

BEFORE THE MARION COUNTY BOARD OF COMMISSIONERS

An Appeal of an Administrative Decision of
the Marion County Hearings Officer (County
Case no. 25-026).

APPLICANT'S NOTICE OF APPEAL
PURSUANT TO MARION COUNTY CODE
SECTION 17.122.120

I. SUMMARY

This firm represents Denise Burham (the "Applicant"). The Applicant is the applicant for an administrative determination concerning whether Applicant's agricultural fill operation is a farm use on a 129.45-acre property in an EFU (Exclusive Farm Use) zone located at 21875 Butteville Road NE, Aurora, Oregon (the "Property"). Marion County planning staff denied the Applicant's administrative review application which the Applicant appealed to the County Hearings Officer who upheld the denial via her February 17, 2026, Decision (the challenged "Decision"). The Hearings Officer's Decision is attached as **Exhibit 1**. This is an appeal of the Decision pursuant to Marion County Code ("MCC") section 17.122.120.

II. APPEAL TO THE COUNTY BOARD OF COMMISSIONERS

MCC 17.115.110 Determinations and Administrative Reviews

G. MCC 17.122.070 through 17.122.130 shall apply to any appeals from the decision of the hearings officer.

RESPONSE: The applicable provisions of MCC 17.122.070 through 17.122.130 are addressed below. The only applicable provision is MCC 17.122.120, because the other MCC provisions concern variance applications, decisions, call-up actions by the County Commissioners, and vesting of variance decisions among other provisions that are not applicable to an appeal of a Hearings Officer's denial of an administrative determination to determine whether a use is a farm use.

MCC 17.122.120 Appeal to the board

A. An appeal may be taken to the board by any person, firm, or corporation, or by an officer, department, board or commission of any public corporation or political subdivision of the state of Oregon, aggrieved or affected by the decision of the planning commission or hearings officer on an application for a variance. An appeal must be filed with the county clerk within 15 days from the date of mailing of notice of the decision of the planning commission or hearings officer.

B. The appeal shall be filed in duplicate and one copy thereof shall be forwarded immediately by the clerk to the board. The appeal shall state wherein the planning commission or hearings officer failed to conform to the provisions of this title.

RESPONSE: The Applicant is the Property owner who was aggrieved by the Hearings Officer's denial because the Hearings Officer misconstrued the applicable law and the Decision is not supported by substantial evidence. This appeal is timely filed within 15 days of the date of the

mailing of notice of the Decision of the Hearings Officer on February 17, 2026. The Applicant is filing this notice of appeal in duplicate as required by the MCC.

The Hearings Officer failed to conform to the provisions of this title by basing her denial on several erroneous findings.

- The Hearings Officer decision was not responsive to the request by Applicant to determine whether deposition of soil constitutes an accepted farm practice. Instead, the Hearings Officer incorrectly places a burden of proof on the Applicant related to “applicable criteria” as if the Applicant was applying for a permit. The Applicant was not applying for a permit, and as such, the Hearings Officer incorrectly weighed the evidence before her. The Hearings Officer also incorrectly placed a burden upon the Applicant to prove that her activities were an accepted farm practice.
- The Hearings Officer incorrectly concluded that the use was a solid waste disposal activity because of a single incidence of countertop material being mixed in with a single soil load. Rather, the evidence demonstrates that the soil being deposited was being dewatered and used for farming. Regardless of the soil being applied to the farm use has incidental debris (as most soil does), the Applicant is not permanently disposing of solid waste. The Hearings Officer also wrongly considers whether there are contaminants in the soil, which question is irrelevant to whether or not the soil can, in fact, be used for farming.
- The Hearings Officer incorrectly concluded that the “principle use” of the farm soil deposition is not an accepted farm use, despite the uncontested evidence that the soil, once dewatered, is in fact used for farming. In so doing, the Hearings Officer wrongly relied on the fact that the agricultural fill activity is supported by appropriate infrastructure to ensure that the fill activity can be conducted safely. The Hearings Officer also incorrectly focused on the means by which soil is delivered and accepted instead of the fact that the principle goal of the Applicant is land leveling and agricultural fill (which purpose the Hearings Officer acknowledges).
- The Hearings Officer incorrectly concludes that the Applicant must prove that the use of a dewatering pit to accept farm fill a use separate from the agricultural fill activity that must be proved to be “customarily practiced.” The definition of accepted farm practice has never been that narrowly drawn.
- The Hearings Officer incorrectly concluded that the use of soil for mitigation of erosion, expanding arable farmland, land leveling, improving access across farmland is “secondary” to the acceptance and dewatering of the soils ultimately used for those purposes.
- The Hearings Officer correctly found that depositing soil on farmland to mitigate erosion, level and expand arable farmland, and improve access across the farmland is an accepted farming practice, but incorrectly concluded that the soil’s transportation by Vactor trucks affects whether the agricultural fill is an accepted farm practice. She reaches this conclusion because “there is no evidence in the record demonstrating that receipt of

hydraulic vacuum extraction slurry is a customary agricultural practice.” How the soil is transported to a farm is an arbitrary distinction and utterly unrelated to the question of whether that soil can and will be used for farming. Stated simply, the means and methods of conveyance of soil to a farm is irrelevant to the question of whether its deposition constitutes an accepted farm practice.

