



July 17, 2026

Garrett H. Stephenson
Admitted in Oregon
D: 503-796-2893
C: 503-320-3715
gstephenson@schwabe.com

VIA E-MAIL – ABARNES@CO.MARION.OR.US

Hon. Colm Willis
Chair, Marion County Board of
Commissioners
PO Box 14500
Salem, OR 97309

RE: Application by Denise Burnham for Administrative Decision concerning Agricultural Fill
Appeal of Hearings Officer Decision in Case No. 25-026
Our File No.: 145550-296311

Dear Chair Willis and Commissioners:

This office represents Denise Burnham in her application (the “Application”) for an Administrative Decision No. 25-026. This letter is respectfully submitted prior to the County Board of Commissioners (the “Board”) hearing on July 22, in which it will hear Ms. Burnham’s appeal of a Hearings Officer’s decision concluding that her importation of hydro-excavated soil is not a “farm use” as defined in ORS 215.203 and a parallel provision of the Marion County Code (“MCC”).

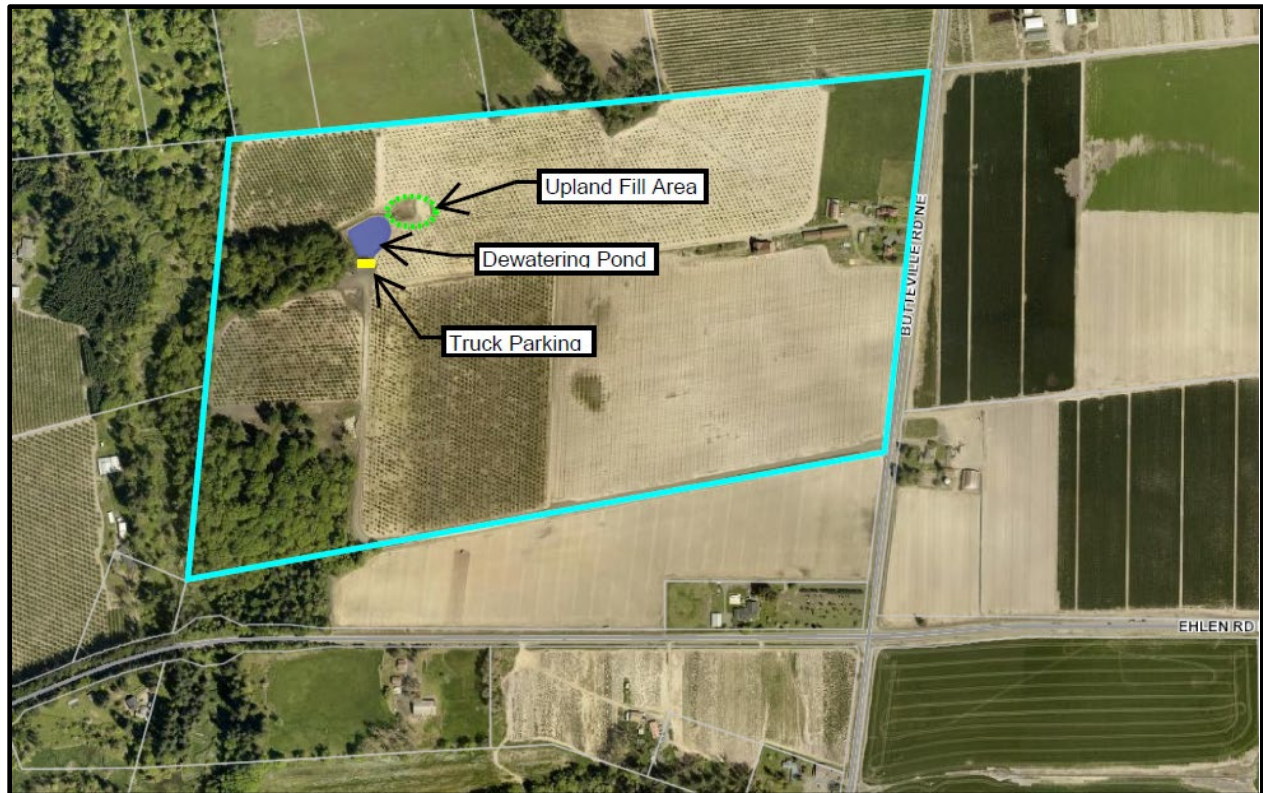
The Hearings Officer erred as a matter of both law and fact. There is clear and un rebutted evidence in the record establishing that Ms. Burnham’s soil importation and dewatering on the Burnham hazelnut farm is itself a “farm use” that increases the productivity and reduces the costs of her farming business. As demonstrated by testimony enclosed in this letter and other letters submitted separately, using soils generated from other uses to improve farming is exactly what Marion County should be encouraging, not prohibiting. For these reasons, explained in detail below, the Board should reverse the Hearings Officer’s decision and conclude that the Burnham farm’s agricultural fill activity is a “farm use” under ORS 215.203(2)

1. Introduction

As beneficiary of the Burnham Living Trust, Ms. Denise Burnham owns an approximately 130-acre farm located at 21855 Butteville Road, just north of the intersection of Butteville and Ehlen Road. The farm is dedicated to raising hazelnuts and wheat, and is operated by Ms. Burnham’s son-in-law Cheyne Fobert of Fobert Farms, Inc. **Exhibit 1.** Mr. Fobert is a member of a long-time farming family that has raised hops, hazelnuts, and other crops in Hubbard and Aurora. In November, 2023, Ms. Burnham contracted with All-Ways Excavating

Hon. Colm Willis
July 17, 2026

to import fill material, which was intended to fill in a large depression and other low spots on the Burnham farm.



According to the Marion County Farm Bureau and other farming organizations, as well as individual farmers, importation of soil (including that generated by hydraulic excavation) and using it to fill farmland is an utterly common agricultural practice. **Exhibit 2.** Soil excavated elsewhere is commonly used by farmers to improve and smooth their lands, mitigate or prevent erosion, reclaim unproductive farmland, and avoid boggy soil conditions that might harm livestock or damage equipment. **Exhibit 3.** In this instance, all of these benefits are sought by Ms. Burnham and Mr. Fobert.

This case arose because the means of transporting this soil, hydro-excavation trucks (commonly called “vactor trucks”) were used to deposit the soil while it’s suspended in the water used for hydro-excavation. Trucks importing this soil deposited it into an existing depression¹ on the Burnham property, where the soil was dewatered and intended to raise this portion of the property and surrounding areas to make them viable for farming. The area used for soil

¹ This gully, which is now used as the dewatering pond, has not been identified as a wetland or otherwise a water of the state.

Hon. Colm Willis
July 17, 2026

deposition and dewatering is near the western edge of the Property and consists of approximately 2/3 of an acre. It was carefully prepared for this purpose and to prevent runoff from entering or leaving the property. During the dewatering process, excavated soil settles on the pond's bottom while the supernatant pool can be drawn down by evaporation or use of the water for irrigation, leaving clean, dry soil underneath.

Stated simply, it is the appearance of this process, not the use itself, which has animated the several complaints to state regulators against Ms. Burnham, as well as the County's enforcement action. All of the state's regulatory concerns have been withdrawn, so the County itself remains the sole obstacle to Ms. Burnham continuing her agricultural fill activity. Ms. Burnham attempted to finally resolve the issue by filing this Application, in which she requested that the County find that her agricultural fill activity is a farm use as defined in ORS 215.203.

In response, the Hearings Officer issued a deeply flawed decision, which rather than correctly applying the law, sought to characterize Ms. Burnham's farm uses on the mere basis of how the soil is generated and dewatered, as well as the prospect of Ms. Burnham receiving some compensation for importing the soil. As explained below, Oregon law does not support those distinctions.

Finally, it is crucial that the County get this decision right for Ms. Burnham, as well as numerous other farmers who commonly rely on soil imports, including soil delivered by vector trucks, to improve their farmland and by extension, the profitability of their farms. Indeed, you have in the record before you a number of letters from experts and farming interests supporting Ms. Burnham's Application, including the following.

- Marion County Farm Bureau. **Exhibit 2.**

According to the Marion County Farm Bureau:

"Modern farming operations routinely involve truck traffic, outside contractors, imported inputs, soil amendments, compose, rock, fill and other materials necessary to improve and maintain agricultural land. Vacuum trucks are becoming increasingly common on farms as a safe and reliable excavation tool. [...] [F]armers are often paid and often pay for fill, but in all cases, the fill is ultimately used for farming."

- Hazelnut Growers of Oregon. **Exhibit 3.**

Testimony from the Hazelnut Growers of Oregon explains that infrastructure similar to that constructed on the Burnham farm (including paving) is utterly common on farms, as is compensation for accepting soil amendments to be used on those farms.

Hon. Colm Willis
July 17, 2026

- Deboodt Land and Livestock. **Exhibit 4.**

The Deboodt's farm uses vac trucks both for excavation on their farm and their use of hydraulically excavated soil on their farm.

- Oregon Property Owner's Association. **Exhibit 5.**

OPOA advocates for farmers throughout Oregon, with respect to this case, explains that "farms routinely receive soil, compost, rock, mulch, and other inputs from off-site sources, often under arrangements where the farmer receives a fee for accepting the materials. The fact that money may change hands in connection with those inputs does not transform the farm into a commercial dump site."

