

## AGENDA COVER MEMO

W. G. L.

**DATE:** February 13, 2006

**TO:** Lane County Board of Commissioners

**DEPARTMENT:** Public Works Department, Land Management Division

**PRESENTED BY:** Kent Howe, Planning Director  
Stephen Vorhes, Assistant County Counsel

**TITLE:** Order No. 06-\_\_-\_\_-\_\_ /In the Matter of Responding to the LUBA Remand of a County Decision Denying a Request to Amend the Lane County Rural Comprehensive Plan to Add 575 Acres to the County Goal 5 Inventory of Significant Mineral and Aggregate Sites and Allow Mining on the Site in Order No. 02-5-15-10 (PA 99-5996; Eugene Sand & Gravel)

### I. MOTION

Move approval of Order No. 06-\_\_-\_\_-\_\_ and respond to the remand of the county decision in the Eugene Sand & Gravel appeal by amending Order No. 02-5-15-10 and re-adopting the Exhibit "A" to that order with changes described in the proposed order.

### II. ISSUE

In Order No. 02-5-15-10 the Board took final action denying the request of Eugene Sand & Gravel to amend the Lane County Rural Comprehensive Plan ("RCP") and allow mining on land north of Eugene. This action was appealed to the Oregon Land Use Board of Appeals ("LUBA"). Two of three issues ultimately were remanded by LUBA to Lane County, for further action. The proposed order presents responses that will address the LUBA remand.

### III. DISCUSSION

#### A. Background

In May 2002, Lane County took action denying the application of Eugene Sand & Gravel, Inc. for an RCP amendment to add 575 acres north of Eugene to the Goal 5 inventory of significant mineral and aggregate sites and allow mining on approximately 240 acres of the site. The county action was appealed to LUBA by Eugene Sand & Gravel, Inc. ("petitioner"). On February 25, 2003, LUBA issued its decision upholding the county action on most of the issues raised by the petitioner and Oregon Concrete and Aggregate Producers Association ("intervenor-petitioner"), but remanding the action based on resolution of three issues (including farm stands in the mining conflict with agriculture and related economic, social, environmental and energy ("ESEE") analysis; adequacy of findings in the mining conflict with riparian resources and related ESEE analysis; and use of local approval criteria to support the denial decision).

The petitioner and intervenor-petitioner appealed the LUBA decision to the Court of

Appeals. Lane County, Thistledown Farms and Lone Pine Farms, Ltd filed cross-petitions for judicial review of the LUBA decision on the role of farm stands in the mining conflict with agriculture analysis. On July 30, 2003, the Court of Appeals affirmed the LUBA decision on the petition of Eugene Sand & Gravel, Inc. and reversed and remanded the LUBA decision on the cross-petitions. The petitioner did not seek Supreme Court review of the Court of Appeals' decision. The appellate judgment of the Court of Appeals became effective December 19, 2003, and LUBA issued a final decision on January 16, 2004, that resulted in a remand of the Lane County decision on only two issues.

## B. Analysis

The two issues that LUBA remanded concerned the adequacy of findings on the mining conflict with riparian resources and related ESEE analysis and the use of local approval criteria to support the denial decision. Neither of those two issues on remand requires the county to reopen the record for additional evidence or to adopt significant additional findings. For each of the issues remanded by LUBA, the county needs to only revise and clarify the findings adopted in support of the action or, as necessary, provide additional explanation of evidence in the record that supports the findings already adopted by the county decision. There are a couple of options available to the Board in dealing with the remand of the riparian issues. Regardless of the choice made on that remand issue, action should be taken to revise the findings on the RCP and rezoning amendment requirements to clarify the basis for the decision only depends on the analysis of application compliance with applicable Statewide Goals and the Goal 5 Rule on Mineral and Aggregate resources.

One response could be to view the existing riparian protection requirements of county land use regulations as sufficient protection for the riparian resource and conclude compliance with those regulations will minimize the mining conflicts. Such a conclusion could also rely upon the analysis of the effect of groundwater levels on wetlands that previously led the Board to the conclusion that mining conflicts with wetlands could be minimized with reasonable and practicable conditions. This approach is incorporated in the proposed order with an explanation of that analysis and the resulting revisions to the original findings adopted by Order No. 02-5-15-10. Specific changes are included in the Exhibit "A" attached to the proposed order.

Another response to the LUBA remand could be to further explain the conflicts between the proposed mining and the Goal 5 riparian resources to determine whether those mining conflicts could be minimized to the point where the conflicts were no longer significant. Such an approach could include revisiting the analysis of mining conflicts affecting wetlands and might conclude those conflicts with wetlands and riparian resources could not be sufficiently minimized. In that case, it would be necessary to revise the adopted Goal 5 findings to address the LUBA remand by including additional findings on significant mining conflicts with Goal 5 wetland and riparian resources and revise the ESEE analysis accordingly. One example of that approach is included as an attachment to this memo showing changes to paragraph 18 in Exhibit "A" to Order No. 02-5-15-10 in legislative format. Should the Board be interested in this approach, further refinements to the findings could be made based on Board review and discussion of the evidence with staff at a later date.

The procedural options available to the Board range from taking action based on the existing record to reopening the record to schedule a public hearing on the remand

issues. If the Board decides to reopen the record to consider additional written evidence and arguments or hold another hearing, additional notice will need to be given. The proposed order has been drafted in a manner that enables action without reopening the record and is based on the existing evidence and testimony. It makes minimal changes to the findings supporting the action by removing the conflicts with riparian resources analysis and relying primarily on the sustained basis for denial, mining conflicts with agricultural practices.

C. Alternatives / Options

1. Adopt the proposed Order.
2. Amend the Order.
3. Do not adopt the Order and provide additional direction on a remand response.

D. Recommendation

Option 1.

E. Timing

Action is at the discretion of the Board.

**IV. IMPLEMENTATION/FOLLOW-UP**

Notice of the final Board decision will be provided to the parties.

**V. ATTACHMENTS**

Proposed Order, with Exhibit "A".

