

**BEFORE THE BOARD OF COMMISSIONERS
FOR MARION COUNTY, OREGON**

In the Matter of the
Application of
Denise Burnham

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Case No.
Administrative Review
25-026

ORDER NO. 26-097

This matter came before the Marion County Board of Commissioners at a regularly scheduled and duly noticed public hearing on July 22, 2026, on an application of Denise Burnham for an administrative review to determine whether operation of a site for placement of “clean” 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).

The Planning Director issued a decision denying the application on September 25th, 2025. The applicant appealed this denial on October 1st, 2025. The Marion County Hearings Officer held a duly noticed hearing on the application on December 18th, 2025. The Hearings Officer issued a decision on February 17th, 2026, denying Administrative Review 25-026. The Hearings Officer’s decision was appealed to the Board on March 3rd, 2026. On July 22nd, 2026, the Board considered appeal, application, record and findings.

IT IS HEREBY ORDERED that the Board **APPROVES** the Administrative Review and adopts the evidence and Findings of Facts contained herein as Exhibit A.

MARION COUNTY BOARD OF COMMISSIONERS



Chair



Date



Commissioner



Date



Commissioner



Date

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board of Commissioners (the “Board”), after careful consideration of the testimony and evidence in the record, issues the following findings regarding the Administrative Review:

1. NATURE OF THE APPLICATION

This matter came before the Marion County Board of Commissioners on the application of Denise Burnham for an administrative review on a 129.45-acre property in an EFU (Exclusive Farm Use) zone located at 21875 Butteville Rd NE, Aurora (T4S; RIW; Section 8; Tax lot 200).

2. REQUEST

The Application is for an interpretation of ORS 215.203(2) and the County’s codification of this statute in MCC 17.110.223. The Applicant’s original request was for an Administrative Review to determine whether the Applicant’s proposal to “fill and contour the property with clean fill (soil from hydraulic vacuum excavation of utility lines and similar sources) for farm use, specifically to mitigate erosion, to fill low spots in arable areas, to expand arable area, and to improve access across the farm” meets the definition of farm use in ORS 215.203(2)(a) and the County’s codification of this statute in MCC 17.110.223. This case came before the County Board of Commissioners after the Applicant appealed a decision of a Marion County Hearings Officer which concluded that importation of fill from hydraulic-excavation trucks (“vactor trucks”) is not a “farm use” as defined in ORS 215.203(2) and MCC 17.110.223.

The legal question before the Board is whether the act of accepting soil in slurry form from vactor trucks and dewatering that soil on a land currently employed for a farm use, with the intention to use that soil to fill or improve existing farmland, is a “farm use” as defined in ORS 215.203(2) and MCC 17.110.223. To determine whether the Applicant’s particular agricultural fill activity¹ is a “farm use,” the Board must determine whether Ms. Burnham’s land is itself put to a farm use—whether it is “currently employed” for the “primary purpose of obtaining a profit in money by raising, harvesting and selling crops”—and whether the Applicant’s agricultural fill activity is part of such farm use, or constitutes a separate farm use or nonfarm use.

3. SUMMARY OF DECISION

For the reasons below, **THE BOARD SUSTAINS THE APPLICANT’S APPEAL, REVERSES THE HEARINGS OFFICER’S DECISION,** and concludes as follows:

- a. The importation and preparation of clean fill soil, including the dewatering of saturated soil, can be a “farm use” if the material is intended to be used to improve the farm on which it is deposited and to support a current or future farming operation.

¹ The Board does not use the phrase “agricultural fill activity” to denote or connote any legal term of art or defined term. Rather, this phrase is used simply as a straightforward description of the use proposed by the Applicant.

- b. The Applicant's proposed agricultural fill activity would be considered a farm use if conducted as Ms. Burnham and Mr. Fobert propose with fill use consisting only of "clean" fill and the fill being used to improve the Applicant's farm.

The Board elaborates on these conclusions below under its "Conclusions of Law" section.

4. PROCEDURAL HISTORY

- a. Initial Proceedings

The Applicant filed the Application on August 25, 2025. In an administrative decision dated September 25, 2025, the County Planning Director concluded that the Applicant's proposed and prior agricultural fill activities do not meet the definition of "farm use." The Applicant submitted a timely appeal of the Director's decision on October 1, 2025.

- b. Hearings Officer Review

A Marion County Hearings Officer conducted a properly-noticed public hearing on the Application on December 18, 2025. The Applicant and several other individuals appeared before the Hearings Officer both orally and in writing. The Hearings Officer issued her decision on February 17, 2026, affirming the Director's conclusion.

- c. County Board of Commissioners Review

The Board conducted a properly-noticed public hearing on July 22, 2026. Several individuals testified in support of and against the Application.

