

Memorandum

To: Benton County Planning Commission

From: Jeffrey G. Condit 

Subject: Response to May 5, 2025, Memorandum from Jeffrey L. Kleinman
File No. LU-24-027

Date: June 6, 2025

As you know, we represent Valley Landfills, Inc. (“VLI”), the applicant for the above-noted conditional use permit application (CUP). This memorandum responds to the above-noted memorandum prepared by Jeff Kleinman, attorney for Valley Neighbors for Environmental Quality and Safety.

I. Response to Mr. Kleinman’s Sections I and II (Introduction and General Comments)

A. New Landfill. Mr. Kleinman argues that this CUP for expansion of the landfill should be treated as an application for a new landfill. That is not a plausible interpretation. The proposed expansion is on land specifically designated for landfill use, for which zoning was adopted with the intention of providing for future expansion of the landfill. A landfill has been operating in this area for 70 years, and the expansion area will be part of the landfill operation that includes areas north of Coffin Butte Road.

B. Conditions of Approval. VLI respectfully disagrees with the representation that it has a track record of noncompliance with conditions of approval or that Benton County (the “County”) will not enforce conditions. The decisional record from 1973 through 1990 is not complete and is prior to Republic’s ownership, so VLI also has limited records from this period. In the proposed conditions of approval, there are conditions that must be completed to the County’s satisfaction during development before VLI can move onto the next phase. There are also operating conditions that continue to apply to the landfill after operations begin, such as maintenance of the vegetative screen and odor and noise monitoring and mitigation. If VLI fails to comply with these conditions, the County can bring an enforcement action against VLI up to and including revocation of the CUP. The proposed conditions are consistent with the County’s

modern practice and provide plenty of teeth to ensure that VLI will continue to comply with any conditions of approval imposed by the County.

C. Benton County Talks Trash (BCTT). VLI agrees that the BCTT final report is not a binding legal document; it is, however, a highly persuasive resource. Multiple stakeholders spent months going over the history and legal framework of the landfill and produced a BCTT final report with significant (if not total) consensus. Mr. Kleiman argued at the May 6 hearing that the Planning Commission should ignore the analyses by the BCTT legal subcommittee because it included the County counsel and two attorneys for VLI. We note that Mr. Kleinman was invited to participate by Sam Imperati, the Oregon Solutions moderator, and Mr. Kleinman declined. As a result, Mr. Imperati retained former LUBA member and long-time land use lawyer Virginia Lucker to serve as the Committee's member on the legal subcommittee to ensure that the final report represented views coming from multiple perspectives. The consensus work product of the legal subcommittee included Ms. Lucker's substantive input and conclusions.

D. Past Representations About the Landfill. Mr. Kleinman and several persons testifying at the hearings argued that "promises were made" 50 years ago that the landfill would be temporary or would close after a certain period. We reiterate that the only applicable criteria are those in the current County land use regulations. *See, e.g., M & T Partners, Inc. v. City of Salem*, ___ Or LUBA ___ (LUBA No. 2018-143) (Aug. 14, 2019) (oral and written representations by the applicant that the commercial shopping center uses allowed under a comprehensive plan and zone change would not include a Costco store did not support denial of a subsequent application including a Costco, where that restriction was not incorporated into the zone change and the Costco otherwise complied with the adopted requirements of the zone).

II. Response to Mr. Kleinman's Section III (Conditional Use Approval Standards)

A. Meaning of "Seriously Interfere" under BCC 53.215(1). Mr. Kleinman appears to argue that any interference that is more than insignificant is serious. That is not consistent with the express language of the Benton County Development Code. The interpretation that VLI proposed in its Burden of Proof, and with which staff concurred in the Staff Report, was based upon the BCTT analysis. That analysis was based not just on the input from the lawyers, but primarily on research by County planning staff about how the County has historically interpreted the conditional use criteria in past land use decisions. The Planning Commission should bear in mind that the conditional use criteria in BCC 53.215 apply to all conditional uses

under the Benton Development Code. If the County adopts a much more restrictive definition with regard to this application, then the County will have to apply that interpretation in any future CUP application for any conditional use in the Code. If the County adopts a more restrictive interpretation for this application than its historic interpretation, that affects the plausibility of the interpretation. If the County adopts a more restrictive interpretation for the application and then reverts to its historic interpretation in future applications, that is a due process issue. As an applicant, VLI expects to be judged based upon the text of Code and consistent the County's past practice.

Mr. Kleinman's construction of the term "significant" is not relevant because that term is not used in BCC 53.215(1).

B. Interference with Uses on Adjacent Property. BCC 53.215(1) requires an analysis of the impacts on adjacent property and on the character of the area. VLI identified the adjacent properties based upon the definition of "adjacent" in Webster's Third New International Dictionary, which, as Mr. Kleinman notes, is the dictionary preferred by LUBA and the appellate courts when construing terms of common usage. See BOP at 19-20. VLI identified adjacent properties, not just adjacent to the expansion area, but adjacent to the existing landfill plus the expansion area; VLI also included in its analysis properties abutting the adjacent properties. While VLI does not necessarily agree that this expansive view of "adjacent" is required by the Benton County Code, the Staff Report concurs that this captures all of the "adjacent properties."