Attachment A - Optional revision to Exhibit "A" showing changes to enhance riparian findings with changes to the previous text shown in legislative format.

Relevant portions of the LUBA remand decisions.

**IN THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY,  
OREGON**

Order No. 06-\_\_-\_\_-\_\_

- ) In the Matter of Responding to the
- ) LUBA Remand of a County Decision
- ) Denying a Request to Amend the
- ) Lane County Rural Comprehensive
- ) Plan to Add 575 Acres to the County
- ) Goal 5 Inventory of Significant Mineral
- ) & Aggregate Sites and Allow Mining
- ) on the Site in Order No. 02-5-15-10
- ) (PA 99-5996; Eugene Sand & Gravel)

**WHEREAS**, in May 2002, Lane County took action denying the application of Eugene Sand & Gravel, Inc. for a Lane County Rural Comprehensive Plan (RCP) amendment to add 575 acres north of Eugene to the Goal 5 inventory of significant mineral and aggregate sites and allow mining on approximately 240 acres of the site, which the Board of County Commissioners did by adopting Order No. 02-5-15-10 on May 15, 2002; and

**WHEREAS**, the county action was appealed to the Oregon Land Use Board of Appeals ("LUBA") and on February 25, 2003, LUBA issued its decision upholding the county action on most of the issues raised by the petitioner, but remanding the action based on three of the issues raised by petitioner (including farm stands in the mining conflict with agriculture and related economic, social, environmental and energy "ESEE" analysis; adequacy of findings in the mining conflict with riparian resources and related ESEE analysis; and use of local approval criteria to support the denial decision); and

**WHEREAS**, the petitioner appealed the LUBA decision to the Court of Appeals and Lane County, Thistledown Farms and Lone Pine Farms, Ltd cross-petitioned for judicial review and on July 30, 2003, the Court of Appeals affirmed the LUBA decision on the petition of Eugene Sand & Gravel, Inc. and reversed and remanded the LUBA decision on the cross-petitions; and

**WHEREAS**, the petitioner did not seek Supreme Court review of the Court of Appeals' decision, the appellate judgment of the Court of Appeals became effective December 19, 2003, and LUBA issued a final decision on January 16, 2004, that resulted in a remand of the Lane County decision on only two issues (the adequacy of the findings in the mining conflict with riparian resources and related ESEE analysis; and the use of local approval criteria to support the denial decision); and

**WHEREAS**, neither of the two issues on remand require the county to reopen the record for additional evidence or to adopt significant additional findings and instead, for each of the two issues remanded by LUBA, the county need

only revise and clarify the findings adopted in support of the action or, as necessary, provide additional explanation of evidence in the record that supports the findings already adopted, now, therefore, be it hereby

**ORDERED**, that the Board of County Commissioners of Lane County responds to the LUBA remand of the county decision to adopt Order No. 02-5-15-10 by amending that order and re-adopting the Exhibit "A" to that order with the changes as described and shown in the Remand Response and Explanation of Findings contained in the Exhibit "A" attached and incorporated herein by this reference.

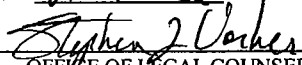
Dated this \_\_\_\_ day of February, 2006.

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Bill Dwyer, Chair  
Lane County Board of Commissioners

APPROVED AS TO FORM

Date 2-14-2006 Lane County

  
OFFICE OF LEGAL COUNSEL

**Exhibit A**  
**To Order No. 06-\_\_-\_\_**

**Remand Response and Explanation of Findings**  
**Supporting Order No. 02-5-15-10**

**Introduction**

In May 2002, Lane County took action denying the application of Eugene Sand & Gravel, Inc. for a Lane County Rural Comprehensive Plan (RCP) amendment to add 575 acres north of Eugene to the Goal 5 inventory of significant mineral and aggregate sites and allow mining on approximately 240 acres of the site. The county action was appealed to the Land Use Board of Appeals (“LUBA”) by Eugene Sand & Gravel, Inc. (“petitioner”). On February 25, 2003, LUBA issued its decision upholding the county action on most of the issues raised by the petitioner and Oregon Concrete and Aggregate Producers Association (“intervenor-petitioner”), but remanding the action based on resolution of three issues (including farm stands in the mining conflict with agriculture and related economic, social environmental and energy “ESEE” analysis; adequacy of findings in the mining conflict with riparian resources and related ESEE analysis; and use of local approval criteria to support the denial decision).

The petitioner and intervenor-petitioner appealed the LUBA decision to the Court of Appeals. Lane County, Thistledown Farms and Lone Pine Farms, Ltd filed cross-petitions requesting judicial review of the LUBA decision on the role of farm stands in the mining conflict with agriculture analysis. On July 30, 2003, the Court of Appeals affirmed the LUBA decision on the petition of Eugene Sand & Gravel, Inc. and reversed and remanded the LUBA decision on the cross-petitions. The petitioner did not seek Supreme Court review of the Court of Appeals’ decision. The appellate judgment of the Court of Appeals became effective December 19, 2003, and LUBA issued a final decision on January 16, 2004, that resulted in a remand of the Lane County decision on only two issues (the adequacy of findings in the mining conflict with riparian resources and related ESEE analysis; and the use of local approval criteria to support the denial decision).

Neither of those two issues on remand requires the county to reopen the record for additional evidence or to adopt significant additional findings. For each of the issues remanded by LUBA, the county needs to only revise and clarify the findings adopted in support of the action or, as necessary, provide additional explanation of evidence in the record that supports the findings already adopted by the county decision.

**Intervenor-petitioner’s (OCAPA) Third Assignment of Error**

Intervenor-petitioner argued to LUBA that the county decision inadequately addressed OAR 660-023-0180(4)(b)(D) in the analysis of the mining conflicts with riparian resources. Specifically, intervenor-petitioner argued that the county findings concluding that water drawdown from mining would conflict significantly with riparian resources

were inconsistent with other county findings that concluded proposed minimization measures would adequately ensure no other Goal 5 resources, including wetlands, would be significantly affected by the proposed mining. Intervenor-petitioner contended that the county findings were not logical in assuming mining would significantly affect riparian areas but would not significantly affect wetlands when those areas are all hydrologically connected.