5. PUBLIC TESTIMONY

In addition to the oral and written testimony already in the record, the Board received the following written and oral testimony prior to and during the hearing:

- a. **Oregon Department of Agriculture ("ODA").** ODA submitted a signed letter indicating that "ODA has not taken a position on this county land use matter, and the September 15, 2025, email was not intended as one." ODA also explained that its September 15, 2025 "did not comment on whether any activity constitutes a "farm use" under ORS chapter 215."
- b. **Applicant's Legal Counsel.** Applicant's legal counsel, Garrett Stephenson of Schwabe, Williamson & Wyatt, submitted a 17-page letter with exhibits arguing that the Applicant's proposed agricultural fill activity constituted a "farm use" under applicable law. Exhibits to this letter included testimony supporting the Applicant with factual and legal arguments from the following individuals and organizations:

- i. Marion County Farm Bureau
 - ii. Hazelnut Growers of Oregon
 - iii. Deboodt Land and Livestock
 - iv. Oregon Property Owners Association Legal Center
 - v. State Rep. Shelly Boshart Davis (District 15)
- c. **Letters dated July 15 and July 21 from the legal counsel for Scott and Judy Chambers.** The Chambers argued, among other things, that there was no evidence that or case law “indicating that commercial vector truck dump facility with six dumping bays which accepts waste from an urban area is common to farms growing filberts.” The Chambers cite *Ehler v. Washington County*, 52 Or LUBA 663 (2006) and prior testimony by ODA as support for its arguments that the Applicant’s agricultural fill activity is not a “farm use.” The July 21 letter particularly argues that the LUBA cases cited by the Applicant in support of the Application are irrelevant.
- d. **State Rep. Vikki Breese-Iverson (District 59).** Rep. Breese-Iverson testified in support of the Application, arguing among other things that “filling is a vital agricultural tool.”
- e. **Springwood Acres.** Mr. Scott Reed of Springwood Acres farm in Multnomah County testified in support of the Application and explained that he has accepted clean fill to improve his farm, including material from vacuum trucks. Mr. Reed also explained that, “in many cases, we were paid tipping fees to accept these materials.”
- f. **Austin Barnes, Principal Planner for Marion County.** Mr. Barnes provided a staff report, and explained county staff’s concerns about the Application, including the following:
 - i. The primary purpose of the dump site appears to be obtaining a profit from disposal of industrial and commercial vacuum truck waste, based on the presence of granite countertop material in at least one of the loads.
 - ii. Staff views the Applicant’s agricultural fill activity to be a solid waste disposal site.
 - iii. ODA determines what is an “accepted farm practice” and provided a letter explaining that the Applicant’s agricultural fill activity is not a farm use.
 - iv. Staff has environmental concerns about the Applicant’s dewatering pit concerning potential contamination of Ryan Creek.
- g. **Applicant’s Legal Counsel.** Mr. Stephenson argued that the central legal issue is whether importing soil via vacuum trucks—dewatered on-site and then used as fill on the Applicant’s farm—qualifies as “farm use” under ORS 215.203(2)(a). He presented the Applicant’s theory of the case, namely that the dewatering pit, importation of fill from vac trucks, and use of that fill for farming were part of the Applicant’s farm use. In particular, he explained that water impoundments such as

the dewater pond are specifically included within the definition of farm use under ORS 215.203(2)(a). He also summarized written evidence in the record that importation of clean soil was a common agricultural practice in Oregon and contended that previous DEQ and Oregon Water Resources Department investigations concluded without finding active violations.

In response to questions about enforceability, Mr. Stephenson made three points. First, he explained that the definition of farm use in ORS 215.203(2)(a) provides the County a “limiting factor” in determining when a farm use becomes a non-farm use. Second, he explained that if a farmer’s intent is to import clean fill material for filling or improvement of farmland, importation of material other than clean fill would not be a farm use, and would be subject to County enforcement as an unpermitted non-farm commercial use. Third, he explained that County enforcement could be conducted just as it would with any other land use restriction, and in this case, that the heightened scrutiny on the Burnham’s farm made it unlikely that any code violation could go unnoticed. Finally, he pointed to LUBA cases concerning the importation and use of municipal wastewater and biosolids for farming, which has been determined to be a “farm use” by LUBA, and that the principles in those cases pertain here.

- h. **Ms. Denise Burnham, Applicant.** Ms. Burnham testified that the project was motivated by the need to fill washouts and improve the elevation of her property for hazelnut production. She expressed frustration over the scrutiny the farm has received, asserting that her goal is simply to flatten the land and continue farming without the current level of administrative interference.
- i. **Mr. Cheyne Fobert, farm manager for the Applicant.** Mr. Fobert argued that managing soil levels is an essential, daily task for maintaining a productive hazelnut orchard. He defended the use of vacuum trucks as a modern, less invasive technology compared to traditional heavy equipment, argued the pit and staging area constitute necessary, temporary agricultural infrastructure. He testified that the berm was specifically designed to safely detain the material. He also explained that the soil importation would stop once the low-lying areas are filled.
- j. **Ms. Samantha Bayer, Oregon Property Owners Association.** Ms. Bayer explained that her organization believes that the Applicant’s proposed agricultural activity meets the definition of a “farm use” under applicable law. She also testified that hazelnut orchards require relatively flat and even surfaces.
- k. **Mr. Joseph Schaefer, Jordan Ramis, on behalf of Scott and Judy Chambers.** Mr. Schaefer argued that vacuum trucks typically extract subsoil, industrial slurry, and debris from utility construction sites, not high-quality topsoil suitable for farming. Mr. Schaefer also suggested that improvement of the existing farm road was not a farm use, and there was no plan showing where the fill will be placed in

the future. Mr. Schaefer also argued that trees were removed to make room for the dewatering pit and associated infrastructure.

- l. **Mr. Ben Williams.** Mr. Williams referred to written materials from vac truck manufacturers indicating that those manufacturers believe that vac truck slurry is most appropriately disposed of in licensed landfill facilities. Mr. Williams also argued that the Applicant would not adequately monitor whether or not the material imported by vac truck was “clean fill.”
- m. **Mr. Chad Goffin,** Code Enforcement Officer for Marion County. Mr. Goffin provided a brief history of the code enforcement matter and explained that, in his opinion, the Applicant was running “some sort of illegal dumping business.”

