..... 13

 C. Third Assignment of Error 20

 1. Preservation of Assignment of Error..... 21

 2. Standard of Review..... 22

 3. Argument..... 22

 4. Conclusion 59

V. Conclusion..... 60

Certificate of Filing and Service 62

Certificate of Compliance 64

Table of Authorities

Cases

Dodd v. Hood River County,

317 Or 172, 179 (1993)	4
<i>Eng v. Wallowa County</i> , 79 Or LUBA 421 (2019)	23
<i>Gage v. City of Portland</i> , 319 Or 308, 316-17 (1994)	3, 14
<i>Gould v. Deschutes County</i> , 216 Or App 150, 162, 171 P3d 1017 (2007)	60
<i>Norvell v. Portland Area LGBC</i> , 43 Or App 849, 853 (1979)	4, 24
<i>Rhyne v. Multnomah County</i> , 23 Or LUBA 442, 447-48 (1992)	60
<i>Schrepel v. Yamhill County</i> , ___ Or LUBA ___ (LUBA No. 2020-067, December 30, 2020	44
<i>Stop the Dump Coalition v. Yamhill County</i> , 364 Or 432, 435 P3d 698 (2019)	16, 19, 20, 24, 44, 45, 53
<i>Stop the Dump Coalition v. Yamhill County</i> , 79 Or LUBA 459, 465 (2019)	56
<i>Sunnyside Neighborhood v. Clackamas County Comm.</i> , 280 Or 3, 20-21 (1977)	3
<i>Von Lubken v. Hood River County</i> , 118 Or App 246, 846 P2d 1178, <i>rev den</i> , 316 Or 529 (1993)	15
<i>Von Lubken v. Hood River County</i> , 28 Or LUBA 362, 365-9 (1994)	15
<u>Statutes</u>	
ORS 197.015(10)(a)(A)	2
ORS 197.296(1)	14

ORS 197.825(1)	2
ORS 197.830(7)(a)	1
ORS 197.830(7)(b)(B)	1
ORS 197.835(9)(a)(D)	3, 14
ORS 215.203(2)(c)	27
ORS 215.275	24, 62
ORS 215.296	22, 24
ORS 215.296(1)	21

Rules

OAR 660-015-0000(11).....	8
OAR 661-010-0071	60

Local Code Provisions

Comprehensive Plan Policy 11.12.....	9
MCC 39.7515(C)	1, 12, 13, 20, 22, 59
MCC 39.7515(D).....	1, 2, 4, 7, 9, 10, 11, 12
Multnomah County Comprehensive Plan 11-11.....	9, 10
Multnomah County Comprehensive Plan 11-2.....	6
Multnomah County Comprehensive Plan 11-3.....	6
Multnomah County Comprehensive Plan 11-8.....	8
Multnomah County Comprehensive Plan 11-5.....	11

1 **I. Standing to Appeal**

2 Intervenor-Petitioner 1000 Friends of Oregon (1000 Friends) has
3 standing to intervene. 1000 Friends submitted written testimony in
4 the local proceedings (Rec-3338) and submitted a timely motion to
5 intervene. ORS 197.830(7)(a), (b)(B).

6 **II. Statement of the Case**

7 **A. Nature of the Land Use Decision and Relief Sought**

8 A Multnomah County hearings officer issued decisions to approve
9 conditional use permits for a Portland Water Bureau water filtration
10 plant, pipelines, and communication tower on Multnomah County
11 lands zoned Multiple Use Agriculture 20 (MUA-20) and Exclusive
12 Farm Use (EFU). 1000 Friends seeks reversal or remand of the
13 decisions.

14 **B. Summary of the Arguments**

15 Intervenor-petitioner makes the following arguments.

16 First Assignment: The county's decision violates MCC 39.7515(D).

17 Second Assignment: By failing to consider the impacts from years-
18 long construction, the decision violates MCC 39.7515(C) and the
19 statutory farm impacts test.

20

1 Third Assignment: intervenor-petitioner argues that the county's
2 decision related to farm impacts, misconstrues applicable law, lacks
3 support of substantial evidence in the whole record, and is not
4 supported by adequate findings.

5 **C. Statement of Material Facts**

6 Intervenor-petitioner relies on the statement of facts provided by
7 petitioner, Cottrell CPO. Other relevant facts are discussed in the
8 assignments of error.

9 **III. Jurisdiction**

10 LUBA has jurisdiction to review land use decisions made by local
11 governments. ORS 197.825(1). The decision applies land use
12 regulations and is therefore a land use decision. ORS
13 197.015(10)(a)(A).

14 **IV. Argument**

15 **A. First Assignment of Error**

16 The county's decisions violate MCC 39.7515(D), and the hearings
17 officer's findings are inadequate.

18 **1. Preservation of Assignment of Error**

19 This issue is preserved. Rec-3340; *see also*, Rec-3339, App-54, and
20 Rec-330.

1 **2. Standard of Review**

2 LUBA will reverse or remand a decision that improperly construes
3 applicable law. ORS 197.835(9)(a)(D). LUBA does not defer to a
4 hearings officer's interpretation of local code. *Gage v. City of*
5 *Portland*, 319 Or 308, 316-17 (1994).

6 Adequate findings must (1) identify the relevant approval
7 standards, (2) set out the facts which are believed and relied upon,
8 and (3) explain how those facts lead to the decision on compliance
9 with the approval standards. *Sunnyside Neighborhood v. Clackamas*
10 *Co. Comm.*, 280 Or 3, 20-21 (1977). Additionally, findings must
11 address and respond to specific issues relevant to compliance with
12 applicable approval standards that were raised in the proceedings
13 below. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853 (1979).

14 Finally, substantial evidence is "evidence a reasonable person
15 would rely on in making a decision." *Dodd v. Hood River County*, 317
16 Or 172, 179 (1993), and "[s]ubstantial evidence exists to support a
17 finding of fact when the record, viewed as a whole, would permit a
18 reasonable person to make that finding." *Id.*

1 **3. Argument**

2 MCC 39.7515(D) requires that the applicant’s proposed treatment
3 facility “[w]ill not require public services other than those existing or
4 programmed for the area.” Intervenor-petitioner argued that the new
5 pipelines, a new emergency access new roadway, and the facility
6 itself were not “programed” for the area. Rec-3340. Citing statewide
7 land use planning goals 11 and 12 and their implementing rules,
8 intervenor-petitioner noted that the applicant had not shown that
9 “the applicant’s proposed facilities have been programed for the area”
10 in a manner consistent with the goals or applicable facility and
11 transportation plans. Rec-3340. The hearings officer’s response, as
12 well as the applicant’s response, misconstrue applicable law. App-54;
13 Rec-330.

14 In this case the treatment facility requires the extension of public
15 services, which includes the construction and installation of multiple
16 miles of large diameter steel water pipes² designed to carry 135

² Rec-6053 (The project proposes the installation of *over 30,000 linear feet of new large-diameter welded steel pipeline* which conveys both unfiltered (raw) and filtered (finished) water to and from the proposed drinking water Filtration Facility. *Construction of these large-diameter pipelines requires significant trench width in public ROW* and, subsequently, reconstruction of existing roadways over the

1 million gallons per day.³ Rec-3340. These new large-diameter
2 pipelines will take “raw” or untreated water from existing large
3 diameter distribution pipelines, referred to as conduits, that are
4 located east of the proposed treatment facility. Rec-6047, 7252. New
5 large-diameter pipelines will then take “finished” or treated water to
6 a new “intertie” and from the intertie to existing conduits located
7 north and west of the treatment facility. Rec-6047, 7143, 7144. The
8 applicant also proposes a new, smaller 12-inch diameter distribution
9 line that will send finished water to the Lusted Treatment Facility.
10 Rec-7138, 7143.

11 To put it mildly, the treatment facility requires far more than
12 drilling a private well or installing a private service line to connect to

pipeline corridor.”) (emphasis added); *see* Rec-6015, 6020 (describing and showing location of *9-foot diameter tunnels* approximately 850 feet long to house the raw water pipelines leading to the filtration facility); *see also* Rec-5551 (describing Mr. Ackerman’s design of “new large diameter pipelines from the existing conduits to the treatment facility and from the treatment facility to the existing pipes” as being between 42-inch to 72-inch steel pipes); Rec-7485, 7489, 7247-48 (Mr. Ackerman regularly presented on the project’s planning progress as well as “the new pipelines’ welded joints.”); Rec-5041 (describing need to protect against corrosion by applying electric current to the metal of the new pipelines.)

³ Rec-7143 (describing capacity of the raw water pipelines leading to the filtration facility and the two finished water pipelines leaving the facility)

1 an existing public water main located in an adjacent utility right of
2 way. The record shows that there is currently no existing public
3 water service for the property. The applicant explains, “there is
4 [currently] no water source on-site” and that “two nurseries currently
5 operating... utilize irrigation water from wells on their adjoining
6 properties.” Rec-7142. Other than drilling a well or the possibility
7 connecting to an existing community water system or historic water
8 district facilities,⁴ the county’s comprehensive plan explains that
9 there are no programmed public water services for the area.⁵ Comp
10 Plan 11-3.

