

**LU-24-027 IN-PERSON TESTIMONY
SUBMITTAL COVER SHEET**

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**MEMORANDUM OF VALLEY NEIGHBORS FOR
ENVIRONMENTAL QUALITY AND SAFETY**

TO: Benton County Board of Commissioners
FROM: Jeffrey L. Kleinman
RE: File No. LU-24-027 (Republic Services/Valley Landfills Inc.)

I. INTRODUCTION AND PRELIMINARY MATTER

This office represents Valley Neighbors for Environmental Quality and Safety ("Valley Neighbors"). Valley Neighbors comprises a large group of property owners, farmers and residents in the area surrounding the proposed landfill expansion site, including but not limited to the Soap Creek Valley and Tampico communities. Its members will be directly and adversely affected by the proposed expansion. Many will suffer greater impacts than before as the dump grows southward. They have explained those impacts and will continue to do so as to the current proposal and most recent staff report.

As a preliminary matter we must lodge a procedural objection here. We are told that hearing staff has been directed from above to reject any email and electronic filings submitted after the *commencement* of your initial hearing and not place them before the Board, although the record is still open and even though staff's initial communication with participants stated that email and electronic filing would in fact remain open. This has prejudiced the substantial rights of those unable to submit written material into the record in person.

II. BACKGROUND AND ISSUES BEFORE THE BOARD.

A bit of perspective may be helpful in your consideration of this case. An earlier, more expansive proposal came before the Planning Commission in 2021. The Planning Commission voted unanimously to deny it. The applicant appealed to this Board, but then withdrew its appeal. Thereafter, presumably working with financing from the applicant, the county pulled together the expensive Benton County Talks Trash (BCTT) process, to which well-meaning citizens devoted thousands of hours of their time—although to what end no one knows. The Board accepted but did not adopt the lengthy BCTT report.

Then, with the current application impending, the county disbanded its Solid Waste Advisory Committee which under your Code would have provided the initial review, and substituted the county's Environment and Natural Resources Advisory

Committee (ENRAC) in its place. In an effort to seal the deal, staff prohibited ENRAC from accepting public testimony at its hearing. (Really. What gives here?) Nonetheless, on April 16, 2025, ENRAC delivered a lengthy, blistering rebuke, recommending that the Planning Commission deny the application.

In the meantime, the Planning Commission itself was reconstituted, removing some members who had voted to deny the 2021 application and substituting in new members. The Planning Commission in turn put in a remarkable amount of time listening to the evidence, totaling 15 hours of public hearings. It then voted unanimously to deny the new application. *Question:* Is there something about its dump, the quality of its operation, and the proposed expansion that the applicant simply does not get?

Facing time constraints and unwilling to rely upon staff to fully, accurately, or meaningfully incorporate their findings into a decision, Planning Commission members stated their reasoning in full in the discussion which preceded their vote and then incorporated their reasoning into their findings. Contrary to some characterizations, the findings are complete and, for all practical purposes, quite consistent. Simply stated, the Commissioners took matters into their own hands for good reason, and considering that they are not paid professionals, did a very solid job.

Then, after its appeal was filed, the applicant asked for and received several weeks of additional time before proceeding to the staff report and Board hearing. Why? It wasn't to come up with more effective mitigation measures to address public concerns. It was to engage two public relations consulting firms to try to organize support of the application.

As the current application has moved through the process, the applicant and its consultants have added more and more words to the record, but precious little by way of real mitigation or actual proof of compliance with the county's approval standards. Instead, they attempt a whitewash involving "experts," many of whom appear not to have visited the site, if they have even been to Benton County in the first place for any reason other than to testify in support of the application. At the same time, they do their best to denigrate the direct testimony and experience of your citizens—your longtime community members—who have actually had the lived experience of the applicant's operation. And contrary to the applicant's contentions regarding the controlling law, the following principles apply under *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341, 364 (2015).

- The testimony of affected citizens based on lived experience may be believed and can prevail over the testimony of paid experts.

- Evidence regarding impacts of an applicant's nearby existing operations is relevant in evaluating a proposed expansion of that operation. (In *Stop the Dump* appropriately enough, the application was for the southward expansion of an existing landfill.)

The applicant and its consultants demand that the community and this Board accept their paid-for hypotheses over reality. In a nutshell, the applicant is asking: "Who are you gonna believe, us or their lyin' eyes, ears and noses?" That is intended as a rhetorical question, and indeed it is one. The problem is that the answer is the opposite of the one they surmise.