6. APPLICABLE LAW

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).

As relevant here, ORS 215.203(2)(a) and the County’s parallel codification of this statute in MCC 17.110.223 provide as follows:

“(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 on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. [...].

(b) As used in this subsection, “current employment” of land for farm use includes:

(A) Farmland, the operation or use of which is subject to any farm-related government program;

(B) Land lying fallow for one year as a normal and regular requirement of good agricultural husbandry;

(C) Land planted in orchards or other perennials, other than land specified in subparagraph (D) of this paragraph, prior to maturity;
[...]

(E) Wasteland, in an exclusive farm use zone, dry or covered with water, neither economically tillable nor grazeable, lying in or adjacent to and in common

ownership with a farm use land and which is not currently being used for any economic farm use;

(F) Except for land under a single-unit dwelling, land under buildings supporting accepted farm practices, including the processing facilities allowed by ORS 215.255 and the processing of farm crops into biofuel as commercial activities in conjunction with farm use under ORS 215.213 (2)(c) and 215.283 (2)(a);

(G) Water impoundments lying in or adjacent to and in common ownership with farm use land;

[...]"

When deciding whether an existing or proposed use is a "farm use," the Board is charged with determining whether the use at issue constitutes "the current employment of land for the primary purpose of obtaining a profit in money" by engaging in any one or more of the several listed examples of farm use in subsections (2)(a) and (2)(b). Under ORS 215.203(2)(b)(F), whether a given farm use constitutes an "accepted farm practice" is relevant only when determining if buildings other than single-unit dwellings constitute a farm use. The Board finds that, as to the use considered in this Decision, the relevant test in this case is not whether the use is an "accepted farm practice," because the Applicant does not contend, nor is there any evidence, that her agricultural fill activity or its related improvements constitute "land under buildings supporting accepted farm practices" as stated in subsection (2)(b)(F).

As the County has codified ORS 215.203(2) verbatim, the Board must interpret its parallel definition in MCC 17.110.223 consistent with LUBA's case law. *Kenagy v. Benton County*, 115 Or App 131 (1992). The Board has examined several decisions of the Oregon Land Use Board of Appeals cited by the parties in this case. These are listed below followed by an explanation of each case's relevance, or lack thereof.

- a. *Swenson v. Oregon Department of Environmental Quality*, 9 OR LUBA 10 (1983).

In this case, LUBA concluded that the importation of wastewater from a local cannery, to be treated and used for irrigation on a farm, was a farm use as defined in ORS 215.203, although the project itself was concerned primarily with the disposal of wastewater and not farming. The Board notes the following quote from LUBA:

"The Board views the source of the water to be unimportant. What is important is the employment of the land for the growing of crops. The fact that a holding pond is to be used and has the added benefit of disposing of wastewater does not mean the wastewater will not be put to farming the property for a profit in money."

Id. at 17–19.

- b. *Friends of the Creek v. Jackson County*, 36 Or. LUBA 562 (1999), *aff'd* 165 Or App 138 (2000).

This case concerned a challenge to the land application of wastewater effluent and dried biosolids proposed by Jackson County after it was prohibited from discharging its sewer system effluent to Ashland Creek. These two effluent storage reservoirs comprising approximately 21 acres, and two additional storage lagoons comprising approximately 6 acres, an additional sludge drying bed of 1 acre, a 1200 sq. ft. office, and support facilities consisting of “necessary pipelines, an access road, fencing, and irrigation canal crossings.” *Id.* at 565. LUBA concluded that this infrastructure for the treatment and deposition of wastewater and biosolids constituted a “farm use,” although the property was not yet cultivated. LUBA explained that the subjective motivations of the farmer are irrelevant for determining whether a proposed activity constitutes a farm use:

“[W]e do not believe the legislature intended, by requiring that the land be currently employed “for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops,” to require an inquiry into the primary actual motivation of particular land owners. Such an inquiry could easily have the anomalous result of having a farm that is indistinguishable from its neighbor fall outside the ORS 215.203(2)(a) definition of farm use, simply because its owner happened to be primarily motivated by something other than the monetary return that is realized from selling the crops that are raised on the property.”

Id. at 577.

The Board notes that this principle was recently reaffirmed in *Central Oregon Landwatch v. Deschutes County*, LUBA No. 2023-009, slip. op 29–30 (July 28, 2023), wherein LUBA explained: “Whether land may be employed “for the primary purpose of obtaining a profit in money,” for purposes of ORS 215.203(2)(a), is an objective test that focuses on the activities that would be occurring on the land.”

- c. *Cox v. Polk County*, 39 Or LUBA 1 (2000).

Cox concerned the application of industrial effluent onto a large EFU property owned by the City of Dallas that was intended to be used for poplar tree cultivation. LUBA explained that a use can be both a farm use and a “utility facility necessary for a public service.” Citing the “objective farmer” test established in *Friends of the Creek*, LUBA also explained that:

“so long as poplar trees are raised, harvested and sold for a gross profit, in our view, it does not matter that the particular owner of the poplar tree farm may primarily be motivated to operate the poplar tree farm by factors other than the profit that is actually realized by raising and selling the poplar trees.”

- d. *Ehler v. Washington County*, 52 Or LUBA 663 (2006).

