

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

3
4 STOP THE DUMP COALITION,
5 WILLAMETTE VALLEY WINERIES ASSOCIATION,
6 and RAMSEY McPHILLIPS,
7 *Petitioners,*

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9 and

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11 FRIENDS OF YAMHILL COUNTY,
12 *Intervenor-Petitioner,*

13
14 vs.

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16 YAMHILL COUNTY,
17 *Respondent,*

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19 and

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21 RIVERBEND LANDFILL CO.,
22 *Intervenor-Respondent.*

23
24 LUBA No. 2016-026

25
26 FINAL OPINION
27 AND ORDER

28
29 Appeal from Yamhill County.

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31 Jeffrey L. Kleinman, Portland, filed a petition for review and argued on
32 behalf of petitioners.

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34 William Frederick Paulus, Portland, filed a petition for review and
35 argued on behalf of intervenor-petitioner.

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37 Timothy S. Sadlo, Assistant County Counsel, McMinnville, filed a
38 response brief and argued on behalf of respondent.

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2 Tommy A. Brooks, Portland, filed a response brief and argued on behalf
3 of intervenor-respondent. With him on the brief were James E. Benedict and
4 Cable Huston LLP.

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6 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board
7 Member, participated in the decision.

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9 REMANDED 07/08/2016

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11 You are entitled to judicial review of this Order. Judicial review is
12 governed by the provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioners appeal a county decision on remand from LUBA that again approves site design and floodplain development review to authorize expansion of an existing landfill on land that is zoned for exclusive farm use.

REPLY BRIEF

Petitioners move to file a reply brief to address issues raised in the response briefs regarding waiver and issue preclusion. The county and intervenor-respondent Riverbend Landfill Co. (Riverbend) (together, respondents) oppose the reply brief, arguing that it was untimely filed.

The reply brief is allowed. OAR 661-010-0039 requires the reply brief to be filed within seven days of the date the response brief is filed—in this case, the reply brief was due May 20, 2016. The reply brief was filed four days later, on May 24, 2016, in violation of OAR 661-010-0039. However, OAR 661-010-0005 provides that violations of LUBA’s rules not affecting the substantial rights of the parties shall not interfere with LUBA’s review. In the present case, oral argument was scheduled June 2, 2016, eight days after the reply brief was filed. The reply brief is only three pages long. Respondents have not established that having approximately one week prior to oral argument to read the three-page reply brief prejudices their substantial rights.¹

¹ Because the reply brief is allowed, we need not consider petitioners’ motion to allow late filing, or petitioners’ conditional motion to strike the

1 **FACTS**

2 The present decision is on remand from LUBA. *Stop the Dump*
3 *Coalition v. Yamhill County*, 72 Or LUBA 341 (2015) (SDC-1). In that
4 decision, LUBA sustained two assignments of error in part concerning ORS
5 215.296(1), which requires a finding that the proposed use in an exclusive farm
6 use zone will not force a significant change in accepted farm practices, or
7 significantly increase the cost of such practices, on surrounding lands.² The
8 ORS 215.296(1) test is sometimes referred to as the Farm Impacts test or the
9 significant change/cost standard.

response briefs for alleged violations of LUBA’s rules on service, or the responses thereto.

² ORS 215.296 provides, in relevant part:

“(1) A use allowed under ORS 215.213 (2) or (11) or 215.283 (2) or (4) may be approved only where the local governing body or its designee finds that the use will not:

“(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or

“(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.

“(2) An applicant for a use allowed under ORS 215.213 (2) or (11) or 215.283 (2) or (4) may demonstrate that the standards for approval set forth in subsection (1) of this section will be satisfied through the imposition of conditions. Any conditions so imposed shall be clear and objective.”

1 In *SDC-1*, LUBA identified several analytical errors and remanded the
2 county’s decision to reevaluate the evidence in the record free of those
3 analytical errors, and to determine whether Riverbend has demonstrated that
4 the cumulative impacts of the proposed use will not force a significant change
5 in, or significantly increase the costs of, accepted farm practices on
6 surrounding lands.³ In particular, LUBA directed the county to reconsider the
7 evidence with respect to several types of landfill expansion impacts on farm
8 practices, including: (1) impacts of litter on the adjacent McPhillips farm, (2)
9 impacts of nuisance birds on nearby farms, (3) impacts on pheasant-raising
10 operations on the McPhillips farm, and (4) impacts on farm stands and direct
11 farm sales on nearby farms.

³ No statute or other authority defines “significant” as used in ORS 215.296(1), and the county did not attempt to articulate its understanding of what that term means. In *SDC-1*, we observed:

“Because the term “significant” is undefined, and of common usage, it is permissible to consult dictionary definitions. The most pertinent definition of “significant” in *Webster’s Third New International Dictionary* (2002), 2116, appears to be “**3 a** : having or likely to have influence or effect : deserving to be considered[.]” Because ORS 215.296(1) is framed in the negative (the applicant must demonstrate that the proposed use “will not” force a significant change, etc.), it seems appropriate to consider related antonyms such as the term “insignificant,” which Webster’s defines in relevant part as “**e** : of little size or importance[.]” *Id.* at 1169.” 72 Or LUBA at 359, n 12.

1 On remand, the county commissioners re-opened the evidentiary record
2 to accept new evidence with respect to some of the remand issues, conducted a
3 public hearing on February 4, 2016, and allowed the parties to file written
4 rebuttal of new evidence until February 11, 2016. On February 18, 2016, the
5 commissioners deliberated and re-approved the proposed use, adopting
6 findings in support on February 25, 2016. This appeal followed.

7 **INTRODUCTION**

8 In this appeal, petitioners and intervenor-petitioner Friends of Yamhill
9 County (FOYC) each filed petitions for review with a single assignment of
10 error. Both assignments of error challenge the county’s findings regarding
11 compliance with ORS 215.296(1), although each focuses on different types of
12 impacts on farming practices. Petitioners focus on two types of impacts: litter
13 impacts on hay farming, and nuisance bird impacts on grass-seed farming.
14 Riverbend’s brief responds to petitioners’ petition. FOYC’s petition focuses on
15 other impacts, including impacts to fruit and nut farmers, nuisance bird impacts
16 on livestock, impacts of landfill odor on direct farm sales and farm stands,
17 impacts on pheasant and poultry operations, impacts on vineyards and wineries,
18 and cumulative impacts. The county’s brief responds only to FOYC’s petition.
19 We will address each petition for review separately, starting with petitioners’
20 brief, but where the arguments in each set of briefs overlap, will combine them
21 as necessary.

1 **ASSIGNMENT OF ERROR (Petitioner)**

2 **A. Impacts from Litter**

3 As explained in *SDC-1*, the McPhillips farm is adjacent to and
4 downwind of the Riverbend Landfill. McPhillips provided detailed testimony
5 regarding changes and increased costs to his hay operation caused by landfill
6 litter deposited in his hayfields.⁴ Specifically, McPhillips testified that the
7 landfill trash forces him to conduct frequent patrols of the hayfield during the
8 year to prevent plastic bags from being buried in the soil over time. In
9 addition, McPhillips testified that he also conducts litter patrols before cutting

⁴ In our decision, we quoted the following testimony:

“The prevailing wind currents in the vicinity of Riverbend landfill are west to east. Trash is often blown from the landfill to the McPhillips farm. Litter is a serious issue when haying as plastic bags get caught in the balers. Furthermore, we spend a lot of time all year long picking up the plastic bags from our fields, on our roads and in our trees. We have to do it often as the plastic gets wet and then begins to get covered by crops and dirt where it eventually ends up shredded and then buried into our class 1 and 2 soils. We have a plastic bag reimbursement policy when we trade and sell our hay * * * There is no telling if garbage will show up in our product when the bales are opened up and we offer to buy those bales back. Our streams are lined with plastic bags from Riverbend landfill, especially after a flood. It takes a great deal of time and cost for our farm manager to pick up the litter * * *.” 72 Or LUBA at 367-68.

“We have to spend a great deal of time going all over our fields picking up the plastic before we bale, because it destroys the baling machine.” Transcript of December 4, 2014 hearing, Appendix B, 29-30.” *Id.*

1 and baling the hay, in order to prevent damage to baling machines and to
2 prevent plastic from contaminating the hay bales. The county did not address
3 whether the changes described by McPhillips are significant changes to
4 accepted farm practices. Instead, the county concluded, based on evidence that
5 one to two bags of trash are collected twice per week at the litter fence
6 separating the landfill from the McPhillips Farm, that the volume of trash
7 escaping onto the McPhillips property over or through the litter fence is not
8 significant, and therefore found the proposed landfill expansion complies with
9 ORS 215.296(1). We rejected that approach.⁵

10 On remand, McPhillips provided additional detail regarding changes and
11 costs that he alleges are caused by landfill trash.⁶ In addition, several other hay

⁵ We stated in *SDC-1*:

“* * * Even if the volume of trash escaping from the landfill is relatively small, as measured by the number of trash bags that must be collected within a given period of time, or any other measurement or comparison, that does not mean that the changes McPhillips must make to its farm operations to prevent damage to baling machines and avoid loss of hay bale sales are necessarily insignificant. The significance of those changes is what the county must evaluate under ORS 215.296(1), not the relative volume of the litter that prompts those changes.” *Id.* at 368-69.

⁶ In addition to the testimony submitted during the first proceeding, on remand McPhillips testified further regarding the changes and costs to his farm practices:

“Litter that flies onto our western bottom land hay fields and on our sheep pasture and barnyard must be picked up continuously to keep it from matting into the ground where it breaks down in the

1 farmers provided testimony that patrolling hay fields for litter is not an
2 accepted farm practice, and if they had to conduct litter patrols, it would
3 constitute a significant change in their farm practices, and significantly increase
4 the cost of their hay operations.

5 The county adopted new Findings 26-34 regarding litter impacts on the
6 McPhillips farm. Findings 26-28 largely repeat the county's approach that we

grass seed plants and soil. Litter patrol is done on a weekly basis.
This is a significant change to standard farming practice.

“The landfill and McPhillips Farm share the same bottomland basin. Each time the floodway/floodplain floods (4 times in 2015-2016) wind-blown garbage that gets into the river floats onto my farm where it gets caught in trees and bushes when the water recedes. As it dries out, wind blows the garbage off the trees and into my fields. Picking trash is a constant chore and imposes significant changes and costs to my farming practice.