We have stated the point colloquially, but the fact is that the applicant's effort to dismiss eyewitness testimony as "anecdotal" and "speculative," and therefore irrelevant or entitled to greatly diminished weight, set forth in its "Appeal Narrative," is without legal basis. The testimony of the affected community members who have suffered from the impacts of the dump, is factual and is true and correct unless proven otherwise.¹ It is the distant, paid consultants whose testimony is speculative.

Relatedly, staff contends that where earlier Code violations of and violations of permits or conditions of approval have been reported but not fully adjudicated, they

¹We would point out that a county staff person inappropriately kicked off the 'just anecdotal' theme in a comment made during the proceedings of your Planning Commission. Such casual dismissiveness of the work product of your citizens, some of whom are in fact well-qualified experts and none of whom are known to be liars, was hard to stomach then and remains so now. Which judicial or quasi-judicial bodies grant credence to the testimony of eyewitnesses? *All of them.*

are irrelevant and you should not consider them. Seriously? In a county which will not pursue or adjudicate them, or to a non-responsive agency like DEQ? We are not talking about a criminal adjudication here. We are talking about facts reported by community members. These are deemed credible in the absence of proof to the contrary. Staff's guidance is incorrect as a matter of law under *Stop the Dump*. Only a zealous proponent of the application would make the statement in question.

Also on a related note, the applicant's apparent willingness to pay for (for all practical purposes, employ) a Code enforcement person to monitor its own operations is specious. That person could not be objective. Most importantly, such a condition would not render compliance with your approval standards feasible—possible, likely and reasonably certain to succeed. On top of that, adjudication of violations may well move to the courts, rendering compliance and/or sanctions moot because the final decision is not reached until the lifespan of the operation has expired. Thus, the process is set up to fail.

Further, the applicant's position amounts to an attempt at shifting the burden of proof under your approval standards from the applicant to opponents. The applicant "has the initial and ultimate burden of proof" at all times to demonstrate compliance with those standards, including the county's conditional use criteria. *Stop the Dump Coalition*, 72 Or LUBA at 364. It has not met that burden.

The criteria include the following:

53.215 Criteria. The decision to approve a conditional use permit shall be based on findings that:

(1) The proposed use does not seriously interfere with uses on adjacent property, with the character of the area, or with the purpose of the zone;

(2) The proposed use does not impose an undue burden on any public improvements, facilities, utilities, or services available to the area; and

(3) The proposed use complies with any additional criteria which may be required for the specific use by this code.

With respect to Subsection (1), the applicant contends in its appeal narrative that the “Planning Commission decision improperly redefined the terms in the standard in a manner inconsistent with the County’s historic interpretation and inconsistent with the plain meaning of the terms.” The Planning Commission’s findings are absolutely consistent with the plain meaning of the Code’s terms. To the extent that the Commission considered a broader impact area than has been its custom, it is because the impacts of the applicant’s use far exceed those addressed in its previous conditional use cases, and affect a much broader impact area. That is just the nature of the beast.

As staff and the applicant have pointed out:

Webster’s Third New International Dictionary defines “adjacent” as “**not distant or far off * * *: nearby but not touching** * * *relatively near and having nothing of the same kind intervening: having a common border:

ABUTTING, TOUCHING; living nearby or sitting or standing close relatively near or close together: immediately preceding or following with nothing of the same kind intervening.” (Underscoring and bold added.)

Thus, the definition expressly grants this Board the authority and the ability to consider a wider area than that mapped and espoused by the applicant, based upon the evidence placed before it. However, even if one were to adhere to the constricted area mapped, the testimony makes evident that the proposed use will “seriously interfere with uses on adjacent property.” This has been shown as to multiple such properties but, under your Code, one is enough to compel denial of this appeal and the application.

For the Planning Commission to have put on blinders in the manner advocated by the applicant would have been a dereliction of its duties as a review body. Instead, it did its job. It in no way established a troublesome or unjustified precedent for the review of more run-of-the-mill applications.

With respect to the “character of the area, please realize that the plain language of Subsection (1) is in no way limited to adjacent properties. Rather, the “area” is that which is established by the evidence, which is precisely the way the Planning Commission applied the term.