Ehler concerned whether a proposed grading and fill activity on a parcel zoned for agricultural uses met a particular exception to a grading permit requirement under Washington County CDC 201-2.12(G), which exempts “[c]ustomarily accepted agricultural activities, including preparation of land for cultivation[.]” On the facts of this case, the hearings officer concluded that the importation of 100,000 yards of fill was not a “customary accepted agricultural practice.” In doing so, the hearings officer cited “the history of the subject property as a landfill, the lack of ongoing agricultural activity, and the unspecified nature of future agricultural activities.” *Id.* at 675.

Based on the statutes and interpretive caselaw discussed above, the Board concludes that the following legal principles are relevant to determining whether importation of resources, whether water or soil, constitutes a “farm use” in ORS 215.203(2).

First, as a matter of plain language, supporting structures, farm roads, pipes, and water impoundments constitute a farm use if they are located on a farm because they are specifically contemplated in ORS 215.203(2)(a) (the on-site construction and maintenance of equipment and facilities) and (2)(b)(G) (water impoundments). The Board finds that improved farm roads are permitted in EFU zones provided the roads are or can be used for farming. *Wetherell v. Douglas County*, 56 Or LUBA 120, 137 (2008).

Second, whether the importation of resources is a “farm use” is determined by what happens to those resources on the farm, not how those resources were created outside the farm, or the intentions of third parties to dispose of those resources on a farm. “Whether land may be employed “for the primary purpose of obtaining a profit in money,” for purposes of ORS 215.203(2)(a), is an objective test that focuses on the activities that would be occurring on the land.” *Central Oregon Landwatch v. Deschutes County*, *supra* at 29–30. In *Swenson, Friends of the Creek*, and in this case, resources generated from non-farm uses are put to productive use on farms. It is irrelevant where or how effluent, biosolids, or water-saturated soil are generated. So long as they can be used for farming and there is substantial evidence that the farm operator will, in fact, use those materials “for the primary purpose of obtaining a profit in money” by engaging in any one or more of the several listed examples of farm use in subsections (2)(a) and (2)(b), the importation, treatment, and use of those resources is a farm use.

Third, the subjective motivations of the farmer and how the farmer is compensated for any aspect of its farm use are not dispositive to the question of whether importation of such materials is a farm use, so long as those materials are eventually used on the farm.

7. FINDINGS OF FACT

The Board received substantial evidence concerning the Applicant’s farm use, onsite improvements and intended use of the soil generated by hydraulic excavation, enforcement actions undertaken by Oregon Department of Environmental Quality and Oregon Water Resources Department, the Oregon Department of Agriculture, the Marion County Farm Bureau, the Oregon Farm Bureau, Hazelnut Growers of Oregon, Oregon Property Owners Association, two state legislators, Ben Williams, and Scott and Judy Chambers, and the testimony in the record below. Based on this testimony, the Board concludes as follows:

- a. 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.
- b. 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.
- c. Surrounding properties are all zoned EFU and in active farming operations, with some containing dwellings.
- d. The Soil Survey of Marion County, Oregon indicates that the subject parcel consists of 97.1% high-value soils.
- e. The Applicant's property is zoned for exclusive farm use and is currently used for a commercial hazelnut orchard and other farm crops. The Board recognizes that the Property has been in the Applicant's family for several generations and has been farmed continuously. There is no dispute in the record that the Applicant's 130-acre farm property is currently employed "for the primary purpose of obtaining a profit in money." Based on Mr. Fobert's testimony, the current hazelnut orchard operation yields roughly \$9,000 per acre per year at current prices.
- f. The Applicant allowed Greg Wing to improve existing farm roads with new gravel, construct a paved discharge area for trucks, and install a berm in an existing gully to create a dewatering pit that can accept and dry hydraulically-excavated soil. The dewatering pit measures approximately 200 feet long by 150 feet wide and is built in a circular shape. The pit is approximately 20-30 feet deep and was made by installing a berm in a gully on the subject property's filbert orchard's western edge. The pond and associated berm take up approximately 0.8 acres. The pit is currently a water impoundment.
- g. Based on the Geotechnical Memorandum provided by Evren Northwest, the berm constructed by Mr. Wing has been adequately designed and is unlikely to fail. There are currently no environmental or water rights violations active on the Property associated with the Applicant's prior agricultural fill activity.
- h. The Applicant accepted saturated soil for a period of approximately two months in 2023 but has not done so since enforcement letters from Oregon DEQ and County code enforcement caused the Applicant to cease its fill operations. The Applicant has accepted compensation for the importation of this soil and may do

so again in the future. At least one or more of these loads included apparent construction debris consisting of granite tabletop material.