2. Issue and Question Presented

This appeal concerns a decision of the Marion County Hearings Officer which incorrectly concluded that importation of fill from hydro-excavation trucks is not a "farm use." The question before the Board is whether Ms. Burnham's agricultural fill activity is a "farm use" as defined in ORS 215.203(2)(a). Specifically, the Board is charged with determining whether Ms. Burnham's land is "currently employed" for the "primary purpose of obtaining a profit in money by raising, harvesting and selling crops." This case presents a legal question that is informed by relevant facts; it is not an enforcement or permit case, nor do the facts support any credible concern that this use will impact public safety. This latter point is crucial because much of the testimony below focused on safety and environmental concerns, concerns which state regulators have determined to be unfounded. Finally, 1000 Friends of Oregon and the Friends of French Prairie have attempted to make this case about vac trucks and not about farm use; the Board must focus, as Oregon law requires, on the fact that the Burnham farm seeks to use dewatered soil to improve their farmland.

a. Procedural Background

This case arose from a number of alleged violations of Oregon environmental laws, all of which have been withdrawn by Oregon regulators. Complaints apparently made by Ms. Burnham's neighbor precipitated enforcement actions by the Oregon Department of Environmental Quality and Oregon Water Resources Department. All of those enforcement actions were later withdrawn after these agencies determined that this agricultural fill activity did not violate any state environmental or water laws. **Exhibits 6 and 7.** Complaints also reached the County Code Enforcement officer, who issued a citation to Ms. Burnham for allegedly operating a "business."

Hon. Colm Willis
July 17, 2026

b. Facts

The 130-acre Burnham hazelnut farm on Butteville Road has been in Ms. Burnham's family for generations. In 2023, Ms. Burnham and Mr. Fobert were given the opportunity to obtain soil generated by vacuum excavation and contracted with All-Ways Excavating to construct the necessary support facilities to allow safe receipt of this material. This material has been used and is intended to continue to be used to mitigate erosion, fill low spots, expand arable land, and improve farm access. **Exhibit 1.**

Importation of this fill involves a roughly 2/3 acre dewatering pond surrounded by a berm and an improved farm road surface to allow trucks to deposit fill and allow for evaporation to remove the water from the fill. The road access was built on existing dirt farm roads and tractor paths, and was upgraded with gravel. The disposal points for the dewatering pond (approximately 1/15th of an acre) were paved. Some dewatered fill was placed upland of the pond and will be used to level the field just to the east of the pit.

As noted above, Oregon DEQ and OWRD thoroughly examined the use. DEQ ultimately concluded there were no known environmental regulations being violated at the site. **Exhibit 6.** Even before it withdrew its enforcement action, DEQ considered Ms. Burnham's imported material to be clean fill that could remain in place without a solid waste permit. **Exhibit 8.** OWRD concluded that the impoundment of the dewatering pond did not require a permit or additional water right, and like DEQ, withdrew any opposition to the activity. **Exhibit 7.**

3. Summary of Arguments

a. Ms. Burnham's agricultural fill activity meets the applicable definition of "farm use" in ORS 215.203.

There is no dispute in the record that the Burnham farm is used primarily for growing hazelnuts. The importation and preparation of soil regardless of the form in which it is delivered and regardless of the means of its delivery is part of this farm use. There is no question that the Burnham farmland used for this activity is "currently employed" for the primary purpose of obtaining a profit in money from the growing of hazelnuts. Too, the improvements made to the property to facilitate Ms. Burnham's agricultural fill activities – the dewatering pond, its related dumping area, and the road necessary to get to it—constitute the on-site construction and maintenance of [...] facilities used for the fill activity.

b. The Hearings Officer incorrectly construed and applied the law.

The Hearings Officer's Order was based on perceptions advocated by opposed citizens and was entirely divorced from the governing law. Rather than citing to cases made available to her where LUBA addressed similar uses (which Ms. Burnham's counsel made available to her),

Hon. Colm Willis
July 17, 2026

the Hearings Officer instead looked to sources of authority entirely outside of the legal doctrines applicable here. Consequently, the Hearings Officer did not identify any case law to support her conclusions; indeed, there is none.

c. Soil imports, including via vector trucks, is an utterly common and well-established farming practice.

As explained in **Exhibits 2–5**, importation of soil to be used in a farming activity is utterly common in farming, as is the use of vac trucks both for farm excavation and as a source of fill materials. Farmers use of improved haul roads and construction of infrastructure supporting fill uses is also very common throughout Oregon. According to a representative from Deboodt Farm, soils generated by hydraulic excavation “is no different than if we were to order fill materials, soils, from businesses that serve the same purpose. For us, it is a cheaper method that accomplishes the same goals, to improve the productivity of the farm while addressing the economic constraints (costs) of obtaining the material through other methods.” **Exhibit 4**. There is also no question that a farm’s acceptance and use of materials for its farm activity meets the definition of “farm use” even if they receive compensation for doing so. See, **Exhibits 2–5**, **Exhibit 9** (article on farmer paid for taking municipal sewage biosolids).

d. Hearings officer’s decision hurts Ms. Burnahm and farming in Oregon.

This case is one that is generating statewide concern from farmers and farming organization. Rep. Shelley Boshart Davis explains in Exhibit 10: “The farming community across Oregon is watching this case closely.” The following statement from Tim Deboodt of Deboodt Land and Livestock best sums up the concerns raised by our client, the Marion County Farm Bureau, the Oregon Hazelnut Growers, and others:

“We are gravely concerned about the decision of the Hearings officer in this case. The determination that the placement of fill from hydro-excavation is not a farm use, if upheld, has the potential to impact farms state-wide, not just those located in Marion County. This practice is not a separate use but one which is used as a part of on-farm (agricultural) practices. Just because the practice may seem rare and unusual to neighbors doesn't make it a non-farm practice.

The economics of farming is made more difficult by overbearing local/state and federal regulations. Failing to recognize the use of clean fill to maintain and improve farm productivity is an inappropriate ruling and piling on more regulations is not the answer. Instead, supporting innovation (in this case the use of deposits from hydro-excavation) supports local agricultural and the true preservation of agricultural lands and our farms.” **Exhibit 4**.

4. Ms. Burnham’s agricultural fill activity meets the definition of farm use in ORS 215.203(2).

Oregon law applicable to this case is found in ORS 215.203(2) and relevant LUBA case law, including a number of cases identified below that directly refute the Hearings Officer’s decision. Thus, the Board should find (1) that Ms. Burnham’s agricultural fill activity is meets the definition of farm use in ORS 215.203(2), (2) that her acceptance and dewatering of hydraulically excavated soil is directly supported by LUBA caselaw, and (3) that the Hearings Officer failed to correctly examine or apply either the relevant or statutory decisional law.

a. Ms. Burnham’s farm and her agricultural fill activity meets the statutory definition of “farm use” in ORS 215.203(2).

The question before the Board is whether Ms. Burnham’s farming activities, including her agricultural fill activities, meet the statutory definition of “farm use” in ORS 215.203, which is set forth in relevant part below:

“(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

Hon. Colm Willis
July 17, 2026

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;

[...]"

This statute is replicated verbatim in the County's code at MCC 17.110.223, which means that the County is required to interpret this definition consistent with LUBA's case law. *Kenagy v. Benton County*, 115 Or App 131 (1992). Given that the plain meaning of the definition of "farm use" reasonably incorporates agricultural fill activity (whether the farmer receives compensation or not), the Board can apply the statute on its face and conclude that the Burnham farm generally, and her agricultural fill activity specifically, meets the above definition of "farm use."

There is no question that the Burnham hazelnut farm is "currently employed" "for the primary purpose of obtaining a profit in money"; that is, indeed, the sole use to which as to which the farm is employed. Ms. Burnham's intentions² concerning the soils deposited in the dewatering pit are entirely connected with this purpose, as she has made clear both orally and writing: "Dewatered soil would be moved to fill the area upland of the pit, and to other low spots across the farm, before the pond is ultimately filled to the top of the berm." Dec. D. Burnham, July 20, 2025. **Exhibit 1.** Ms. Burnham went on to explain several additional uses for the dewatered soil, including:

- Filling of the dewatering pond to allow productive farming for the first time in that area.
- Filling other gullies on the property to mitigate erosion to the Ryan Creek watershed.
- Increasing the arable area of the farm.

² The Hearings Officer did not question that Ms. Burnham's intentions with regard to the fill material are genuine, and assumed they were.

Hon. Colm Willis
July 17, 2026

- Filling low spots in the farm to prevent damage to equipment.

All of these uses of the imported soil are unquestionably “farm uses” because nobody argues that filling for the purposes of improving farmland or creating new farmland is not “the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops.” *See, Exhibits 2–5, Exhibit 10.*

Even the Hearings Officer conceded as much: “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.” In so doing, she cited to the second emphasized component of the above definition, which provides that “‘farm use’ includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection.” That is, the preparation and improvement of farmland by the importation of soil for fill and other uses is a farm use. There is no dispute on this question, and the Hearings Officer’s analysis should have ended there.