“My hay field, directly adjacent to the dump, has constant maintenance issues related to litter collection.

“Litter gets caught in our hay bales making them useless. We have to pull plastic bags out of the gears and tongs of our haying equipment. The source of this litter is the dump.

“Our goats and sheep survive on home-grown hay. I have to constantly comb the hay fields for trash. We have to constantly hop off farm equipment to pick up litter while conducting other farm services in order to provide my livestock with the litter-free fodder. This is a significant change in farm practice.

“What hay I do not use myself I sell or trade. We have to offer to buy back any bales that end up with landfill trash mixed in. This represents a significant cost increase and erodes what little profit there is in selling hay.” Record 149-50.

1 rejected in *SDC-1*, to focus entirely on the significance of the volume of trash
2 entering the McPhillips property. Findings 29-33 purport to address the
3 pertinent question on remand, whether the changes that McPhillips must make
4 in response to landfill trash constitute “significant changes in accepted farm
5 practices” or significantly increase costs of those practices. Finding 30
6 discusses a letter from a hay farmer, Walster, in support of McPhillips’
7 testimony regarding landfill trash, which the findings characterize as
8 conflicting with McPhillips’ testimony. Finding 31 cites another letter from a
9 farmer complaining of trash in a hay field adjacent to the landfill and Highway
10 18 as evidence that the landfill is not the only source of litter for properties,
11 like McPhillips’, that border both the landfill and the highway. Finding 32
12 states that McPhillips’ testimony on other matters tends to be overstated or
13 internally inconsistent, which undermined the county’s confidence in his
14 testimony regarding landfill trash. Finding 33 returns to the theme set out in
15 Findings 26-28 that “only small amounts of litter make it to a farm field,” and
16 cites the “conflicting evidence” discussed in Findings 30 to conclude that small
17 amounts of litter have no significant impact on farm practices. From that basis,
18 the county ultimately concludes that the county “is not persuaded that Mr.
19 McPhillips spends a significant amount of time or costs patrolling his fields for
20 a likely small amount of litter. To the extent Mr. McPhillips spends time and

1 effort patrolling his fields at all for litter, the Board finds that effort is not
2 significant under the significant change/cost standard.” Record 28.⁷

3 In Finding 34, the county states that in order to remove any doubt about
4 the significance of litter impacts from the landfill, the county will impose two
5 additional conditions. Condition 24 requires Riverbend to install an additional
6 litter fence between the working face of the landfill and the McPhillips farm.
7 Condition 25 requires Riverbend to provide or pay for litter patrols on the
8 McPhillips farm during the time of year immediately prior to harvesting the hay
9 field.

10 Petitioners argue, and we tend to agree, that Findings 26-33 are
11 problematic and that key premises are not supported by substantial evidence.
12 For example, no reasonable decision-maker would conclude, as the county does
13 in Finding 30, that the Walster letter conflicts with McPhillips’ testimony
14 regarding the impacts of litter on hay operations, or rely on the Walster letter to
15 support the ultimate conclusion that the county draws, that McPhillips does not
16 in fact conduct the litter patrols that he repeatedly testified about in detail.⁸ On

⁷ We follow the parties in citing to the record on remand as “Record,” and the record in *SDC-1* as “LUBA Record.”

⁸ Walster’s hay farm is a number of miles north and west of the landfill and is not impacted by landfill litter. In relevant part, Walster states that “[m]aybe once or twice a year, we’ll find a piece of litter in one of our hay fields and have to pick it up. Many years we don’t find any.” From that statement the county makes the inference that picking up “small” amounts of litter does not represent a significant change or significantly increased cost in hay farm

1 that point, the findings do not identify any substantial evidence—evidence a
2 reasonable person would believe—that conflicts with McPhillips’ testimony.
3 Lacking conflicting or contrary evidence on this point, in the end the county is
4 reduced to simply stating its belief, unsupported by any evidence, that
5 McPhillips’ testimony cannot be believed.

practices. The county then returns to its inference (unsupported by any evidence) that only “small” amounts of landfill litter make it over or through the litter fence. The county then connects those two inferences, and ultimately concludes that McPhillips does not spend a significant amount of time or costs to conduct litter patrols for a likely “small” amount of litter. The main flaw in that chain of inferences is that there is zero evidence in the record to suggest that the amount of litter McPhillips picks out of his fields on weekly patrols or prior to harvest is anything like the single piece of litter that Walster states she finds “once or twice” a year, and sometimes not at all, in her hay fields. The amount of litter McPhillips picks up may be “small” relative to *something*, but if “small” means one or two individual pieces of trash per year, as the county seems to suggest, there is nothing in the record supporting the county’s conclusion that only “small” amounts of landfill litter make it to McPhillips’ hay fields.

The county and Riverbend made no effort to estimate, even to a rough approximation, how much landfill litter makes it over or through the litter fence onto McPhillips’ fields. If the litter fence captures one to two trash bags worth of litter twice per week, that means it captures something like 100 to 200 trash bags worth of litter every year. However, there is no evidence in the record on what percentage of the entire volume of windblown trash the litter fence captures (other than McPhillips’ testimony, which suggests it is not very effective). Even if we assume that the litter fence captures 90 percent of landfill trash that would otherwise blow onto the McPhillips farm, that would mean approximately 10 to 20 trash bags worth of litter are deposited every year onto his fields. 10 to 20 trash bags of litter per year seems a far cry from one to two individual pieces of trash per year. Weekly patrols may well be necessary to minimize the impacts of having the equivalent of 10 to 20 trash bags dumped on the hay fields.

1 However, we need not resolve petitioners’ detailed challenges to
2 Findings 26-33. That is because the question is not whether Findings 26-33, in
3 isolation, are adequate and supported by substantial evidence. The question is
4 whether the county erred in concluding that the proposed landfill use complies
5 with the significant change/cost standard at ORS 215.296(1), as that proposal is
6 *conditioned* pursuant to ORS 215.296(2). As noted above, the county imposed
7 Conditions 24 and 25, which are intended to reduce or eliminate the need for
8 and the cost of the litter patrols described in McPhillips’ testimony.
9 Accordingly, we turn to that question. For purposes of our analysis we assume,
10 without deciding, that Findings 26-34 are insufficient in themselves to support
11 a finding of compliance with ORS 215.296(1), or to undermine McPhillips’
12 testimony regarding the need for and the frequency of litter patrols without
13 Conditions 24 and 25.

14 ORS 215.296(2) provides that compliance with the ORS 215.296(1)
15 significant change/cost standard can be satisfied through imposition of
16 conditions of approval. *See* n 2. In Finding 34, the county states that in order
17 to remove any doubt about the significance of litter impacts from the landfill,
18 the county will impose two additional conditions. Condition 24 requires
19 Riverbend to install an additional litter fence between the working face of the
20 landfill and the McPhillips farm. Condition 25 requires Riverbend to provide

1 or pay for litter patrols on the McPhillips farm during the time of year prior to
2 harvesting the hay field.⁹

3 Petitioners argue that Condition 24 is inadequate to demonstrate that the
4 significant change/cost standard is met, because it addresses only one source of
5 litter—wind-blown trash from the working face—and does not address three
6 other identified sources of litter: avian-borne trash, litter escaping from
7 garbage delivery trucks, and flood-borne litter. Second, petitioners argue that
8 Condition 24 requires an additional litter fence only between the working face

⁹ Conditions 24 and 25 provide:

“24. Until Riverbend Landfill no longer receives waste for landfilling, the Applicant shall provide additional litter fencing between the working face of the landfill and the McPhillips farm.

“25. Until Riverbend Landfill no longer receives waste for landfilling, the Applicant must ensure that the grass and hay fields located on the McPhillips farm (Tax lots 401 and 700) are patrolled for litter prior to when those fields are harvested through one of the three following methods, the choice of which shall be at the sole discretion of the owner/operator of the McPhillips Farm:

“i. Applicant will provide litter patrolling services

“ii. The Owner/Operator and Applicant will jointly identify a third party to provide litter patrolling services at the Applicant’s sole expense

“iii. The Owner/Operator will provide litter patrolling services and Applicant will reimburse th[e] actual, reasonable costs for those services.” Record 54.

1 and the McPhillips Farm, and does nothing to protect other farmers. Third,
2 petitioners argue that there are no minimum requirements for the amount of
3 new fencing, and no evidence regarding how effective it would be in catching
4 wind-borne trash.

5 With respect to Condition 25, requiring that Riverbend provide or pay
6 litter patrols of the McPhillips Farm, petitioners contend that the condition is
7 legally inadequate, because if patrolling for litter is a significant change/cost, it
8 is irrelevant who provides or pays for it. According to petitioners, conditions
9 sufficient to satisfy ORS 215.296(1) must eliminate the significant change/cost
10 or reduce it to insignificance, not simply shift the significant cost or change to
11 the applicant. Further, petitioners argue that Condition 25 addresses litter
12 impacts only on the McPhillips Farm, and requires litter patrol only prior to
13 harvest, despite McPhillips' testimony that weekly, year-round litter pick up is
14 necessary.

15 Riverbend responds, and we agree, that the county could reasonably rely
16 on Conditions 24 and 25 to demonstrate compliance with ORS 215.296(1).
17 The county found that the working face is the primary source of landfill trash
18 that reaches the McPhillips property. Petitioners do not dispute that finding, or
19 that the existing litter fence is at least somewhat effective in preventing landfill
20 litter from reaching the McPhillips property. The county could reasonably
21 conclude that a second litter fence, located between the working face and the

1 existing fence in the direction of the McPhillips Farm, is likely to further
2 reduce the amount of trash that reaches the McPhillips property.

3 It is true that the second litter fence addresses only wind-borne litter
4 from the working face, not the three other sources identified in the testimony.
5 However, the undisputed finding that the working face is the primary source of
6 landfill trash to reach the McPhillips property suggests that other vectors, such
7 as windblown trash from garbage trucks, are less significant sources, and
8 petitioners cite no evidence to the contrary. In addition, as Riverbend points
9 out, the county also imposed additional nuisance bird control measures
10 intended to keep birds away from the working face, which may have the added
11 benefit of reducing whatever amount of landfill trash is carried by birds from
12 the working face to the McPhillips property.