- i. The Applicant intends to import water-saturated soil generated by hydraulic excavation to improve her farm. Specifically, the Applicant intends to use dewatered soil to fill low spots on her Property to improve her farming operation. The Applicant explains in her signed declaration that the berm will be filled and will improve access to the backside of her farm, that doing so will mitigate erosion to the Ryan Creek watershed by rerouting storm drainage across a wider area, will increase the arable area of the farm, and will reduce the incidence of farm equipment getting bogged down. The Board has no reason to believe that these intentions are not genuine.
- j. The Applicant intends to fill the existing dewatering pit. Both the Applicant and Mr. Fobert testified that they will be able to farm the area currently used for the dewatering pit once it is full, and that the topsoil used to create the berm enclosing the pond will be spread back over the area.
- k. Based on aerial photos provided by the Chambers, it appears that some already-useable farmland may have been dedicated to use for the Applicant's dewatering pit.
- l. Evidence submitted by OPOA suggests relatively flat ground is necessary for hazelnut farming and that filling low spots is beneficial for purposes of the use of a mechanical harvester.
- m. Importation of fill material generated elsewhere is an "accepted farm practice." This was mentioned in testimony by the Applicant, OPOA, the Marion County Farm Bureau, the Hazelnut Growers of Oregon, Deboodt Land and Livestock, Springwood Acres, and others. Importation of water-saturated soil generated by hydraulic excavating is less prevalent, but is also commonly done by other farms in Oregon, whether the soil is generated onsite or offsite. This is established by testimony from Deboodt Land and Livestock, Springwood Acres, and Rep. Shelly Boshart Davis.
- n. Paved and otherwise improved farm roads and parking areas similar to the one constructed by Mr. Wing are common on farms in Oregon. According to the Hazelnut Growers of Oregon, "asphalt, pavement, and parking infrastructure are common on farms. Building a temporary pit or paving a parking area does not turn [a] commercial farm business into a commercial landfill."
- o. While hydraulic excavation slurry may be intended by vector truck manufacturers to be disposed of in licensed disposal facilities, there is no evidence that the material deposited on the Property or planned to be imported in the future was or will be hazardous. This conclusion is supported by Oregon DEQ's conclusion that the "soil material currently within the disposal pit soil meets the analytical criteria

to be considered substantially the same as ‘clean fill’ and will be exempt from solid waste permitting requirements.”

- p. Farmers can and often do accept compensation for materials that are ultimately used to benefit their farming operation. This is reflected in the testimony of the Hazelnut Growers of Oregon, the Marion County Farm Bureau, and others. The Board also recognizes the example of the City of Enterprise paying a farmer to accept biosolids generated by the City’s municipal sewerage system, appended to the Applicant’s July 17, 2026 letter.

8. CONCLUSIONS OF LAW

Based on applicable law, evidence, and public testimony in the record, the Board finds as follows:

- a. Importation of soil or filling activities that are not proposed to support farming or cannot be used to support farming, do not meet the definition of “farm use.”

The Board concludes that ORS 215.203(2) and ORS 215.283(2)(a) (providing for commercial activities in conjunction with a farm use) provide a legislative structure establishing that importing materials that may seem like an agricultural product or input may not be a “farm use” if the material cannot be put to use on the farm upon which it is deposited. For example, if soil were simply deposited on farm and then re-sold for uses on another farm, then the owner would be engaged in “dirt selling” and not farming (as Ms. Bayer put it in her oral testimony).

As to the Applicant’s prior agricultural fill activity, the Board finds that deposition of construction debris such as composite granite or other engineered countertop material is not a farm use. This is not an enforcement case and the Board understands that dumping the engineered countertop material was perhaps unintentional and *de minimus*. However, any deposition of what fairly meets the definitions of “solid waste” or “waste” stated in MCC 17.120.315 could and likely would not be a farm use and may be subject to County code enforcement. Where inadvertent mixing of soil and waste could occur, a prudent farmer would take steps to ensure that waste or solid waste is not deposited on his or her farm.

- b. The importation and preparation of soil, including the dewatering of saturated soil, can be a “farm use” if the material is intended to be used to improve the farm on which it is deposited and to support a current or future farming operation.

As a general matter, importation and dewatering of water-saturated clean soil generated by hydraulic excavation can meet the definition of “farm use” in ORS 215.203(2)(a) provided (1) that the soil meets DEQ’s definition of “clean fill” or otherwise can be shown to be likely to support an existing or proposed farming operation, and (2) will be used in a farming activity on the property that constitutes the “current employment of land for the primary purpose of obtaining a profit in money” for any of the enumerated farming activities in ORS 215.203(2). This conclusion is supported by LUBA’s opinions in *Swenson* and *Friends of the Creek*, discussed above, as well as the following facts:

First, importation of fill material generated elsewhere is an “accepted farm practice.” This was explained in testimony by the Applicant, OPOA, the Marion County Farm Bureau, the Hazelnut Growers of Oregon, Deboodt Land and Livestock, Springwood Acres, the John Rissberger Nursery and others. Importation of water-saturated soil generated by hydraulic excavating is also something that other farms appear to do, whether that soil is generated onsite or offsite. This is established by testimony from Deboodt Land and Livestock, Springwood Acres, and Rep. Shelly Boshart Davis.

Second, paved and otherwise improved farm roads and parking areas are common on farms. According to the Hazelnut Growers of Oregon, “asphalt, pavement, and parking infrastructure are common on farms. Building a temporary pit or paving a parking area does not turn [a] commercial farm business into a commercial landfill.”

However, given that there is no evidence in the record that non-clean fill material will benefit the Applicant’s farming activity or any other farming activity, and because the Board does not believe that the Oregon legislature intended to allow farms to conduct solid waste disposal activities without a permit issued pursuant to ORS 215.283(2) and MCC 17.120 unless those activities also meet the definition of farm use, disposal of materials determined by the County to constitute solid waste would probably not be considered a “farm use.”

Finally, compensation paid to a farmer or landowner for receiving fill dirt, whether from vector trucks or otherwise, does not inherently demonstrate that an existing or proposed agricultural fill activity is not a “farm use” as defined in ORS 215.203(2)(a) and MCC 17.110.223. Whether compensation is accepted may be one of many facts considered when determining whether a proposed fill activity is either a farm use or nonfarm use. However, if the proposed fill activity meets the indicia of a “farm use” as described in ORS 215.203 and the LUBA caselaw discussed above, it is irrelevant whether the farmer is accepting or will accept compensation for receiving fill. The Board’s conclusion in this regard is supported by a preponderance of evidence, discussed above, that compensation of farmers for accepting materials to be used for an existing or proposed farming activity is relatively common, and is even supported by governmental agencies in some cases.