Despite widespread agreement that importation of soil meets the definition of farm use, the Hearings Officer was apparently swayed by the *appearance* of the use and not its substance when she wrongly concluded that Ms. Burnham’s agricultural fill activity was a solid waste disposal use. Specifically, the Hearings Officer believed that the presence of an improved road, concrete pad, and dewatering pond conclusively demonstrated that this was not an agricultural fill activity. The problem with that conclusion is that ORS 215.203(2)—and applicable LUBA caselaw, discussed below—expressly contemplates water impoundments as farm uses. First, ORS 215.203(b)(E) includes within the definition of “farm use” “[w]asteland, 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.” Second, ORS 215.203(b)(E) includes within the definition of farm use “water impoundments lying in or adjacent to and in common ownership with farm use land.” Emphasis added.

Aside from the dewatering pond (again, expressly allowed by ORS 215.203(b)(E)), the Hearings Officer made much about the improvement of the farm road necessary to access the pond, mistakenly believing the entire road to be asphalt (it is almost entirely gravel), and implying that it was simply too robust to be part of a genuine farm activity. Her position on this point is directly refuted by LUBA caselaw: “access roads or driveways for farm use are outright permitted uses in the EFU zone,” regardless of how well they are constructed. *Wetherell v. Douglas County*, 56 Or LUBA 120, 137 (2008).

Hon. Colm Willis
July 17, 2026

Reading these together, the Board should conclude that Ms. Burnham's agricultural fill activity meets the statutory definition of "farm use" in ORS 215.203(2) for the following reasons:

1. There is no dispute in the record that the act of importing soil and using it to improve farm land is "the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops."
2. Improvement of the existing access road and creation of a secure disposal point for the soil is a "farm use" because it amounts "to the on-site construction and maintenance of equipment and facilities" used for Ms. Burnham's agricultural fill activity. ORS 215.203(2)(a).
3. The dewatering pond is itself specifically within the definition of farm use, because it is a "water impoundment lying in or adjacent to and in common ownership with farm use land." ORS 215.203(2)(b)(G).

b. LUBA caselaw supports the conclusion that Ms. Burnham's agricultural fill activity is a farm use.

Contrary to the Hearings Officer's conclusory statements otherwise, LUBA caselaw directly supports Ms. Burnham's Application. In fact, LUBA addressed the very questions at issue here in one of its earliest decisions, *Swenson v. Oregon Department of Environmental Quality*, 9 OR LUBA 10 (1983). In that case, the Metropolitan Wastewater Management Commission in Lane County proposed to transport liquid effluent from a cannery to a farm where it would be treated in a holding pond and then disposed of through spray irrigation on that farm. The petitioner in *Swenson* argued that the importation, treatment, and deposition of the effluent was not done for the "primary purpose" of making a profit in money by raising crops under ORS 215.203(2)(a).

LUBA firmly disagreed, and held that while the waste disposal project undertaken by the Commission was not a farm use, the onsite treatment of the water and its use for irrigation was absolutely a farm use, because the water treated onsite would be used for irrigation:

"The project is for the purpose of disposing of wastewater. [...] However, the land upon which the facility is to exist is being and is to be used for the growing of crops. There will be a pumping station which will be used to pump the Agripac effluent into the holding pond and, as the Board understands it, to aireate the water.

Hon. Colm Willis
July 17, 2026

The Board believes it is common knowledge and may take notice that some crops require irrigation. ORS 40.065. The Board has not seen a case in which the issue of where a farmer obtains water for irrigation has been a question. Irrigation pipe and the building to house irrigation equipment, if there is one, is part of the equipment necessary to irrigate. Irrigation is an “accepted farming practice.” [...] In this case, the farmer will irrigate the crop with water from Agripac which has been held in a pond in an exclusive farm use zone. The Board concludes the pond and equipment can be considered in farm use.

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.

The Board concludes that the county was correct in finding that the proposal was within the definition of an accepted farming practice and in compliance with Goal 3.”

Swenson, 9 Or LUBA at 17–19. *Emphasis added.*

LUBA’s analysis in *Swenson* is directly applicable here. Both Ms. Burnham’s agricultural fill activity and the farmer’s effluent treatment and irrigation activity in *Swenson* involve the importation of a resource (soil or water) that is generated elsewhere, storage of the resource in an impoundment, and deposition of the material on the farm to improve the productivity of the farm. It is worth noting that LUBA not only concluded that use of a holding pond for treatment was a “farm use” because the resource under treatment would eventually be put to productive farm use, but also held that the source of that resource was unimportant.

Sixteen years later, LUBA took up a similar case and did not deviate from its approach in *Swenson*. *Friends of the Creek v. Jackson County*, 36 Or. LUBA 562 (1999), *aff’d* 165 Or App 138 (2000) concerned a challenge 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. This involved a massive system that nobody disputed was not, when considered in isolation, a farm use: 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 nonetheless concluded that deposition of liquid effluent and dried biosolids constituted a farm use, notwithstanding the sheer immensity of the support facilities involved,

Hon. Colm Willis
July 17, 2026

and even though no farm activity for the remaining land had been started or even identified. Responding to the petitioner's argument that the primary purpose of the activity was to treat wastewater, not to obtain a profit from farming, LUBA concluded that the subjective intent of the farmer was not relevant to the question of whether a given activity is, in fact, 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. As especially relevant here, in rejecting Friends' arguments that application of the solid material after drying was not a farm use, LUBA concluded:

“The only apparent significant factual difference between *Swenson* and the present appeal is the part of the current proposal to dry and apply sludge to the land. However, just as irrigation is indisputably an accepted farming practice, it seems equally obvious that fertilizing and taking other appropriate actions to improve the productivity of the soil is also an accepted farming practice.”

Applicable LUBA case law stands for the common sense notion, with respect to importation of soil and water resources to a farm, it is the ultimate use of the resource being imported (in this case, agricultural fill) that determines whether is a “farm use.” It is not, contrary to the Hearings Officer, determined by the origin of the resource, its method of import, or the specific infrastructure needed to receive, store, or treat it. These cases establish the several important principles.

- The farm use question is determined based on what happens on the farm, not what happens outside the 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*, LUBA No. 2023-009, slip. op 29–30 (July 28, 2023) (*hereinafter* “710 Properties”). In *Swenson*, *Friends of the Creek*, and in this case, resources generated from non-farm uses are put to productive use on farms, providing an advantage to the both uses. It is completely irrelevant how effluent, biosolids, or water-saturated soil are generated. So long as they are used for farming, either now or proposed

to be so in the future (*see Friends of the Creek*), the importation and treatment of those resources is a farm use.³

- The subjective motivations of the farmer and how the farmer is compensated for any aspect of its farm use is not relevant to the question of whether importation of such materials is a farm use, so long as those materials are eventually used on the farm. “[S]o long as [crops] are raised, harvested and sold for a gross profit, in our view, it does not matter that the particular owner of the * * * farm may primarily be motivated to operate the * * * farm by factors other than the profit that is actually realized by raising and selling the [crops].” *Cox v. Polk County*, 39 Or LUBA 1, 11-12 (2000).
- Supporting structures, roads, pipes, and water impoundments have all been determined to constitute part of the farm uses described above, and 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).

5. Hearings Officer Errors

The Hearings Officer’s decision is rife with errors, primarily due to two factors. First, the Hearings Officer absolutely failed to correctly interpret and apply the governing law discussed above. Indeed, the Hearings Officer referred to the requirements of LUBA and “Oregon case law,” but failed to cite to a single case to support her analysis. She did not even discuss the cases directly on point, *Swenson* and *Friends of the Creek*, even though those cases were identified by Ms. Burnham’s attorney at the December 18, 2025 hearing.

Second, the Hearings Officer imported several irrelevant and inapplicable regulations into her analysis, including the County’s solid waste conditional use standards (this is not an application for a conditional use) and definitions of “farm” and “farm practice” from unrelated statutes.

³ LUBA went on to observe that:

“An example of such a farm would include a farm operation that is marginally profitable, where the farmer continues the farming operation primarily because the farmer is dedicated to continuing the family farm. Such a farmer’s primary reason for continuing the farm might have little to do with the profit realized from the farm. Under petitioner’s argument, such a farm would not constitute farm use while the next door neighbor’s identical farm would constitute a farm use, if the next door neighbor was primarily motivated by the profit derived from the farm.”

Friends of the Creek v. Jackson County, 36 Or. LUBA at 577 n. 8.

a. The Hearings Officer misconstrued applicable law.

The Hearings Officer wrongly confined her analysis to two elements: Ms. Burnham and Mr. Fobert’s subjective purpose in filling the farmland with material that has been hydraulically excavated, and second, whether “receipt of hydraulic vacuum extraction is a reasonable and accepted farm practice such that it is considered a farm use.”⁴ Neither of these correctly apply the governing law discussed above.

The Hearings Officer acknowledged that the excavated material would be put to farm use, but applied a subjective test in concluding that primary purpose of the site was disposal of wastes, by positing “whether the current employment of this land [...] is primarily agricultural production or the compensated receipt and deposition of off-site slurry.” That analysis is wrong as a matter of law: *Swenson*, *Friends of the Creek*, and *Cox* expressly reject the subjective analysis that the Hearings Officer conducted. Rather, LUBA has clearly stated that the test is objective, not subjective. *710 Properties LLC* at 30. And, LUBA has concluded that source of the resources being imported is irrelevant. *Swenson*, 9 Or LUBA 19.