- The Hearings Officer incorrectly determined that if a farmer receives compensation for the deposition of soil, the agricultural fill activity no longer constitutes an accepted farm use. The fact that the Applicant was paid by those depositing the soil is irrelevant. Whether farmers pay for soil, get it for free, or are compensated for receiving it is not relevant if the purpose for depositing the soil on a property is to support farming activities.
- The Hearings Officer incorrectly invented the category of “trench slurry,” which is not a separate category of soil. Regardless, the Hearings Officer also erred in opining that the character of the soil matters to the question of whether its deposition is an accepted farm practice; the record demonstrates that this soil is being used in a farming activity.
- The Hearings Officer incorrectly considered potential impacts to Ryan Creek. While this may be an environmental concern, environmental impacts to creeks are not a factor in whether an activity constitutes an “accepted farm activity.”

III. CONCLUSION

The Board of County Commissioners can find that this Appeal is properly made, as explained above. Additional argument and evidence shall be provided in writing prior to the Hearing on this Appeal.

BEFORE THE MARION COUNTY HEARINGS OFFICER

In the Matter of the Application of) Case No. 25-026
Denise Burnham)
ADMINISTRATIVE REVIEW

ORDER

I. Nature of the Application

This matter came before the Marion County Hearings Officer on the Application of Denise Burnham for an administrative review to determine whether operation of a site for placement of fill from hydraulic vacuum extraction is a farm use on a 129.45-acre property in an EFU (Exclusive Farm Use) zone located at 21875 Butteville Rd NE, Aurora (T4S; R1W; Section 8; Tax lot 200).

II. Relevant Criteria

The standards and criteria relevant to this Application are found in the Marion County Code (MCC), Title 17, especially MCC 17.136 (Exclusive Use Zone) and MCC 17.110.223 (Definition of Farm Use).

III. Hearing

A public hearing was held on this matter on December 18, 2025. At the hearing, the Planning Division file was made a part of the record. The following persons appeared and provided testimony:

- | | | |
|----|-----------------|---|
| 1. | Austin Barnes | Marion County Planning Division |
| 2. | Thomas Benke | Attorney for Applicant |
| 3. | Denise Burnham | Applicant |
| 4. | Cheyne Fobert | Witness in Favor of Application |
| 5. | Joseph Schaffer | Jordan Ramis / Witness in Opposition to Application |
| 6. | Jamie Howsley | Attorney for Opponents Judy and Scott Chambers |
| 7. | Ben Williams | Witness in Opposition to Application |
| 8. | Jim Johnson | Witness in Opposition to Application |

No objections were raised to notice, jurisdiction, conflict of interest, or to evidence or testimony presented at the hearing. No documents were entered into the record as exhibits.

An open record period was requested and permitted. The following documents were received during the first open record period:

December 22, 2025: Submission from Jim Johnson, Working Lands Policy Director, 1000 Friends of Oregon

December 23, 2025: Statement by Deanna Nibler

December 23, 2025: Submission from Jamie Howsley, Attorney for Scott and Judy Chambers, including email from Kevin Fenn, Oregon Department of Agriculture and article from Salem Statesman Journal

The following document was received during the second open record period:

January 2, 2026: Submission from Thomas R. Benke, Attorney for Applicant

IV. Executive Summary

Applicant requests an administrative review to determine whether operation of a site for placement of fill from hydraulic vacuum extraction is a farm use on a 129.45-acre property in an EFU (Exclusive Farm Use) zone located at 21875 Butteville Rd NE, Aurora.

Marion County Planning denied the application based on the determination that the primary purpose of the use was to obtain profit from the disposal of industrial and commercial Vactor truck waste, as opposed to farm use. Marion County Planning determined Applicant has created a new solid waste disposal site, which is not permitted in Marion County.

Applicant argues that she did not apply for review of existing site features. Applicant argues that she applied for Administrative Review for her prospective request to fill and contour the property with hydraulically excavated soils for farm use, including erosion mitigation, filling low spots, expansion of arable areas, and improved farm access.

Applicant and opponents dispute the primary purpose of filling farmland with material, including soils that have been hydraulically excavated. The determinative issue is whether the current and proposed employment of the land constitutes "farm use" under ORS 215.203 and MCC 17.110.223.

The record demonstrates that the dominant use of the site during the relevant period was the compensated receipt and deposition of off-site trench slurry rather than agricultural production. Even if the primary purpose of the operation can be considered the construction and maintenance of equipment and facilities for raising, harvesting, and selling crops, the receipt of hydraulic vacuum extraction is not a reasonable and accepted farm practice such that it is considered a farm use.