11 The hearings officer interpreted the term “programed for the area”
12 to mean that “if an application needed a water line, it could still be
13 approved even if the water line was not currently in the area, if it

⁴ Comp Plan 11-2: The comprehensive plan recognizes that “[h]istorically, public water lines have been located within a number of rural water districts, including in Corbett and other locations.”; *see* Rec-192, 8031 (map of Lusted and Pleasant Home Water Districts)

⁵ Comp Plan 11-3: “In rural Multnomah County, most sewer, water, and drainage facilities are installed and maintained on-site by individual property owners or other private entities with the exception of road drainage facilities. For most rural households and businesses, domestic water is obtained via private wells.... No additional municipal service is planned for the rural areas in the future.”

1 was going to be installed before the project operated.” App-54. Based
2 on that understanding, the hearings officer concluded that the new
3 pipelines and roadway (and presumably the services they provided)
4 “are ‘programed for the area’ and the Application meets [MCC
5 39.7515(D)].” App-54. However, the hearings officer failed to address
6 the relevant text or context of MCC 39.7515(D). The hearings offer
7 also failed to determine how or when the county—or any of the area’s
8 public facility service providers—had possibly programmed, the
9 proposed pipelines. App-54.

10 The interpretation of MCC 39.7515(D) begins with the provision’s
11 text and context. Notably, the hearings officer misinterprets the
12 plain meaning of the term “programed for.” Just because the
13 pipelines would be installed prior to the project’s operation does not
14 mean that the pipelines—or the service provided—had or has been
15 “programed.” This case does not involve an applicant to connects to a
16 public service water line that was otherwise existing or programmed
17 to serve the subject property. Instead, the applicant proposes to build
18 miles of massive pipelines off the subject property for the purpose of
19 connecting the treatment facility to distribution lines that are not

1 part of the public water systems contemplated by the comprehensive
2 plan as providing service to the rural area, much less the property.

3 Here, the county's code provisions do not define the term "public
4 services." However, the relevant regulatory context frequently uses
5 the term. For example, statewide land use planning goal 11 applies
6 to "public facilities and services." OAR 660-015-0000(11). Goal 11
7 requires local governments to "plan and develop a timely, orderly and
8 efficient arrangement of public facilities and services to serve as a
9 framework for urban and rural development." OAR 660-015-
10 0000(11). To that end, Goal 11 requires that

11 "[u]rban and rural development shall be guided and
12 supported by types and levels of urban and rural public
13 facilities *and services* appropriate for, but limited to, the
14 needs and requirements of the urban, urbanizable, and
15 rural areas to be served."
16
17 OAR 660-015-0000(11) (emphasis added).

18 The comprehensive plan explains that "Counties are directed to
19 plan for public facilities in rural areas, consistent with the rural
20 nature of those areas" and that "[t]he Goal 11 administrative rule
21 also provides guidance on where sewer and water lines may be
22 located, as well as needed coordination with other service providers."
23 Comp Plan 11-8. To that end the comprehensive plan includes the

1 following county goal “[t]o coordinate and collaborate with service
2 providers and affected agencies to ensure an appropriate level of
3 public services to rural areas of the County, consistent with their
4 rural character.” Comp Plan 11-11. The comprehensive plan’s policy
5 and strategy 11.12 requires that “[a] water supply system for new
6 development shall be by either... “[c]onnection to a public water
7 system having adequate capacity to serve the development and all
8 other system customers” or “a private water system....”

9 Within that context, the connection proposed by the applicant to a
10 public water system fails to meet the requirements of MCC
11 39.7515(D). As described in the record, the new pipelines that the
12 applicant must build for the treatment facility, and the water service
13 that the applicant would require both to and from the facility are
14 truly massive. The new pipelines are described as being between 42-
15 inch and 72-inch diameter steel pipes, capable of carrying 135 million
16 gallons a day, that at one point require the construction of a 9-foot
17 diameter tunnel buried over 150 feet below ground. *See supra* fn1,
18 fn2; Rec-7252. These are certainly, not pipelines designed to meet the
19 county’s goal of “ensur[ing] an appropriate level of public services to
20 rural areas of the County, consistent with their rural character.”

1 Comp Plan 11-11. The scale of water service being conveyed to and
2 from the property is capable of serving over (or close to) a million
3 residents. Rec-3391, 2952, 2806 (noting wholesale customers leaving
4 PWB). For comparison, the historic Pleasant Home Water District
5 and the Lusted Water District contains a service population of
6 around 2,500 customers. *See* Rec-754-55, 2985 (listing “service
7 population”), 2952.

8 As far as intervenor-petitioner can determine, the applicant has
9 not demonstrated that the “public services” proposed by the
10 applicant—the ability to deliver and convey 135 million gallons of
11 water a day to and from the subject property—are or have been
12 “programmed for the area.” MCC 39.7515(D). The comprehensive
13 plan certainly does not anticipate such a large, urban-scaled
14 expansion of public water service to the subject property. None of the
15 historic water districts described as providing service within the
16 comprehensive plan are even remotely capable of providing that level
17 of service. Moreover, the record does not show that such service has
18 been planned or programmed by either, a community water system
19 (which does not exist on the subject property) or a historic water
20 district, such as the nearby Lusted or Pleasant Home water districts.

1 Rec-3937 (stating that the water filtration site is located outside of
2 the Pleasant Home Water District service boundary). At most the
3 Pleasant Home Water District has committed to providing water to
4 the property for the purposes of construction only. Rec-3937.

5 Notably, these are the only possible public service providers of
6 water contemplated by the comprehensive plan pursuant to
7 statewide Goal 11: historic water districts and community water
8 systems. *See* Comp Plan at 11-5 (showing map of water districts
9 identified by the comprehensive plan as public facilities). Although
10 the Portland Water Bureau provides *wholesale* water to the water
11 districts, the PWB is not itself a historic water district service
12 described in the comprehensive plan. *Id.* In other words, the county
13 does not recognize the PWB as an entity that could or would
14 “program” water service to customers within the county.

15 Finally, the water service proposed by the applicant is certainly
16 not “existing.” MCC 39.7515(D). In order to deliver and convey the
17 amount of water proposed—again, 135 million gallons per day—the
18 applicant proposes to dig up numerous public right-of-ways in the
19 area and build an underground tunnel for the purpose of installing
20 many miles of large diameter pipes. *See supra* fn1, n2. These

1 facilities do not currently exist, and they would only be constructed
2 for the purpose of providing water service to the proposed filtration
3 facility.

4 By concluding that the proposed large diameter pipelines existed
5 or were otherwise programmed for the area, the hearings officer
6 misconstrued applicable law. MCC 39.7515(D); 197.835(9)(a)(D). This
7 error requires reversal because the applicant's proposed treatment
8 facility requires the large diameter pipelines to function. There is no
9 basis for concluding that the newly proposed pipelines and intertie
10 facilities are programmed for the subject property or local area within
11 the meaning of MCC 39.7515(D). The applicant's treatment facility
12 simply cannot meet that criterion. In the alternative, intervenor-
13 petitioner requests remand.

14 **B. Second Assignment of Error**

15 The County Misinterpreted the Statutory Farm Impacts Test to
16 Exclude Impacts Caused by Construction as a Matter of Law.

17 **1. Preservation of Assignment of Error**

18 Multiple commenters raised the issue of construction related farm
19 impacts and the legal requirement to consider those impacts
20 pursuant to applicable criteria, such as MCC 39.7515(C) and ORS

1 197.296(1). Rec-3734-3735 (Oregon Dept. of Ag); Rec-2843-45, Rec-
2 3557-3574 (Pleasant Home Community Association); Rec-2931-2933
3 (Oregon Nursery Association); Rec-836-39, 841-43, 844-45 (Carrie
4 Richter).

5 **2. Standard of Review**

6 LUBA will reverse or remand a decision that improperly construes
7 applicable law. ORS 197.835(9)(a)(D). LUBA does not defer to a
8 hearings officer's interpretation of local code. *Gage v. City of*
9 *Portland*, 319 Or 308, 316-17 (1994).

10 **3. Argument**

11 After concluding that “most of the farm impacts will come from
12 the construction of both the treatment facility and the pipelines,” the
13 hearings officer concludes that construction impacts are not impacts
14 that may be considered under the statutory farm impact test by
15 adopting PWB's proffered analysis of cases identified by opponents
16 coupled with an inference-based contextual analysis of the statutory
17 farm impact test. App-46-47. Intervenor-petitioner explains below
18 that the hearings official misapplied the statutory test. In doing so,
19 the hearings official also misconstrued and misapplied MCC
20 39.7515(C).