The Hearings Officer’s decision similarly mischaracterized the test as being whether the receipt of soil from hydraulic excavation is an “accepted farm use” separate from the broader farming operation on the farm itself. On the contrary, LUBA has been crystal clear that the relevant question is not whether the facilities used to receive, treat, and distribute those resources are themselves “farm uses,” it is whether the use to which imported resources will be put on the farm would be a farm use: “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.” *Swenson*, 9 Or LUBA 19. This principle was again emphasized in *Friends of the Creek* and reiterated in *710 Properties*.

The Hearings Officer’s related point, that an activity must be “customary” in order to be a “farm use” is an incorrect reading of the statute. The requirement that a farm use be “customary” is a requirement only for “land under buildings supporting accepted farm practices, including the processing facilities allowed by ORS 215.255 and the processing of farm crops into [...]”⁵ This is not an application for “buildings supporting accepted farm practices,” therefore, there is no requirement that the use be “a mode of operation that is common to farms of a similar nature, necessary for the operation of such farms to obtain a profit in money, and customarily utilized in conjunction with farm use.” As noted above, Ms. Burnham’s agricultural fill activity meets the

⁴ As explained above, it is the ultimate use of these materials by the farmer, not their receipt, that characterizes their farm use. *710 Properties*, slip. op 29–30.

⁵ The term “accepted farm practices” appears only with respect to buildings on farmland that are not “single-unit dwellings.” This is the only category of uses that must be “customary,” per the definition in ORS 215.203(2)(c), because “accepted farm practices” is a phrase that is used only with respect to such buildings.

Hon. Colm Willis
July 17, 2026

plain definition of “farm use” in ORS 215.203, which does not depend on whether the proposed use is a “customary” farm practice.

At any rate, testimony in the record from the Marion County Farm Bureau demonstrates that, in fact, the importation and later use of hydraulically excavated soils is, in fact, common on farms in Oregon. So, even if Ms. Burnham’s agricultural fill activity must be a “customary” farm activity, evidence in the record demonstrates that it is. *See, Exhibits 2–5, Exhibit 10.*

b. The Hearings Officer incorrectly applied the definitions in ORS 30.930.

The sole question before the Board is whether the Application meets the definition of “farm use” set forth in ORS 215.203(2)(a) and or (b). However, the Hearings Officer relied on the definitions in ORS 30.930, which is not a land use statute, to import different definitions of “farm” and “farming practice.” ORS chapter 30 concerns liability protections for farm and forest activities, primarily concerning nuisance or trespass.⁶ The words “farm” and “farming” are defined in chapter 90 for this purpose only. For this reason, the County may not apply those definitions to this Application, either directly or as persuasive authority.

c. The Hearings Officer incorrectly concluded that Ms. Burnham and Mr. Fobert’s agricultural fill activity constitutes solid waste disposal.

Despite the great weight of the evidence, the Hearings Officer concluded that “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.” HO Order at 10. In so doing, the Hearings Officer incorrectly applied the definition of “solid waste” in MCC 17.120.315, apparently under the theory that if Ms. Burnham’s agricultural fill activity met the definition of “solid waste,” then it must be a solid waste use. In this regard, the Hearings Officer was incorrect for two critical reasons.

First, contrary to the Hearings Officer’s conclusion, Ms. Burnham’s agricultural fill activity meets neither the County nor the state definitions of solid waste. In making this error, the Hearings Officer imported inapplicable definitions from the County’s “Specific Conditional Use” chapter. Specifically, the Hearings Officer concluded that the definitions applicable to a “solid waste disposal site” under 17.120.315 apply to this Administrative Review.

They do not. First, MCC 17.120.315 provides that the definitions listed there are “as used in MCC 17.120.310 through 17.120.380.” This Application is not for a conditional use under those sections; therefore, these definitions do not apply as a legal matter. In fact, there is

⁶ These definitions are expressly applicable to ORS 30.930 to 30.947, not ORS 215.203(2)(a) and (b), which are relevant here.

Hon. Colm Willis
July 17, 2026

no definition of “solid waste” in the broadly-applicable definitions in the MCC at Ch. 17.110. Finally, the purpose statements for the solid waste program do not relate at all to importation fill.

Second, even if definitions in MCC 17.120.315 were applicable, Ms. Burnham’s agricultural fill activity does not meet any aspect of them, for the simple reason that fill dirt and soil do not meet the definition of “solid waste” in the first place. The County’s definition of “solid waste” and “waste” are as follows:

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;

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

As the declaration of Ms. Burnham demonstrates, there is no principled argument that the soil being dewatered on her property, which will be used thereafter in her farm operation, is “useless, unwanted, or discarded.” **Exhibit 1.** It is not useless because it can be and has been put to productive use in leveling and amending the soil of the farm. It is not unwanted because Ms. Burnham and Mr. Forbert want the soil being imported. And, it is not discarded because a great deal of investment has been made to keep and reuse the soil onsite.

The soil imported by Ms. Burnham and Mr. Forbert does not meet that definition because that soil is not waste in the first place. Even if it were, hydro-excavated soil is nothing like the examples used in the County’s solid waste definition, which include “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.”

Most critically, according to DEQ, the soil imported by Ms. Burnham and Mr. Forbert is not “solid waste” under the state’s definition of the term, which the County’s own definition duplicates. Rather, these soils meet the definition of “clean fill” in OAR 340-093-0030(19), which provides as follows:

“(19) “Clean Fill” means material consisting of soil, rock, concrete, brick, building block, tile or asphalt paving, which do not contain contaminants which

Hon. Colm Willis
July 17, 2026

could adversely impact the waters of the State or public health. This term does not include putrescible wastes, construction and demolition wastes and industrial solid wastes.”

After analyzing Ms. Burnham’s agricultural fill use, it concluded:

“DEQ has reviewed the clean fill determination submitted on your behalf by EVREN Northwest on March 8, 2024. DEQ finds that pending compliance with water quality regulations, 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.” Ex. 8.

Given that even DEQ does not believe that the materials imported by Ms. Burnham meet the definition of “solid waste,” and because the facts themselves prove that they do not, the Hearings Officer’s conclusions otherwise are simply wrong and must be rejected. So too must the Hearings Officer’s conclusion that the soil in the dewatering area is not “clean fill”: given that DEQ investigated this activity and concluded that it was, in fact, a clean fill activity, no reasonable decision maker could conclude otherwise.

6. Conclusion

This Board has a well-deserved reputation for being kind to farmland. My client and the other parties advocating for her now ask the Board to be kind to farmers. In this case, the Board need only follow established law to do so. For these reasons, as well as those explained above, the Board should reverse the Hearings Officer’s decision and conclude that Ms. Burnham’s agricultural fill is an allowable “farm use” under ORS 215.203(2) and applicable case law.

Best regards,

SCHWABE, WILLIAMSON & WYATT, P.C.



Garrett H. Stephenson

GST:jmhi
Enclosures

cc: Ms. Denise Burnham (via email)
Mr. Cheyne Fobert (via email)
Mr. Austin Barnes (via email)
Mr. Steve Elzinga (via email)

Declaration of Denise M. Burnham

I, Denise M. Burnham, declare and depose:

1. I am over the age of 18 and competent to make this declaration.
2. I make this declaration voluntarily and based on my personal knowledge unless otherwise stated.
3. I own, personally and as beneficiary of the Burnham Living Trust, an approximately 130 acre farm located at 21855 Butteville Rd, NE, Aurora, Oregon 97002, tax lot 041W080000200.
4. Except for the residence, all the property is dedicated to farm use, mainly the cultivation and harvesting of food crops, with some uncultivated woodland. At present, most of the farm is planted with hazelnut (filbert) trees and the rest with wheat. In previous years, row crops and ornamental nursery plants have also been cultivated on the farm.
5. I don't run any business out of my residence except for farming.
6. I have attached to this declaration a map of the property showing the location of my residence and various other locations referenced in this declaration.
7. The area where the berm and pit are presently, located on the west or backside of my property, chronically washed out before the berm was constructed. Arable upland was repeatedly lost to erosion and access to the northwest corner of my property was often difficult or impossible. The unimproved route along the northern boundary of my property is not a good option because the gully there impedes movement of large trucks and farm equipment.
8. Greg Wing suggested to me and to my son-in-law Cheyne Fobert, who manages the farm, that he could build a berm across the washed out area on the backside of my property using material excavated from the gully. The overburden would be set aside and the good clay beneath excavated to build the berm. The remaining pit would be used to dewater hydraulically excavated soil collected and transported to the farm by vacuum trucks (or "vac-trucks"). Dewatered soil would be moved to fill the area upland of the pit, and to other low spots across the farm, before the pit is ultimately filled to the top of the berm. We have discussed, but have not decided upon, doing something similar in the vicinity of the gully to the south, the "future fill

DECLARATION OF DENISE M. BURNHAM

Page 1 of 2

*The Environmental Compliance Organization LLC
PO Box 80458, Portland OR 97280
503-890-4030 / trbenke@env-compliance.com*

area" shown on the attached map.

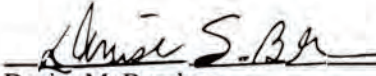
9. Because of the number of trucks accessing the farm, to avoid having the trucks tear up the asphalt drive where I live, I asked that All-Ways Excavating USA LLC improve the roadway running along the southern boundary of my property and then extend the road northward to the primary fill area. It's always important to have good roads in and around your croplands to facilitate cultivation, irrigation, spraying and harvesting of cash crops.