Reference has been made to the meanings of “seriously” and “significant.” We addressed these terms at some length at pages 5-7 of our May 5, 2025 memorandum to

your Planning Commission. Suffice it to say though, if you are in any way inclined to be persuaded that approval of this application would not result in “serious interference,” please picture yourselves as homeowners or farmers or foresters or providers of equine therapy services to the handicapped or disabled, adjacent to or anywhere near the expansion site. We can nearly guarantee that you would find that the proposed operation seriously interferes with your use and enjoyment of your property, as well as with the character of the area. Under no circumstances would you move to or wish to live anywhere near it, regardless of depressed property prices.

With respect to the portions of the proposal within the Forest Conservation (FC) zone², the following criteria also apply:

60.220 Conditional Use Criteria.

(1) A use allowed under BCC 60.205 or 60.215 may be approved only upon findings that the use:

(a) Will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands;

(b) Will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel; and

(c) Complies with criteria set forth in BCC 53.215 and 53.220.

²“Relocation of leachate ponds, loadout, sump, an outbound scale, portions of the perimeter landfill road, and a shop/maintenance building; and removal of existing landfill and leachate activities on the east side of the subject property within the FC zone.” Staff Report 13.

The evidence now in the record before you establishes unresolved violations of these criteria. As has been testified this southward expansion will force a significant change in, or significantly increase the cost of, accepted farming and forest practices on agriculture and forest lands under Subsection (a), above. With respect to Subsection (b), it will also by its very nature “significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel.” (We refer you to the letter in the record from the Adair Fire Chief.)

The application and staff review have also failed to fully consider a key factor for your consideration. As others will explain, this is an unusual application, in that it triggers landfill operations on nearby properties that are not subject to conditions of approval imposed here, by lifting the applicant’s landfill tonnage cap. A condition of approval adopted here will not be enforceable as to activities the applicant conducts on the other properties it owns. This is because they are not subject to this application.

Permits currently exist for the applicant’s parcels north of Coffin Butte Road zoned for disposal, where disposal is currently taking place. A 1,100,000 ton annual intake limit currently constrains the applicant’s landfilling operations on those parcels. However, as the franchise agreement between the County and the applicant is written,

approval of this application will trigger removal of the tonnage cap constraining filling on the other properties. For example, if this application is approved, intake volumes at the applicant's fill on the site of the former quarry will no longer be subject to any limitation. The upshot of all this is that approval of this application would in turn trigger and cause noise, odor, traffic, fire protection and any number of additional impacts which neither the applicant nor staff has identified or addressed. The impacts in question will compound those affecting the community affected herein and discussed by witnesses (and consultants). It may also affect other property owners. Failure to consider and evaluate those impacts of any approval of *this* application necessarily doom this application to denial for failure to fully address the approval criteria in a manner which would allow findings supported by substantial evidence.

III. CONDITIONS OF APPROVAL

What can we now expect from the applicant by way of compliance with proffered conditions?

The applicant's initial expansion application kicking off the events leading up to Benton County Talks Trash and the application before you now, was filed in 2021. Ever since, the applicant has had the ability and a very strong incentive to minimize the impacts of its landfill, including noise, odor, and uncontrolled trash, upon the

affected community and the county as a whole. Presumably, it has put on its best face in order to show that it can be a responsive neighbor and comply with the county's approval standards; to do otherwise would frankly be both arrogant and lame.

As you can see though, the applicant's best efforts fall far short of satisfying your code requirements. (Alternatively, if they have not been trying their best, they have shown that they will not comply and are institutionally incapable of complying with conditions of approval.) In either event, the application must be denied.

Certain conditions of approval now proposed by staff and the applicant are intended to address—or at least dress up or whitewash—major issues identified by your Planning Commission based upon the evidence in the record before it. We see more words than before, but the proposed conditions do not come close to meeting the legal requirements for such conditions.

In order to rely upon conditions of approval, the applicant (and hence the decisionmaker) must demonstrate that compliance with all discretionary approval standards is "feasible." *Meyer v. City of Portland*, 7 Or LUBA 184 (1983), *aff'd*, 67 Or App 274, 678 P2d 741, *rev den*, 297 Or 82, 679 P2d 1367 (1984). The Court of Appeals has held that "feasibility" means that "substantial evidence supports a finding that solutions to certain problems * * * are possible, likely and reasonably certain to succeed." 67 Or App at 280 n 5. (Emphasis added.) *See also Gould v. Deschutes*

County, 227 Or App 601, 606-607 (2009) to the same point. As explained below and in the testimony of many others, the showing of feasibility simply has not been made on this record.