**Criterion on remand is OAR 660-023-0180(4)(b)(D) (LCDC 2-1996), which provides in relevant part:**

“(4) For significant mineral and aggregate sites, local governments shall decide whether mining is permitted. \* \* \* The process for reaching decisions about aggregate mining is as follows:

“(a) The local government shall determine an impact area for the purpose of identifying conflicts with proposed mining and processing activities. The impact area \* \* \* shall be limited to 1,500 feet from the boundaries of the mining area, except where factual information indicates significant potential conflicts beyond this distance.

“(b) \* \* \* For determination of conflicts from proposed mining of a significant aggregate site, the local government shall limit its consideration to the following:

“ \* \* \* \*

“(D) Conflicts with other Goal 5 resource sites within the impact area that are shown on an acknowledged list of significant resources and for which the requirements of Goal 5 have been completed at the time the PAPA is initiated[.]”

**LUBA’s ultimate direction on remand:**

“In addition, the county’s decision and the record in this appeal do not adequately explain the county’s conclusion that the proposed mining will lower groundwater level[s] in a way that results in a significant conflict with riparian areas. Accordingly, the county must adopt findings that better explain its conclusion that conflicts between mining and riparian areas will not be minimized.”

**Response and Explanation of Findings:**

The adopted findings in Exhibit “A” to Order No. 02-5-15-10 specifically address the proposed mining conflicts with Goal 5 resources in paragraph 18 (pages 10-11). Those provisions conclude the mining conflicts to wetlands, sensitive fish and waterfowl areas and sensitive bird habitat could be minimized by imposition of reasonable and practicable

conditions. In paragraphs 18.g. through 18.m. the county decision analyzed mining conflicts with Goal 5 riparian resources and concluded those conflicts could not be minimized, based primarily on the groundwater impacts to riparian vegetation. That conclusion was based primarily on conflicting testimony on the aquifer and effectiveness of proposed mitigation measures designed to minimize the conflict.

One response to the LUBA remand could be to further explain the conflicts between the proposed mining and the Goal 5 riparian resources to determine whether those mining conflicts could be minimized to the point where the conflicts were no longer significant. Such an approach could include revisiting the analysis of mining conflicts affecting wetlands and might conclude those conflicts with wetlands and riparian resources could not be sufficiently minimized.

Another response could be to view the existing riparian protection requirements of county land use regulations as sufficient protection for the riparian resource and conclude compliance with those regulations will minimize the mining conflicts. Such a conclusion could also rely upon the analysis of groundwater levels on wetlands that previously led to the Board conclusion that mining conflicts with wetlands could be minimized with reasonable and practicable conditions.

Based on a review of the record and those findings, the Board concludes revisions to Exhibit "A" shall be made and are hereby adopted to support Order No. 02-5-15-10 by adding riparian resources to paragraph 18.f. and deleting the remaining paragraphs 18.g. through 18.m. so that paragraph 18 ends with 18.f., which reads as follows:

- "f. Based upon the testimony and evidence in the record, the Board finds that the conflicts to wetlands, riparian resources, sensitive fish and waterfowl areas, and sensitive bird habitat could be minimized by the imposition of reasonable and practicable conditions as described in the proposed Ordinance PA 1164."

The relevant portion of Exhibit "A" of Order No. 02-5-15-10 showing those changes in legislative format is attached and incorporated here to show the adopted changes.

### **Petitioner's Tenth Assignment of Error**

Petitioner argued to LUBA that the county decision improperly included analysis of certain mining conflicts that had not been sufficiently minimized in the economic, social, environmental and energy ("ESEE") analysis under OAR 660-023-0180(4)(d). While the focus of that argument involved the conflicts with agricultural practices, the initial LUBA decision also agreed with petitioner's argument as it related to intervenor-petitioner's arguments on conflicts with riparian resources described above. Based on that remanded issue, LUBA concluded petitioner's argument that the county decision improperly considered mining related conflicts with riparian resources in performing the ESEE analysis remained valid.



**Criterion on remand is OAR 660-023-0180(4)(d) (LCDC 2-1996), which provides in relevant part:**

- “(d) The local government shall determine any significant conflicts identified under the requirements of subsection (c) of this section that cannot be minimized. Based on these conflicts only, local government shall determine the ESEE consequences of either allowing, limiting, or not allowing mining at the site. Local governments shall reach this decision by weighing these ESEE consequences, with consideration of the following:
  - “(A) The degree of adverse effect on existing land uses within the impact area;
  - “(B) Reasonable and practicable measures that could be taken to reduce the identified adverse effects; and
  - “(C) The probable duration of the mining operation and the proposed post-mining use of the site.”

**LUBA’s ultimate direction on remand:**

“The only remaining conflicts that the county may have improperly considered in performing its ESEE analysis are mining related conflicts with riparian resources. \* \* \* If the county is unable on remand to adopt adequate findings that are supported by substantial evidence, which establish that there would be significant mining related conflicts with riparian resources that cannot be minimized, conflicts with riparian resources may not be considered in the ESEE analysis. In that event, the county must adopt a revised ESEE analysis that omits any consideration of riparian area conflicts.”

**Response and Explanation of Findings:**

The adopted findings in Exhibit “A” to Order No. 02-5-15-10 specifically include the proposed mining conflicts with Goal 5 riparian resources in paragraph 29.c. under the Environmental Consequences part of the ESEE analysis (page 24). Based on the action to revise the findings and conclude the mining conflicts with riparian resources could be sufficiently minimized, the Board concludes the ESEE analysis addressing the environmental consequences should be revised, as well. This would be accomplished by removal of the finding that concludes negative environmental consequences would result from the proposed mining groundwater discharge conflicts with Goal 5 riparian resources. Based on a review of the record and the LUBA remand, the Board concludes revisions to Exhibit “A” shall be made and are hereby adopted to support Order No. 02-5-15-10 by deleting paragraph 29.c. and renumbering the remaining paragraphs. The

relevant portion of Exhibit “A” of Order No. 02-5-15-10 showing those changes in legislative format is attached and incorporated here to show the adopted changes.