- c. The Applicant’s proposed agricultural fill activity would be considered a farm use if conducted as Ms. Burnham and Mr. Fobert propose with fill use consisting only of “clean” fill and the fill being used to improve the Applicant’s farm.

Given that the Applicant’s prior agricultural fill activity had ceased prior to her application for this Administrative Review, the Board considers the question at issue to be prospective—informed but not determined by evidence concerning the agricultural fill activity that occurred on the Property in 2023. As described by the Applicant and Mr. Fobert, the proposed agricultural fill activity appears to fit the definition of “farm use” in ORS 215.203(2) and MCC 17.110.223 for three relatively straightforward reasons. First, the farm is currently used for a hazelnut orchard that is intended to (and apparently does) generate a profit in money. Second, the Applicant’s farm (and hazelnut farming in general) benefits from smooth ground and the filling of existing low-spots. Third, the Applicant intends to use the dried soil for farming.

Fourth and finally, the Applicant has an established plan for why and how long fill will be accepted on the Property to be used for grading purposes.

If used as consistent with the above analysis, the existing dewatering pit would meet the definition of “farm use” under ORS 215.203(2)(a) for the reasons discussed above, and also because it meets the definition of “farm use” in ORS 215.203(2)(b)(G) as a “water impoundment lying in or adjacent to and in common ownership with farm use land.” This conclusion is supported by several examples present in LUBA caselaw where private and municipal liquid and solid wastes (biosolids) were actually treated in settling ponds on the farm property. While these cases do not deal directly with the import of fill dirt, the Board finds that there is no principled difference between treatment and use of these wastes for irrigation and fertilization, and the dewatering and use of soil for farming or filling to improve farmland.

The existing farm road improvements and paved discharge area are part of the farm use and are separately within the definition of “on-site construction and maintenance of equipment and facilities” used to support the Applicant’s agricultural fill activity, under ORS 215.203(a)(2). This conclusion is supported by testimony by Ms. Burnham and Mr. Fobert that these roads existed in at least some form before the agricultural fill activities began, and that part of Ms. Burnham’s intent in accepting fill is to improve farm access and equipment mobility. The Board also recognizes that these sorts of improvements are common on farms, as explained by the Hazelnut Growers of Oregon.

The Board concludes that, at least in this case, the Applicant’s proposed agricultural fill activity does not meet the definitions concerning solid waste disposal in MCC 17.120.315, for two reasons. First, the Applicant has demonstrated with a preponderance of evidence that the fill is intended to be used in her commercial farming activities and Applicant has a plan to stop accepting fill once the need has been met. Second, the evidence in the record indicates that DEQ has determined that the material deposited thus far meets its definition of “clean fill.” Third, the definition of “waste” in MCC 17.120.315 is “useless, unwanted or discarded materials.” In this instance, the evidence shows that the Applicant places value upon the imported soil for farming, not just for the fees its importation might generate for her. Therefore, the Board concludes that, at least in this case and as it pertains to clean soil, the soil deposited by vector trucks does not meet the County’s definition of “waste.”

9. RESPONSE TO PUBLIC TESTIMONY

Before addressing the particular arguments raised during public hearing, the Board first addresses a common argument that appeared in certain public comments and the Hearings Officer’s decision: the purported requirement that a farm use must be “customary,” “common,” or an “accepted farm practice.” As noted above, the Board finds that this standard applies under ORS 215.203(2)(c) only to “land under buildings supporting accepted farm practices.” Because Ms. Burnham’s proposed fill and dewatering activity does not include such a building, the correct test is instead the plain, two-part definition in ORS 215.203(2)(a): whether an activity constitutes (1) current employment of land (2) for the primary purpose of obtaining a profit in money by raising, harvesting, and selling crops — which expressly includes “the on-site construction and maintenance of equipment and facilities used for” that purpose, and which separately, under

ORS 215.203(2)(b)(G), includes “water impoundments lying in or adjacent to and in common ownership with farm use land.”

Second, the Board finds that ORS 30.930-.947 (commonly referred to as Oregon’s “right to farm law”) does not supply the correct test of whether a given use is a “farm use” as defined in ORS 215.203. ORS chapter 30 concerns causes of legal actions and limitations on those actions. ORS 30.930-.947 concern liability and regulatory protections for farm and forest activities. The words “farm” and “farming” are defined in chapter 90 for this purpose only, and ORS 215.203(2) does not adopt those definitions.

The Board also finds that the correct test is objective, not subjective — determined by “the activities that would be occurring on the land,” not the origin of the resource, the method used to import it, or the farmer’s compensation or motivation. *See Central Oregon Landwatch v. Deschutes County; Cox v. Polk County, Friends of the Creek v. Jackson County, supra*. This objective-test argument is relevant to arguments premised on the operator’s compensation, subjective motivation, or the material’s off-site source.

The following discussion responds directly to written and oral testimony submitted by Michael F. Ryan, 1000 Friends of Oregon, Friends of French Prairie, and Scott and Judy Chambers. These arguments often overlap, so for brevity sake, the Board responds to each singly.

- a. Argument: The retention pond/dam was built for a purpose outside EFU-designated use parameters, and the access road, dump pad, and holding pond were constructed without a permit — a violation of the intent of EFU rules.

Board Finding: ORS 215.203(2)(b)(G) expressly defines “farm use” to include “water impoundments lying in or adjacent to and in common ownership with farm use land.” The dewatering pit therefore falls within, not outside, the statutory definition. Given that the dewatering pit is to be used for a farm use, the Board concludes that no permit is required.