1 During the proceeding below, the applicant’s opponents relied on
2 the Court of Appeals and LUBA’s holdings from *Von Lubken v. Hood*
3 *River County* for the proposition that consideration of “cumulative
4 impacts” across all farm practices within a farm unit, required
5 consideration of construction impacts. *Von Lubken v. Hood River*
6 *County*, 118 Or App 246, 846 P2d 1178, *rev den*, 316 Or 529 (1993);
7 28 Or LUBA 362, 365-9 (1994). As part of its final written argument,
8 PWB distinguished LUBA’s holding in *Von Lubken* from this case by
9 claiming that *Von Lubken* was limited solely to the consideration of
10 farm impacts occurring during remand.

11 PWB’s reading of *Von Lubken* is overly narrow because it
12 completely overlooks the required obligation to consider the
13 cumulative impacts on farming as articulated by the Court of
14 Appeals. Excluding construction impacts from the analysis as a
15 matter of law, as PWB advocates, eviscerates any ability to
16 meaningfully evaluate the degree to which a use, including
17 construction, will impact surrounding farming. Such an
18 interpretation would be contrary to the entire structure of farmland
19 protection in Oregon.

1 Acknowledging that the focus in *Stop the Dump Coalition* was to
2 interpret the term “significant,” the Oregon Supreme Court’s
3 analysis offers a detailed explanation of the legislative history for the
4 farm impact test generally which does not support the county or
5 PWB’s position. Citing to the legislative policy as well as Goal 3, the
6 focus for the farm impact test is on “preserving land in productive
7 agriculture” and that “agricultural uses not be displaced by or
8 subject to interference from non-farm uses.” *Id.* at 457 citing *Von*
9 *Lubken*, 188 Or App 246 at 250. Construction impacts can absolutely
10 interfere with, if not displace existing agricultural uses and that
11 displacement can be so intense and long-running that the effects
12 become permanent.

13 Patrick Holt, a fourth-generation farmer and president of R&H
14 Nursery, which farms 10 different properties with its headquarters
15 for processing, deliveries and shipping located on Carpenter Lane
16 identified the following effects that the road closures coupled with
17 the volume of construction trucks:

18 “We will be unable to timely ship our trees to our
19 customers. The delay of traffic will slow common carrier
20 semi’s from reaching the headquarters farm where we

1 load out all orders. As this continues we will get a
2 reputation on being impossible to reach in a timely
3 fashion and trucks will refuse to take our loads to the east
4 coast. Furthermore, since plant sales have a narrow
5 window in the spring, our customers will begin to look
6 elsewhere for the plant material.”

7 Rec-2721.

8 Mr. Holt goes on to recount his review of the PWB traffic
9 compatibility materials with other nursery owners and one farmer
10 concluded “Wow Pat, you’re going to be put out of business.” Rec-
11 2721. Not only will the road closures from pipeline installation
12 “cripple” his business, commercial customers will not buy from a
13 nursery stock farmers that cannot be accessed in timely and
14 predictable fashion. This is not about sheer inconvenience, this is
15 testimony from an expert nurseryman that farm practices will be
16 destroyed and the business effect will be permanent.

17 Determining as a matter of law that construction impacts from a
18 nonfarm use may not be considered would, by definition, not be
19 “cumulative” in evaluating effects and subvert the entire purpose for
20 the significant impact test and a farm protection scheme that is

1 focused on limiting nonfarm uses. This result would violate the Court
2 of Appeals holding from *Von Lubken* and the Supreme Court’s
3 analysis in *Stop the Dump Coalition*. It would also subvert Goal 3,
4 which requires that non-farm uses should be minimized to allow for
5 maximum agricultural productivity.

6 Rather than acknowledge the strong farm-protection legacy, the
7 hearings officer adopts by reference the legal analysis provided by
8 PWB, and concludes that the farm impacts test does not include
9 construction. PWB ultimately argues that, because construction
10 impacts to farm uses are temporary and not specifically referenced in
11 the statute, they should not be considered. PWB points to concerns
12 over “reductions in the supply of operating, productive agricultural
13 land over time...due to nonfarm uses” as the concern identified by
14 the Oregon Supreme Court in *Stop the Dump Coalition*.

15 However, the PWB misrepresents what the Supreme Court said:

16 “[W]e disagree with the Court of Appeals that ORS
17 215.243(2) must lead to the conclusion that the legislature
18 intended the farm impacts test to focus on impending
19 changes to the gross supply of agricultural land. We agree
20 that the legislature was concerned about the supply of

1 agricultural land, but we conclude that the legislature
2 intended the farm impacts test to focus on forced changes
3 in farming and forest practices and the costs of those
4 practices, as referenced in ORS 215.296(1). That reading
5 of the farm impacts test is consistent with the statutory
6 text, and the context that we have discussed indicates
7 that *the focus on adverse changes to operations on the*
8 *affected farms was key*. By adopting the farm impacts test,
9 the legislature was not content to disallow nonfarm uses
10 only if there were impending reductions in the resulting
11 supply of agricultural land. Instead, it appears that the
12 legislature understood *that adverse changes in farm*
13 *practices or the costs of those practices could well lead to*
14 *later reductions in the supply of operating, productive*
15 *agricultural land over time, as it becomes more onerous for*
16 *owners to continue their agricultural use of EFU land due*
17 *to nearby nonfarm uses*.

18 *Id.* at 454. (Emphasis added.) The Supreme Court's holding makes
19 manifestly clear that the focus is not just on retaining the overall
20 supply of land in the long term but rather on protecting an existing

1 farmer from having to change their farm operations or incur
2 additional costs as a result of a nonfarm use. The adverse impacts
3 caused by construction traffic coupled with road closures, detours,
4 and delays to R&H Nursery will have this exact result.

5 By adopting PWB's arguments as its own, the hearings officer
6 adopted a rule that prohibits consideration of construction impacts as
7 a matter of law because they are by definition temporary. A
8 temporary construction impact may not rise to the level of being
9 significant depending on the level of interference with specific farm
10 practices on an individual farm. In *Stop the Dump Coalition*, the
11 Court concluded that a "farm-by-farm cumulative impacts analysis"
12 was required. *Id* at 459. This evaluation, which the hearings officer
13 seems to suggest is required, must be provided and it must include
14 an evaluation of the impacts resulting from construction.

15 The hearings officer concludes that by opining that if a reviewing
16 court finds that construction impacts must be considered, it will
17 create an unavoidable conflict of disallowing pipelines on EFU land
18 where they are allowed under ORS 215.296(1) and the
19 comprehensive plan policy that Multiple Use Agricultural Policies
20 are to be less intensive than the EFU. App-49. Again, the only bright

1 line rule that intervenor-petitioner seeks is one that does not
2 prohibit the consideration of construction-related impacts under the
3 MUA-20 conditional use scheme and on lands zoned EFU. Under this
4 fact-based analysis, utility uses will only be disallowed on MUA-20 or
5 EFU land where, as part of a cumulative impact review, construction
6 has a significant impact on accepted farm practices or significantly
7 increase the cost of farming.

8 For these reasons, the hearings officer's finding that "temporary
9 construction impacts do not have to be considered when determining
10 whether the use could force a significant change in or increase the
11 cost of accepted farm practices under MCC 39.7515(C) or ORS
12 215.296" was error. App-47. Simply because the hearings officer
13 states that construction impacts are "inherently temporary," does not
14 mean that they cannot also exceed the threshold of significance. For
15 this reason, this decision must be remanded.

16 **C. Third Assignment of Error**

17 In concluding that the construction-related transportation impacts
18 would not have a significant impact on accepted farm practices, the
19 hearings officer misconstrued the applicable standard and adopted
20 inadequate findings that are not supported by substantial evidence.

1 **1. Preservation of Assignment of Error**

2 Throughout this proceeding, nursery farmers continually raised
3 concerns over the impact that construction and adjusted traffic
4 patterns resulting from in-road improvements and pipeline
5 installation will have on rural roads and operations. Rec-747, 780.
6 Maintaining predictable and free-flowing road connections to move
7 employees, equipment and plant material from farm to farm and to
8 market is an accepted farm practice. Rec-2930. Farmers have
9 particular, trusted and efficient routes that they follow. Rec-757. In-
10 road work will deprive farmers from accessing their farm fields. Rec-
11 756. Opponents pointed out deficiencies with the PWB
12 transportation analyses including the failure to consider contra-
13 flows. Rec-1978/1981.

14 With regard to the hearings officer's finding that the average
15 delay will only be three seconds, this is a new fact that was raised for
16 the first time as part of PWB's final written argument. Parties are
17 not precluded from raising a challenge to the county's admission of
18 new evidence within the applicant's final written argument as a
19 procedural error on appeal to LUBA merely because they failed to
20 object during the proceedings below where the record was closed and

1 no further testimony was allowed. *Eng v. Wallowa County*, 79 Or
2 LUBA 421 (2019).