**Petitioner’s First and intervenor-petitioner’s Eleventh Assignment of Error**

Petitioner and intervenor-petitioner argued to LUBA that the county decision erroneously applied local approval criteria to the mining application and based the denial of the application in part on the failure to satisfy local code requirements contrary to OAR 660-023-0180. Specifically, petitioners contended that the text and context of the Goal 5 rule, especially OAR 660-023-0180(2)(c) and (7), make it clear that rule was intended to preempt all local government regulations pertaining to approval of aggregate mining.

**Criterion on remand is OAR 660-023-0180(2)(c) and (7) (LCDC 2-1996), which provide, in relevant part:**

“(2)(c) Local governments shall follow the requirements of [OAR 660-023-0180(4)] in deciding whether to authorize the mining of a significant mineral or aggregate resource site[.]

“ \* \* \* \* ”

“(7) Local governments shall amend the comprehensive plan and land use regulations to include procedures and requirements consistent with this rule for the consideration of PAPAs concerning aggregate resources. Until such local regulations are adopted, the procedures and requirements of this rule shall be directly applied to local government consideration of a PAPA concerning mining authorization [.]”

**LUBA’s ultimate direction on remand:**

“Finally, on remand, the county must not consider or apply comprehensive plan and land use regulations criteria that go beyond OAR 660-023-0180 in reviewing the application.”

“The Court of Appeals’ decision did not disturb our resolution of petitioner’s first assignment of error and OCAPA’s eleventh assignment of error, which sustained petitioners’ allegations that the county erred in applying its own local criteria in considering an application to mine pursuant to OAR 660-023-0180. Therefore, the county must consider petitioner’s application under only the rule.”

**Response and Explanation of Findings:**

The adopted findings in Exhibit “A” to Order No. 02-5-15-10 specifically include analysis of comprehensive plan amendment and rezoning criteria in paragraphs 33-

through 35 (pages 26-27). Those findings in paragraphs 33 and 35 primarily focused on the application compliance with the Goal 5 Rule for mineral and aggregate resources. To the extent those findings create the impression that the basis for the county decision included consideration of more than OAR 660-023-0180, those findings shall be revised to clarify the only reason for denial of the application is the failure to meet the requirements of the Goal 5 Rule for mineral and aggregate resources. Specifically, the pertinent portions of paragraphs 33 and 35 shall be revised in relevant part to read as follows:

“33. \* \* \* \* Based only upon the evaluation that the proposed mining plan does not meet the requirements of the Goal 5 Rule for mineral and aggregate resources in OAR 660-023-0180 and notwithstanding the failure to meet the other listed reasons in LC 16.400(6)(h)(iii) for amending the Rural Comprehensive Plan which shall not provide a basis for this action, the Board concludes that the Rural Comprehensive Plan should not be amended to allow mining as requested in the application.

“ \* \* \* \* ”

“35. The requirements for rezoning are set forth in Lane Code 16.252(2) which states: *[R]ezonings and changes in the requirements of this Chapter shall be enacted to achieve the general purpose of this Chapter and shall not be contrary to the public interest.* The Board finds that the requirements for rezoning the property to Sand, Gravel and Rock Products Zone (SG) are not met because the proposal fails to meet the requirements of the Goal 5 Rule for mineral and aggregate resources in OAR 660-023-0180 necessary to receive a Rural Comprehensive Plan designation of Natural Resource: Mineral and rezoning to allow mining. Because the proposal fails to meet the requirements of the Goal 5 Rule for mineral and aggregate resources as described above, the Board concludes rezoning to allow mining as requested in the application would be contrary to the public interest.”

The relevant portion of Exhibit “A” of Order No. 02-5-15-10 showing those changes in legislative format is attached and incorporated here to show the adopted changes.

### **Conclusion**

For the reasons provided above, the action taken in Order No. 02-5-15-10 remains valid and effective to deny the application for mining under the Goal 5 Rule for mineral and aggregate resources. The minor changes to Exhibit “A” of that order described herein have no effect on the ultimate findings of fact and conclusions adopted by that action. That order and those findings remain in effect and together with this action amending and readopting those findings as revised herein adequately resolves the remand from LUBA.

**Portions of Order No. 02-5-15-10 Exhibit "A"**

**Findings Excerpts On Remand From LUBA**

**Mining Conflicts With Goal 5 – Riparian Resources/revise findings as follows:**

“18. Conflicts with Goal 5 Resources

- a. The next category of conflicts are identified pursuant to OAR 660-023-0180(4)(b)(D) which states: *“Conflicts with other Goal 5 resource sites within the impact area that are shown on an acknowledged list of significant resources and for which the requirements of Goal 5 have been completed at the time the PAPA is initiated[.]”*
- b. Lane County Goal 5 resources within the 1500 foot impact area consist of riparian resources, wetlands, sensitive fish and waterfowl areas, and sensitive bird habitat.
- c. Lane County RCP Wetlands Resources consist of those wetlands identified on the National Wetlands Inventory Map for Junction City Quadrangle. (Exhibit #181). The map identifies Spring Creek, the oxbow, the swale running northeast from the oxbow to the river, and the existing swale traversing Area 3.
- d. Lane County RCP Sensitive Fish & Waterfowl Areas are identified in the 1983 revision of the Flora & Fauna Working Paper. The Main Stem of the Willamette River is listed as a “Sensitive Fish & Waterfowl Area.”
- e. Lane County RCP Areas of sensitive bird habitat are contained within Exhibit “A” of Lane Manual 11.400. Within the section entitled “Great Blue Heron Rookeries” is a listing for “Beacon Landing” within T16S, R4W Sec 25. ODFW information identifies the rookery southeast of the subject property occurring on the north half of an island and occupied by 14 nests.
- f. Based upon the testimony and evidence in the record, the Board finds that the conflicts to wetlands, riparian resources, sensitive fish and waterfowl areas, and sensitive bird habitat could be minimized by the imposition of reasonable and practicable conditions as described in the proposed Ordinance PA 1164.
- ~~g. The Lane County RCP riparian resources within Resource Zones (EFU, F-1, F-2, PR, ML) consist of lands within 100 feet of a Class I Stream as indicated on the Wildlife Habitat Maps adopted in December 1980 (Exhibit #185). Within the 1500 foot impact area as expanded due to flooding and groundwater impacts, Spring Creek and the Willamette River are identified as Class I Streams on the map. Spring Creek enters the subject property at the southwest portion of the oxbow, swings north along the western boundary of Area 2, then exits at the northern side of the oxbow heading northwest adjacent to the northern boundary of Area 1.~~