As for environmental permitting, both DEQ and the Oregon Water Resources Department formally withdrew their enforcement actions after independently concluding the activity did not violate any environmental or water-right permitting requirement. Because the state agencies with actual permitting authority found none was required, the absence of a permit does not demonstrate that the Applicant’s agricultural fill use is not allowed in the EFU zone. Furthermore, the Board finds that they are not responsible for, nor empowered to, enforce DEQ or OWRD laws, policies, or rules regarding permitting.

- b. Argument: The right to farm statute (ORS 30.930–.947) and agricultural water quality statute (ORS 561.191) are instructive on what counts as a farming practice, including a requirement that the activity be a normal, accustomed, generally accepted, reasonable, and prudent method.

Board Finding: As explained above, the sole question before the Board is whether the Applicant’s proposed agricultural fill use meets the definition of farm use under ORS 215.203(a). Other definitional tests are inapplicable to this Application. Whether a farm use

must be “customary,” “common,” or an “accepted farm practice” is relevant under ORS 215.203(2)(c) only to “land under buildings supporting accepted farm practices.”

- c. Argument: The record shows the applicant received vector truck dumping in violation of MCC 17.136 and 17.110.223, and receiving fill from hydraulic vacuum extraction is not a reasonable, accepted, prudent farm practice under ORS 215.203(2); if permitted at all, it should be permitted through the conditional use process.

Board Finding: The Application is not for a conditional use for solid waste disposal. While the definitions in MCC 17.120.315 are instructive insofar as they provide a guidepost to characterizing a particular use, they do not determine whether or not that use is a “farm use” under ORS 215.203. As explained above, even if those definitions applied, the soil proposed by the Applicant to be imported to her farm does not meet the County's own definition of “solid waste” or “waste” (materials that are “useless, unwanted, or discarded”), because the material is proposed to be retained and beneficially reused on the farm. Additionally, DEQ determined that the present material meets its definition of “clean fill,” not solid waste.

- d. Argument: County enforcement found the site “functions like a solid waste facility,” with the primary purpose of obtaining value in the disposal and storage of waste, and this is a profit-driven disposal operation for industrial/commercial vector truck waste.

Board Finding: Denise Burnham's sworn declaration states the material is to be used to fill an eroding gully, mitigate erosion into the Ryan Creek watershed, increase arable acreage, and prevent farm equipment from getting bogged down in low spots. These constitute an orchard-improvement purpose, not disposal for its own sake. Unlike a true disposal site, all material is intended to stay on the property and be used for the Applicant's farming operation. Additionally, as stated above, the Board finds that because the Applicant has a clearly defined purpose for the imported fill and a timeline of when the importation of the fill will cease, this project is not a forever disposal site, but rather a targeted purpose. Furthermore, DEQ found the material “meets the analytical criteria to be considered substantially the same as ‘clean fill’” and is exempt from solid waste permitting.

- e. Argument: No permits were ever obtained for the facilities in place, and without testing each shipment it is impossible to determine if the fill is clean; the applicant's “clean fill” characterization for the 238 loads received (Nov. 2023–Jan. 2024) is unsupported.

Board Finding: The Application is for an interpretation of ORS 215.203(a) and MCC 17.110.223. It is neither a permit application nor an enforcement action. DEQ makes clean fill determinations, not the County. DEQ specifically evaluated the clean-fill determination submitted on Ms. Burnham's behalf and found the material within the disposal pit meets clean-fill criteria. As explained above, whether future loads contain clean fill is a factor in whether the use can be considered a “farm use,” but there is no applicable law that requires the applicant to test every load to determine that it continues to meet DEQ's definition of “clean fill,” nor is such testing required to carry on a farm use. If future loads deposited on the Property contain non

“clean fill” or solid wastes, then a county code enforcement action could be opened and an investigation would ensue.

- f. Argument: The operator received \$300 per load and 238 loads with no calculation of the volume actually needed for the stated farm purpose, indicating a commercial operation rather than a farm use.

Board Finding: Per the Marion County Farm Bureau letter “farmers are often paid and often pay for fill, but in all cases, the fill is ultimately used for farming,” and per the OPOA Legal Center letter “the fact that money may change hands... does not transform the farm into a commercial dump site.” Under *Cox v. Polk County* and *Friends of the Creek*, LUBA has squarely held that a farm operator's compensation and subjective motivation are legally irrelevant to the farm use determination so long as the imported material is put to productive farm use.

- g. Argument: A Ditch Witch industry publication shows vector truck “spoils” are recognized industry-wide as material requiring regulated handling and disposal at certified sites, undermining any claim this is ordinary, unregulated dirt.

Board Finding: DEQ reviewed the clean-fill determination for this specific site and concluded the material meets the “clean fill” definition under OAR 340-093-0030(19) and is exempt from solid waste permitting. A site-specific regulatory determination is more probative than general industry literature discussing vector truck operations nationally. The Board concludes that there is no regulatory requirement that all vector trucks must dispose of their loads in licensed landfills. Rather, it will depend on whether the material is regulated by DEQ as solid or liquid waste.

- h. Argument: There is no evidence a six-bay commercial vector dump facility is common to, necessary for, or customarily utilized by farms growing hazelnuts. The ODA email from Kevin Fenn states the activity must be a “normal and accustomed practice” and that the pit, haul road, and dewatering are not customary farm practices, and there is no record evidence of comparable vector dump sites on other EFU land.