13 It is also true that Condition 24 requires a second litter fence only
14 between the working face and the McPhillips property to the north and east.
15 However, as Riverbend argues, McPhillips was apparently the only adjacent
16 farmer to testify regarding landfill litter impacts on their farm practices.¹⁰
17 Because the McPhillips Farm is immediately adjacent and downwind of the

¹⁰ A farmer named Ellingson testified that one year he contracted to cut hay from a parcel adjacent to the landfill and Highway 18, on which he found a “lot of trash.” Record 88. However, Ellingson never identified the location of the parcel, or whether it was upwind or downwind of the landfill. Further, he did not state, as McPhillips did, that the landfill was a significant source of the trash found on the parcel, although that is fairly implied.

1 landfill in the prevailing winds, it presumably receives the bulk of wind-blown
2 trash. In addition, as Riverbend argues, the second litter fence, because it is
3 closer to the working face, will presumably intercept at least some trash that
4 might otherwise find its way from the working face to lands other than the
5 McPhillips Farm.

6 Finally, petitioners argue that there are no minimum requirements for the
7 length of fence, and no evidence regarding how effective it will be at
8 intercepting trash. However, Condition 24 requires “additional litter fencing
9 between the working face of the landfill and the McPhillips Farm.” While the
10 working face will move around, under Condition 24 there must always be a
11 secondary litter fence between the working face and the McPhillips Farm,
12 which borders the landfill to the north and east. Condition 24 is sufficiently
13 clear regarding the required minimum length: the length necessary to stand
14 between the working face and the McPhillips Farm. As to effectiveness,
15 petitioners do not dispute that the existing fence is at least somewhat effective
16 at intercepting landfill trash, and cite no reason to think that the secondary
17 fence will not be at least as effective. While it might be highly useful to have
18 some evidence or quantification of how effective the existing fence is, and
19 hence some basis to estimate how effective the secondary fence will be, we
20 disagree with petitioners that the record must necessarily include such evidence
21 in order for the county to rely upon Condition 24 in part to demonstrate
22 compliance with ORS 215.296(1).

1 While the county can reasonably find that the second litter fence will
2 reduce somewhat the amount of landfill trash that reaches the McPhillips
3 property, Condition 24 may not be a sufficient basis in itself to conclude that
4 the need for the litter patrols and other measures McPhillips testified to has
5 been eliminated or reduced below the level of significance. However, as
6 explained below, we believe that with Condition 24 and Condition 25 together
7 a reasonable decision-maker could conclude that the reduced amount of landfill
8 trash that reaches the McPhillips property will not force a significant change in
9 farm practices, or significantly increase McPhillips' costs.

10 As noted, Condition 25 requires Riverbend to provide for litter patrols of
11 the McPhillips property prior to the hay harvest, via one of three methods
12 chosen by McPhillips: (1) by Riverbend employees, (2) by third parties paid by
13 Riverbend, or (3) by McPhillips' employees, with reimbursement by
14 Riverbend. Petitioners first argue that Condition 25 essentially concedes that
15 litter patrols are a significant change, and that simply having the applicant
16 assume the cost and burden of making the patrols does not eliminate the
17 significant change or reduce it below significance. We are aware of no cases
18 that have addressed whether a county can satisfy ORS 215.296(1) by
19 conditioning approval to require the applicant to assume the cost and/or the
20 burden of performing actions *on the affected farm* necessary to prevent a
21 significant change in accepted farm practices on that farm or significant
22 increase in costs on that farm. However, we do not see that Condition 25

1 exceeds the county's authority under ORS 215.296(2) or otherwise is an
2 impermissible method to prevent or render insignificant costs or changes to
3 accepted farm practices that would otherwise occur.

4 It is important to recognize that the litter patrols described by McPhillips
5 are not "accepted farm practices." The record includes abundant testimony
6 below by McPhillips and other hay farmers that litter patrols on hay fields are
7 not a typical or accepted farm practice. Record 103-04 (Walster), Record 102
8 (Sweeney), Record 88 (Ellingson), Record 138 (Cruikshank), Record 140
9 (Bansen). The farm practice at issue is presumably the growing, harvesting,
10 baling and selling of hay. In other words, McPhillips' "accepted farm practice"
11 is to grow, harvest, bale and sell hay without having to incur costs or make
12 significant efforts in order to deal with landfill litter in the hay fields. If a
13 condition of approval can be imposed that effectively relieves McPhillips of
14 some or all of the costs and changes necessary to deal with landfill litter in the
15 hay fields, we see no reason why the county cannot rely in part upon such a
16 condition in determining whether the ORS 215.296(1) significant change/cost
17 standard is satisfied.

18 The more troubling potential shortcoming in Condition 25 is that, as
19 petitioners note, it requires that Riverbend provide or pay for litter patrols only
20 prior to the hay harvest, despite McPhillips' testimony that he must conduct
21 weekly litter patrols year-round, in order to keep plastic bags from getting
22 buried in his farm soils. Riverbend proposed Condition 25 based on the

1 apparent understanding that McPhillips’ greatest concern was the impact of
2 plastic bags on the baling process, interfering with baling machines and passing
3 through to the bales, which reduces or eliminates the bales’ marketability.¹¹
4 McPhillips objected to the condition, at Record 149, as “trespass” and a
5 “taking,” but did not dispute that Riverbend-provided or paid-for litter patrols
6 conducted prior to harvest would be effective at reducing impacts caused by
7 plastic bags interfering with baling machines and passing through into the
8 bales. Without some conflicting evidence on that point, the county could
9 reasonably conclude that Condition 25 would reduce the impacts of plastic
10 bags on the baling process and the sale of bales to an insignificant level.

11 The litter patrols required by Condition 25 are apparently not intended to
12 reduce the need for the weekly litter patrols testified to by McPhillips. The
13 purpose of the weekly litter patrols, we understand from McPhillips’ testimony,
14 is not to prevent damage to threshing or baling machines during harvest, or to
15 prevent plastic from getting into the bales, but instead to prevent plastic bags
16 from becoming buried in the soil over time. This is presumably undesirable,
17 although McPhillips does not explain why. Under Condition 25, McPhillips
18 may still feel compelled to conduct litter patrols at various times throughout the
19 year to collect landfill plastic before it works its way into the soil.

¹¹ Riverbend proposed the condition in a letter to the county, based on the understanding that McPhillips had testified that the “impact from the landfill is greatest when he bales hay[.]” Record 182.

1 Unfortunately, there is no direct evidence from any party whether any litter
2 patrols McPhillips may need to conduct at other times of the year after
3 implementation of Conditions 24 and 25 would constitute, in themselves,
4 significant changes to accepted farm practices. Nonetheless, as discussed
5 above, the county could reasonably conclude that the additional fence required
6 by Condition 24 will reduce the amount of plastic bags that reach the
7 McPhillips property to some degree. That will presumably reduce the need for,
8 or the frequency of, any litter patrols that McPhillips would otherwise conduct
9 at non-harvest times of the year. Further, the Riverbend-provided litter patrols
10 required by Condition 25 prior to harvest are presumably capable of removing
11 some accumulation of plastic before it gets completely buried in the soil, not
12 just what has blown over the fence the day before harvest.¹² Although it is a
13 close question, we believe that a reasonable decision-maker could conclude
14 that after implementation of Conditions 24 and 25 landfill litter would not
15 cause significant change in accepted farm practices on the McPhillips property.

¹² We note in this respect that ORS 215.296(3) to (5) provide a process whereby a farmer affected by a conditional use approved under ORS 215.296(1) and (2) may file a complaint with the county alleging violations of conditions and that the violation forces a significant change in, or significantly increases the cost of, accepted farm practices. If the county finds the complaint to be true, it can require the operator to take corrective action and ultimately impose fines. The availability of that process provides some assurance that Conditions 24 and 25 can be effectively enforced.

1 **B. Nuisance Bird Impacts**

2 In *SDC-1*, LUBA remanded that the county’s initial decision for the
3 county to address again whether nuisance birds, primarily gulls and crows,
4 attracted to the food source presented by the working face of the landfill force
5 significant changes to accepted farm practices or significantly increase the
6 costs of such practices. LUBA directed that the county reconsider, free of
7 several analytical errors, testimony that nuisance birds attracted to the landfill
8 are displaced by the landfill’s falconry program onto nearby farms, and cause
9 damage to grass seed plugs, fruit and nut orchards, and lamb and sheep
10 operations. On remand, the county adopted new Findings 51-78, again
11 concluding that nuisance birds will not force significant changes or
12 significantly increase the cost of farm practices.

13 Findings 51-53 recite that the existing landfill attracts some nuisance
14 birds, but that nuisance birds are also attracted to other food sources found on
15 farms in the area, which require farmers to engage in some level of nuisance
16 bird management. In Finding 54, the county sets out what it understands the
17 relevant inquiry to be: to determine if nuisance birds attracted to the landfill
18 increase the burden on farm practices beyond the burden that would occur in
19 the landfill’s absence and, if so, determine whether that increase is
20 significant.¹³

¹³ Finding 54 states,

1 Findings 55-56 reject claims that the landfill is responsible for any
2 increase in nuisance bird populations in the area, noting that the size of the
3 working face, the source of food at the landfill, has not increased, and
4 attributing any population increase to other factors, such as increasing
5 urbanization.

6 Findings 57-59 describe the landfill's existing nuisance bird
7 management program, consisting of a falconry program two to four days per
8 week. One of the bases for remand in *SDC-1* was to address testimony that the
9 falconry program simply displaces nuisance birds from the landfill onto nearby
10 farms. On remand, the county concluded that the falconry program displaces
11 nuisance birds onto nearby farms only temporarily, causing only short-term
12 impacts.

13 Findings 60-64 address specific testimony regarding impacts on grass-
14 seed farms. Findings 65-70 address specific testimony regarding impacts on
15 cherry, berry and filbert farm operations. Findings 71-77 address specific
16 testimony regarding impacts on a nearby lambing operation. In Finding 78, the

“The mere attraction of nuisance birds to the landfill does not indicate whether the attraction rises to a level [of] significance enough to force changes in farm practices or to increase the costs of farm practices. To the contrary, it is undisputed in the record that bird control is an accepted farm practice regardless of the presence of a landfill. The Board must therefore determine if birds attracted to the landfill increase the burden on Farm Practices beyond the burden that would occur in the landfill's absence and, if so, determine whether that increase is significant.” Record 32.