The proposal therefore does not qualify as farm use and is not permitted in the EFU zone. Applicant's application for administrative review for placement of fill from hydraulic vacuum extraction as a farm use is DENIED

V. Findings of Fact

The hearings officer, after careful consideration of the testimony and evidence in the record, issues the following findings of fact:

AR 25-026 - ORDER
Burnham
Page 2

1. The subject property is designated Primary Agriculture in the Marion County Comprehensive Plan and zoned EFU (Exclusive Farm Use). The intent of both the designation and zone is to provide areas for continued practice of commercial agriculture and to protect commercial agricultural operations.
2. The subject property is located on the western side of Butteville Rd NE, approximately 900 feet north of its intersection with Ehlen Rd NE. The property contains two stick-built dwellings, one built in 1908 and the other in 1933. The parcel also contains multiple accessory farm structures. The parcel and dwellings are considered legal for land use purposes.
3. Surrounding properties are all zoned EFU and in active farming operations, with some containing dwellings.
4. The Soil Survey of Marion County, Oregon indicates that the subject parcel consists of 97.1% high-value soils.
5. Applicant requests a determination whether operation of a site for placement of fill from hydraulic vacuum extraction is a farm use. The Application is for specifically for an administrative review to determine whether operation of a site for placement of fill from hydraulic vacuum extraction is a farm use. Applicant also argues in the alternative that the fill from hydraulic vacuum extraction, a "dewatering activity" is a conditional use which may be permitted in an EFU zone.
6. Various agencies were contacted and given an opportunity to comment. The following comments were received from various governmental agencies, non-profit organizations, and individuals:

Marion County Septic commented: "Per OAR 340-07-0130(12), "Initial and repair absorption areas must NOT be subject to activity that is likely to adversely affect the soil or functioning of the septic system. Including but not limited to: Vehicular traffic, covering the area with asphalt or concrete, filling, cutting, or other soil modification." Any existing drainfield and future repair area should not be filled and should be delineated from all other site manipulation."

Marion County Code Enforcement provided comments requesting denial stating that they believe this to a commercial dumping operation rather than a farm use.

Marion County Building Inspection commented: No Building Inspection concerns. Permit(s) may be required to be obtained if development of structures and/or utilities installation is proposed over the proposed fill soil pit locations. A compaction report of the soils may be needed to prove the density of the fill material is sufficient to support a structure. It is advised to obtain this compaction report for future use if structures are to be developed in these locations.

1000 Friends of Oregon commented requesting denial of the permit asserting that use is not a farm use and rather a commercial dumping operation. The comments from 1000 Friends of Oregon can be found in full in the case file.

Friends of French Prairie commented requesting denial of the permit asserting that use is not a farm use and rather a commercial dumping operation. In the comments, Friends of French Prairie submit pictures of the subject property with the dumping pit. Some pictures appear to show countertop waste being dumped into the pit. This would contradict the statements made by the applicants that only dirt and water have been dumped in their pit. The pictures show bright white material that appears to be ground up or in small chunks, similar to countertop waste that was dumped at a pit on another Marion County property associated with a disposal site. Friends of French Prairie's comments can be found in full in the case file.

Jamie Howsley of Jordan Ramis Law Firm represents a neighbor, the Chambers Family, and submitted a letter requesting denial of the permit asserting that use is not a farm use and rather a commercial dumping operation. They also submitted enforcement letters against the property from DEQ, Oregon Water Resources Department and Marion County Code Enforcement. The letters from DEQ detail numerous violations related to water quality and hydraulic oil spills. The letter from Oregon Water Resources Department states that they are in violation of ORS 537.130(1) and 537.130(2) for constructing a earthen dam and storing water without a water right.

Additionally, Mr. Howsley submitted two videos, one of the muddy, turbid water of Ryan Creek due to the contamination by the pit and a second of a pump actively pumping water from the pit into the Ryan Creek wetlands area. Their comments can be found in full in the case file.

Michael McCauley commented requesting denial of the permit asserting that use is not a farm use and rather a commercial dumping operation. He also raises concerns about the construction of the berm and the damage it would cause if it were to fall and flow into Ryan Creek. The comments can be found in full in the case file.

All other contacted agencies either failed to comment or stated no objection/concern to the proposal.

7. Applicant is requesting a determination as to whether operation of a site for placement of fill from hydraulic vacuum exaction is a farm use.
8. In 2023, Applicant excavated and constructed a large pit on her property, measuring approximately 200 feet long by 150 feet wide and built in a circular shape. The pit is approximately 20-30 feet deep and was made by substantially digging out a gully on the subject property's filbert orchard's western edge and extending the digging into the orchard and flat areas of the property. The pit and associated berm take up approximately 0.8-1.0 acres.