10. Fees paid to All-Ways Excavating USA LLC by the vac-truck operators would cover the cost of these improvements as necessary to transport, dewater and place the hydraulically excavated soil as clean fill.

11. There are at least four reasons why the dewatering and placement of the hydraulically excavated soil is beneficial to my farm:

- a. The berm and (eventually) filled pit will improve access to the backside of my farm;
- b. Filling the gullies on the backside of my farm will mitigate erosion to the Ryan Creek watershed by rerouting stormwater drainage across a wider area (meaning as sheet flow rather than by channeling);
- c. The arable area of the farm will be increased; and
- d. Filling low spots across the farm will reduce the incidence of farm equipment getting bogged down and will aid in planting, irrigation and spraying.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

 7/20/25
Denise M. Burnham (date)

DECLARATION OF DENISE M. BURNHAM

Page 2 of 2

The Environmental Compliance Organization LLC
PO Box 80458, Portland OR 97280
503-890-4030 / trbenke@env-compliance.com





Marion County Farm Bureau

PO Box 12216
Salem, OR 97309

Phone: 503-877-1999
Fax: 866-509-3212
www.marioncofarm.com

July 15, 2026

Marion County Board of Commissioners
555 Court St NE, Suite 5232
Salem, OR 97301

VIA EMAIL: PublicHearings@co.marion.or.us.

Re: Letter in Support of Denise Burnham - Land Use Case No. 25-026

Dear Commissioners,

On behalf of the Marion County Farm Bureau, we submit this letter in support of Denise Burnham and Cheyne Fobert. By way of background, the Marion County Farm Bureau represents the interests of farmers and ranchers throughout Marion County, Oregon.

Marion County Farm Bureau appears in this matter because the Hearings Officer's decision in Land Use Case No. 25-026 raises issues of significant concern to the agricultural community. If allowed to stand, the decision could create uncertainty for farmers and ranchers who need to maintain, improve, and make productive use of EFU-zoned agricultural land.

The Burnham property is a working commercial hazelnut orchard. The activity at issue involved bringing clean fill onto the property and retaining it there to level and improve orchard ground. From the perspective of Marion County's agricultural community, that is the type of land-maintenance that farmers commonly undertake in order to keep their agricultural land productive and in active farm use.

The Hearings Officer's decision appears to treat the on-site use of clean fill to maintain and improve a working orchard as though it were the operation of a commercial landfill or separate disposal business. Marion County Farm Bureau respectfully disagrees with that characterization. The relevant question should be whether EFU land is being used for agricultural purposes with the intent of to obtain a profit. The Burnham property is used as a commercial orchard, and the clean fill was used to improve that orchard ground. The fact that material was brought from off-site, that trucks entered the property, or that compensation may have been involved in accepting useful material should not transform a working farm into a prohibited non-farm use.

Modern farming operations routinely involve truck traffic, outside contractors, imported inputs, soil amendments, compost, rock, fill, and other materials necessary to improve and maintain agricultural land. Vacuum trucks are becoming increasingly common on farms as a safe and reliable excavation tool. Agricultural producers also routinely engage in practical arrangements that may involve compensation, cost offsets, or other economic terms. In such arrangements, farmers are often paid and often pay for fill, but in all cases, the fill is ultimately used for farming. Farmers also frequently improve their land with parking areas or other infrastructure improvements to increase business efficiency. Those facts do not change the primary use of the property as a commercial farm. In our view, Ms. Burnham's farming operation, including its past importation of soil – compensated or otherwise – is typical in nature to similar activities conducted as part of farms throughout the County.

Marion County Board of Commissioners

July 15, 2026

Page Two

These improvements will increase the long-term productivity, efficiency, and economic viability of the farm. More productive farms support Oregon's rural communities, expand agricultural output, and contribute to the continued growth of one of the state's most important economic sectors.

This matter is therefore important not only to this farm family, but also to the broader Marion County agricultural community. A decision affirming the Hearings Officer's reasoning could affect farmers and ranchers throughout the county who need to improve low ground, amend soils, address drainage issues, maintain access, or otherwise adapt their land to remain productive.

For these reasons, Marion County Farm Bureau respectfully urges the Board to reverse the Hearings Officer's decision in Land Use Case No. 25-026, apply the correct farm use standard, and recognize that the on-site use of clean fill to maintain and improve a working commercial orchard is an agricultural use.

Thank you for your consideration of this letter and for your attention to the interests of Marion County's agricultural community.

Respectfully submitted,

Marion County Farm Bureau

A handwritten signature in black ink, appearing to read 'Dana Estensen', followed by a long horizontal flourish line.

Dana Estensen

Marion County Farm Bureau President



July 9th, 2026

Marion County Board of Commissioners
555 Court St NE
Salem, OR 97301

RE: Support for Denise Burnham – Appeal of Land Use Case No. 25-026

Dear Marion County Board of Commissioners,

On behalf of the undersigned Hazelnut Growers of Oregon (HGO) , I am writing to express our strong concerns regarding the Hearings Officer's (HO) recent decision. Marion County is the heart of Oregon's hazelnut industry. While this case involves just one orchard, the HO's legal reasoning sets a dangerous statewide precedent that threatens the operating rights of every working farm in Oregon.

The core issue is simple: does using clean fill dirt to maintain a commercial orchard count as a protected "farm use" under ORS 215.203, or does it turn a working farm into an illegal commercial landfill?

By ruling that this activity constitutes a landfill, the HO ignored the realities of modern agriculture.

We urge the Board to overturn this decision for the following reasons:

1. The Decision Penalizes Common Activities Found on Farms:

The HO penalized the property owners for four characteristics that are completely normal on working farms:

- **Infrastructure:** Asphalt, pavement, and parking infrastructure on common on farms. Building a temporary pit or paving a parking area does not turn commercial farm business into a commercial landfill.
- **Compensation for the Fill:** Farmers are frequently compensated for accepting soil amendments. For example, federal NRCS programs regularly pay farmers to utilize biochar. Receiving a fee for fill does not make a farm a commercial landfill.



- **Incoming Truck-Traffic:** Reclaiming and leveling low-lying land requires heavy material transport. Farms interact constantly with contractors, vendors, and suppliers. If the number of trucks coming onto a farm can strip a farm of its agricultural status, what is the threshold, and who decides it? If 100% of this clean fill remained on-site for agricultural improvement, why does the number of trucks entering the property even matter?
- **Outside Materials:** Farmers routinely import off-farm materials like compost, shavings, and clean soil. Restricting material just because it came from a third party disrupts standard agricultural supply chains.

2. The Decision Creates an Illegal Legal Burden and Stifles Innovation:

Under Oregon law (ORS 215.203), the test for “farm use” on EFU land is straightforward: the operator must engage in a listed agricultural activity for the primary purpose of making a profit. The statute explicitly lists the on-site maintenance of facilities like orchards.

Denise and her family are clearly operating a commercial hazelnut orchard for profit. They accepted clean fill material solely to maintain their orchard and earn a living as farmers. No fill material leaves their property, and they are not selling it to others. Their actions constitute on-site orchard maintenance and should be considered farm use.

Not accepting this, the HO unlawfully altered the statutory test by requiring the farmers to prove their method is a “customary” practice. The HO incorrectly dragged Oregon’s Right to Farm tort law (a tool to fight neighbor nuisance lawsuits) and ODA’s water quality standards into a land-use evaluation. This creates a new and unauthorized legal hurdle that threatens standard farming activities.

It also injects immense bureaucratic scrutiny and uncertainty for Marion County farmers. If protected farm use is limited to only what is “customary,” who decides this standard – outside special interest groups, county planning staff, the Board of County Commissioners? What does this mean for agricultural innovation? Does a farmer now need to receive land use approval from the county before trying a new method or a new technology?

The Burnham family used an innovative, mutually beneficial arrangement to accept clean soil from hydro-excavation (“vac trucks”). This process yields clean, high-quality soil perfect for leveling land. Just because a practice is new or modern does not mean it should be penalized.

If the HO’s restrictive “customary” test stands, agricultural innovation will freeze. Farmers will live in fear that adopting new technologies or efficiencies will trigger code violations and cost them their protected farm status.



Conclusion

Denise Burnham and her family acted as resourceful stewards of their land, using clean material to improve their orchard. We respectfully request that the Board defend Oregon's land-use laws, protect our agricultural economy, and overturn the Hearings Officer's decision.

Sincerely,

A handwritten signature in black ink, appearing to read "Troy Johnson", with a long horizontal flourish extending to the right.

Troy Johnson
CEO, Hazelnut Growers of Oregon
Donald, OR 97020



Deboodt Land and Livestock
10685 NW Dehler Rd
Prineville, OR 97754

July 15, 2026

Marion County Board of Commissioners
555 Court St NE, Suite 5232
Salem, OR 97301
VIA EMAIL: PublicHearings@co.marion.or.us.

RE: Letter in Support of Denise Burnham – Land Use Case No. 25-026

Dear Commissioners,

As a partner and representative of Deboodt Land and Livestock, a farming and livestock operation headquartered in Prineville (Crook County), Oregon, I submit this letter in support of Denise Burnham and Cheyne Fobert. Our farming business has been following this matter through published reports and the public record made available by Marion County. I am writing because of our concern about the precedent setting consequences of a decision issued by the Marion County Hearings Officer in regard to this matter.