- ~~h. Conflicts with riparian resources consist of lowering of the water table causing impacts to the riparian vegetation, constructing a bridge across the creek to access Area 2, placement of berms, removal of vegetation and erosional effects of flooding. The riparian vegetation provides shade and habitat to the fish and wildlife species that reside in the stream and riparian corridor. These species include but are not limited to listed threatened species and state sensitive species identified by testimony and evidence presented in the record. Based upon evidence and testimony in the record, the Board finds that the predicted conflicts caused by the reduction in groundwater levels and increased flood levels and velocities represent significant conflicts with Goal 5 riparian vegetation and resource sites within the impact area.~~
- ~~i. The removal of vegetation and setbacks for structures, including riprap covered berms, are addressed by Lane County Class 1 Stream Riparian Regulations of Lane Code 16.253 and the setback requirements of the Exclusive Farm Use Zone, Lane Code 16.212(8)(c) respectively. These provisions require setbacks of 100 feet for all structures and contain a limitation on removal of vegetation within the 100 foot setback area. Provisions exist within the Lane Code for the modification of the setback standard for the placement of the bridge within the 100-foot setback, Lane Code 16.253(3). Provisions also exist for the review and approval of a Riparian Setback Area Development Plan for the development of berms within the 100-foot setback area, Lane Code 16.253(5).~~
- ~~j. Impacts to riparian resources from the lowering of the groundwater adjacent to a Class 1 Stream are not addressed under any applicable standard so minimization must reduce the conflict to a level that is no longer significant.~~
- ~~k. The applicant proposes to discharge clear water into infiltration trenches or directly into the oxbow to maintain the water levels in the oxbow and minimize impacts to riparian resources.~~
- ~~l. Evidence submitted by Joel Massman Ph.D. (Exhibits 775 and 963A) demonstrates that the applicant's groundwater studies are not accurate enough to support a finding that the conflict with Goal 5 riparian resources can be minimized. The Board finds the evidence presented by Dr. Massman regarding transmissivity and quantities of water within the aquifer to be credible and it undermines the reliability of the evidence presented by the applicant. Based upon this and all the evidence in the record, the Board finds that the applicant failed to establish the conflict can be reduced to a level where the groundwater impacts to riparian resources vegetation are not significant. Based upon the testimony and evidence in the record regarding the physical characteristics of the aquifer, the Board finds that the proposed development of interceptor trenches along the perimeter of the proposed mining cells to minimize the conflict is not reasonable or practical and will not sufficiently reduce the level of the predicted conflicts with the Goal 5 riparian resource sites located within the impact area.~~
- ~~m. The Board finds that conflicts with Goal 5 riparian resources considered under OAR 660-023-0180(4)(b)(D) have not been minimized."~~

**ESEE Analysis of Environmental Consequences** revise findings as follows:

“29. Environmental Consequences

- a. Negative environmental consequences of allowing the proposed mining at the site would result from the conflict created by the groundwater discharge with regards to the existing uses located within the impact area. The pumping of groundwater to conduct dry mining below 30’ in depth within mining cells “A” through “G” shown on the proposed mining plan map (Fig. 2b of Exhibit 283D) would result in the lowering of the aquifer and depletion of available water for residential purposes within the impact area.
- b. Negative environmental consequences of allowing the proposed mining at the site would result from the conflict created by the flooding discharge with regards to the existing uses located within the impact area. Increased flooding would exacerbate the existing flooding problems in the area including the possibility of river capture.
- ~~c. Negative environmental consequences of allowing the proposed mining at the site would result from the conflict created by the groundwater discharge with regards to the riparian resources of Spring Creek located within the impact area. The lowering of the water table would affect the availability of water necessary to support the vegetation within riparian corridor.~~
- cd. Negative environmental consequences of allowing the proposed mining at the site would result from the conflict created by the flooding with regards to the agricultural practices. Increased flooding would have the following negative environmental effect on agricultural practices within the impact area:
  - Loss of topsoil and associated nutrients; and
  - Extended saturation time of root zones in peach and apple orchards and row crops.
- de. Negative environmental consequences of allowing the proposed mining at the site would result from the conflict created by the discharge of groundwater with regards to the agricultural practices located within the impact area. Reduction in groundwater levels would have the following negative environmental effect on agricultural practices within the impact area:
  - Direct infiltration of chemicals used in the extraction and processing of gravel (xylene, benzene and other solvents) into water; and
  - lowering of the aquifer and depletion of available water for irrigation purposes.
- ef. Negative environmental consequences of allowing the proposed mining at the site would result from the conflict created by the production of dust with regards to the agricultural practices located within the impact area. The

impacts from dust would have the following negative environmental effects on the surrounding agricultural practices within the impact area:

- Plant growth is reduced from reduced photosynthesis;
- The application of herbicides, fungicides and insecticides becomes less effective;
- Collection of dust on peaches;
- Impact to the health of the apple orchard from dust mites;
- Impact to horse health from dusty hay; and
- Impairment of bee pollination.

fg. By weighing the positive and negative consequences of allowing, limiting or not allowing mining, the Board concludes the environmental consequences of allowing mining are so detrimental to the conflicting uses that mining should not be allowed. When considering the relative importance of mining compared to the existing and approved uses identified above as being subject to the significant conflicts that could not be minimized, the Board concludes the existing and approved uses, particularly the agricultural practices, are of sufficient environmental importance relative to the proposed mining site that mining must not be allowed.”