9. An asphalt access road was constructed to access the pit site. The access road is approximately 3,570 feet long and leads to 6 dumping bays marked by painted white lines on the ground and yellow safety railings to denote the edge of the pit. After completion, Vactor trucks employed by utility companies such as NW Natural, PGE, ProVac and Poltelco began dumping at the site.

The Vactor trucks dump a slurry made of water and dirt which is the by-product of hydraulic excavation. High pressure water is used to loosen dirt and dig trenches/holes while an industrial vacuum sucks the slurry into a holding tank on the truck. The trucks then travel from the jobsite to the subject property and dump the slurry into the pit.

Applicant received compensation for each truck that was dumped and based on evidence submitted in the record, receiving \$300 per load and receiving 238 loads from November 2023 to January 2024.

10. Evidence in the record includes photographs suggesting that materials other than soil and water may have been deposited. The pit was excavated before the fill was received. Applicant states that “the sources of clean fill placed at the property will be hydraulically excavated soil collected regionally (most commonly from utility trenches) and transported to the farm by Vactor trucks.

Applicant states that because Vactor trucks soils are inherently watery, the soils may be placed initially in the gully or “pit” created by prior construction of the berm at the northwest corner of the property, which the soils will be possibly dewatered before being moved elsewhere across the site as needed to achieve the stormwater control objectives of the clean fill activity.

11. DEQ and OWRD issued notices of violation concerning water discharge and dam construction. However, on September 3, 2025, the DEQ withdrew the Order directing Ms. Burnham to stabilize or decommission the berm and pit on the property.
12. Friends of French Prairie submitted photos of the above companies dumping at the site enough to be used in construction) being dumped into the pit by Pacific Northwest Marble and Granite on December 12, 2023. The photos show white material leaving the truck and accumulating in the pit and around the edges of the truck where it sits on the asphalt above the pit.
13. Applicant argues that the “pit” (resultant of the berm), the “haul road,” and the asphalted “turnaround area” should not be considered in her application for administrative review of a prospective request to fill and contour the property with hydraulically excavated soils for farm use. Applicant suggests that an Administrative Review of land-use compatibility is inherently prospective, and evaluates whether a described activity, if undertaken as proposed, is allowable under the zoning ordinance. Applicant states that these features, specifically, the pit, haul road, and turnaround area are not before the County for review and are not included in the scope of the application.

VI. Additional Findings of Fact and Conclusions of Law

1. Applicants have the burden of proving all applicable standards and criteria are met. As explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390 at 394-95 (1987):

“Preponderance of the evidence” means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the burden of proof rests. (Citation omitted.)

Applicants must prove, by substantial evidence in the whole record, that it is more likely than not that each criterion is met. If the evidence for any criterion is equally likely or less likely Applicants have not met their burden, and the application must be denied. If the evidence for every criterion is in Applicants’ favor, then the burden of proof is met.

2. The subject property is zoned Exclusive Farm Use. Applicant states that the purpose of the operation is to fill in low lying portions of their property to improve drainage and expand the property’s farmable area. Applicant proposes to fill parts of the farmland with topsoil that has been hydraulically excavated from utility trances and similar shallow excavations to mitigate erosion, fill low spots, and improve access across her farm. Applicant further states that after the pit area fills; she will farm on top of it. Applicant argues that the operations is a “farm use” as the term is defined in MCC 17.110.223 and ORS 215.203(2)(a).
3. MCC 17.110.223 provides the definition of farm use as taken from ORS 215.203(2)(a):

As used in this section, "farm use" means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof "Farm use" includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. "Farm use" also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding cultivation, maintenance and harvesting of aquatic, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. "Farm use" includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. "Farm use" does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees or land described in ORS 321.267 (3) or 321.824 (3).

MCC 17.110.223 defines farm use to include the use of land for the primary purpose of obtaining profit in money by harvesting and selling crops, and to include the on-site construction and maintenance of the facilities.

4. Marion County Planning determined that because the operation's primary purpose was in obtaining profit from waste disposal, Applicant had created a new solid waste disposal site, which is not permitted in Marion County. New solid waste disposal sites are not permitted in Marion County pursuant to MCC 17.136.050 (I).

Only expansions of lawfully established sites can be permitted. Marion County determined that the proposed operation does not fall into a lawfully permitted site, as no prior land use permits were applied for and the site was not operating prior to county's comprehensive plan being acknowledged in 1983. On that basis, the County determined that the proposed use is not a farm use.