1 county concludes that nuisance birds attracted to the landfill have not, and will
2 not, force significant changes in farm practices, or significantly increase the
3 cost of farm practices. In the same finding, the county imposed Conditions 22
4 and 23. Condition 22 requires Riverbend to increase the falconry program
5 from two-to-four days to six days per week between October 15th and March
6 15th of each year, the winter months when nuisance bird populations are highest
7 and grass-seed plantings most vulnerable. Condition 23 requires Riverbend to
8 contract with the U.S. Department of Agriculture to provide additional adaptive
9 management bird control measures.

10 On appeal, petitioners focus their arguments on findings addressing
11 alleged nuisance bird damage to grass-seed farming, while FOYC challenge
12 findings addressing other alleged impacts. Both petitioners and FOYC
13 challenge numerous individual findings, arguing that specific findings or sub-
14 findings are inadequate and not supported by substantial evidence. We address
15 here both sets of arguments.

16 **1. Findings 51-64: Impacts on Grass-Seed Farms**

17 We generally agree with petitioners that some of the findings and
18 evidentiary conclusions in Findings 51-64 are problematic. One of the
19 persistent difficulties in this appeal and in *SDC-1* is the lack of any evidence
20 regarding how many nuisance birds the landfill attracts to the area, as compared
21 to the number of nuisance birds that would be present in the area absent the
22 landfill. The county's decision suggested in *SDC-1* that such information

1 would be highly useful, but seemed to fault the farmer/opponents for failing to
2 provide that information, rather than Riverbend, the party with the burden of
3 proof on compliance with ORS 215.296(1).¹⁴ On remand, Riverbend
4 apparently chose not to attempt to provide any estimates or information
5 regarding the number of nuisance birds the landfill attracts to the area
6 compared to the nuisance bird population that would be present absent the
7 landfill.¹⁵ Despite the statement in Finding 54 that the county must “determine
8 if birds attracted to the landfill increase the burden on Farm Practices beyond
9 the burden that would occur in the landfill’s absence,” the findings that follow
10 do not make any attempt to determine, even to a rough approximation, how
11 many birds the landfill attracts, which would seem to be an important step in
12 determining whether the birds attracted to the landfill change farm practices or
13 increase costs, above any changes or costs attributable to the birds that would
14 be present on nearby farms in the absence of the landfill.

¹⁴ We agreed with the county that “[a] study of bird populations on and near the landfill, particularly compared to a study of bird populations on similar farm lands distant from the landfill, would seem to be both feasible and highly useful in answering the question posed by ORS 215.296(1) with respect to nuisance bird impacts.” 72 Or LUBA at 371.

¹⁵ That choice was possibly due to the length of time such a study would require. A U.S. Department of Agriculture biologist recommended a study of bird populations involved with the landfill and the efficacy of management methods to keep birds away from the landfill, but noted that such a study would need to last a year or longer to account for seasonal variations. Record 258.

1 There is abundant testimony, and no apparent dispute, that nuisance
2 birds as a whole presently cause significant changes in farm practices and
3 significantly increase costs on nearby grass-seed farms. The farmer/opponents
4 attribute much of those changes and costs to birds attracted to the landfill,
5 describing, for example, large flocks of birds coming from the landfill to feed
6 or roost on their property, then returning to the landfill. Riverbend critiqued
7 and attempted to diminish that testimony, and generally took the position that
8 nuisance birds attracted to the landfill do not cause any significant change or
9 increased cost over and above the changes and costs that would be attributable
10 to nuisance birds that would be present in the absence of the landfill.
11 Unfortunately, there is very little evidence to support either view.

12 The county's findings follow Riverbend's approach, and generally
13 critique and attempt to diminish the testimony by farmer/opponents regarding
14 impacts of nuisance birds on their farm practices. The findings ultimately
15 conclude that nuisance birds attracted to the landfill do not cause a significant
16 change in farm practices or significantly increase costs, but in the absence of
17 any evidence regarding what role the additional nuisance birds attracted to the
18 landfill play in the changes and costs experienced by nearby farmers, as
19 contrasted with nuisance birds who would be present in the absence of the
20 landfill, the county's ultimate conclusion regarding compliance with ORS
21 215.296(1) does not have a strong foundation. Because the burden of proof of
22 compliance with ORS 215.296(1) rests with the applicant, the county cannot

1 simply critique the testimony of opponents, or rely upon the absence of
2 evidence to the contrary, but must support its finding of compliance with ORS
3 215.296(1) by citation to substantial, affirmative evidence in the record,
4 evidence demonstrating to a reasonable decision-maker that the proposed
5 landfill will not significantly change farm practices or significantly increase
6 costs.

7 As we understand the record and the parties' arguments, the evidence
8 that the county primarily relies upon to support its finding that ORS 215.296(1)
9 is met with respect to nuisance birds is the testimony of Riverbend's falconer.
10 There is undisputed testimony from the falconer (and opponents) that nuisance
11 birds are attracted to the landfill, and that while the landfill's current falconry
12 program generally reduces bird populations in the area from the population that
13 would exist without the program, it also displaces nuisance birds from the
14 landfill to nearby farms. In *SDC-1* we remanded the county's decision to
15 address the issue raised regarding whether the falconry program concentrates
16 the nuisance bird population on nearby farms on days when the falconry
17 program is in operation, and if so the effect of that concentration of nuisance
18 birds on the question posed by ORS 215.296(1).

19 There is also undisputed testimony that nuisance birds fly back and forth
20 between the landfill and nearby grass-seed farms, apparently depending on
21 whether the falconry program is operating that day. On remand, the falconer
22 acknowledged that the intermittent nature of the existing falconry program may

1 allow nuisance birds to “feed unabated at the landfill” on days when the
2 program is not in effect, and then “spend their ‘off days’ near the landfill
3 awaiting an opportunity to access the waste.” Record 256.¹⁶ For that reason,

¹⁶ The falconer’s letter states, in relevant part:

“* * * Falconry is the most effective and responsible bird control solution available to the solid waste industry. Falconry works where other abatement techniques fail for two key reasons, 1) birds fear natural avian predators (falcons and hawks), and 2) that fear-response is strong enough to prevent birds from feeding at the landfill.

“The Riverbend falconry program has proven highly effective at deterring unwanted birds and reducing their overall numbers both at the landfill and on neighboring properties. The falconers constantly monitor nuisance birds and record the peak count of every species during each shift. Those data have revealed two important measures of the program’s success: 1) seasonal peak counts of the three primary nuisance species have declined each year [since 2012], and 2) the duration of seasonal peaks have decreased each year.

“The current falconry program involves a seasonally variable schedule that ranges from 2 to 4 days of service each week. Experience has demonstrated that a schedule of more falconry yields better and faster results. When nuisance birds are met with more days of resistance at the landfill, they are forced to find food elsewhere. Specifically, with more frequent falconry the flocks quickly become less concentrated and disperse more widely. For example, if gulls were able to feed unabated at the landfill for a period following several days of falconry, they would spend their ‘off days’ near the landfill awaiting an opportunity to access the waste. However, more frequent falconry over a period of several weeks will force the flock to explore more widely and discover new natural sources of food. If the flock were denied access to the

1 the falconer recommended increasing the intensity of the falconry program. *Id.*
2 The falconer also recommended that the landfill employ USDA bird abatement
3 services. *Id.*

4 The county cites the falconer's testimony as a key support for its
5 conclusion that nuisance birds attracted to the landfill do not significantly
6 change farm practices or significantly increase costs. As far as we can tell, the
7 falconer's testimony is the only, or at least the strongest, affirmative evidence
8 Riverbend submitted that attempts to provide some basis to conclude that the
9 nuisance birds attracted to the landfill do not force significant impacts on
10 nearby farm practices. Based on the falconer's recommendation, the county
11 imposed Condition 22, which requires increased falconry activities no fewer
12 than six days per week during winter months when bird populations are highest
13 and grass-seed fields most vulnerable. The county also imposed Condition 23,

waste more often, they would have no incentive to remain nearby
and would abandon neighboring fields much more quickly.

“Based on our experience at Riverbend, it is my opinion that the
falconry program has been effective at reducing bird impacts to
tolerable levels, and that a more intensive and targeted falconry
schedule would reduce those impacts even more. Such increased
efforts would keep offending populations of gulls, ravens and
starlings below 100, 50 and 200, respectively. Any additional
abatement measures that could be deployed to supplement the
falconry program would further accelerate and improve overall
results. The Wildlife Services division of the U.S. Department of
Agriculture's Animal and Plant Health Inspection Service
(APHIS) offers a variety of bird abatement services to augment the
Riverbend program.” Record 256.

1 which requires Riverbend to contract with USDA to provide adaptive
2 management bird control measures applicable to landfills. A USDA biologist
3 identified several such measures, at Record 259.

4 As with the findings regarding landfill trash, the parties engage in an
5 extended disagreement whether each of the Findings 51-64 regarding nuisance
6 birds are adequate and supported by substantial evidence. For the most part,
7 we need not address the parties' detailed disputes regarding Findings 51-64,
8 because the relevant question is not whether those findings, individually or
9 collectively, are sufficient in themselves to support the finding of compliance
10 with ORS 215.296(1). The relevant question is whether the findings and record
11 demonstrate that the proposed landfill, *as conditioned by the county's decision*,
12 complies with ORS 215.296(1) with respect to nuisance bird impacts.
13 Accordingly, we focus our analysis on that question, and the parties' disputes
14 regarding Conditions 22 and 23.