### **County Plan and Rezone Criteria**

“33. The requirements for amendments to the Rural Comprehensive Plan (RCP) include Lane Code 16.400(6)(h)(iii) which states: *The Board may amend or supplement the Rural Comprehensive Plan upon making the following findings:*  
*(aa) For Major and Minor Amendments as defined in LC 16.400(8)(a) below, the Plan component or amendment meets all applicable requirements of local and state law, including Statewide Planning Goals and Oregon Administrative Rules.*  
*(bb) For Major and Minor Amendments as defined in LC 16.400(8)(a) below, the Plan amendment or component is:*  
*(i-i) necessary to correct an identified error in the application of the Plan; OR*  
*(ii-ii) necessary to fulfill an identified public or community need for the intended result of the component or amendment; OR*  
*(iii-iii) necessary to comply with the mandate of local, state or federal policy or law; OR*  
*(iv-iv) necessary to provide for the implementation of adopted Plan policy or elements; OR*  
*(v-v) otherwise deemed by the Board, for reasons briefly set forth in its decision, to be desirable, appropriate or proper.*

Because the proposed Post-Acknowledgement Plan Amendment (PAPA) includes a request to add a site to the Lane County Inventory of significant Mineral and Aggregate Sites and is not an amendment to the Plan Diagram only, the Board finds that the amendment to the RCP is classified as a major amendment pursuant to Lane Code 16.400(8)(a) which states: *Amendments to the Rural Comprehensive Plan shall be classified according to the following criteria:*

*(i) Minor Amendment. An amendment limited to the Plan Diagram only and, if requiring an exception to Statewide Planning Goals, justifies the exception solely on the basis that the resource land is already built upon or is irrevocably committed to other uses not allowed by an applicable goal.*

*(ii) Major Amendment. Any amendment that is not classified as a minor amendment.*

Based only upon the evaluation that the proposed mining plan does not meet the requirements of the Goal 5 Rule for mineral and aggregate resources in OAR 660-023-0180 and notwithstanding the proposal failures to meet the other listed reasons in LC 16.400 (6)(h)(iii) for amending the Rural Comprehensive Plan which shall not provide a basis for this action, the Board concludes that the Rural Comprehensive Plan should not be amended to allow mining as requested in the application.

\* \* \* \* \*

35. The requirements for rezoning are set forth in Lane Code 16.252(2) which states: *[R]ezonings and changes in the requirements of this Chapter shall be enacted to achieve the general purpose of this Chapter and shall not be contrary to the public interest.* The Board finds that the requirements for rezoning the property to Sand, Gravel and Rock Products Zone (SG) are not met because the proposal fails to meet the requirements of the Goal 5 Rule for mineral and aggregate resources in OAR 660-023-0180 necessary Lane Code 16.400 to receive a Rural Comprehensive Plan designation of Natural Resource: Mineral and rezoning to allow mining. Because the proposal also fails to meet the requirements of the Goal 5 Rule for mineral and aggregate resources as described above, and the Board concludes rezoning to allow mining as requested in the application would be contrary to the public interest.”



**Draft LUBA remand findings option for addressing the remanded issue of mining conflicts with riparian resources in the Eugene Sand & Gravel appeals by enhancing the analysis of groundwater level conflicts.**

**The following provides an example for revising the Goal 5 findings to include additional findings on significant mining conflicts with Goal 5 wetlands and riparian resources:**

“18. Conflicts with Goal 5 Resources

a. The next category of conflicts are identified pursuant to OAR 660-023-0180(4)(b)(D) which states: *"Conflicts with other Goal 5 resource sites within the impact area that are shown on an acknowledged list of significant resources and for which the requirements of Goal 5 have been completed at the time the PAPA is initiated[.]"*

b. Lane County Goal 5 resources within the 1500 foot impact area consist of riparian resources, wetlands, sensitive fish and waterfowl areas, and sensitive bird habitat. See e.g. written testimony of Ethan Perkins, (#441, #1019); see also testimony of Rhoda Love, Native Plant Society, (#497, #782).

c. Lane County RCP Wetlands Resources consist of those wetlands identified on the National Wetlands Inventory Map for Junction City Quadrangle. (Exhibit #181). The map identifies Spring Creek, the oxbow, the swale running northeast from the oxbow to the river, and the existing swale traversing Area 3.

d. Lane County RCP Sensitive Fish & Waterfowl Areas are identified in the 1983 revision of the Flora & Fauna Working Paper. The Main Stem of the Willamette River is listed as a "Sensitive Fish & Waterfowl Area."

e. Lane County RCP Areas of sensitive bird habitat are contained within Exhibit "A" of Lane Manual 11.400. Within the section entitled "Great Blue Heron Rookeries" is a listing for "Beacon Landing" within T16S, R4W Sec 25. ODFW information identifies the rookery southeast of the subject property occurring on the north half of an island and occupied by 14 nests.

f. The Lane County RCP riparian resources within Resource Zones (EFU, F-1, F-2, PR, ML) consist of lands within 100 feet of a Class I Stream as indicated on the Wildlife Habitat Maps adopted in December 1980 (Exhibit #185). Within the 1500 foot impact area as expanded due to flooding and groundwater impacts, Spring Creek and the Willamette River are identified as Class I Streams on the map. Spring Creek enters the subject property at the southwest portion of the oxbow, swings north along the western boundary of

Area 2, then exits at the northern side of the oxbow heading northwest adjacent to the northern boundary of Area 1.

g. Conflicts with wetlands and riparian resources consist of lowering of the water table causing impacts to the wetlands adjacent to Spring creek and its associated riparian vegetation, constructing a bridge across the creek to access Area 2, placement of berms, removal of vegetation and erosional effects of flooding. The riparian vegetation provides shade and habitat to the fish and wildlife species that reside in the stream and riparian corridor. These species include but are not limited to listed threatened species and state sensitive species identified by testimony and evidence presented in the record. Based upon evidence and testimony in the record, the Board finds that the predicted conflicts caused by the reduction in groundwater levels and increased flood levels and velocities represent significant conflicts with Goal 5 wetlands, riparian vegetation and resource sites within the impact area.