MCC 17.120.315 (A), (C), (D) and (E) defines "dispose" "solid waste" "solid waste disposal sites" and "waste":

A. "Dispose" or "disposal" includes accumulation, storage, collection, transportation, and disposal of solid wastes;

C. "Solid waste" means all putrescible and nonputrescible wastes, whether in a solid or in a liquid form, except liquid-carried industrial wastes or sewage or sewage hauled as an incidental part of a septic tank or cesspool cleaning service, but including garbage, rubbish, ashes, sewage sludge, street refuse, industrial wastes, swill, demolition and construction wastes, abandoned vehicles or parts thereof, tires, discarded home and industrial appliances, manure, vegetable or animal solid or semi-solid wastes, dead animals and other discarded solid materials;

D. "Solid waste disposal site or sites" means any land used for disposal of solid wastes, including, but not limited to, dumps, landfills, sanitary landfills, incinerators, and composting plants, but not including a landfill site which is not used by the public either directly or through a disposal service and which is used by the owner or tenant thereof to dispose of sawdust, bark, soil, rock, building demolition material or nonputrescible industrial waste products resulting from the process of manufacturing;

E. "Waste" means useless, unwanted or discarded materials.

In support of the determination, Marion County noted that the evidence in the record also shows more than soil and water were dumped in the pit. Evidence indicates that countertop material was dumped in this pit, and that the material was not used just to level and fill existing low areas on the property to make it suitable for farming, the "pit" was deeply excavated in order to make room for the fill material to be received.

Applicant argues that the "countertop material" was actually granite that is similar to rock or clean fill, which would be used to fill low areas as part of land leveling.

5. Applicant states that she began this operation to fill in low lying lands on their property so they could create more farmable areas and mitigate erosion. Applicant also states that they only receive clean fill from companies doing excavation work. Provided in the definition of farm use is the sentence: *"Farm use" includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection.* "

It is common practice for farmers to receive fill dirt. Fill dirt is often offered for free, or property owners pay for it. What is less common are companies paying a property owner to dispose of their extra dirt. The evidence indicates that 238 loads were received in a three-month period, averaging nearly 80 loads per month.

Applicant argues that the receipt of compensation does not negate the "farm use." Applicant argues that it does not matter if "disposal" is a purpose because the primary purpose is farming.

Comments in support of the application argue that Applicant has a right to farm and use good farming practices, and that maintaining tillable soil and leveling the fields is a part of good farming practices. Comments in support of the Application acknowledge that there has been "considerable investment to create a safe environment for trucks to dump their fill" and that compensation "for that investment is only fair." (Statement of F. John Rissberger, John Rissberger Nursery).

Applicant argues that she is essentially improving the land for future farming. Applicant actively farms the property and argues that the fill is being placed for the express purpose of expanding arable area and mitigating erosion in service of orchard productivity.

Applicant's request addresses four "uses" in her request: Mitigating erosion, filling low spots in arable areas, expanding arable areas, and improving access across the farm. Applicant argues that these are "textbook examples of 'farm use' under ORS 215.203 and MCC 17.110.680."

6. ORS 215.203(2)(c) defines "farm use." Under ORS 215.203(2)(a), "farm use" requires current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or other listed agricultural activities. The statute does not independently define "accepted farming practices," but Oregon case law requires that the activity be directly and functionally related to agricultural production.

The analysis requires consideration of two issues: First: What is the primary purpose in filling the farmland with material, including soil, that has been hydraulically excavated from utility trenches and similar shallow excavations? Is the primary purpose to mitigate erosion, level the farmland, improve farm access and increase tillable acreage for enhanced profit from farming? Or, is the primary purpose to obtain profit from the disposal of industrial and commercial Vector truck waste. Second: Even if the primary purpose of the operation can be considered the construction and maintenance of equipment and facilities for raising, harvesting, and selling crops, is receipt of hydraulic

vacuum extraction a reasonable and accepted farm practice such that it is considered a farm use.

7. Marion County Planning characterized the operation as functioning similarly to a disposal or materials handling site. The Hearings Officer does not sit in review of a solid waste permit application and does not base this decision on whether the site meets the technical definition of a “solid waste disposal site.”

However, the definitions contained in MCC 17.120.315 provide context for understanding the functional nature of the activity. The record demonstrates that materials generated as by-products of off-site construction activity were transported to the subject property for unloading and deposition. The infrastructure constructed—paved haul road, marked dumping bays, and a large, excavated pit—facilitated repeated receipt of truckloads of material.

These characteristics inform the land use characterization analysis. The activity more closely resembles a materials receiving and deposition operation serving off-site construction activity than agricultural production or soil redistribution incidental to farming.

This characterization is relevant solely to determining whether the activity qualifies as farm use under ORS 215.203. It is not a determination that Applicant is operating a regulated solid waste facility.