15 As we understand matters, the key question is how likely is it that the
16 falconry program, as conditioned by the decision, can reduce the number of
17 nuisance birds in the area due to the landfill operation that feed or roost on
18 nearby farms below the point where that extra increment of nuisance birds in
19 the area does not force additional significant changes or increased costs on
20 nearby farmers. It is undisputed that the working face of the landfill is a rich
21 food source for gulls and other nuisance birds. The grass-seed fields on nearby
22 farms are a less rich source of food and roosting sites, but nonetheless would

1 attract some nuisance birds in winter months even in the absence of the landfill.
2 A significant problem with the existing falconry program, the bulk of the
3 testimony suggests, is that on the intermittent days it is in effect it drives
4 nuisance birds away from the landfill, and thereby displaces nuisance birds
5 onto nearby farms, where the birds grub for worms in the grass-seed fields,
6 allegedly causing damage to grass-seed plugs, and then simply wait for the next
7 day or time period when the falconry program is not operating, when the
8 nuisance birds return to feed at the working face. As we understand it, even
9 Riverbend's falconer agrees that the current intermittent falconry program
10 allows this revolving platter dynamic to continue.

11 Condition 22 purports to address this problem, by increasing the falconry
12 program to a minimum of six days per week during the winter months. As we
13 understand the falconer's testimony, the intended purpose is to more effectively
14 deprive nuisance birds access to the rich food source represented by the
15 landfill. If nuisance birds attracted to the landfill cannot access that rich food
16 source due to intensive falconry, they will initially disperse to nearby farms,
17 but the population that remains in the area long-term is not likely to exceed the
18 number that the available food supply in the grass-seed fields can support. In
19 other words, the intended effect of a more intensive falconry program is that,
20 over time, the winter nuisance bird population in the area will drop to a level

1 that will not be significantly greater than the population that would be present
2 in the absence of the landfill.¹⁷

3 That appears to be the theory, at least. How effective will Condition 22
4 actually be? As is frequently the case with land use approvals, conditions are
5 imposed based on predictions about future effectiveness, and such predictions
6 are sometimes little more than educated guesses. Generally, a decision-maker
7 can have more confidence in the informed predictions of a subject-matter
8 expert, compared to similar predictions by non-experts. And, a decision-maker
9 can have more confidence in expert predictions where there is no conflicting
10 evidence about the effectiveness of the condition. In the present case, the
11 falconer is a wildlife biologist and expert in nuisance bird control. While there
12 is plenty of conflicting evidence regarding the efficacy of the *existing*
13 intermittent falconry program, we are cited to no conflicting testimony
14 regarding the effectiveness of the more intensive falconry program required by
15 Condition 22. While petitioners argue that Condition 22 is simply doubling
16 down on what they argue is an ineffective or actually harmful program, as we
17 understand it Condition 22 is intended to fix a perceived shortcoming in the

¹⁷ The falconer stated to the board of commissioners:

“* * * we keep them away from the landfill and they seek other opportunities locally. But in the long term, they are not finding the significant resources that they came to the valley for so they stop coming.” Intervenor-Respondent’s Response Brief, Supp App-6.

1 existing intermittent falconry program. If Condition 22 in fact can fix that
2 shortcoming, then the falconry program may be able to reduce nuisance bird
3 populations attributable to the landfill to a level not significantly greater than
4 would be present in the absence of the landfill, in the manner that the falconer
5 predicted.

6 With respect to Condition 23, requiring that Riverbend contract with the
7 USDA to provide adaptive bird management services, FOYC argues that there
8 is no evidence that such a contract is feasible, and it is not clear what the actual
9 services would be, or how effective they would be. FOYC also notes that some
10 of the methods identified in the USDA letter for managing nuisance birds at
11 landfills will not work at Riverbend. For example, one identified technique is
12 to eliminate water sources that attract birds, but FOYC notes that riparian and
13 wetland areas on or near the landfill are protected and cannot be eliminated.

14 The USDA biologist stated that “[t]here is no single new or old bird
15 control method that eliminates birds from frequenting and damaging
16 agricultural or landfill operations,” and recommended an integrated approach
17 that employs a wide of range of techniques, including (1) managing the
18 working face of the landfill to minimize the availability of food items, (2)
19 install parallel monofilament or wire lines to exclude birds, (3) eliminate bare
20 ground/short grass areas by planting taller grasses or vegetation, (4) eliminate
21 water sources, (5) use visual & audio repellents, and (6) implement lethal
22 control of non-protected species and limited lethal control of protected species

1 under a U.S. Fish and Wildlife permit to increase the effectiveness of non-
2 lethal deterrents. Record 259.

3 FOYC offers no reason to believe that obtaining a contract with the
4 USDA to provide adaptive bird management services is not feasible. If for
5 some reason Riverbend cannot obtain a contract as required by Condition 23, it
6 will be in violation of its conditions, and will have to return to the county for
7 further proceedings. While some of the methods described in the USDA letter
8 may not be fully applicable to the Riverbend landfill, FOYC does not dispute
9 that other methods will apply. Both the falconer and the USDA biologist
10 indicated that an integrated approach using multiple methods will be more
11 effective than a single approach, such as relying solely on the falconry
12 program. If there is any evidence in the record suggesting that the methods
13 identified in the USDA letter will not contribute to the effectiveness of the
14 effort to control nuisance bird populations attracted to the landfill, FOYC does
15 not cite it.

16 In the end, the question on review is whether a reasonable decision-
17 maker, considering the evidence in the whole record, could conclude that
18 Riverbend has demonstrated that, with the conditions imposed, the nuisance
19 bird populations attracted to the landfill will not significantly change farm
20 practices, or significantly increase the cost of farm practices, on nearby farms.
21 While some of the findings addressing nuisance birds are, arguably, inadequate
22 or not supported by substantial evidence, we believe that a reasonable decision-

1 maker could rely upon Conditions 22 and 23 to ensure that ORS 215.296(1) is
2 met.

3 **2. Findings 65-70: Impacts on Fruit and Nut Farms**

4 The proposed landfill will open a new module that is approximately one-
5 quarter mile closer to, and within one-half mile of, the Frease farm, which has a
6 large hazelnut orchard, a five-tree cherry orchard, and also a small berry
7 operation. One basis for remand in *SDC-1* was to address the testimony of
8 Lillian Frease regarding impacts of bird defecation on hazelnut, cherry and
9 berry operations. Ms. Frease testified that she had to cease direct and indirect
10 sales of cherries and berries due to concerns regarding contamination and
11 disease that she attributed to the defecation of birds attracted to the landfill that
12 overfly her orchards. Ms. Frease also testified to increased costs to control
13 funguses on her hazelnut orchard, costs she attributed to defecation of birds
14 attracted to the landfill.

15 In Findings 65-70, the county rejected Ms. Frease’s claims of significant
16 impacts on her fruit and nut operations. The county also concluded that the
17 more intensive falconry program and other measures required in Conditions 22
18 and 23 will “remove any remaining doubt that the landfill expansion will
19 satisfy the Farm Impacts criteria with respect to the Frease Farm.” Record 35.
20 In addition, the county imposed Conditions 26 and 27, which require
21 Riverbend to purchase the entire crop of cherries and berries produced by the
22 Frease Farm, at a market price that is adjusted each year.

1 FOYC challenges the findings that reject Ms. Frease’s testimony,
2 arguing that the findings are inadequate and not supported by substantial
3 evidence. Again, we need not address those challenges in detail. The pertinent
4 question is whether the findings and record, as conditioned by the decision,
5 demonstrate that ORS 215.296(1) is satisfied with respect to the Frease farm.
6 As discussed above, a reasonable decision-maker could conclude that under
7 Conditions 22 and 23 the population of nuisance birds attracted to the landfill
8 is likely to reduce to a level that is not significantly greater than the number of
9 nuisance birds that would be present in the absence of the landfill. If so, that
10 would likely also reduce impacts on the Frease Farm that Ms. Frease attributed
11 to birds attracted to the existing landfill. A reasonable decision-maker could so
12 conclude.

13 With respect to Conditions 26 and 27, requiring that Riverbend purchase
14 the entire crop of cherries and berries produced by the Frease Farm, FOYC
15 argues that selling to a single-buyer instead of multiple buyers is nonetheless a
16 significant change in accepted farm practices, and further that when the landfill
17 closes in 15 years Ms. Frease will have no developed markets and will have to
18 start over, increasing her costs. However, while selling to a single buyer rather
19 than multiple buyers may be a change in farm practices, it is not clear why it
20 would be an adverse change. Selling to a single buyer might reduce marketing
21 and other costs and practices necessary to sell to multiple buyers. We do not
22 think that ORS 215.296(1) is concerned with changes that benefit or reduce the

1 costs of farm practices. In any case, the alleged significant change here is the
2 complete cessation of cherry and berry sales, not single versus multiple buyers.
3 Conditions 26 and 27 effectively restore the lost cherry and berry sales, and
4 thus would seem to either eliminate the alleged significant change or reduce it
5 to insignificance. Further, if after the landfill closes the Frease Farm resumes
6 sales to multiple buyers, that would seem to restore the status quo ante. FOYC
7 had not demonstrated that a reasonable decision-maker could not rely in part on
8 Conditions 26 and 27 to ensure compliance with ORS 215.296(1) with respect
9 to impacts on the Frease Farm.

10 **3. Findings 74-77: Impacts on Raising Lambs and Sheep**

11 In *SDC-1* LUBA remanded the county's initial decision in part to address
12 testimony regarding impacts of crow predation on the lamb and sheep-raising
13 operation at the Redmond Noble Farm, located approximately one mile away
14 from the landfill. Ms. Redmond Noble testified to four instances of crows
15 attacking lambs and ewes, and that in response she had to discontinue the
16 practice of pasturing newborn lambs and must keep them in the barn, which
17 increases costs and loss. Further, Ms. Redmond Noble testified that she no
18 longer keeps sheep on pasture during clement winter days, which forces her to
19 provide more hay, increasing costs. Ms. Redmond Noble attributed the
20 increased predation to crows that are attracted to the landfill, citing to a
21 conversation with another sheep farmer north of McMinnville, more distant
22 from the landfill, who reports no crow predation.

1 Findings 74-77 reject those claims, essentially disputing that crow
2 predation experienced at the Redmond Noble farm is attributable to crows
3 attracted to the landfill. The findings note that the Redmond Noble farm is
4 adjacent to the expanding urbanized area of the City of McMinnville, which is
5 a source of nuisance birds such as crows. In Finding 77, the county concludes
6 that the evidence in the whole record does not indicate that the landfill
7 expansion would significantly change or significantly increase the cost of farm
8 practices at the Redmond Noble farm. As with other findings, the county also
9 relies upon the conditions of approval imposed regarding bird control measures
10 to ensure compliance with ORS 215.296(1).