3 **2. Standard of Review**

4 The same standard of review that applies to the first assignment
5 of error applies.

6 **3. Argument**

7 Although the hearings officer found that “temporary construction
8 impacts do not have to be considered,” in the alternative, the
9 hearings officer also concluded that temporary construction impacts
10 to farming would not force any significant change in the existing
11 farm practices or increase the costs of those practices under MCC
12 39.7515(C) for both MUA-20 and EFU zoned property.⁶ The hearings
13 officer’s findings open with an explanation that construction impacts
14 are nothing more than temporary irritants that all drivers have to
15 endure. App-49. According to the hearings officer, because public
16 roads are “inherently the use of a shared public resource,

⁶ The hearings officer applied the farm impact test as set forth in ORS 215.296, even though the farm impact test set forth in MCC 39.7515(C) is not identical and does not apply to lands zoned MUA-20 and the applicable test for lands in EFU requires consideration of ORS 215.275, which is similar to ORS 215.296, but also not identical.

1 accommodation of other[s] using that shared resource is part of the
2 accepted farm practice,” quoting PWB at App-257.

3 If traffic impacts to accepted farm practices needs to be
4 considered, the hearings officer concludes that “there will only be a
5 total of three seconds delay at area intersections.” App-49. The
6 County Transportation Department concluded that traffic can be
7 managed without interfering with farm traffic. These findings
8 reflect the failure to apply the farm impact test consistent with the
9 Oregon Supreme Court’s decision in *Stop the Dump Coal. v. Yamhill*
10 *County*, 364 Or 432, 444-45, 435 P3d 698 (2019), fail to respond to
11 the detailed concerns raised by farmers, who the hearings officer
12 found were experts, and are not supported by substantial evidence.

13 First, the hearings officer’s personal experience with construction
14 traffic and participation in other land use proceedings is neither
15 relevant, nor responsive to the criteria, it does not identify or
16 respond to the evidence contained within the record, and it does not
17 explain how the conditions will serve as sufficient mitigation. *1000*
18 *Friends of Oregon v. Lake County, supra* and *Norvell v. Portland*
19 *Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979). The
20 inconveniences the hearings officer identifies – max lines and sewer

1 line replacement – are uniquely urban concerns that have no
2 application on rural lands. Whether congestion must be accepted
3 because cities must grow, does not mean that this growth must be
4 accommodated on the backs of areas zoned for farming and protected
5 from urban growth where farming is sacrosanct.

6 Whether farmers have to suffer construction impacts resulting
7 from new farm uses, like the construction of a barn, or additional
8 rural residences is not the question. The question is whether the
9 statewide farm protection laws or the MUA-20 regulations, and the
10 policies that they implement, require that farmers must suffer
11 unprecedented levels of traffic and in-road work for a non-farm, out
12 of scale use, simply because the roads are “public.” The answer is no,
13 nothing in the MUA-20 regulations or state law gives a non-farm use
14 the right to suck all of the available road capacity out of the
15 surrounding roads (and then some) forcing significant changes in
16 accepted farm practices and significantly increasing their cost.

17 As a matter of introduction, the first step for applying the farm
18 impacts set forth in the *Stop the Dump Coal. v. Yamhill County* case
19 requires a farm-by-farm and farm-practice-by-farm-practice analysis
20 where the applicant identifies the surrounding lands, the farms on

1 those lands, the accepted farm practices on each farm, and the
2 impacts of the proposed nonfarm use on each farm practice.

3

4 *A. The accepted farming practice for nursery farmers within the*
5 *surrounding lands relies on a fully-functioning, predictable road*
6 *system between farms, fields and in getting the product to market.*

7 An “accepted farming practice” means “a mode of operation that is
8 common to farms of a similar nature, necessary for the operation of
9 such farms to obtain a profit in money, and customarily utilized in
10 conjunction with farm use.” ORS 215.203(2)(c). This is a fact-based
11 inquiry requiring identification of common practices necessary to
12 farm for profit.

13 Although the hearings officer acknowledges that the “farm
14 impacts test requires farm specific analysis,” the applicant failed to
15 engage in this effort in the first instance. App-47. PWB’s farm
16 compatibility analysis is set forth in the record at 7128-7292. Rather
17 than identify accepted farm practices on a farm-by-farm basis, the
18 farm compatibility analysis describes accepted farm practices by
19 categories of farming such as bareroot and ball and burlap trees,

1 container nurseries and the like.⁷ Under *Stop the Dump*, the
2 applicant bears the burden of evaluating the farm-by-farm impacts
3 in the first instance and PWB never satisfied this obligation. *Supra*
4 at 445.

5 In describing the accepted farm practices of nurseries, not a farm-
6 by-farm evaluation, Mr. Prengruber explains:

7 Most medium to large scale nurseries here farm separate fields
8 that require moving employees and equipment over the roads.
9 Employees are moved in buses and equipment is moved by driving
10 trucks or tractors that pull equipment. When large equipment such
11 as forklifts, disks, or diggers are moved, they are sometimes
12 transported on trailers or flatbed trucks. Plants dug in the fields are
13 moved to the headquarters for grading, sorting, and short-term
14 storage before shipping. Semitrailer trucks are loaded at the nursery
15 headquarters to transport the loads to wholesale customers. Rec-
16 7161.

⁷ This evaluation does not mention that riding on county roads is an accepted farm practice for the nearby equine stabling and training operation, Hawk Haven. Rec-1474-1476.

1 There is no discussion that farming nursery stock for profit
2 requires fully functioning roads that allow for predictable and
3 reliable transportation of employees, materials and equipment
4 between farms, fields and to market.

5 The map attached as App-9 to the Joint Appendix illustrates
6 wholesale nursery stock farming is the prevailing agricultural
7 activity in this area occupying 8728 acres surrounding the PWB
8 facility. Jeff Stone, the president of the Oregon Association of
9 Nurseries testified: “For agriculture, it is imperative that an
10 operation be able to move employees, equipment, and plant material
11 from farm to farm.” Rec-2932.

12 Surface Nursery farms seven different properties requiring the
13 frequent movement of employees, materials, equipment and product
14 between fields that is predictable and efficient. Shawn Nerison, the
15 manager of Surface Nursery, in consultation with other nursery
16 farmers explained:

17 “We have well-established routes to move employees and
18 equipment from headquarters to off-site locations; these
19 routes take into consideration how fast regular traffic
20 moves on the road, and how heavy the traffic is to ensure

1 the safety of my employees who will be moving slower
2 than regular traffic. Our routes also consider school bus
3 routes, bus stops, and pick up/drop off routines, as well as
4 the safest roads to operate on should we encounter poor
5 weather conditions.

6 Rec-2863.

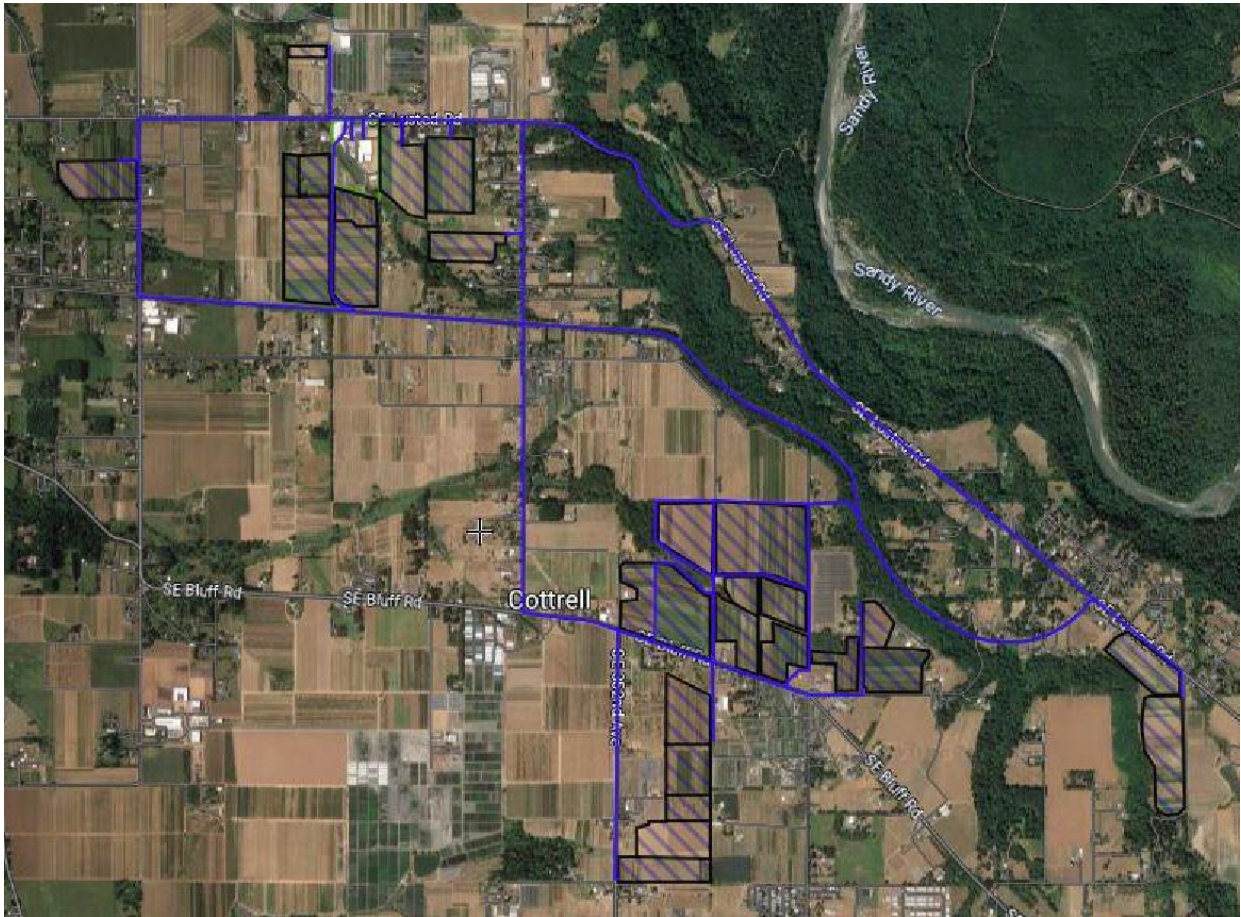
7 This image at Rec-2874 shows the multiple Surface fields in blue
8 squares with the farm headquarters outlined in green:

9

10

11

1



2

3 The blue lines show the common routes used multiple times daily to
4 transport crews, equipment and materials between fields. Rec-2862-
5 2863. Farm traffic using these routes include a wide variety of slow-
6 moving vehicles such as farm tractors and tractors pulling trailers,
7 semi-trucks and heavy-duty diesel trucks hauling or towing
8 implements, equipment, portable restrooms, and supplies, as well as
9 crew transport buses, and foremen pickups. Rec-759.

10 Mr. Nerison explained:

PETITION FOR REVIEW

1 “My statement emphasizes the operational necessity of
2 having unfettered access on surrounding roads, so that if
3 there is a reason we need to change our usual route, for
4 instance an accident, weather issue, or county road work,
5 we can do so without delay. Mr. Prenguber is trying to
6 show that using multiple routes is an accepted farm
7 practice, but quite the opposite is true. We have
8 particular, trusted and efficient routes we follow that we
9 know exactly how long they take and what obstacles or
10 hazards our employees may encounter, such as bus stops,
11 difficult turns, or conflicts with businesses or other
12 nurseries. Using this knowledge of the area, best practices
13 for farming is to utilize the safest most direct route with
14 the fewest obstacles. The part that Mr. Prenguber got
15 right is that we do need, and it is an accepted practice to
16 have, multiple safe and efficient options available *should*
17 *we need them.*”

18 Rec-757-758 (Emphasis in original).

19

1 Amalia Bruley, a shipping coordinator and lifelong resident
2 testified:

3 “The reality is that construction-related delays and
4 detours on multiple area roads at the same time is
5 absolutely not part of the character of this area.”

6 Rec-774.

7 More specifically, in order for Surface Nursery employees to reach
8 fields located on Bluff Road from the headquarters on Lusted Road,
9 the accepted farm practice would be to travel south on Cottrell Rd.
10 Once PWB construction begins, this route will encounter pipeline
11 construction or road improvement delays closing all or a portion of
12 nearly all of the intersections that today provide Surface farmers
13 with a predictable and direct route.⁸ Shawn Nerison of Surface
14 Nursery explained:

⁸ Using the numbers that correspond to the intersection numbers assigned throughout the PWB transportation analyses in the record, these intersections include Lusted / Cottrell (#4), Dodge Pk/Cottrell Rd (#6), Carpenter Lane/Cottrell Rd (#8), turn East onto Bluff Rd (#10), proceed straight to 352nd and turn North or South at 352nd into fields on either side of Bluff Road, or, continue on Bluff to the Bluff/Proctor/362nd Ave 3-way intersection (#11) and turn onto Proctor Rd, continue straight to field entrance.

1 “Sustained road construction over months that forces us
2 to take alternative routes and/or change our normal
3 logistical practices is not part of our accepted farming
4 practices, but rather a disruption to them and only done
5 when absolutely necessary in a specific instance. This is
6 not a common, accepted practice, because alternate routes
7 create logistical disruptions resulting in increased
8 operating costs to our operation. It happens very rarely, in
9 fact probably less than once a year, that we experience
10 delays and detours on local roads. As evidenced by the
11 condition of our local roads, regular maintenance and
12 road improvements are not a common occurrence.”

13 Rec-2732

14 As discussed in greater detail below, delays from construction
15 traffic coupled with pipeline installation and road construction for
16 almost every link that connects nursery fields together will have a
17 cumulative and compounding effect because the first tractor
18 experiencing a delay then holds up the second tractor and so on.
19 This adds up for each tractor, truck, crew van and anything else
20 trying to reach one of the many off-site field locations, often with

1 multiple farm vehicles needing to reach the same field at the same
2 time. Rec-774.

3 Further, the wholesale ornamental nursery stock industry is an
4 export business that relies on shipping brokers and common-carrier
5 commercial trucks arranged by out-of-state buyers. Surface Nursery
6 relies on approximately 100-130 semi-trucks per year to transport its
7 plants to market. These brokers identify the time of truck arrival,
8 loading and departure with schedules that must be strictly followed.
9 These common carriers are scheduled to pick up orders at other
10 nurseries requiring that the truck be loaded in a specific order
11 determined by the broker. These schedules are “strictly followed;”
12 trucks cannot deviate from their stops and pick up out of order due to
13 road closures, detours or delays. Farmers on record uniformly
14 agreed that historically, the very rare occasion a truck is delayed has
15 been due to unpredicted inclement weather or a car accident.” Rec-
16 753, 774. The consequences of regular delays or confusion during
17 road closures, delays and detours will result in loss of customers,
18 especially to farms in those segments lasting multiple months.
19 Brokers and customers will avoid purchasing products from
20 nurseries where access is not predictable and that reputational

1 impact will have a permanent negative impact on farm profit. Rec-
2 3707, 2831.

3 Other than dismissal out of hand because urban road repairs are
4 commonplace, the hearings officer's findings do not respond to this
5 detailed farm testimony or explain why it fails to establish that
6 nursery farmer reliance on roads is an accepted farm practice.⁹
7 *Norvell supra*. Further, the record does not support a finding that
8 construction projects to fix the roads, install utilities or widen them
9 for new development is a common occurrence. In fact, the well-

⁹ Although not mentioned by PWB or adopted by the hearings officer by reference, Prengruber's final written response does include the following conclusory statement:

“There will be marginally higher costs resulting from the additional time spent on the road, but fundamentally spending time on the roads is already a characteristic of accepted farm practices that involve using public roads. Delay on the road is also fundamentally part of the use of the public road network, due to various activities such as when farmers move through a school zone around the time of pick-up or drop-off. This is due to the existing land use patterns of farmland interspersed with the semi-urban population in the Surrounding Lands.” Rec-681.

Nursery operators directly explained that they select routes that are not impacted by bus stops and referencing “semi-urban population” impacts to farmers ability to rely on designated routes is not reflected anywhere on this record.

1 deteriorated condition of the roads is well-documented in this record
2 and for that reason requires PWB to take a “fix-it-first” approach to
3 restoring the roads to a condition that will allow for use by its
4 construction traffic. Rec-774.

5 At its core, no reasonable person could look at the evidence
6 presented by the farmers explaining the business of nursery farming
7 and not conclude that predictable and efficient travel between fields
8 and to market is not essential to farming for profit. The hearings
9 officer’s conclusions to the contrary ignore rather respond to the
10 farmers detailed and specific substantial evidence to the contrary.

11

12 *B. Considered cumulatively, construction delays will exceed will impose a*
13 *significant change and increase the cost of farming.*

14 The hearings officer goes on to conclude that construction impacts
15 will not impose a significant impact under the farm impact test
16 because: “there will only be three seconds of delay at area
17 intersections.” App-49. This conclusion is based on the following
18 explanation in PWB’s final written argument:

19 “So, how much delay are we talking about? At the very
20 worst (peak construction) at the most delayed intersection

1 (Carpenter/Cottrell), the delay caused by the project is all
2 of 15 and a half seconds. Table 1 below shows those
3 calculations, done by subtracting the existing, background
4 conditions seconds of delay from the peak construction
5 (with road closures) seconds of delay. The information
6 comes from the Construction TIA and One-Access
7 Analysis. Note that this also includes growth in
8 background traffic, so it is a conservative estimate of the
9 seconds of delay caused by the project.

10 “The average (mean) of these seconds of delay is all of
11 3.3 seconds for the Dodge / Altman closures and 3 seconds
12 for the Lusted/Cottrell closures. This is what the traffic
13 engineer means when he says that the road network has a
14 high level of available capacity that can accommodate
15 construction with minimal delays.”