h. The removal of vegetation and setbacks for structures, including riprap covered berms, are addressed by Lane County Class 1 Stream Riparian Regulations of Lane Code 16.253 and the setback requirements of the Exclusive Farm Use Zone, Lane Code 16.212(8)(c) respectively. These provisions require setbacks of 100 feet for all structures and contain a limitation on removal of vegetation within the 100-foot setback area. Provisions exist within the Lane Code for the modification of the setback standard for the placement of the bridge within the 100-foot setback, Lane Code 16.253(3). Provisions also exist for the review and approval of a Riparian Setback Area Development Plan for the development of berms within the 100-foot setback area, Lane Code 16.253(5).

i. Impacts to wetlands and riparian resources from the lowering of the groundwater adjacent to a Class 1 Stream are not addressed under any applicable standard so minimization must reduce the conflict to a level that is no longer significant.

j. The applicant proposes to discharge clear water into infiltration trenches or directly into the oxbow to maintain the water levels in the oxbow and minimize impacts to wetlands and riparian resources.

k. Evidence submitted by Joel Massman Ph.D. (Exhibits 775 and 963A) demonstrates that the applicant's groundwater studies are not accurate enough to support a finding that the conflict with Goal 5 riparian resources can be minimized. The Board finds the evidence presented by Dr. Massman regarding transmissivity and quantities of water within the aquifer to be credible and it undermines the reliability of the evidence presented by the applicant.. Based upon this and all the evidence in the record, the Board finds that the applicant failed to establish the conflict can be reduced to a level where the groundwater impacts to riparian resources vegetation are not

significant. Based upon the testimony and evidence in the record regarding the physical characteristics of the aquifer, the Board finds that the proposed development of interceptor trenches along the perimeter of the proposed mining cells to minimize the conflict is not reasonable or practicable, and will not sufficiently reduce the level of the predicted conflicts with the Goal 5 riparian resource sites located within the impact area.

l. Based upon the testimony and evidence in the record, the Board finds that the applicant has not met their burden of demonstrating that conflicts to wetlands, riparian resources, sensitive fish and waterfowl areas, and sensitive bird habitat could be minimized by the imposition of reasonable and practicable conditions as described in the proposed Ordinance PA 1164.

m. The Board finds that the applicant has not met their burden of demonstrating that the above described conflicts with Goal 5 riparian resources considered under OAR 660-023-0180(4)(b)(D) can be minimized for this proposal.”

1 events and does nothing to undermine petitioner's evidence regarding the specific impact of  
2 the proposed mining operations on this site.

3 Respondents argue that the county's findings rely on testimony by an expert in flood  
4 water analysis, who testified that she believed that the variables used in petitioner's flood  
5 modeling did not accurately depict current conditions and, as a result, were less likely to  
6 accurately predict flood impacts during mining. Respondents also argue that petitioner's  
7 evidence did not take into account the effect its proposed minimization measures would have  
8 on flood levels on agricultural land across the Willamette River from the mine. Respondents  
9 argue that petitioners are asking LUBA to independently reweigh the evidence and substitute  
10 its view of the evidence for that of the Board of Commissioners. According to respondents,  
11 the county reviewed the evidence that petitioner presented in light of opposing testimony, and  
12 made the evidentiary call that petitioner's evidence was either insufficient to ensure that the  
13 applicable standards will be met or that the evidence was not credible.

14 We agree with respondents that petitioners have not established, as a matter of law,  
15 that only its evidence is to be believed. We may not reweigh the evidence the county relied  
16 upon and the evidence relied upon by the Board of Commissioners is sufficient for a  
17 reasonable person to conclude that it undermined petitioner's evidence. Accordingly,  
18 petitioner's sixth and seventh assignments of error are denied. Petitioner's ninth assignment  
19 of error is denied in part. OCAPA's fifth and tenth assignments of error are denied.

20 **IX. RIPARIAN RESOURCES**

21 **IX. A. Conflicts with a Goal 5 Resource**

22 OCAPA argues in its second assignment of error that the county erred in considering  
23 the impacts that petitioner's proposed mining activities would have on inventoried riparian  
24 habitat associated with the Willamette River and Spring Creek. OCAPA explains that the  
25 Board of Commissioners concluded that two maps in the county's comprehensive plan  
26 identify the Willamette River and Spring Creek as riparian areas and that the county adopted

1 a program pursuant to OAR 660-016-0050 (1980) (Old Goal 5 Rule) to protect those areas.  
2 OCAPA argues that the two maps cannot have the effect that the decision says they have,  
3 because Goal 5 did not identify riparian areas as a Goal 5 resource until 1996. *See* OAR 660-  
4 023-0090 (riparian corridor rules). In addition, OCAPA argues that conflicts with riparian  
5 areas cannot be considered under OAR 660-023-0180(4)(b)(D), because nothing in the  
6 county's plan for "protection" of the two waterways identifies aggregate mining as a conflict.  
7 According to OCAPA, the county's Goal 5 protection program must identify mining as a  
8 conflict and, after conducting an ESEE analysis, the county must conclude that mining should  
9 be prohibited in order to protect the resource. OCAPA argues that absent such an  
10 identification and conclusion in the acknowledged comprehensive plan, the impact on  
11 riparian areas *cannot* be considered a conflict in this proceeding.

12 Respondents argue that OCAPA waived this issue by failing to raise it below.  
13 OCAPA provides no citations to the record to show that it raised the issue before the county.  
14 Accordingly, that issue is waived and OCAPA's second assignment of error is denied.

15 **IX. B. Adequacy of Findings**

16 In its third assignment of error, OCAPA argues that even if the two maps properly  
17 identify the two areas as waterways to be protected under Goal 5, the county's findings that  
18 water drawdown from mining will affect the riparian areas is inconsistent with other county  
19 findings that the proposed minimization measures will ensure that no other Goal 5 resources,  
20 including wetlands and wildlife areas, will be significantly affected. OCAPA contends that it  
21 is not logical to assume that mining will significantly affect riparian areas next to Spring  
22 Creek and the Willamette River, but will not significantly affect wetlands when those areas  
23 are all hydrologically connected.