MCC17.120.315 (A), (C), (D) and (E) defines “dispose,” “solid waste,” “solid waste disposal sites,” and “waste”:

A. “Dispose” or “disposal” includes accumulation, storage, collection, transportation, and disposal of solid wastes;

C. Solid waste” means all nonputrescible wastes, whether in a solid or in a liquid form, except liquid-carried industrial wastes or sewage or sewage hauled as an incidental part of a septic tank or cesspool cleaning service, but including garbage, rubbish, ashes, sewage sludge, street thereof, tires, discarded home and industrial appliances, manure, vegetable or animal solid or semi-solid wastes, dead animals and other discarded solid materials;

D. “Solid waste disposal site or sites” means any land used for disposal of solid wastes, including, but not limited to, dumps, landfills, sanitary landfills, incinerators, and composting plants, but not including a landfill site which is not used by the public either directly or through a disposal service and which is used by the owner or tenant thereof to dispose of sawdust, bark, soil, rock, building demolition material or nonputrescible industrial waste products resulting from the process of manufacturing;

E. “Waste” means useless, unwanted or discarded materials.

Applicants state that they began this operation to fill in low lying lands on their property so they could create more farmable areas and mitigate erosion. They also state that they only receive clean fill from companies doing excavation work. Provided in the definition of farm use is the sentence: "Farm use" includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection." It is common practice for farmers to receive fill dirt. Often it is offered for free, or property owners pay for it, as a method for construction sites to get rid of extra dirt and keep it in the local area.

However, the evidence tends to indicate that the Applicant's facility functions like a solid waste facility, where the actual waste, or soil in this case, is useless or unwanted material and the value is in the disposal and storage of it.

Marion County Planning's determination is factually supported: the pit was excavated, Applicant built paved dumping bays, there was regular truck traffic, and fees were paid by waste generators. These facts tend to demonstrate that the site was likely developed for waste receipt on an industrial scale, and that the economic purpose of the operation is disposal. Marion County determined that the Applicant's property functions like a solid waste facility, where the actual waste, or soil, is useless or unwanted material, and the value is in the disposal and storage of the waste material. Marion County determined that the primary purpose of the property appeared to be obtaining a profit from the disposal of industrial and commercial Vector truck waste, and that this use does not constitute farm site, which is not permitted in Marion County under MCC 17.136.050(I).

The cumulative picture appears to support the determination that the Applicant's primary purpose in constructing the facility is to obtain value in the disposal and storage of waste material. The functional characteristics of the activity resemble those of a disposal or materials handling operation rather than agricultural production.

8. Comments submitted by Applicant's neighbors posit that the proposed "land leveling" is farm use. Applicant also correctly notes that the economic structure of the transaction is not dispositive. However, the primary functional use of the site during operations is the receipt of off-site excavated materials, dewatering operations, and infrastructure to allow truck access and staging.

The importation, treatment, and placement of off-site materials is not itself the raising or harvesting of crops, nor is it a facility subordinate and customarily provided in conjunction with farm use. Rather, it is a waste handling and fill activity serving off-site development.

LUBA has consistently held that activities must be directly and primarily related to agricultural production to qualify as farm use. Where the dominant purpose of the activity is non-farm in nature, incidental agricultural benefit is insufficient.

The creation of additional arable land is secondary and contingent. The record does not quantify acreage gained or demonstrate that the activity is necessary for farm viability.

The determinative question is not whether land leveling can constitute farm use. It often can. The question is whether the current employment of this land, as demonstrated by the record, is primarily agricultural production or the compensated receipt and deposition of off-site trench slurry. The evidence of infrastructure, scale, compensation, and third-party waste generation demonstrates that the dominant use during the relevant period was materials handling rather than crop production. Accordingly, the proposal does not constitute "farm use" under ORS 215.203.

9. The Hearings Officer recognizes the applicant's argument that the primary purpose of the proposal is agricultural land leveling and increased arable acreage. Applicant asserts that grading and soil placement are routine agricultural activities and that the dewatering and placement of hydraulically excavated soils is merely the chosen method of achieving that land improvement.

In deference to the Applicant and for purposes of this section only, the Hearings Officer assumes *arguendo* that Applicant's primary objective is land leveling for agricultural production. Even under that assumption, the proposal does not qualify as a permitted farming practice.

Even if the primary purpose of the operation can be considered the construction and maintenance of equipment and facilities for raising, harvesting, and selling crops, the Applicant must also establish that the receipt of hydraulic vacuum extraction a reasonable and accepted farm practice such that it is considered a farm use.

10. Applicant bears the burden of establishing that importing and dumping off-site Vactor truck trench spoils as the means of achieving land leveling is generally accepted, customary, reasonable and typical of farms of similar size and type.
11. Jim Johnson, Working Lands Policy Director for 1000 Friends of Oregon testified that the Vactor truck dump is not a farm use. Mr. Johnson testified that an activity that is not a customary farm practice cannot constitute a farm use as defined in ORS 215.203(2)(a).

Kevin Fenn, Water Quality and SWCD Program Manager, Oregon Department of Agriculture writes that in regard to regulation under the Agricultural Water Quality program, the ODA makes decisions on what agricultural activities are and what constitutes agricultural fill. For either, the activity must be a normal and accustomed practice. The put site would not be considered an agricultural activity. Fill or placement of material could be considered agricultural depending on the situation.

Mr. Fenn's statement is consistent with Mr. Johnson's testimony.