16 App-258.

1 Although these arguments get dense quickly, this conclusion is
2 legally inadequate, factually misleading and not based on facts that a
3 reasonable person would rely on in making a decision.¹⁰

4 First, relying on an average amount of intersection delay for all
5 intersections to find no significant change or significantly increase
6 the cost of farming entirely fails to satisfy the farm-by-farm specific
7 analysis of impacts required under *Stop the Dump supra*. As the map
8 illustrating the travel routes taken by Surface illustrates, its
9 accepted farm practices do not rely on travel through Oxbow /
10 Altman (#1) or Lusted / Hudson (#13) intersections which PWB
11 claims will not suffer any construction-related delay. By relying on
12 an average, PWB is underrepresenting the actual impacts to farm
13 practices, what the farm impacts test requires.

14 Nursery farmer testimony, as most obviously depicted in the map
15 of the Surface farm fields, shows that acceptable farming practices
16 cannot be accomplished without traveling through multiple
17 intersections adversely impacted by PWB construction traffic.

¹⁰ As noted in the CPO brief, this three-second average calculation and its significance were new facts raised for the first time in PWB's final written argument that prejudiced participants' substantial rights.

1 Multiple delays will also be compounded, cumulatively affecting
2 multiple farm traffic all trying to get to and from fields. Rec-774. To
3 add to this, all compounded, accrued travel times are experienced at
4 least twice daily, as the impacted routes must again be traveled by
5 all farm traffic at the end of day to return to the farm headquarters.
6 None of these circumstances are not reflected in the 3-second delay
7 assumption identified by PWB and relied on by the hearings officer.

8 The am and pm peak traffic tables in the PWB construction TIA
9 that serve as the basis for the 3-second delay assumption were
10 created in order to show that each individual intersection would
11 perform at acceptable levels of service (LOS) to meet the County's
12 minimum performance levels. Although PWB is inconsistent in its
13 claims about the degree that satisfying LOS standards alone is
14 dispositive, evaluating levels of delay on isolated, individual
15 intersections without identifying any established farmer travel route
16 makes the 3-second delay assertion entirely misleading and
17 incomplete.

18 Second, although this is not explained anywhere in PWB's final
19 written argument, it appears that PWB calculated the 3 second
20 average by subtracting the existing conditions intersection delay

1 assumptions (Table 5) from the projected delay resulting from a
2 singular road closure, either Dodge Park /Altman or Lusted Cottrell
3 (Table 8) within the PWB Construction Traffic Impact Analysis
4 (TIA). Rec-4212/4219. This approach was varied to include the
5 updated delay projections in the One-Access Analysis resulting from
6 using Carpenter Lane as the single point of access along with the
7 rideshare approaches proposed by PWB within the conditions set
8 forth in Table 1 to result in a delay of 15.6 seconds. Rec-1940.

9 These calculations are misrepresentative in a number of respects.
10 First, Table 1 from the One-Access Analysis sets forth delay
11 resulting from application of the 296-vehicle trip cap and it does not
12 appear to take into account the impact of the identified road closures
13 that serve as the basis for the delay calculations in Table 8 in the
14 Construction TIA. This discrepancy creates a comparison of apples
15 vs oranges.¹¹ Second, Table 8 identifies delay at a single intersection
16 resulting from one full road closure and assumes a fully functioning
17 two-way roads at other unimpeded intersections. This does not

¹¹ It is clear from the single sentence wholesale adoption of the 3-second average delay that the hearings officer made no concerted effort to understand the origins of these figures or their accuracy.

1 account for delays associated with the multiple roads and
 2 intersections that will be partially closed, with only one-lane
 3 available for traffic subject to flagger authorization for passage.¹²
 4 Note that using PWB projections comparing existing and peak
 5 construction intersection performance totals, the existing
 6 intersection delay for these five intersections taken together is 39
 7 seconds, when compared with the total peak construction delays,
 8 including the mitigation strategies, the total delay will be 76 seconds.

¹² PWB identified intersections / roads that will be partially closed include:

- “1. SE Lusted Rd. at the County Line— raw water line
2. SE Cottrell Rd/Dodge Pk Blvd— where finished water line heads west from the filtration plant
3. SE Dodge Pk Blvd. — where finished water line turns north to cross Ekstrom Nursery.
4. SE Lusted Rd.— where three finished water lines leave intertie facility, two will cross Lusted Rd then turn west along north side of ROW. The third finished water line will go west along the south side of the ROW.
5. SE Altman Rd.— where one finished water line will tie into existing pipeline at intersection of Altman and Lusted.
6. SE Pipeline Rd.— where the second finished water line will tie into existing pipeline at Pipeline Rd.
7. SE Altman Rd and SE Oxbow Dr.— where third finished water line will tie into existing pipeline in SE Oxbow Dr.” Rec-3004

1 Rec-4212-4213. Compounded by multiple daily trips through this
2 intersection along with delay from other impacted intersections and
3 road segments, requires a significant change in farm practices and
4 will increase their cost.

5 Third, none of the peak flow projections assumed by PWB include
6 any contra-flow trips. Stated differently, PWB indicates all of the
7 commuter and truck traffic will arrive during the am peak hour yet
8 no exiting trips will occur during this same AM peak hour. As the
9 licensed traffic engineer working with the opposition explained:
10 “there are no land uses of any kind which do not generate contra-flow
11 trips.” Rec-823. This is particularly difficult when you consider that
12 one of the PWB’s primary trip mitigation strategies was to adjust
13 work schedules making it more likely to generate contra-flow trips.
14 For example, PWB’s construction plans indicate continuous haul
15 truck trips bringing in material and hauling out dirt during all hours
16 of construction. PWB offered no *Norvell* findings in response.

17 PWB argues that the “actual quantitative seconds of delay and the
18 quality of the movement on the public roads” reflected in the level of
19 service “will not materially degrade farmers’ ‘perception of the
20 quality of flow’ or ‘driver satisfaction.’” App-249. However, no

1 reasonable person would rely on PWB and the County's
2 transportation experts to determine whether the levels of
3 construction traffic will have a significant impact on farm practices
4 and costs. In the following passage the hearings officer seemed to
5 agree that farmers were the experts:

6 "I believe the farmers who I find to be experts in this area
7 are correct in determining that there will be farm
8 impacts. I have to determine if those impacts are
9 significant."

10 App-45. The hearings officer's about face in the findings is
11 unexplained.

12 In summary, PWB's assertion that the amount of delay
13 averages 3 seconds per intersection, and the hearings officer's
14 wholesale reliance on that, is inaccurate and fails to accurately
15 reflect the impacts construction impacts will have on farmers.

16

17 *C. Construction Traffic and In-Road Closures will Exceed the*
18 *Threshold of Significance.*

19 The hearings officer failed to acknowledge and apply the
20 significance thresholds established by LUBA and the courts that

1 would control application of the statutory significant impact test
2 under ORS 215.296 which provides:

3 “A ‘significant’ change in an accepted farm practice is one
4 that is likely to have an important influence or effect on
5 that farm practice. *Stop the Dump*, 364 Or at 447. A
6 ‘significant’ increase in the cost of a farm practice is one
7 that represents an influential or important increase in the
8 cost of that farm practice. *Id.*”

9 *Schrepel v. Yamhill County* ____ Or LUBA ____ (LUBA No. 2020-067,
10 December 30, 2020).

11 The only finding responsive to this requirement is the PWB
12 statement, adopted by the hearings officer by reference, which states:

13 “As explained above, it is an accepted farm practice to
14 modify routes. The question is not merely whether this
15 accepted farm practice is used more frequently during the
16 temporary construction period, but instead **whether that**
17 **temporary increase in the use of an accepted farm**
18 **practice rises to the level of significance, not**
19 **annoyance.** Even if it takes an extra 15 minutes to get to
20 a field a few times during the temporary construction

1 period, the field will still be there, and the accepted farm
2 practices will all continue without any change.

3 “Even if it takes an extra 15 minutes to get to a field a few
4 times during the temporary construction period, the field
5 will still be there, and the accepted farm practices will all
6 continue without any change.”

7 App-276 (Emphasis in original).

8 Disregarding delay because “the field will still be there” fails to
9 acknowledge that the purpose of the farm impact test is to protect
10 farm practices and the farmers engaged in those practices and not to
11 preserve a certain number of fields that cannot be farmed because
12 they are inaccessible for accepted farm practices. *Stop the Dump* at
13 444-445; *id.* at 445 (“The emphasis in Goal 3 (1988) was not on a
14 gross supply of agricultural land per se, but rather on preservation of
15 large areas of productive, working agricultural land.”). Further, there
16 is no evidence in the record to so suggest that nursery farming can be
17 accomplished by accessing “a field a few times” during the
18 construction period that again, will last for 5-7 years.