11 FOYC argues that Redmond Noble's testimony is unrebutted that the
12 crow predation that has occurred stems from crows attributable to the landfill,
13 and that there is no substantial evidence in the record to the contrary. The
14 county responds that there is conflicting evidence, in the form of inferences
15 drawn from the undisputed facts that the farm is located some distance from the
16 landfill, but adjacent to an urban area, a known source of crows, and Redmond
17 Noble experienced no need for changed farm practices from crow predation
18 until 2008 or 2009, despite the fact that by then the landfill had been operating
19 in its present form as a large regional landfill for over a decade.

20 As with much else in this case, there is no solid evidence either way on
21 whether the crow predation Redmond Noble experienced in 2008 or 2009 was
22 caused by crows attributable to the presence of the landfill. It is a point on

1 which the county can only draw inferences from weak and conflicting
2 evidence. We cannot say that the inferences the county draws from the
3 evidence in the record are ones that no reasonable decision-maker could draw.
4 In addition, we believe the county could reasonably rely on the conditions of
5 approval discussed above requiring more intensive and additional nuisance bird
6 management techniques, as an additional basis to conclude that ORS
7 215.296(1) is met with respect to impacts on the Redmond Noble farm.

8 **4. Summary Regarding Nuisance Birds**

9 For the reasons explained above, petitioners and FOYC have not
10 demonstrated that the county erred in concluding that, as the approval is
11 conditioned by the decision, nuisance birds attracted to the landfill will not
12 significantly change accepted farm practices, or significantly increase of the
13 cost of such practices.

14 Petitioners' assignment of error is denied.

15 **ASSIGNMENT OF ERROR (FOYC)**

16 FOYC's assignment of error challenges other findings addressing
17 alleged impacts on specific types of farm practices, and on specific farms.
18 FOYC also challenges the county's findings that the cumulative impacts of the
19 landfill are not significant.

20 **A. Odor Impacts on Direct Farm Sales and Farm Stands**

21 In *SDC-1*, LUBA remanded the initial decision to adopt findings
22 addressing alleged impacts of landfill odor on direct sales of agricultural

1 products, stating that “[i]f direct sales are reduced or eliminated by landfill
2 impacts, including odor and visual impacts, that could constitute a ‘change’ in
3 accepted farm practices.” 72 Or LUBA at 375.

4 On remand, the county adopted Findings 94-96 addressing allegations
5 that landfill odor and the visual impact of the landfill affect direct sales of lamb
6 and beef to customers on the Redmond Noble farm. Redmond Noble testified
7 that “odors and the visual impact of a working garbage dump * * * will
8 significantly impact my ability to conduct direct farm sales to customers who
9 come to my farm to purchase lamb, hay, or other crops. It will also preclude
10 my future ability to put up a farm stand.” LUBA Record 147. Redmond Noble
11 related two incidents where a customer “saw the landfill and asked how it was
12 affecting my farm and wondered about my water quality and consequences to
13 my livestock from the dump.” Record 278.

14 The county rejected the alleged odor and visual impacts on direct sales as
15 speculative and based on customer perceptions, rather than changes to accepted
16 farm practices. With respect to visual impacts, the county noted that the
17 concerns expressed by the two customers related to water quality, and further
18 stated that there was no allegation of lost sales or lost customers.¹⁸ With

¹⁸ Finding 94 states, in relevant part:

“* * * The allegation of impacts to direct farm sales on [the Redmond Noble farm] is speculative and based only on the apparent inquiry of two customers who ‘wondered about’ water quality and a concern by the farmer that if customers ‘lose faith in

1 respect to odor impacts, the county found there was not credible evidence that
2 landfill odors are the source of the odors Redmond Noble complained about,
3 noting the existence of other odor generators in the area, and also noting that
4 Redmond Noble did not allege any loss of customers due to odor impacts.¹⁹

5 On appeal, FOYC challenges Findings 94-95, arguing they are
6 inadequate and not supported by substantial evidence. The county responds,

the wholesome goodness of products,' she might lose sales and income. In other words, that testimony asserts impacts to a perception based on the presence of the landfill, and customer perception is not an accepted farm practice. Moreover, the concerns expressed by the customers were related to water quality, which the Board has determined is not negatively impacted by landfill operations. The Board also notes that there is no evidence that the Redmond Noble farm has actually lost a customer because of the existing landfill. Moreover, the proposed expansion will not move the landfill appreciably closer to the Redmond Noble farm in a manner that could be perceived from miles away, nor will the landfill increase in height, therefore limiting any perception that the landfill will loom larger near that farm.” Record 40.

¹⁹ Finding 95 states, as relevant:

“* * * With respect to odor, the Board finds that there is no credible evidence in the record to indicate that odors from the landfill are the odors causing the alleged impacts at this farm. The Redmond Noble farm is in a rural area that generates many offensive odors, and the record indicates the presence of other odor generators in the area, including non-farm odors like the composting facility in McMinnville. Even if an offensive odor in this area could be attributed to the landfill, this testimony does not assert that the farm lost the business of a customer as a result. The Board finds that the loss of no customers is not significant.” Record 40.

1 and we agree, that FOYC has not demonstrated that the county erred in
2 concluding that odor and visual impacts have not significantly affected direct
3 farm sales on the Redmond Noble farm.

4 FOYC first argues that the findings do not address Redmond Noble’s
5 statement that landfill odors preclude her from establishing a future farm stand,
6 at LUBA Record 147. Findings 88-93 are unchallenged findings that address
7 potential impacts on farm stands, in particular an existing farm stand located
8 near the landfill west of Highway 18. Those findings do not address Redmond
9 Noble’s claim that landfill odors preclude her from establishing a farm stand.
10 However, in *SDC-1* we held that findings under ORS 215.296(1) need not
11 address alleged impacts on future, hypothetical farm uses. 72 Or LUBA at 377.
12 The county was not required to address alleged odor impacts on a hypothetical
13 farm stand, or testimony involving speculative future farm uses.

14 FOYC next challenges the statement that “customer perception” of odor
15 or visual impacts “is not an accepted farm practice,” noting LUBA’s holding in
16 *SDC-1* that “[i]f direct sales are reduced or eliminated by landfill impacts,
17 including odor and visual impacts, that could constitute a ‘change’ in accepted
18 farm practices.” 72 Or LUBA at 375. However, the finding that customer
19 perceptions are not farm practices is not inconsistent with our statement that
20 reduction or elimination of direct sales could constitute a change in accepted
21 farm practices. The key question is whether direct sales are impacted in a way
22 that forces a significant change in how farm products are sold or that cause

1 significantly increased costs. Redmond Noble did not identify any changes in
2 the way she conducts direct sales of farm products or any increased costs. At
3 best she expressed concern that in the future she would lose some direct sale
4 customers due to odor impacts. While losing direct sale customers or
5 reasonable apprehension about losing customers could lead a farmer to *make*
6 changes or incur increased costs, without some identified changes or increased
7 costs there is no violation of ORS 215.296(1).

8 Finally, FOYC argues that the findings stress the distance between the
9 main Redmond Noble farm property and the landfill, but fail to acknowledge
10 that Redmond Noble leases land much closer to the landfill. However, FOYC
11 does not allege or cite to any evidence that Redmond Noble conducts direct
12 farm sales on the leased land closer to the landfill.

13 **B. Impacts on Pheasants and Poultry**

14 In *SDC-1*, LUBA remanded the county's initial decision to adopt more
15 adequate findings regarding impacts on McPhillips' pheasant-raising operation.
16 McPhillips had testified that pheasants are susceptible to noise, and that
17 mechanical noise from the landfill, including back-up beepers that simulate
18 sounds of birds of prey intended to scare away nuisance birds, had the effect of
19 terrorizing his pheasants, causing injury and losses. In addition, McPhillips
20 had testified that he had to grant permission to the falconer to retrieve falcons
21 that strayed to his property, allegedly to hunt his pheasants and chickens.

1 On remand, the county adopted Findings 99-110 to address landfill
2 impacts on pheasants and poultry operations. Findings 99-105 review the
3 evidence regarding the McPhillips pheasant operation, and ultimately conclude
4 that McPhillips can continue that operation without being forced to change
5 farm practices or incur additional costs. In Finding 106, the county reviews
6 several new and previously-imposed conditions of approval that the county
7 states “will further guarantee operation of the landfill does not significantly
8 impacts pheasants on the McPhillips Farm,” including (1) a condition that
9 prohibits construction of Module 10, the area closest to the McPhillips Farm,
10 (2) a requirement for different back-up beepers to replace the beepers that
11 McPhillips complained sounded like birds of prey, and (3), because the county
12 is requiring Riverbend to conduct more intensive falconry, a requirement that
13 Riverbend compensate McPhillips for the cost of placing a cover on his
14 existing pheasant pens to protect against predatory birds. Record 43.

15 FOYC argues that Findings 99-105, the basis for the county’s conclusion
16 that the landfill does not force a significant change or significantly increase the
17 cost of McPhillips Farm pheasant operation, are inadequate and not supported
18 by substantial evidence. FOYC also argues that the conditions discussed in
19 Finding 106 are insufficient to ensure compliance with ORS 215.296(1).
20 Again, we need not discuss in detail FOYC’s specific challenges to Findings
21 99-105, as the relevant question is whether findings and record, as conditioned
22 by the decision, are sufficient to demonstrate compliance with ORS 215.296(1).

1 The condition eliminating the back-up beepers McPhillips complained of is
2 sufficient to eliminate that impact entirely. FOYC argues that the landfill
3 generates other noise, such as the sound of garbage trucks, but as far as we are
4 informed the back-up beeper was the only specific landfill sound that
5 McPhillips linked to impacts to his pheasants.

6 FOYC argues that the condition requiring that Riverbend compensate
7 McPhillips for the cost of netting is not an appropriate condition, because it
8 simply shifts the cost to Riverbend. However, as discussed above with respect
9 to litter impacts, we see no reason why the county cannot ensure compliance
10 with ORS 215.296(1) with respect to allegations of increased costs by requiring
11 the applicant to pay those costs.