As a matter of history, our farm regularly used hydro-excavation as a method of doing farm maintenance of our sumps and ponds. On our farm, the use of VAC truck systems allows us to annually maintain our irrigation sumps and ponds. Irrigation waters, delivered by our local Irrigation District, bring with them sediments from the system. Those sediments collect in our sumps and ponds, negatively impacting the operations of our irrigation pumps. As sediments collect, we lose pump efficiency and volume of water. Other operations within the District and throughout central Oregon, also use this technology to remove sediments. Hydro-excavation allows for the efficient removal of sediments while minimizing the risk of breaching our sump and pond liners.

Use of the materials (sediment) is left by the operator of the VAC trucks for our use on farm. This material is used for the purposes of leveling lands and covering areas where limited soil reduces site productivity. We also provide the opportunity for these businesses to bring similar materials from other (off farm) locations. This material is no different than if we were to order fill materials, soils, from businesses to serve the same purpose. For us, it is a cheaper method that accomplishes the same goals, to improve the productivity of the

farm while addressing the economic constraints (costs) of obtaining the material through other methods.

We are gravely concerned about the decision of the Hearings officer in this case. The determination that the placement of fill from hydro-excavation is not a farm use, if upheld, has the potential to impact farms state-wide, not just those located in Marion County. This practice is not a separate use but one which is used as a part of on-farm (agricultural) practices. Just because the practice may seem rare and unusual to neighbors doesn't make it a non-farm practice. What is the difference between bringing "dry" fill to fill low areas and add soil to areas where soils are lacking/poor/rocky and bringing in "wet" soils that are first allowed to dry on site and then applied in the same way?

Please do not allow this ruling, the Hearings Officer's decision in Land Use Case No. 25-026 to stand and instead approve the Administrative Review application. The economics of farming is made more difficult by overbearing local/state and federal regulations. Failing to recognize the use of clean fill to maintain and improve farm productivity is an inappropriate ruling and piling on more regulations is not the answer. Instead, supporting innovation (in this case the use of deposits from hydro-excavation) supports local agricultural and the true preservation of agricultural lands and our farms.

Thank you for your important consideration of this ruling!

Respectfully submitted,



Tim Deboodt

Partner, Deboodt Land and Livestock, LLC



PROTECTING PRIVATE PROPERTY RIGHTS SINCE 1989

OPOA Legal Center

(503) 620-0258

www.oregonpropertyowners.org

July 16, 2026

Marion County Board of Commissioners
555 Court St NE
Salem, OR 97301

RE: Appeal of Land Use Case No. 25-026 – Burnham Property

Dear Chair and Members of the Board,

On behalf of the OPOA Legal Center, we write today in support of Denise Burnham's appeal of the Hearings Officer's decision in Land Use Case No. 25-026.

By way of background, the OPOA Legal Center has been defending the rights of Oregon property owners for more than 35 years. As a non-partisan, non-profit organization, our mission is straightforward: to protect the rights of Oregon's private property owners to make productive use of their land without undue government interference. Over the past three and a half decades, we have represented countless Oregon property owners, appearing before county boards, state agencies, and in the court system on property rights issues ranging from farm use determinations to urban growth boundaries.

We know Oregon's land use system well – including where it works, and where it doesn't. We appear here because the Hearings Officer's decision in this case does not work. It misapplies Oregon law, and if it stands, it will cause real harm to agricultural property owners in Marion County and across the state.

I. Maintaining Agricultural Facilities Through Fill is Protected Farm Use

The legal question before the Board is narrow: whether accepting fill and storing it in a soil-settling pit qualifies as a “farm use” permitted outright, or instead constitutes an unauthorized commercial landfill requiring conditional land use approval.

Under both Oregon law (ORS 215.203) and Marion County Code (MCC 17.110.223), “farm use” is defined broadly to mean “the current employment of land for the primary purpose of obtaining a profit in money” by doing one of several activities, including “on-site maintenance of agricultural facilities” – in this case, filling in low spots to maintain an orchard. Thus, the statutory test for determining farm use is (1) the current employment of land; (2) for the primary purpose of obtaining a profit in money; (3) by doing one of the enumerated activities – in this case maintaining agricultural facilities.

Here, the property owner is employing her farmland for the primary purpose of earning profit by growing and selling hazelnuts. In addition, to support the growing and harvesting of hazelnuts, the property owner is accepting fill material produced off site to maintain the hazelnut orchard. Generally, the strategic use of fill is a vital farm management practice because it allows producers to level depressions, repair soil erosion, and stabilize heavy machinery lanes to ensure long-term soil health and safe, functional infrastructure on their facilities.

Eliminating low spots and grooves in an orchard is also a standard practice in the hazelnut industry. For example, farmers level and flatten the “alleyway” between the tree rows to make fewer “dips” for the hazelnuts to lay in to avoid them being missed by the harvester:

After flailing, a weighted roller can flatten the orchard floor firmly to remove small ruts and bumps and create a smooth surface. Having flat ground allows the sweeper paddles or brushes on the harvester to efficiently pick the hazelnuts off the ground as it passes. Ensure there are no bumps or depressions in the orchard floor and remove any mounds of soil immediately around trees.

See Ontario Ministry of Agriculture, Food and Rural Affairs, *Publication 863: Guide to Hazelnut Production in Ontario* 109 (Oct. 18, 2022), <https://www.ontario.ca/files/2022-10/omafra-guide-to-hazelnut-production-in-ontario-en-2022-10-13.pdf>. As such, utilizing fill material in a hazelnut orchard to fill in low spots can be necessary for both the production and harvesting of hazelnuts.¹

The primary purpose of using the property, including the use of the soil settling pit to generate and store fill material, is to earn a profit from growing and selling hazelnuts. There is no intention on behalf of the property owner to do anything other than successfully maintain a commercial hazelnut orchard. The Board need not go further to find that this activity is “farm use” and thus allowed without obtaining land use permits from the County.

A. The Factors Cited by Hearings Officer Do Not Change the Legal Analysis

In the decision, the Hearings Officer points to truck traffic, compensation received for accepting fill from an off-site source, and infrastructure improvements made to aid parking on the trucks as evidence that the activity was more of a commercial landfill rather than agricultural operation. With respect, none of those factors alter the legal conclusion that this activity is farm use.

Farms routinely have trucks and vehicles of all types entering their properties. That is because farms in the EFU zone are supposed to be commercial businesses. Thus, the relevant question is not how many trucks visited the property or whether the owner received compensation for accepting material. The relevant question is what happened to the material once it arrived. Here, the fill remained on the property and was used to improve the orchard. That is a farm use. The

¹ See also Jeff L. Olsen, Or. State Univ. Extension Serv., *Growing Hazelnuts in the Pacific Northwest: Orchard Design* 2–3 (EM 9077, Nov. 2013, reviewed 2023), <https://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/43811/em9077.pdf>

incidental trip-count of how the material gets to the property does not convert a farm into something else.

Further, farms routinely receive soil, compost, rock, mulch, and other inputs from off-site sources, often under arrangements where the farmer receives a fee for accepted the materials. The fact that money may change hands in connection with those inputs does not transform the farm into a commercial dump site. Indeed, federal conservation programs affirm the opposite: they subsidize the purchase and application of carbon-rich soil amendments, such as biochar, precisely because incorporating outside materials to make farmland more productive is an encouraged agricultural practice.²

Additionally, the farmer's use of asphalt to create a truck parking area does not convert a working farm into a commercial landfill. To the contrary, hard-surfaced areas are a routine and practical feature of agricultural operations where trucks, equipment, manure handling, loading, unloading, or material storage require stable, durable, and cleanable surfaces.

That is not merely common sense; it is recognized agricultural practice. USDA NRCS guidance expressly provides:

If you have an area on your farm where heavy trucks make frequent visits, or areas that need to be scraped to remove manure or other materials, paving may be the best solution. Materials such as concrete, asphalt, soil cement, fly ash and paving blocks can be used for paving.

U.S. Dep't of Agric., Nat. Res. Conservation Serv., *Small Scale Solutions for Your Farm: Heavy Use Area Protection* (FY 2022), <https://www.nrcs.usda.gov/sites/default/files/2023-01/heavy-use-area-protection-small-scale-solutions-fy22.pdf>.

Thus, the presence of asphalt on a farm is not evidence of an unlawful activity. In many agricultural settings, impervious or all-weather surfaces are affirmatively recommended to improve safety, sanitation, drainage, trafficability, equipment access, and environmental protection. The Board should therefore evaluate the asphalt parking area for what it is: ordinary farm infrastructure supporting farm operations, not a change in use to a commercial waste disposal facility.

A comparison to standard agricultural practices exposes the flaw in the Hearings Officer's reasoning. CAFOs and livestock operations routinely use excavated ponds, lagoons, and other waste-management structures on agricultural land to store manure slurry and wastewater. Those facilities can involve substantial earthwork, engineered excavation, contractor involvement, heavy equipment, truck traffic, and long-term alteration of the land surface – often times with concrete or other impervious materials. Yet they are treated as agricultural infrastructure without a second

² Allied Soil Health & Am. Farmland Tr., *Biochar Basics: Current Status of NRCS Incentive Payments* (July 28, 2023), <https://farmlandinfo.org/wp-content/uploads/sites/2/2023/08/biochar-current-incentives.pdf>.

thought because their function is agricultural: managing byproducts of livestock operations so farming can continue.