19 This statement is absolutely belied by the testimony of every
20 nursery stock farmer who, together, echo the significant impacts

1 construction delays will have on their accepted farm practices and
2 costs. Multiple farmers have stated that PWB's reports show there is
3 no alternative route for reaching their fields when construction
4 affects certain roads. Jesse Nelson, a third-generation nursery
5 farmer, states:

6 "We are farm operator X and on page 87 of the PDF it
7 states "none due to safety issues, the route of travel is
8 only on Dodge Park". Farm operation F is the same in
9 that there is no alternate. That means if any disruption
10 on Dodge Park we won't be able to access our farm. There
11 is no mitigating this."

12 Rec-2831.

13 The unrefuted evidence submitted by Patrick Holt of R&H
14 Nursery and other farmers is that the delays in completing work,
15 overtime and employee cost increases caused by those delays, and
16 complicating an already complex logistical structure for commercial
17 production and sales will significantly increase the cost of farming.
18 In fact, the hearings officer did conclude that "agricultural products
19 have tight timelines for shipping." App-42.

1 In discussing what is depicted in Video entitled “Large Truck and
2 Farm Traffic on Cottrell Rd SB at Bluff,” Mr. Nerison explains:

3 “where a tractor using Cottrell Rd (coming from Bluff Rd),
4 which is the new route they will have to take as PWB is
5 closing off the current easement they use to reach their
6 Bluff Rd fields, encounters a dump truck hauling gravel.

7 The dump truck pauses, likely waiting to see if the tractor
8 will pull off the road which it cannot because of the very
9 wide implement it is pulling. The tractor can’t move over
10 because it would wipe out the mailbox on the side of the
11 road, and also the tractor driver can’t look behind him to
12 watch where the implements tires are and at the same
13 time look forward while driving. The dump truck
14 attempts to pass the tractor on the shoulder, driving over
15 a grass strip that borders a pasture (hopefully where no
16 water lines are running, as the dump truck weighs appx
17 75,000 pounds). When the dump truck driver realizes
18 there still isn’t enough room, he backs up and causes the
19 traffic behind him to also back up about 100 feet and pull
20 off into a gravel driveway. The tractor and the traffic

1 behind it pass, slowly, and then the southbound traffic is
2 able to pull back onto the road. This video is also
3 referenced in Surface Nursery's responses to the
4 suggested alternate route of Cottrell Rd to Bluff instead of
5 Carpenter for their farm traffic. In this instance, the
6 tractor encountered one dump truck and caused about a
7 5-minute delay."

8 Video 23, Rec-753.

9 Patrick Holt, president of R&H Nursery, explained that any delay
10 in moving equipment or employees increases the cost of farming in
11 the way of having to pay overtime, to hire more employees to get the
12 work completed, and lost revenue if orders cannot be timely filled
13 according to customer needs. Rec-3276-3278. More specifically, Mr.
14 Holt testified:

15 "The inability of employees to access the farm and the
16 restricted mobility of farm operations will have
17 devastating financial impacts ultimately resulting in
18 trees not being able to be managed properly and customer
19 orders not being prepared, loaded and shipped. When
20 employees are unable to get to work, production is halted.

1 When employee commute times are extended due to
2 delays, detours and closures on their usual routes to and
3 from work, they may seek work at a different nursery
4 where the commute is less stressful, resulting in loss of
5 work force which will negatively impact productivity. The
6 months when the most construction may be done on the
7 surrounding area are the same months that are typically
8 the busiest in the nursery industry. The impact from
9 reduced workforce efficiency and productivity will directly
10 impact R & H Nursery's bottom line.”

11 Rec-3280.

12 Again, testimony from a shipping coordinator, Amalia Bruley,
13 testified that the industry norm for nursery stock is to pay by the
14 mile and that special instructions for detours, delays and potential
15 construction conflicts could cost around \$200 per load or even more
16 for complex routes that require pickups at multiple nurseries.
17 Detours would affect the loading sequence of trucks and disrupt the
18 meticulous loading and unloading order required by each stop.
19 Nursery stock is time-sensitive, and delays can compromise quality.
20 According to this shipping coordinator, when the smaller

1 independent carriers become aware of the construction impacts to
2 the route system, farmer will likely be forced to rely on more
3 expensive national carriers that have historically added surcharges
4 of \$3000 to undesirable routes. Rec-774.

5 Regarding the intersection at Carpenter Lane and Cottrell Road,
6 R&H Nursery, which is located on Carpenter Lane, Surface Nursery,
7 and others have built their businesses in this area expecting less
8 than 14 am / 11 pm trips per day resulting in a delay at this
9 intersection of less than 10 seconds. Without mitigation,
10 construction of this facility will add 749 am / 749 pm peak hour trips,
11 adding 648-second delay, the equivalent of nearly 11 minutes for
12 every single time they enter this intersection during the peak hour.
13 With the imposition of a trip cap condition of approval, discussed in
14 greater detail below, the total number of vehicles allowed to pass
15 through this intersection will be 296 trips for the am and the pm
16 peak hours. A reasonable person could not view this 20-fold increase
17 in traffic necessary to construct this nonfarm use, taking into
18 account the time-sensitive nature of nursery farming transportation
19 demands, without concluding that this level of construction traffic
20 and in-road pipeline activity will have a sustained, important and

1 influential impact on how these farms are operating and create
2 influential increases in the cost of farming.

3 PWB farm expert does not evaluate the effect of a 15.6-second
4 best case scenario delay on R&H Nursery accepted farm practice,
5 which requires 10-15 employees daily to pass through the Carpenter
6 / Cottrell intersection when arriving at work, during the day as
7 employees transport tractors, equipment, trees, supplies and crew to
8 up to ten off-site fields, returning to headquarters for lunch and then
9 back to their work locations, returning again at the end of the day,
10 and when exiting the site at the end of the work day. In addition,
11 there are multiple other trips through that intersection in the course
12 of normal daily operations, including to/from headquarters for
13 additional supplies or repairs, deliveries, service providers, and
14 commercial trucks for shipping and receiving. This is dozens of trips
15 through the Carpenter / Cottrell intersection all experiencing delays
16 and causing a massive ripple effect throughout R&H's operation.

17 According to Mr. Nerison, every road that feeds into Lusted near
18 its nursery is planned for some kind of construction, closure, or to be
19 used as a detour route and will be flooded with an additional traffic
20 load, and:

1 “the interference ongoing and extensive road construction
2 and pipeline construction activities will cause to our
3 operation, including inbound and outbound, employees,
4 service providers, vendors, local deliveries, crew and
5 equipment mobility, and prospective customers visiting
6 the farm. Our nursery is located on Lusted Road between
7 Altman Road and Hosner. The only accesses to our farm
8 are in this stretch of road. Commercial shipping trucks,
9 employees, service vendors, crew transport and farm
10 equipment all have to pass through either the intersection
11 at Lusted & Hosner, Lusted & Cottrell, or Lusted &
12 Altman. These are all locations identified as impacted by
13 construction for either pipeline construction or road
14 ‘improvements’ to facilitate pipeline construction. If any
15 one of those intersection is closed or has a delay, traffic
16 will stack up quickly because there are no alternate
17 routes without significant re-routing prior to arriving at
18 the impacted intersection. Mr. Prenguber argues the point
19 that our entrances will not be closed, but he misses the
20 point that the roads to get there will be.”

1 Rec-757.

2 In explaining the ways in which PWB's construction scheme was
3 not equal to ordinary expected delays on public roads, Mr. Nerison
4 testified:

5 "Farmers cannot be expected to rearrange their accepted
6 farming practices and use alternate routes for 14 months,
7 just for one of many road segments impacted. That is
8 literally a 'change' to accepted, established farm practices.

9 This is significantly longer and much more disruptive
10 than any regular road closure due to construction,
11 weather, or an accident."

12 Rec-752.

13 The PWB's recommended detour for Ekstrom & Schmitt to travel
14 down 302nd where reduced visibility creates hazardous conditions
15 for slow moving farm traffic such as tractors pulling trailers will not
16 only create a significant change, it introduces an additional level of
17 risk. Rec-780-782.

18 Asking farmers to change their accepted route for accessing their
19 fields, even if it was not any longer, still requires significant change
20 under *Stop the Dump* at 461. (Paying farmers for their u-pick cherry

1 crop or funding liter removal before harvesting hay is a significant
2 change in farm practices). The same is true with PWB's suggestion
3 that farmers will know of the delays and detours by using trip
4 availability software. As Mr. Nerison again so aptly noted:

5 "It is NOT an accepted farm practice to check road
6 conditions on TripCheck or other GPS app before sending
7 equipment or crews to or from fields. Expecting farmers
8 and employees to do so adds more time to job duties and
9 requires that every driver have a smart phone, which is
10 not a requirement of employment at a farm."