12 FOYC also argues that paying for netting to prevent falcons from
13 attacking pheasants does not address the possibility that falcons (or crows
14 attracted to the landfill) may still fly over the pens, panicking pheasants.
15 Further, FOYC argues that the findings and conditions do not address the
16 possibility that gulls attracted to the landfill could transmit Coccidia to
17 McPhillips' pheasants and poultry, a disease that can be transmitted by gull
18 droppings. Similarly, FOYC notes that the landfill is a designated dump for
19 birds killed by avian flu, and argues that the findings do not address the
20 possibility that gulls could transmit avian flu to pheasants and poultry.
21 However, FOYC cites to no testimony that overflights by falcons or crows are
22 sufficient to cause significant impacts to pheasants or poultry; almost all the

1 testimony on this point was concerned with falcons attacking pheasants within
2 their pens. With respect to the possibility of landfill gulls transmitting
3 Coccidia, the county responds that in the original decision at Findings 155-56,
4 the county rejected similar claims, based on a finding that Coccidia is host-
5 specific and does not pass from one species to another, and that those findings
6 were not challenged in the appeal leading to *SDC-1*. We agree with the county
7 that that issue cannot be raised for the first time in the present appeal. *Beck v.*
8 *City of Tillamook*, 313 Or 148, 831 P2d 678 (1992).

9 With respect to avian flu, in the present decision the county adopted
10 Finding 128, which rejects similar concerns regarding a poultry operation at
11 Crescent Farms, which we discuss below. The county argues that Finding 128
12 is also sufficient to reject claims regarding impacts on the McPhillips' pheasant
13 operation. We address below, and reject, FOYC's challenges to Finding 128,
14 and agree with the county that that finding is also a sufficient basis to reject
15 FOYC's similar argument regarding the possibility of transmitting avian flu to
16 McPhillips' pheasants.

17 Findings 107-09 address McPhillips' allegations regarding harm to his
18 poultry (chicken) operation caused by landfill noise and the potential for falcon
19 attacks on chickens. McPhillips provided no detail about his poultry operation,
20 but the findings set out the typical accepted farm practices for raising poultry,
21 note that poultry habituate to noise and are more tolerant of noise than are
22 pheasants, note the absence of any evidence that McPhillips' chickens have

1 been attacked by falcons or harmed by nuisance birds, and conclude that the
2 landfill will not force significant changes to McPhillips' poultry operation.

3 FOYC argue that the findings are inadequate, citing failure to address the
4 potential for transmittal of Coccidia and avian flu to chickens. We reject that
5 argument for the same reasons cited elsewhere in this opinion. FOYC does not
6 challenge the findings with respect to the potential for falcon attacks. With
7 respect to noise, FOYC cites to testimony that intense noise can adversely
8 affect chickens. LUBA Record 3440. However, there is apparently no
9 testimony that McPhillips' chickens have been subject to intense noise or that
10 landfill noise has harmed McPhillip's chickens. The county cites to a noise
11 study showing only small increases over ambient noise levels at the closest
12 residential site east of the landfill (*i.e.*, on the McPhillips' property). LUBA
13 Record 4502-14. In the absence of more focused testimony regarding the
14 location of the McPhillips' poultry operation and alleged noise impacts on that
15 operation, the county could reasonably rely upon the noise study to conclude
16 that landfill noise will not significantly impact the McPhillips' poultry
17 operation.

18 **C. Impacts on Equine Operations at Double G Paints**

19 Double G Paints raises and breeds champion quarter horses, and is
20 southwest of the landfill, adjacent to Highway 18.²⁰ The expansion to Module

²⁰ The actual distance is disputed. The owners of Double G Paints stated that the expansion will put the landfill within one-tenth of a mile from their

1 11 will bring landfill operations a little closer to Double G Paints than is
2 presently the case. The owner of Double G Paints alleged a number of impacts
3 to their equine operation, including landfill noise that adversely affects the
4 training and breeding of horses, and the deposit of gull excrement on their
5 pasture, which they stated affected their clients' perception of the facility's
6 safety. In the appeal of the county's initial decision, FOYC challenged
7 incorporated findings addressing the alleged gull excrement impact, but did not
8 assign error with respect to the alleged noise impacts. LUBA's decision in
9 *SDC-1* did not reach FOYC's challenge based on the impacts of gull
10 excrement. On remand, the county readopted its original findings. It also
11 adopted a new finding, Finding 122, that addresses the noise issue.²¹

12 In the present appeal to LUBA, FOYC argues that Finding 122 is
13 inadequate because it does not address the gull excrement issue. The county
14 responds that the gull excrement issue was addressed in the incorporated
15 findings adopted in the county's initial decision, which were re-adopted in the

property. Riverbend submitted maps and other documents indicating that the property is 4,180 feet from the expansion, or almost three-quarters of a mile. LUBA Record 120. The county did not resolve the dispute.

²¹ Finding 122 states:

“Testimony in the record asserts that noise from Riverbend Landfill impacts operations at Double G Paint & Quarter Horses. Based on the noise studies in the record, however, the Board finds that the noise levels at that operation are no different as a result of the landfill and that the ambient noise there is already increased because of its proximity to the highway.” Record 45.

1 present decision. The county argues that FOYC failed to challenge those re-
2 adopted findings in the present appeal. We agree with the county. If FOYC
3 wished LUBA to resolve the challenge to the incorporated findings regarding
4 the gull excrement issue that LUBA did not reach in *SDC-1*, it needed to renew
5 that challenge in this appeal, not challenge Finding 122 for failure to address
6 that issue. Even if challenging Finding 122 is sufficient to revive FOYC's
7 challenge to the incorporated findings addressing the gull excrement issue, we
8 agree with the county that FOYC has not demonstrated remandable error. The
9 owners of Double G Paint did not testify to any changes to farm practices or
10 increased costs of farm practices caused by gull excrement in their horse
11 pasture, only that they are concerned that their customers may perceive their
12 facility as unsafe.

13 With respect to the noise issue and the challenge to Finding 122, FOYC
14 argues that the finding is inadequate because it considers only noise impacts
15 from the current landfill, and does not consider the expansion of Module 11,
16 which will bring landfill operations somewhat closer to Double G Paints. The
17 county responds that because no issue was raised regarding noise impacts on
18 Double G Paints in *SDC-1*, FOYC cannot raise that new issue in this appeal.
19 On the merits, the county argues that FOYC is incorrect: the noise study
20 referenced in Finding 122 considered noise generated from the expansion, not
21 just the current landfill. The noise study concluded that landfill noise for
22 properties south and west of the property is not projected to exceed ambient

1 noise levels, due to the proximity of the highway. LUBA Record 4168. We
2 agree with the county on the merits that the noise study appears to consider
3 projected noise from the expansion, and that the noise study is substantial
4 evidence supporting Finding 122.

5 **D. Impacts on Crescent Farms**

6 Crescent Farms is located approximately one mile south of the landfill,
7 and includes a free-range chicken operation and beef cattle operation. In *SDC-*
8 *1*, FOYC raised several issues regarding impacts on Crescent Farms farm
9 practices. LUBA disposed of one issue, but did not reach the remaining issues.
10 On remand, the county adopted Findings 123-27, which repeat its earlier
11 findings rejecting Crescent Farms' claims that nuisance bird excrement will
12 affect their chicken and beef operations.²² The county also added new Finding

²² Finding 125 states the county's main conclusion:

“The Board finds that the Crescent Farms testimony does not describe any Farm Impacts from the existing landfill and, in fact indicates the absence of such impacts. For example, cows are currently raised on the property without the use of any drugs. The development of Module 11 will move the operation of the existing landfill west, and no farther south than the existing landfill. Additionally, the Board finds that there is no credible evidence in the record to conclude that the number of nuisance birds attracted to the existing landfill will increase with the development of Module 11. The Board therefore finds that the expanded landfill will not increase the potential for any impacts to this property.”
Record 46.

1 128 to address a concern raised regarding the risk of transmitting avian flu to
2 poultry.

3 On appeal, FOYC first argues that Finding 125 is inadequate, and that
4 Crescent Farms’ testimony does describe impacts from nuisance bird droppings
5 on the farm’s chicken and beef operations. We have reviewed that testimony,
6 at LUBA Record 2923-24, and do not see that it describes impacts, or alleges
7 changes or increased costs, that require more adequate findings to address.
8 Crescent Farms complains that nuisance birds from the landfill deposit
9 droppings on their pastures, but with the exception of avian flu, discussed
10 below, do not explain what harm or impact nuisance bird droppings cause to
11 their free-range chicken and beef operations. The concern appears to be that
12 customers will perceive that eggs and beef from Crescent Farms are not high
13 quality, but the basis for that perception is not described. Crescent Farms does
14 not allege that it engages in direct sales, or explain how customer perceptions
15 would be formed, or how it could affect sales. As explained above, customer
16 perceptions in themselves are not farm practices. The only specific change or
17 increased cost Crescent Farms describes is a statement that it might feel
18 compelled to construct “enclosed areas in order to keep the seagulls and crows
19 and their droppings from polluting the places where the hens will be foraging.”
20 But putting aside the question of avian flu for a moment, there is no
21 explanation for why additional bird droppings in a poultry yard or a cow
22 pasture warrants constructing enclosed areas to protect chickens or cattle.

1 FOYC had not demonstrated that more adequate findings are necessary to
2 address impacts to Crescent Farms with respect to nuisance bird excrement.

3 With respect to avian flu, Crescent Farms stated:

4 “Riverbend landfill is designated as a dump for birds killed by
5 avian flu. Proximity to contaminated birds increases the risk of
6 our hens becoming ill and ultimately having to be destroyed.
7 Seagulls can transmit avian flu through their droppings. Isolating
8 our chickens from the thousands of seagulls that will be moving
9 closer to our farm operation because of the expanded Module 11
10 will add expense to our egg business.” LUBA Record 2924.