Board Finding: Because the “customary”/ “common to similar farms” test under ORS 215.203(2)(c) applies only to farm buildings, the absence of evidence that this specific facility configuration is “customary” among filbert farms is legally irrelevant to the applicable test in (2)(a) and (2)(b)(G). On the facts, the letters from the Marion County Farm Bureau, Hazelnut Growers of Oregon, Deboodt Land & Livestock (a comparable Oregon farm that itself uses vac-truck-hydraulically-excavated soil the same way), Springwood Acres, and the OPOA Legal Center affirmatively establish the practice is, in fact, relatively common. For this reason, even if the Applicant had to show that her agricultural fill activity was “customary” or an “accepted farm practice,” the Board concludes that it meets these tests on the evidence presented.

As to the ODA email relied upon by the Chambers, ODA’s subsequent testimony, dated July 20, shows ODA expressly declined to take a position on the present land use question and was speaking only to its own jurisdiction under the Agricultural Water Quality program. ODA does not purport to interpret ORS 215.203(a) in any respect.

- i. Argument: LUBA has held a county is not obligated to accept an applicant's characterization of a use, and the fill operation is properly classified as solid waste disposal, which is expressly prohibited on EFU land under MCC 17.136.050(I).

Board Finding: The Board agrees that it is not obligated to accept an applicant's characterization of a use. In this instance, the Board finds that the proposed use would qualify as a farm use based on the preponderance of the evidence in the record, including the history of the use as carried on in 2023, DEQ's opinion that the material deposited on the Property meets the definition of "clean fill," the Applicant's affidavit, the Applicant's expressed purpose and timeline for accepting imported fill, evidence that tends to show that hazelnut orchards generally, and the Applicant's farm in particular, would benefit from fill dirt.

- j. Argument: *Ehler v. Washington County* rejected a similar argument that the definition of "accepted farm practice" has never been narrowly drawn, where an applicant proposed charging a fee to dump fill and the county found that not to be customary for similar farms.

Board Finding: As explained above, *Ehler* is inapposite to the statutory question here because it interpreted a different local code standard and considered a significantly different fact pattern in which a farm activity had not yet been established.

- k. Argument: the previously imported material is "solid waste" because the County's definition includes "demolition and construction wastes," and because the record "shows that marble and granite countertop waste has been dumped already."

Board Finding: The Board finds that deliberate deposition of construction debris such as composite granite or other engineered countertop material is likely not a farm use. Any ongoing deposition of what fairly meets the definitions of "solid waste" or "waste" stated in MCC 17.120.315 could and likely would not be a farm use and may be subject to County code enforcement. However, the material in the existing dewatering pit has been classified as "clean fill" by DEQ, and Applicant does not propose to go on dumping any material that could be characterized as "solid waste," or "waste." Therefore, its proposed agricultural fill activity meets the definition of "farm use."

- l. Argument: Photos show the pit discharging turbid overflow into a tributary of Ryan Creek, which flows to the Willamette River.

Board Finding: The Board takes no position on whether or not turbid water has been generated by the prior agricultural fill activities, because that question does not address whether the Applicant's proposed agricultural activity would be a farm use. The County generally does not have jurisdiction to ensure compliance with environmental law or water quality standards. The state agencies with jurisdiction over water rights and pollution investigated the site and formally withdrew their respective enforcement actions, with OWRD concluding the impoundment did not require a permit or additional water right and DEQ concluding no known environmental regulation had been violated. Even if it were relevant to the question at hand, the Board has no reason to believe that the dewatering pit and berm will violate any applicable environmental laws.

- m. Argument: Before/after aerial photos show the dumping operation displaced previously planted filbert trees and reduced the area available for growing crops, demonstrating the operation is unrelated to farming.

Board Finding: Ms. Burnham's declaration states that the purpose of the fill activity is, among other things, to increase the arable area of the farm over time by filling the pit, the berm area, and other low spots. It may be that interim reduction in planted acreage during construction of the dewatering pond and berm can expand, not reduce, productive farmland once complete. Regardless, neither the Board nor County staff have the expertise necessary to judge how a particular farm operates at this granular of a level, it is not the Board's place to micromanage how farmers use and improve their land. The Board has concluded that the Applicant's proposed agricultural fill activity could and would meet the definition of "farm use" if conducted as the Applicant proposes. Whether this will involve the displacement of a small number of trees for a certain time is irrelevant.

- n. Argument: The applicant only applied for an Administrative Review; if the applicant seeks conditional use approval for the vector dump site, a new application must be submitted with notice to the Chambers family and other neighbors.

Board Finding: The Board agrees that the Application before it is not a conditional use permit for a solid waste disposal site. The Board has found that, if the Applicant operates its agricultural fill activity as she proposes, the activity would be a farm use and no County land use permit would be required.

- o. Argument: The dam is inadequate to contain water and prevent erosion, as shown by before/after photographs taken below the dam on November 24, 2025 and December 19, 2025, with obvious turbidity.

Board Finding: Ms. Burnham's declaration states the dewatering pond area "was carefully prepared for this purpose and to prevent runoff from entering or leaving the property." Based on the geotechnical memorandum provided by Evren Northwest, the berm constructed by Mr. Wing has been adequately designed and is unlikely to fail. The Board finds that the geotechnical analysis constitutes a more authoritative and technically grounded assessment of the structure's adequacy than photographic observation of turbidity after a rain event. Regardless, this Decision does not concern enforcement of state environmental laws, which are enforced by Oregon DEQ.