11 Rec-753.

12 Moving beyond the impact from delays, there are points at which
13 intersection closure and the lack of a detour will require farmers to
14 reconfigure their internal circulation system:

- 15 • For the Sunshine Farm, road closures will require
16 reconfiguring the farm itself or the loading area, a
17 substantial change in farm practices that will come at a
18 significant cost. Rec-1160-1163.
- 19 • R&H Nursery has one entrance on Carpenter Lane for
20 employees, vendors, deliveries, and all farm equipment.

1 The loading area entrance is used for shipping and large
2 truck deliveries. There is one access on Holt property that
3 is used only if necessary due to inclement weather as it is
4 part of a residential property and not part of the farm. If
5 the property lessee were to change, this access would not
6 be available at all and therefore cannot be included in Mr.
7 Prenguber's evaluation of farm access points. The other
8 two access points on Carpenter Lane associated with the
9 property owned by Ron and Mary Roberts are the
10 driveway to the residence and have no through access to
11 the farm headquarters area. Rec-768.

- 12 • The Ekstrom & Schmidt Nursery will have to be
13 reconfigured when the pipeline work requires closure of
14 either the Dodge Park Blvd or Lusted Road because the
15 current farm practice is to maintain only one-way access
16 to each road. Rec-780-782.

17 Rather than respond to these highly detailed and specific
18 concerns, the Globalwise construction farm impact study, as well as
19 the cumulative impact summary, along with most of PWB arguments
20 on this point, focus entirely on conditions of approval that they

1 believe will mitigate impacts to the point of no longer being
2 significant. In response to concerns over road closures, the hearings
3 officer concludes that:

4 “if there is no detour, then the farm equipment will be
5 treated like emergency vehicles and flagged through the
6 construction zone, including having on-hand steel plates.

7 Condition 7.d.iii, page 171. I find that a reasonable
8 mitigation measure.”

9 App-41.

10 PWB did not test, nor did its long roster of expert consultants
11 hazard to explain the logistics and time associated with relocating
12 construction machinery and restoring the road surface through the
13 application of metal plates, the location for redirecting any lines of
14 non-farm traffic, how farm employees in passenger cars will be
15 distinguished for flag through, the location for redirecting any lines
16 of non-farm traffic, nor do the conditions of approval impose any
17 minimum timing obligation deemed necessary to avoid substantial
18 interference with farm practices. Rec-752. *Stop the Dump Coalition*
19 *v. Yamhill County*, 79 Or LUBA 459, 465 (2019).

1 Regarding the amount of construction added traffic, PWB
2 recommended conditions set forth a complex and tangled “spaghetti
3 code” of conditions which are so complicated and over-wrought that
4 they will be impossible to perform. For example, the conditions
5 outlining the timing for in-road work that resemble a highly
6 choreographed can-can rather than traffic improvements.

7 The best example of this relates the Transportation Demand
8 Management (TDM) measures that again, require PWB to achieve
9 something greater than 81.2% reduction in the peak hour PWB
10 commuter vehicle traffic.¹³ The TDM strategies that PWB identified
11 included some combination of the following:

¹³ PWB substantively addresses TDM measures at three points during the proceeding. The first in it written submitted during the hearing in June, 2023 where PWB’s engineer reports that the operational capacity for Carpenter Cottrell intersection is 387 peak hour trips. Rec-3488. PWB proposed to address this limitation by redirecting traffic to the Bluff Road access or a commitment to shift start and end times, a commuter shuttle and incentives for carpooling. Rec-1941. PWB experts assured everyone that 387 vehicles per hour represented a conservative estimate of the amount of traffic necessary to meet the minimum County standards. During the initial open record period after it was clear that Bluff Road could not serve as a secondary non-emergency access to the facility, PWB analyzed the traffic assuming one-access. Rec-1938. In this study, PWB’s engineer determined that the trip cap should be 296 peak hour trips. Again, PWB expert maintain that this one-access analysis is also conservative. Rec-1940. It was not until the final

- 1 ● Vanpooling – a volunteer program where a 15-passenger
2 commuter vans will be given to contractors who agree to
3 pick up and transport a minimum of 8 people from their
4 homes to the work site every day. Rec-564. For a rough
5 sense of scale, this would take 54 vans with 9 people each
6 living in close proximity and with complementary work
7 tasks to make the voluntary vanpool make sense.
- 8 ● Offset Shifts – adjust “the start time of primary
9 trades...to begin and end 30 to 60 minutes earlier than
10 that of other project trades. Rec-565. Without a
11 spectacularly successful volunteer carpooling program,
12 which seems unlikely, PWB construction workers will
13 have staggered shifts starts in 3-4 different hours,
14 meaning other trades may not be on site during up to half
15 of their effective work day.
- 16 ● Off-site parking with shuttle bus – Although the location
17 of the parking area is not known, PWB reports that its

open record period that PWB updated the TDM plan identifying for the first time how this trip reduction would be achieved. This was nothing more than an exercise in optimism without any demonstration of feasibility.

1 contractors have identified one or multiple parking lots
2 that would accommodate at least 300 vehicles,¹⁴ located
3 on private land within an urban growth boundary.

4 Notwithstanding this level of detail in the record, the condition of
5 approval proposed by PWB and adopted by the hearings officer do
6 not impose these same requirements. Summarized for brevity,
7 Condition D(4) requires that before beginning construction, PWB
8 must submit to the County a TDM plan that must: (1) address traffic
9 management to comply with a 296 vehicle cap, (2) use tube counters
10 to ensure the threshold is met (3) “identify TDM strategies” to reduce
11 trip demand at peak hours and if they include the use of shuttle
12 buses, the pickup and drop-off location must be outside of the project
13 study area and on private property; (4) forecast traffic demand in
14 advance so that the appropriate TDM strategy is in place in advance;

¹⁴ PWB projects that a 300-space lot is the maximum size that they would need if they assume “minimal” reductions from the other TDM strategies. Rec-565. If this is correct, PWB assumes that staggered shifts and volunteer vanpooling for 166 trips. If staggered shifts were employed for “primary trades,” this would still require that 100 workers agree to volunteer van pool (10 vans) to work every day.

1 and (5) provide monthly reports to the County demonstrating
2 compliance in advance. App-88.

3 The lack of detail in this condition is insufficient to satisfy the
4 LUBA's requirements for achieving deferred compliance. First, the
5 Hearings Officer made no reference to the need for TDM measures
6 and offers no analysis of whether the proposed measures are
7 sufficiently detailed or feasible to accomplish. Although PWB offers
8 additional findings claiming for the first time that: "Reducing
9 volumes using TDM strategies is feasible," this statement was not
10 adopted by the hearings officer as part of his decision. App-125.
11 *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992). Since
12 the hearings officer did not evaluate the TDM measures for
13 feasibility and, in fact, any evaluation of whether the TDM measures
14 will serve to reduce impacts to avoid having a significant impact on
15 farm practice and costs, the hearings officer had to provide for the
16 same participatory notice and right to appeal. *Gould v. Deschutes*
17 *County*, 216 Or App 150, 162, 171 P3d 1017 (2007).

18 **4. Conclusion**

19 In conclusion, the hearings officer interpreted and applied the
20 farm impact test of MCC 39.7515(C), as well as the statutory test of

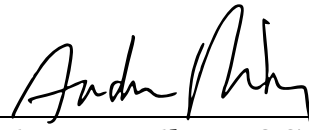
1 ORS 215.275, to require farmers to accommodate a massive influx of
2 construction-related nonfarm traffic that will exist for so many years
3 that it will significantly but also permanently change how nursery
4 farmers conduct nursery stock operations and increase the cost of
5 farming. The hearings officer failed to engage in the rigorous farm-
6 by-farm analysis of cumulative impacts required by *Stop the Dump*,
7 or to indicate any contemplation of the detailed evidence submitted
8 by farmers, whom the hearings officer deemed to be most credible
9 about existing farm conditions. For these reasons, this decision must
10 be remanded.

11 **III. CONCLUSION**

12 Intervenor-petitioner requests that LUBA reverse the county's
13 decision based on the first assignment of error. In the alternative,
14 and on the bases of the remaining assignments of error, intervenor-
15 petitioner requests that LUBA remand the county's decision because
16 it misconstrues the applicable law and lacks adequate findings based
17 on substantial evidence. OAR 661-010-0071.

18 DATED: July 5, 2024.

Respectfully,



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CERTIFICATE OF FILING AND SERVICE

I certify that on the date indicated below, I filed the foregoing corrected petition for review with the Land Use Board of Appeals at the address listed below by first class mail.

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I certify that on the date indicated below, I mailed a copy of the foregoing document by first class mail and provided a copy by email to the parties listed below.

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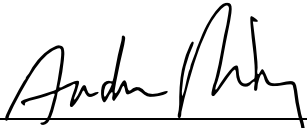
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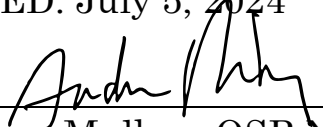
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the 11,000-word word-count limitation in OAR 661-010-0030(2)(b), and the word count of this brief is 10,971 words.

I certify that the size and type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

DATED: July 5, 2024



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