Conditions must not defer the demonstration of compliance with the applicable approval standards to a future point in time where there are no opportunities for public participation. This would violate the requirements in *Fasano v. Washington Co.* Comm., 264 Or 574, 507 P2d 23 (1973), that quasi-judicial land use hearings include an opportunity to be heard, to make a record, and to have adequate findings. *Meyer v. City of Portland*, *supra*, 67 Or App at 280; *Oregon Department of Fish and Wildlife v. Crook County*, LUBA No 2020-114 (May 9, 2021) (slip op at 18-20), *rem'd on other grounds*, 315 Or App 625, 504 P3d 68 (2001) (citing *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007) and concluding that a condition requiring the applicant to “provide evidence to the county that one of the [two] options for implementing habitat mitigation, as detailed in [the mitigation plan] * * * has been initiated” improperly leaves a finding of compliance with the applicable approval standard “to be hashed out in private between intervenor and the county and possibly ODFW”).

Simply stated, conditions of approval are not substitutes for findings of fact and conclusions that an application complies with your land use regulations. Adequate

findings are needed to support the decision and the rationale for imposing the conditions of approval. *See e.g. Thomas v. Wasco County*, 30 Or LUBA 302, 315 (1996).

Again, the proposed conditions before you fall woefully short of meeting the above requirements. Selected conditions are addressed below. Detailed testimony with respect to these and other conditions will be presented by other witnesses.

(1) Conditions P2-2 and OP-3 (Noise)

Condition P2-2 relates to noise generated during “pre-commercial operations.” Condition OP-3 relates to noise generated thereafter, during ongoing commercial operations. Condition P2-2 does not set out specific necessary steps to abate noise above the level set by the condition, merely suggesting possible measures and not setting out consequences (cessation of work? revocation proceedings?) if the standard is not or cannot be met. Thus, this condition fails to meet the requirement that it renders compliance “possible, likely and reasonably certain to succeed.”

Condition OP-3 covers the long-term operation of the proposed fill. It suffers from similar defects, but they are far more numerous and extensive. Sound measurements mean nothing without a sound standard being set, compulsory continuous monitoring and reporting, and measures assuring compliance or shutting down the operation. Further, the condition covers only “on-site equipment,” not

arriving trucks or trailers delivering trash, with their own diesel engine and brake noise, back-up beepers, and clanging tailgates. Republic-owned or operated on-site equipment comprises roughly one percent (1%) of the vehicles operating on the site. Less than 50 percent of the arriving-and-departing truck traffic consists of Republic's own vehicles and is somewhat subject to Republic's control. However, even Republic's trucks require and use regular back up beepers as this is required by law for their operation on public streets and roads.

In its successful effort to provide illusory mitigation measures and entirely avoid the real noise impacts of this proposal, Condition OP-3 is a strong contestant for the gold medal awarded for defective conditions. Unfortunately, it has competition in this case.

(2) Condition OP-4 (Odor)

The dance around odor impacts has become ever more intricate, while still failing to meet the requirements for supportable conditions of approval. The 48-month testing period is artificially constrained. The process for certification of the testers is unknown and unknowable. Given variations in wind, weather, atmospheric conditions, and the nature of the refuse delivered, daily testing would be far from adequate. Testing would have to be conducted twice an hour, if it were effective. However, it is not effective because the professional/academic literature shows that

the Ranger equipment does not identify odor sources or types.

Monthly submissions to third parties would be insufficient and meaningless. And there is no solution to or remedy for violations. This is literally a pig in a poke.

(3) Condition OP-9 (Litter)

The litter control conditions are utterly unworkable. There is no evidence that the proposed fencing will control windborne litter such as paper and the plastic which renders hay unsafe, unuseable, and non-salable.

Daily roadside patrols are inadequate. Weekly clean up on affected farm properties is inadequate, as hourly patrolling is needed to protect crops and livestock. Under the *Stop the Dump* line of cases, farmers and others need not accept strangers on their properties. The offer of such entry and performance of “services” is not mitigation.

Further, there are no consequences for violations. Condition OP-9 assures nothing.

IV. CONCLUSION

For each of the reasons set forth here and on your record, and on the record before your Planning Commission, the applicant has not met its burden of proof herein. This appeal and the application itself must be denied.

Dated: October 22, 2025.

Respectfully submitted,

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