Mr. Johnson also stated that elements of the Agricultural Water Quality statute administered by the Oregon Department of Agriculture (ODA), which defines "farming practices" and Oregon's Right to Farm statute is instructive as to what should be considered a farming practice. ORS 561.191(1) instructs the ODA to development and implement a water quality program that directly regulates "farming practices as defined

in ORS 30.930. ORS 30.930-.947 is commonly referred to as Oregon's Right to Farm law. The definition of "farming practice" in the Right to Farm law, established that a farming practice, amount other things (1) is or may be used on a farm of similar nature; (2) is a generally accepted, reasonable and prudent method for the operation of a farm to obtain a profit in money; (3) Is or may become a generally accepted, reasonable and prudent method for the operation of a farm to obtain a profit in money; and (4) Is done in a reasonable and prudent manner.

The record does not demonstrate that construction of asphalt dumping bays are customary or typical agricultural practices. The record reflects that the infrastructure was constructed to accommodate repeated dumping. The scale, infrastructure, and compensation structure are not characteristic of ordinary land leveling or soil redistribution incidental to farming.

Applicant states in the Application and supporting presentation that the material dumped by the Vactor truck operators is "clean fill." However, the record does not provide sufficient evidence to determine that the Vactor trucks are depositing "clean fill."

The record supports that the hydraulic vacuum extraction is a slurry of soil, water, subsurface material from trenching, and has the potential for underground contaminates. The record supports that the material is generated off-site (and from metropolitan and/or industrial areas), mechanically removed, and transported for disposal.

Without testing each shipment as it arrives on site, it is impossible to determine if the fill is clean or not. There is not a process in place to ensure testing (unless the site is established as a solid waste disposal site and permitted accordingly). Because of the risk of potential contaminants, depositing the sludge into the high value soils of EFU land cannot be said to be a reasonable or an accepted farm practice.

There is no evidence in the record demonstrating that receipt of hydraulic vacuum extraction slurry is a customary agricultural practice. The record contains no substantial evidence that the excavation of a pit and acceptance of vacuum-extracted waste from third-party commercial generators is a practice customarily used by commercial farmers; is recognized by agricultural authorities as a soil preparation or crop production method; or is commonly undertaken in the ordinary course of agricultural production.

The fact that soil is ultimately spread on farmland does not transform the importation and dumping into an accepted farming practice.

Accordingly, the placement of vacuum-extracted fill does not constitute farm use under ORS 215.203.

12. MCC 17.110.223 defines "farm use" consistent with ORS 215.203(2)(a), requiring the current employment of land; for the primary purpose of obtaining a profit in money; through raising, harvesting, and selling crops or other agricultural activities; and activities that are agricultural in nature and consistent with accepted farming practices.

13. In determining whether an activity qualifies as farm use, Oregon case law requires that the activity be directly and functionally related to agricultural production rather than merely incidental or economically beneficial to the landowner. The record does not demonstrate that compensated receipt and deposition of off-site trench slurry is directly related to crop production or typical of agricultural land management MCC 17.110.223 incorporates the concept of accepted farming practices. An accepted farming practice must be customary in the agricultural community; commonly or typically employed in farm operations; reasonably necessary to agricultural production.

Applicant has not demonstrated that commercial farmers customarily construct deep disposal pits with paved dumping stations to accept compensated truckloads of trench slurry; that agricultural authorities recognize hydraulic vacuum trench slurry deposition as a customary farm soil management technique; or that the practice is typical or reasonably necessary to farm operations.

14. Opponents also raise concerns about the proximity of the facility to Ryan Creek.

The Hearings Officer is not reviewing enforcement matters or determining compliance with environmental regulations. However, there are concerns about such a large berm being constructed near Ryan Creek, which flows directly to the Willamette River and serves as fish and wildlife habitat. If the berm were to fail, or contaminated soil be placed in it and drained to Ryan Creek, it could negatively affect downstream property owners and the wildlife. During the rainy months the pit fills up with water, leaving no capacity for soil and poses a threat of collapsing the berm. While the Applicants have submitted a report to DEQ which shows the berm has a low chance of failure, this may not be adequate evidence the berm has been constructed to receive and store soil waste and water long term.

15. Evidence was submitted to the record showing a pump sitting on the berm that pumped turbid water directly from the pit into Ryan Creek, when the pit was filled with water. Letters in the record from DEQ demonstrate that they have concerns about this turbid violation of OAR 340-012-0055(2)(b). It appears the applicants have been knowingly draining this water into Ryan Creek despite the notice of violations sent to them on January 11, 2024 and March 19, 2024 by DEQ.

16. Evidence was submitted to the record showing that on January 2, 2024, a hydraulic line on one of the trucks ruptured and spilled approximately 5 gallons of hydraulic fluid into the pit and surrounding area. Nothing has been submitted to the record to ensure that this will not happen again or that there are proper clean up procedures in place that would stop any hydraulic fluid from getting into the soil, groundwater or Ryan Creek.