11 In response, the county adopted a new finding, Finding 128:

12 “Testimony from Crescent Farms also asserts there is increased
13 risk to poultry due to avian influenza from the landfill. This claim
14 is based on the assertion that Riverbend Landfill is authorized to
15 accept bird carcasses that died from that disease. The Board does
16 not find this argument to be persuasive and finds that no such
17 increased risk exists. First, the allegation is only that Riverbend
18 Landfill is authorized to accept such carcasses and there is no
19 evidence that such carcasses are actually disposed of at the
20 landfill. Second, even if such carcasses are disposed of there in the
21 future, there is a comprehensive set of statutes that govern that
22 process, which are designed to prevent impacts to other
23 agricultural operations. For example, ORS Chapter 601 addresses
24 the burial of any animal carcasses and the Oregon Department of
25 Agriculture implements those statutes. Based on the foregoing,
26 the Board finds that the continued operation of Riverbend Landfill
27 will not cause [any] impacts to Farm Practices as a result of avian
28 influenza risk, much less any significant impacts, on poultry
29 operations at Crescent Farms or any other poultry operation in the
30 study area.” Record 46-47.

31 In challenging the county’s reliance on ORS Chapter 601, FOYC argues that
32 “the county utterly fails to explain the nature or applicability of the regulations
33 in question, or how the applicant has ostensibly come into compliance.” FOYC

1 Petition for Review 40. However, we agree with the county that it could
2 reasonably rely on ORS Chapter 601, which contains licensing and substantive
3 requirements for disposal and burial of animal carcasses, and assigns the
4 Oregon Department of Agriculture responsibility for inspection and regulation
5 of such facilities. Riverbend is apparently one such facility. FOYC has not
6 established that more adequate findings are necessary to explain how the
7 statute and regulations apply to and are implemented at the Riverbend facility.
8 The county could reasonably conclude that speculative concerns regarding the
9 possibility of transmitting avian flu to Crescent Farms' poultry via dead birds
10 buried at the landfill are adequately addressed by statutory and regulatory
11 requirements intended to protect against that possibility.

12 **E. Impacts on Vineyards**

13 The owner of Youngberg Hill winery stated that the sight of the landfill
14 from their property depresses prices for grapes it sells to winemakers,
15 apparently due to customer perceptions regarding environmental impacts of the
16 landfill on air and water quality. In Finding 133, the county concluded that that
17 statement was not evidence of a significant change or increased cost in farm
18 practices:

19 "The record also contains a statement from Youngberg Hill winery
20 alleging the landfill has caused a decrease in the price it sells its
21 grapes. Based on the evidence in the record taken as a whole, the
22 Board finds that the operation of the landfill has not forced a
23 significant change in Farm Practices associated with Youngberg
24 Hill's vineyards. As noted in the testimony, the alleged impacts to
25 grape prices result from customer perception, which is not a farm

1 practice, rather than from a change in farm practices or an increase
2 in costs of farm practices. Even if a customer's perception were
3 relevant, Youngberg Hill describes that perception as being
4 impacted by environmental health factors. The Board has made
5 other findings related to environmental health, such as water and
6 air quality, and the Applicant has demonstrated that there are no
7 significant environmental health risks associated with the landfill."
8 Record 47-48.

9 FOYC argues that LUBA has already decided that impacts based on customer
10 perceptions result in noncompliance with ORS 215.296(1), citing to our
11 statement in *SDC-1* that “[i]f direct sales [to customers] are reduced or
12 eliminated by landfill impacts, including odor and visual impacts, that could
13 constitute a ‘change’ in accepted farm practices.” 72 Or LUBA at 375.
14 However, in this opinion we have qualified that statement, clarifying that while
15 the perceptions of farm stand or direct sales customers might lead a farmer to
16 change farm practices or incur costs, in themselves the possibility of lost sales
17 or reduced prices due to the customer perceptions do not constitute changed
18 farm practices or the increased costs of farm practices. We reject FOYC's
19 arguments to the contrary.

20 **F. Cumulative Impacts**

21 In addition to considering whether individual impacts to farm practices
22 are significant in isolation, the county must also consider whether insignificant
23 impacts are significant in accumulation. *Von Lubken v. Hood River County*,
24 118 Or App 246, 251, 846 P2d 1178 (1993) (county must consider the
25 cumulative impacts of six different types of golf course impacts on the

1 petitioner’s orchard operation). In its *Von Lubken* decision, the Court of
2 Appeals did not specify a methodology for evaluating cumulative impacts
3 under ORS 215.296(1), but in a later iteration of that case, LUBA rejected an
4 argument that impacts are always “additive” in the sense that an individual
5 impact that is almost significant, when considered cumulatively with other
6 insignificant impacts, is necessarily significant.²³ *Von Lubken v. Hood River*
7 *County*, 28 Or LUBA 362, 368 (1994). Under *Von Lubken*, it is clear that, at a
8 minimum, the county must evaluate the cumulative impact of multiple impacts
9 on a particular farm.²⁴

10 Findings 136-41 represent the county’s cumulative impacts analysis.
11 FOYC argues that Findings 136-41 misconstrues the applicable law, and are
12 inadequate and not supported by substantial evidence. We generally agree that

²³ We stated:

“* * * We reject petitioners’ apparent contention that where impacts on an individual accepted farm practice are such that they almost force a significant change in that practice, then any impacts on other accepted farm practices must necessarily lead to a conclusion that there is a cumulative significant change in accepted farm practices. Such may be the case, but it is not necessarily so.”

²⁴ It is less clear whether a cumulative impacts analysis must also evaluate the cumulative impact of the same type of individual impact (e.g. nuisance birds) spread across multiple farms (e.g. McPhillips, Frease and others). Because no party addresses this point, we assume for purposes of this opinion that the cumulative impacts analysis is limited to the cumulative effect of different kinds of individual impacts on each separate farm, not the cumulative effect of the same kind of impacts on multiple farms considered together.

1 the findings misconstrue the applicable law, and do not provide the kind of
2 cumulative impacts analysis that *Von Lubken* requires.

3 Some of the findings are extraneous to any meaningful cumulative
4 impacts analysis.²⁵ Findings 139 and 140 are the only findings that attempt to
5 evaluate cumulative impacts in the manner suggested by *Von Lubken*. Finding
6 139 notes, consistent with LUBA's *Von Lubken* decision, that each of the
7 various alleged impacts are not necessarily additive or universal to all farms.²⁶
8 The county then appropriately focuses on the nearby farms where there were
9 claims of multiple impacts. However, the county then notes that the multiple-

²⁵ For example, Finding 141 finds it “persuasive” that the expanded landfill will essentially replace the existing landfill with respect to the volume of impacts on nearby farms, but there is no explanation for what that has to do with a cumulative impacts analysis, and we see none.

²⁶ Finding 139 states, in relevant part:

“[T]he Board finds that each of the alleged impacts from the landfill affects farms in different ways that are not necessarily additive. Contrary to the impression left by some of the testimony in opposition to the proposal, all alleged impacts do not radiate from the landfill in all directions affecting all farms in the area. * * * Overall, there are very few parcels where multiple impacts are alleged to have occurred. Of those farmers who alleged specific impacts to their property, they constituted only about 6% of the ownerships and approximately 10% of the acreage in the study area. Considering that not all of those allegations were true, and that some of the alleged impacts have been mitigated to near zero, cumulatively they represent a relatively small portion of the landscape. The Board therefore finds that the cumulative effect of the actual impacts is insignificant in that context.” Record 49.

1 impact farms represent only 10 percent of the acreage in the 34.5-square mile
2 study area, and states they cumulatively represent only “a relatively small
3 portion of the landscape.” This is a misconstruction of the cumulative impacts
4 test. The question under *Von Lubken* is not whether the multiple-impact farms
5 are cumulatively a small proportion of the surrounding farms, measured by
6 acreage or any other measure. The question is whether multiple insignificant
7 impacts to each particular farm operation, considered together, reach the
8 threshold of significance for that particular farming operation. The county
9 never attempts to answer that question.

10 In Finding 140, the county finds that, for properties where multiple
11 impacts were alleged, the county has concluded that individual impacts are
12 non-existent or do not rise to the level of significance, and the farmers who
13 alleged multiple or cumulative impacts did “not explain how multiple
14 insignificant impacts become significant when viewed cumulatively.”²⁷ FOYC

²⁷ Finding 140 states:

“Fourth, for properties where multiple impacts are alleged, the Board has determined that some of those impacts are non-existent, or that they do not rise to a level of significance. For example, on the Frease farm, which expressed concerns about impacts relating to both direct sales and to increased costs for [hazelnut] orchards, the Board finds that there has been no impact to direct sales and that the cost of treating [hazelnut] orchards is no different in the presence of the nearby landfill. The record does contain claims that cumulative impacts from the landfill are significant to these properties, but those claims are based on arguments asserting that single impacts viewed in isolation are significant, and they do not

1 argues, and we agree, that Finding 140, which is the only finding that purports
2 to conduct any kind of cumulative impacts analysis at all, is deficient. First,
3 Finding 140 mentions only the Frease farm, and does not discuss any of the
4 other farms that alleged multiple impacts, including McPhillips, Redmond
5 Noble, Double G Paints and Crescent Farms. Even then, Finding 140 does not
6 actually evaluate the cumulative impacts of the two individual impacts
7 identified on the Frease farm. Instead, Finding 140 faults the farmers involved
8 for failure to explain how multiple impacts are cumulatively significant. As
9 FOYC argues, this essentially shifts the burden of proof and explanation to the
10 opponent/farmers. It is the applicant's burden to demonstrate that individual
11 insignificant impacts are not cumulatively significant, and the county's
12 responsibility to adopt findings that determine whether or not that burden has
13 been met. Moreover, the county cannot simply recite that individual impacts,
14 as conditioned, are insignificant, but must consider and determine whether
15 individual insignificant impacts, some of which may be additive and some
16 which may not be, are cumulatively significant with respect to each farm that
17 alleged multiple impacts to their farm practices. The county's findings fail to
18 make that determination.

19 As discussed above, we have affirmed the county's conclusions that
20 individual impacts, as conditioned, are insignificant. In some cases, our

explain how multiple insignificant impacts become significant
when viewed cumulatively." Record 49.

1 affirmance rested heavily or entirely on the conditions that were imposed.
2 Indeed, in addressing litter impacts on the McPhillips farm, we concluded that
3 it was a close question, even considering the imposition of conditions. With
4 respect to such impacts, we did not fully address or affirm the county's initial
5 conclusions that even without conditions the impacts are insignificant.
6 Therefore, on remand to correctly apply the cumulative impacts test, the county
7 should not take as a given that all individual impacts are insignificant without
8 conditions.

9 FOYC's assignment of error is sustained, in part.

10 The county's decision is remanded.