The same principle applies here. On a dairy farm, digging a lagoon to capture and store manure slurry (specifically so those nutrients can be recycled and later spread back onto the fields) is recognized as a standard farm practice. There is no logical reason to treat an orchard's soil-and-water settling pit any differently.

In both cases, a temporary basin is used to hold a wet mixture so that the valuable, organic material can be applied directly back to the farm's soil. Accordingly, the Board should look at what the pit actually *does* – it captures soil to improve farmland. Labeling one recycled slurry as "farming" and the other as "unlawful commercial waste" makes absolutely no sense.

B. The Decision Misapplies the Farm Use Standard

Contrary to the Hearings Officer's decision, ORS 215.203 does not require that a farm practice be "customary." According to the HO Decision, it appears the Hearings Officer borrowed this concept from Oregon's Right to Farm statute and Oregon Agricultural Water Quality regulations – completely separate bodies of law from Oregon land use law. By importing this restrictive standard without statutory authority, the Hearings Officer created a legal test that Oregon law simply does not recognize.

Under the correct standard, the only question is whether the land is employed for the primary purpose of obtaining a profit from agriculture by doing one of the listed activities. As previously discussed, the Burnhams are operating a commercial hazelnut orchard, and using clean fill to level and maintain the orchard floor, which is a direct and necessary physical improvement to support that commercial crop. It is, by definition, a protected farm use.

II. Conclusion

The Burnham family used clean fill on-site to maintain and improve a working commercial orchard. Under ORS 215.203, that is farm use. OPOA respectfully urges the Board to reverse the Hearings Officer's decision, apply the correct legal standard under ORS 215.203, and reaffirm that Oregon's agricultural property owners may maintain and improve their farmland without facing this kind of unwarranted regulatory exposure.

Respectfully submitted,

Samantha Bayer,
General Counsel
OPOA Legal Center
(503) 620-0258



Oregon

Tina Kotek, Governor

Department of Environmental Quality
Office of Compliance and Enforcement
700 NE Multnomah Street, Suite 600
Portland, OR 97232-4100
(503) 229-5696
FAX (503) 229-5100
TTY 711

September 3, 2025

Thomas R. Benke
PO Box 83706
Portland OR 97283

Re: Denise Burnham
Department Order
Case No. LQ/SW-WR-2024-100

On March 13, 2025, the Department of Environmental Quality (DEQ or Department) issued your client Denise Burnham a Department Order (Order) in the above referenced case directing Ms. Burnham to stabilize or decommission a berm and pit on her property in Aurora.

Based on information subsequently provided by you on behalf of Ms. Burnham, DEQ is withdrawing the Order. However, enforcement action may be taken in the future on any new or ongoing violation.

If you have any questions, please contact DEQ Environmental Law Specialist Jeff Bachman 503-229-5950. You may call toll-free within Oregon at 1-800-452-4011, extension 5950.

Sincerely,

Erin Saylor, Interim Manager
Office of Compliance and Enforcement

Enclosure

cc: Chance Plunk, DEQ
Heather Tugaw, DEQ

**DEFENDANT'S
EXHIBIT
11**



Oregon

Tina Kotek, Governor

Water Resources Department

North Mall Office Building

725 Summer St NE, Suite A

Salem, OR 97301

Phone (503) 986-0900

Fax (503) 986-0904

www.Oregon.gov/OWRD

October 3, 2025

Denise S. Burnham
21855 Butteville Rd. NE
Aurora, OR 97002

Regarding Case# 2416002NOV

The Oregon Water Resources Department issued to Denise S. Burnham a Notice of Violation to assess a proposed disciplinary action in the above-referenced matter on February 1, 2024.

The Notice of Violation issued in this matter on February 1, 2024 is hereby withdrawn at this time.

If you have any questions or concerns, feel free to contact me at the number or email address listed below my name.

Sincerely,


Kelly Burgess
Enforcement Compliance
Phone: 503-586 6184
kelly.burgess@water.oregon.gov

Dated this 3rd day of October, 2025
Oregon Water Resources Department

DEFENDANT'S
EXHIBIT
13



Oregon

Tina Kotek, Governor

Department of Environmental Quality

Western Region Salem Office

4026 Fairview Industrial Dr SE

Salem, OR 97302

(503) 378-8240

FAX (503) 373-7944

TTY 711

June 10, 2024

Denise Burnham
c/o Cheyne Fobert
18899 Fobert Road NE
Hubbard, OR 97032

RE: DEQ Response to Evren Northwest April 16, 2024, document
Pre-Enforcement Notice
SW 2024-PEN-8913/WQ 2024-PEN-8915
21855 Butteville Rd NE Aurora OR 97002 Marion County

Dear Denise Burnham,

The Department of Environmental Quality received the document dated April 16, 2024, submitted on your behalf, by Evren Northwest, Inc. (Response). The Response was submitted to address specific violations and corrective actions identified in DEQ's Pre-Enforcement Notice dated March 29, 2024, regarding your property located at 21855 Butteville Road in Aurora, Oregon.

Please be advised that this correspondence is limited to the previously cited violations and your April 16, 2024, response regarding those violations. DEQ remains concerned and unclear as to whether there are future plans to receive material at this site. If no future activities are proposed there would be no requirement to obtain DEQ permits, but there would still be ongoing erosion and sediment control responsibilities which are discussed below. Should you desire to conduct future activities at this site, please see the below contacts list for guidance on applicable requirements prior to resuming activity:

- Solid Waste: Seth Sadofsky regarding dry materials being brought to the site for disposal. This includes dry excavation soil like materials with the potential to be considered "substantially the same as clean fill" which may be eligible for a permit exemption. Seth.Sadofsky@deq.oregon.gov or 503-446-7397
- Wastewater: Ranei Nomura regarding wastewater disposal. Any potable or non-potable water used in the drilling process is considered wastewater regardless of how clean it might be after settling occurs in a disposal pit. Ranei.Nomura@deq.oregon.gov or 503-378-5081.

- Stormwater: Chance Plunk regarding erosion and sediment control requirements and stormwater management. Chance.plunk@deq.oregon.gov or 541-972-5463.

Solid Waste Regulation

Corrective Action – Additional Records Request

DEQ has reviewed the additional records submitted indicating where waste materials were generated. The records are sufficient to meet this corrective action.

Corrective Action – Clean Fill Determination

DEQ has reviewed the clean fill determination submitted on your behalf by EVREN Northwest on March 8, 2024. DEQ finds that pending compliance with water quality regulations, 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.

Water Quality Regulation

Corrective Action: Apply for DEQ water quality permit

DEQ will not require a water quality permit if the disposal pit is no longer used for wastewater disposal.

Corrective Action: Submit engineering plans for the disposal pit

DEQ no longer requires the engineering plans for the disposal pit if it is no longer used for wastewater disposal.

These initial violations, operating without a water quality permit and failure to submit engineering plans, will still be addressed by DEQ’s Office of Compliance and Enforcement with formal enforcement action, which may include the assessment of a civil penalty.

Erosion and Sediment Control

Corrective Action: Obtain coverage under a DEQ 1200-C NPDES General Construction Stormwater Permit

DEQ reviewed the documentation stating that the land disturbance for the project site is currently less than 1 acre and determined a 1200-C NPDES General Construction Stormwater Permit is not currently required.

Corrective Action: Erosion and Sediment Control

DEQ received and reviewed the images submitted by EVREN on your behalf on March 15, 2024, of the erosion and sediment controls installed at the site. DEQ has determined that the installed erosion and sediment controls are sufficient and should continue to be maintained until perennial vegetation that provides 70 percent or more cover on all exposed areas.

Denise Burnham
c/o Cheyne Fobert
June 10, 2024
Page 3

Please be advised that no person shall cause pollution of any waters of the state or place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into waters of the state by any means (Oregon Revised Statute 468B.025). Prior to any further construction activity, please contact Chance Plunk, DEQ's Willamette Basin Specialist, at (541) 972-5463, chance.plunk@deq.oregon.gov, or at 4026 Fairview Industrial Dr SE, Salem, OR 97302 for technical assistance and guidance.

Sincerely,

Becky Williams

Becky Williams (Jun 7, 2024 15:10 PDT)

Rebecca Williams
Manager
Materials Management

Heather Tugaw

Heather Tugaw
Manager
Stormwater Permitting

Ranei Nomura

Ranei Nomura (Jun 7, 2024 15:50 PDT)

Ranei Nomura
Manager
Wastewater Permitting

cc: Becky Williams, DEQ becky.williams@deq.oregon.gov
Cat Rhoades, DEQ cathie.rhoades@deq.oregon.gov
Chance Plunk, DEQ chance.plunk@deq.oregon.gov
Ranei Nomura, DEQ ranei.nomura@deq.oregon.gov
Seth Sadofsky, DEQ seth.sadofsky@deq.oregon.gov
Paul Trone, EVREN NW pault@EVREN-nw.com
Chad Goffin, Marion Co. cgoffin@co.marion.or.us
Greg Wing, All-Ways Excavating greg@allwaysx.com

(<https://capitalpress.com>).