However, Applicant correctly states that the Hearings Officer is not sitting in review of any enforcement order or investigating environmental compliance. The matter before the Hearings Officer is narrowly focused specifically on whether operation of a site for placement of fill from hydraulic vacuum extraction is a farm use. This environmental

context is considered solely for purposes of land use characterization under ORS 215.203 and not as an independent basis for denial.

17. ORS 215.283 provides an exclusive list of uses permitted outright or conditionally in the EFU zone. Uses not listed are prohibited. The applicant has not identified, and the record does not establish, that operation of a compensated trench slurry receiving and deposition site is listed as a permitted or conditional use under ORS 215.283. Because the activity does not qualify as farm use and is not otherwise listed, it cannot be approved.
18. Based on the above findings, it has been determined that placement of fill from hydraulic vacuum extraction is not a farm use and is not permitted on the subject property

VII. Order

It is hereby found that Applicant has not met her burden of proving the applicable standards and criteria for approval of an administrative review application to determine whether operation of a site for placement of fill from hydraulic vacuum extraction is a farm use on a 129.45-acre property in an EFU (Exclusive Farm Use) zone located at 21875 Butteville Rd NE, Aurora (T4S; R1W; Section 8; Tax lot 200). Therefore, the Administrative Review application is DENIED.

VIII. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this Order. An appeal must be filed with the Marion County Clerk (555 Court Str. NE, Suite 2130, Salem, Oregon) by 5:00 p.m. on the 4th day of March, 2026. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED at Salem, Oregon this 17th day of February, 2026.



Jill F. Foster
Marion County Hearings Officer

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing order on the following persons:

Denise Burnham
21855 Butteville Rd.
Aurora, OR 97002

Charles Burman
21855 Butteville Rd.
Aurora, OR 97002

Thomas Benke
PO Box 80458
Portland, OR 97280

Ben Williams
23013 Yearly Lane
Aurora, OR 97002

Jim Johnson
340 SE 6th Ave.
Portland, OR 97214

City: Aurora:
21420 Main St.
Aurora, Or. 97002

Area Advisory Committee #6: (via email)
Ben Williams
fofp99@gmail.com

Roger and Aileen Kaye (via email)
Arkaye2@gmail.com (Aileen)
10095 Parrish Gap Rd. SE
Turner, OR. 97392

1000 Friends of Oregon (via email)
340 SE 6th Ave
Portland, OR 97214

Puttering River Watershed Council (via email)
anna@puddingriverwatershed.org
cleanpuddingriver@gmail.com

County Agencies Notified:

Assessor's Office (via email)
assessor@co.marion.or.us

Tax Collector (via email)
NMcVey@co.marion.or.us

Surveyor's Office (via email)
KInman@co.marion.or.us

Fire District: Aurora (via email)
jwilliams@aurorafire.org

Planning Division (via email)
breich@co.marion.or.us
abarnes@co.marion.or.us
jspeckman@co.marion.or.us
ediaz@co.marion.or.us

Building Inspection (via email)
pwolterman@co.marion.or.us
Kaldrich@co.marion.or.us
CTate@co.marion.or.us

Public Works LDEP Section (via email)
jasmussen@co.marion.or.us
mcldep@co.marion.or.us
JShanahan@co.marion.or.us

School District: (via email)
Ginger.redlinger@nmarion.k12.or.us

Code Enforcement (via email)
CGoffin@co.marion.or.us

State Agencies Notified:

Oregon DEQ

Attn: Mary Camarata
Fairview Industrial Dr. S
Salem, OR 97302

Division of State Lands

775 Summer St. NE
Salem, OR 97310

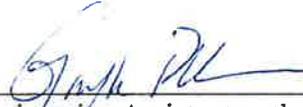
Department of Fish and Wildlife

4034 Fairview Industrial Dr. SE
Salem, OR 97302

DLCD (via email)

Hilary.foote@state.or.us

By mailing to them copies thereof. I further certify that said copies were placed in sealed envelopes addressed as noted above, that said copies were deposited in the United States Post Office at Salem, Oregon, on the 17th day of February, 2026 and that the postage thereon was prepaid.



Administrative Assistant to the
Hearings Officer

MARION COUNTY
BILL BURGESS
MARION COUNTY CLERK

Receipt #: 86301 Receipt Date: 03/03/2026 02:48 PM
Station: 34 Cashier: SKM
Receipt Name: DENISE BURNHAM

Comments: C/O GARRETT STEPHENSON, SCHWABE, WILLIAMSON & WYATT - CASE 25-028

Thank You!
BILL BURGESS, MARION COUNTY CLERK

Please retain this receipt for your records.

Documents are recorded as submitted. The Marion County Clerk's Office
assumes no liability for sufficiency, validity, or accuracy.

| Miscellaneous Fees | |
|--------------------|-----|
| Appeal Fee | YES |

\$500.00

Receipt Total

\$500.00

CHECK

257669

\$500.00