1. Noise. As part of its post-hearing submittal, VLI has submitted an revised Odor Modeling Study dated June 2025 ("June 2025 Noise Analysis") to address the concerns in the Staff Report that led to staff's recommendations for denial and to recommend additional mitigation measures.

a. DEQ Noise Rule. Mr. Kleinman implies the DEQ Noise Control Regulations for Industry and Commerce (OAR 340-035-0035) (the "Noise Rule") are unenforceable and out of date. DEQ does not enforce its noise control regulations because the legislature withdrew DEQ's funding to do so. See OAR 340-035-0110. The Noise Rule has been updated since 1991, however, and is applied by cities, counties, and other state agencies in other contexts. See, e.g., *Mingo v. Morrow Cnty.*, ____ Or LUBA ____ (LUBA Nos. 2011-014, 2011-016, and 2011-017) (June 1, 2011) ("*Mingo I*") (wind energy facility noise). The

Noise Rule is an accepted benchmark for determining noise impacts on surrounding properties, particularly in the absence of any County noise rules.

b. Back-Up Beepers. Mr. Kleinman argues that the proximity alarms that will be installed on VLI's vehicles instead of back-up beepers are even noisier. Mr. Kleinman cites no evidence in support of this allegation. VLI is actually proposing to install ambient-sensing broadband back-up alarms that use white noise that adjusts based upon ambient sound levels. These are much quieter than tonal alarms. June 2025 Noise Analysis.

2. Odor. As part of its post-hearing submittal, VLI has submitted an updated Odor Analysis to address the concerns in the Staff Report that led to staff's recommendations for denial.

3. Methane. Methane emissions are regulated by the EPA. VLI is fully cooperating with the EPA's Section 114 Information Request.

4. Visual Impacts. VLI relies on its analysis in the BOP and the staff analysis. The closed landfill cells will be reclaimed and revegetated over time. VLI has submitted additional testimony addressing the alleged "patchwork of decaying tarps" as part of its June 6, 2025, response to the hearing testimony. VLI has also submitted additional information about the height of the proposed expansion area. It will be below the height of Tampico Ridge at all points and will not be visible from the south side of the ridge

C. The Character of the Area. VLI relies on the arguments in its BOP.

D. 2021 Decision Findings. Mr. Kleinman cites to several findings from the Planning Commission's 2021 decision in support of denying this application. As Mr. Kleinman himself notes, the 2021 application was a substantially different application with a substantially different evidentiary record. Those findings are not relevant to this application.¹

¹ Mr. Kleinman posits that this application is a "Trojan Horse" for the eventual closure of Coffin Butte Road and the filling in of the valley: "it is not inconceivable that the county would apply (to itself) to vacate Coffin Butte Road so that Republic would own and could fill over the right-of-way." In point of fact, any future expansion of the landfill would require a CUP process subject to the same criteria, public notice, and process as the existing application, and any concomitant vacation requires an official action of the County Board of Commissioners, even under the expedited process when all of the abutting property owners consent. See ORS 368.351, 368.356. Approval of this application would not affect the required process applicable to any future application or make it any easier.

E. The Purpose of the Forest Conservation (FC) Zone. Mr. Kleinman's argument that the purpose of the FC zone prohibits landfill use on FC-zoned lands ignores two express provisions in Chapter 60. Section 60.005 (Purpose of the Zone) describes forest-related uses and then goes on to say:

Except for activities permitted or allowed as a conditional use, non-forest uses shall be prohibited in order to minimize conflicts with forest uses, reduce potential for wildfire, and protect this area as the primary timber producing area of the County.

BCC 60.215(11) expressly allows as a conditional use in the FC Zone:

Disposal site for solid waste approved by the Benton County Board of Commissioners and the Oregon Department of Environmental Quality together with equipment, facilities, or buildings necessary for its operation.

Mr. Kleinman's argument is directly contrary to the express language of the Code.

III. Response to Mr. Kleinman's Section IV (Conditions Related to Traffic, Drainage, Leachate Management)

A. Traffic. VLI's traffic consultant has responded to testimony at the hearing regarding transportation in a report dated May 23, 2025, and included in its June 6 response to testimony at the hearing. The proposed improvements to Coffin Butte Road are more than sufficient to address the changes in truck and traffic patterns and will not impede through traffic on Coffin Butte Road.

B. Drainage and Leachate Management. Mr. Kleiman does not explain why he believes VLI's responses to drainage and leachate management are not compliant. VLI has submitted additional evidence into the record in response to testimony at the hearing about drainage/groundwater, leachate, and proposed construction. Typically, construction activity to site a proposed use is not considered part of the impact for conditional use review.²

IV. Response to Mr. Kleiman's Section V (Conditional Use Criteria Under BCC 60.220)

Staff correctly concluded that VLI has demonstrated compliance with these criteria. If the application is approved, the working face of landfill will move from the north side of Coffin Butte Road to the expansion area, but the overall off-site impacts will not be materially

² For example, OAR 340-035-0035(5)(g) exempts construction site noise from compliance with the Noise Rule.

different. As noted in VLI's BOP, farm and forest uses have thrived on adjacent properties, including the farm uses on VLI's properties directly adjacent to the landfill.

V. Response to Mr. Kleinman's Section VI (Development Activities in Wetlands)

Nothing in BCC 99.225 requires an applicant to obtain wetland permits prior to approval of a land use application or require an agency response before approval. None of the wetlands identified on site are a designated Goal 5 wetland under the County Comprehensive Plan or land use regulations, and so the County does not have any independent regulatory authority over any of the wetlands on site. The Draft Conditions of Approval (PA-1) require VLI to obtain an approved wetlands delineation and any necessary removal/fill permits prior to any ground-disturbing activities, as required by state and federal law.

VI. Conclusion

VLI has met its burden for proof to demonstrate compliance with the applicable criteria and respectfully requests that the Planning Commission approve the above-noted application.