[https://capitalpress.com/category/market-](https://capitalpress.com/category/market-guide) [Guide](https://capitalpress.com/category/market-guide) [Growers' Guide](https://digitalgrowersguide.com/) [\(https://digitalgrowersguide.com/\)](https://digitalgrowersguide.com/) [Calendars](#) [Classifieds](#) [\(https://capitalpressah.comediagroup.com/\)](https://capitalpressah.comediagroup.com/) [Ag Shows](#) [\(https://capitalpress.com shows/\)](https://capitalpress.com/shows/)

City will pay farm to take biosolids

Published 9:30 am Monday, December 16, 2024

By BILL BRADSHAWWallowa County Chieftain



The Enterprise City Council listens Dec. 9, 2024, to Michael Eng, of Lostine, Ore., via Zoom at city hall during a discussion about placing biosolids from the sewage treatment plant on a local farm. From left, around the table, are Police Chief Kevin McQuead, Councilor Brandon Miller, City Administrator L...

Apply for up to

\$250*

with money^{app}

*The average approved advance is \$100. Amounts range from \$50-\$100 for first-time users, and \$100-\$250 for returning users. Subject to eligibility. See terms and conditions at cash.money.app.

ENTERPRISE, Ore. — An agreement was reached Dec. 9 between the city of Enterprise and Cornerstone Farms Joint Venture for the farm to take biosolids from the city’s sewage treatment plant.

Trending

Critics challenge Oregon’s new general permit for CAFOs

(<https://capitalpress.com/2026/07/15/critics-challenge-oregons-new-general-permit-for-cafos/>)

Kotek: Oregon ‘revenue neutral’ tax reform possible

(<https://capitalpress.com/2026/07/14/kotek-oregon-revenue-neutral-tax-reform-possible/>)

The biosolids are gleaned from sewage at the plant and then treated and dried. They can be used as fertilizer on agricultural fields. The city will pay Cornerstone to take the biosolids, as the farm must deal with the management issues involved with getting government approval for use of the waste on its crops.

The council voted to pay the Melville family-owned farm just outside of town \$2,250 to accept the biosolids for the first half of 2025, as only one application can be made in that time, and \$4,500 a year during fiscal years thereafter.

Dave Wilkie, wastewater plant operator, said the expense is new to the city, as Enterprise previously only had to pay Wallowa County the cost of diesel fuel for its trucks to haul the waste to the landfill. However, the city is no longer allowed to dump waste there and had to find an alternative. Wilkie said the city will haul the waste to Cornerstone and spread it under the farm’s supervision.

Trending

Wheat prices expected to decline as harvest gets underway

(<https://capitalpress.com/2026/07/14/wheat-prices-expected-to-decline-as-harvest-gets-underway/>)

Demonstration farm to showcase conservation practices

(<https://capitalpress.com/2026/06/29/demonstration-farm-to-showcase-conservation-practices/>)

Michael Eng of Lostine expressed his concern for the possibility that polyfluoroalkyl (part of a class of persistent chemicals known as PFAS) could be found in the biosolids. He submitted a report that said in 2019, the Maine Department of Environmental Protection found PFAS chemicals in the drinking water of 34 towns. PFAS chemicals have been linked to serious health problems, and the so-called “forever chemicals” have turned up on several Maine dairy farms that use sludge as fertilizer. The PFAS chemicals have been linked to cancer and birth defects, among other things, according to reports Eng submitted.

But Kurt Melville, who is in charge of the program under which Cornerstone Farms accepts the biosolids, said he is confident that testing by the U.S. Department of Agriculture and the state Department of Environmental Quality will avoid any problems with the biosolids.

“They test regularly,” Melville said earlier Monday.

He said the state has approved between 800 and 1,000 acres of Cornerstone land for application of city waste. He said it’s usually about 50 pounds per acre, which means just a little per square foot.

“It’s very, very little, and that’s how the state wants it,” he said.

Eng asked the city to consider additional testing for levels of PFAS in the biosolids. Wilkie said he had not heard of testing PFAS levels, but he will research it further.

Public comment

In the public comment portion of the meeting, Tami Nuxall had requested being added to the agenda, but did not show up in time so she did not address the council.

Nuxall has had an ongoing complaint against the Enterprise Police Department about an officer’s use of his handgun during an incident that involved her and her children in 2023.

She has asked that an oversight committee be established for the EPD, but the council has decided that the Police Committee is sufficient.

Nuxall has corresponded with the Oregon Department of Public Safety Standards and Training over the matter and is still unsatisfied.

Other business

In other business Monday, the council:

- Accepted a certificate of appreciation on behalf of Mayor-elect Cody Lathrop submitted by Randy and Maria Tye of the American Legion for giving a proclamation on Veterans Day. The proclamation was made during a Veterans Day open house in Enterprise to inform veterans and the public of what services are available to those who served in the armed forces. Lathrop was not present, but Mayor pro-tem Jeff Yanke accepted it on his behalf and said it would be given to him. Lathrop takes office in January.
- Filled a vacancy on the council left by the resignation of Councilor Corey Otten. His term was set to expire Dec. 31, 2026. Of the three individuals who submitted letters of interest, Karl McFetridge was approved. Also applying were Dave Hayslip and Karl Doss.
- Approved an event permit and street closure for the Eagle Cap Extreme Sled Dog Races veterinarian checks. The vet checks will start at 9 a.m. Wednesday, Jan. 22, on Main Street. Vet checks also will be on Main Street in Joseph starting at 1 p.m. The races start and end at the Ferguson Ridge Ski Area east of Joseph from Jan. 23-25.
- Appointed Anderson Perry Engineering as the city’s engineer of record. Anderson Perry, the current engineer, is the only one who responded to a request for a statement of qualifications.
- Approved a liquor license request by the Bookloft. Councilor David Elliott asked if the establishment was to be divided between where alcohol could be served and where it was prohibited and was told that since alcohol is not the primary business of the Bookloft, it is not required to do so. Councilor Rick Freeman, who owns the liquor store in Enterprise, said it is similar to a restaurant that primarily serves food.
- Heard an update on a Wallowa County zoning application.
- Heard department reports.
- Scheduled councilor training for Wednesday, Dec. 18, at 4 p.m.
- Scheduled the next council meeting for Jan. 13, 2025, at 6:30 p.m. The new mayor and councilors will be sworn in at the meeting.

SHELLY BOSHART DAVIS
STATE REPRESENTATIVE
DISTRICT 15



HOUSE OF REPRESENTATIVES

July 10, 2026

Marion County Board of Commissioners
555 Court St NE
Salem, OR 97301

RE: Appeal of Land Use Case No. 25-026

Dear Chair and Commissioners,

I am writing today to voice my strong support for Denise Burnham and express profound concern over the dangerous precedent set by the Hearings Officer's decision.

This case involves a local farm family using clean material from hydro-excavation or vac-truck work to maintain and level a hazelnut orchard. All material stays on-site to improve the land. Yet, the County Planning Staff and Hearings Officer have labeled this a "commercial landfill" simply because they claim vac-truck material is not a "customary" farm practice.

As a state legislator and a working farmer, I see this decision as a textbook example of the red tape the Legislature intended to protect farmers from when it created our landmark planning system. Family-run farms simply cannot survive if they have to pause operations and hire lawyers every time they adopt new methods to maintain their property. For this reason, and those explained below, the Board should overturn the Hearings Officer's decision.

First, the use of vac-trucks is not uncommon on farms today. In my own experience, I know they are often used to safely expose buried irrigation lines and clear clogged culverts to prevent flooding. Farmers use the leftover material as a cost-effective source of clean fill to level ground. Treating this accepted technology as a pariah and then twisting it to declare a working farm a landfill is completely disconnected from modern agriculture.

Second, this issue goes to the heart of why Oregon's landmark land-use laws were created. The foundational purpose of Exclusive Farm Use (EFU) zoning was to carve out a protected space where farmers could operate efficiently, free from bureaucratic delays and nonsense.

When counties pick apart legitimate farm practices simply because they don't match an arbitrary opinion of what is "customary," the original intent of the law is completely subverted.

We have already seen the economic damage of this approach in the property-tax arena. When regulators' understanding of the law does not keep up with the modern needs of working farms, it puts family farms in an impossible position. Farmers should not be penalized for utilizing modern machinery or innovative practices to keep their businesses viable.

Agriculture is not a monolith. A hay operation, a hazelnut orchard, a nursery, and a cattle ranch all face different overhead, different terrain, and different operational hurdles. They must be allowed to solve those problems using the new tools available today, not the tools of fifty years ago.

Marion County should be leading the state in protecting the right to farm, not pioneering new ways to tangle family farms in red tape. If utilizing modern technology can be twisted into a land-use violation, then the regulatory certainty promised by EFU zoning is long gone.

The farming community across Oregon is watching this case closely. I strongly urge the Board to stand up for the practical realities of working agriculture, honor the true intent of our land use laws, and reject a precedent that invites unnecessary, costly bureaucracy onto our family farms.

Thank you for your time, consideration, and leadership.

Sincerely,

A handwritten signature in blue ink that reads "Shelly Boshart Davis". The signature is written in a cursive, flowing style.

Shelly Boshart Davis