24 Respondents argue:

25 "The county decision made adequate findings describing the various conflicts  
26 with the Goal 5 resource, including lowering the water table, thereby affecting  
27 riparian vegetation, constructing a bridge, placing berms, removing vegetation

1 and the effects of flooding to establish that the proposed mining activities  
2 would result in various conflicts with the identified Goal 5 resource,  
3 including: lowering the water table, thereby affecting riparian vegetation,  
4 constructing a bridge, placing berms, removing vegetation and the effects of  
5 flooding erosion. In particular, the county decision concluded predicted  
6 conflicts from the reduction of groundwater levels and increased flooding  
7 represented significant conflicts with the identified Goal 5 riparian resource.  
8 Those impacts to riparian vegetation are very different than the impacts to  
9 wetlands that might be expected, assuming there were listed Goal 5 wetlands  
10 in the same area. Destruction of riparian vegetation could occur without  
11 necessarily affecting the wetlands or waterfowl and bird habitats as  
12 significantly.” Brief of Respondent Lane County 26.

13 The county’s findings with respect to riparian resources are set out in part at n 12. The  
14 findings suggest that, except for the lowering of groundwater levels, riparian area protections  
15 set out in the LC are adequate to ensure that development within the riparian setback will not  
16 interfere with the resource. Thus, the only apparent reason for the county’s determination that  
17 conflicts with riparian resources will not be minimized is the county’s conclusion that  
18 groundwater drawdown will result in lower water levels. Given that petitioner proposes to  
19 divert water from its operations into Spring Creek and the oxbow, it is difficult to imagine  
20 that water drawdown will lower water levels in either the creek or the river. In addition, there  
21 is an identified wetland area between the oxbow and the Willamette River. Presumably, if  
22 drawdown from mining operations will affect Spring Creek and the Willamette River, it will  
23 likewise affect the wetlands. We agree with OCAPA that county’s findings with respect to  
24 riparian resources and wetlands are inconsistent and that the county’s findings are inadequate  
25 to explain why it believes that water drawdown will affect riparian areas and not wetlands.

26 OCAPA’s third assignment of error is sustained.

27 **X. ESEE ANALYSIS**

28 Petitioner argues in its tenth assignment of error that, because the county erred in its  
29 analysis of conflicts under OAR 660-023-0180, the county’s ESEE analysis is necessarily  
30 flawed because it includes matters that are not properly included in the analysis. According to  
31 petitioner, the impact of the proposed mining practices on the farm stands in the area played a

1 major role in the county's decision that the benefits of preserving existing uses in the vicinity  
2 outweighed the benefits of allowing mining. Petitioner argues that because we cannot be sure  
3 that the Board of Commissioners would reach the same conclusion if the impact on farm  
4 stands was removed from the analysis, we must remand the decision for the county to apply  
5 the ESEE analysis to the proper factors.

6 The county based its decision in large part on the impact that the proposed mining  
7 activities would have on agriculture and on the neighboring farm stands in particular.  
8 Therefore, we agree with petitioner that the challenged decision must be remanded to allow  
9 the county to conduct a new ESEE analysis that does not include consideration of conflicts  
10 with farm stands. The tenth assignment of error is sustained.

#### 11 **XI. APPLICABILITY OF LOCAL APPROVAL CRITERIA**

12 The county denied petitioner's application under OAR 660-23-0180(4). The county  
13 also denied petitioner's application in part because it failed to satisfy local approval standards  
14 that address applications to amend comprehensive plan maps and zoning maps.<sup>15</sup> Petitioner in  
15 its first assignment of error, and OCAPA in its eleventh assignment of error, argue that the  
16 county erred in applying local approval criteria to the mining application and basing the  
17 denial of the application in part on petitioner's failure to satisfy local code requirements.  
18 Petitioners contend that it is clear from the text and context of the Goal 5 rule, especially  
19 OAR 660-023-0180(2)(c) and (7), that LCDC intended that its administrative rule preempt all

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<sup>15</sup> Lane Code (LC) 16.400(6)(h)(iii) sets out the criteria for amending the Rural Comprehensive Plan. It provides, in relevant part:

"The Board [of Commissioners] may amend or supplement the Rural Comprehensive Plan upon making the following findings:

"(aa) For Major \* \* \* Amendments \* \* \* the Plan component or amendment meets all applicable requirements of local and state law, including Statewide Planning Goals and Oregon Administrative Rules.

"(bb) For Major \* \* \* Amendments \* \* \* the Plan amendment or component is:

1 local regulations pertaining to the approval of aggregate mining.<sup>16</sup> According to petitioners,  
2 LUBA has held that OAR 660-023-0180(7) does not permit a local government to apply local  
3 code provisions to deny a post-acknowledgement plan amendment for mining. *See Morse*  
4 *Bros., Inc. v. Columbia County*, 37 Or LUBA 85, 89 (1999), *aff'd* 165 Or App 512, 996 P2d  
5 1023 (2000) (“\* \* \* OAR 660-023-0180(7) has the legal effect of preempting county  
6 comprehensive plan and land use regulation provisions that would otherwise apply to a post-  
7 acknowledgement plan amendment \* \* \*”).

8 Respondents argue first that the language that petitioners rely on in *Morse Bros., Inc.*  
9 is *dicta*, because the issue in that case was whether the county could use its surface mining

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- “(i-i) necessary to correct an identified error in the application of the Plan; OR
  - “(ii-ii) necessary to fulfill an identified public or community need for the intended result of the component or amendment; OR
  - “(iii-iii) necessary to comply with the mandate of local, state or federal policy or law; OR
  - (iv-iv) necessary to provide for the implementation of adopted Plan policy or elements; OR
  - “(v-v) otherwise deemed by the [B]oard [of Commissioners], for reasons briefly set forth in its decision, to be desirable, appropriate or proper.”

“\* \* \* \* \*

LC 16.252(2) sets out the requirements for rezoning property. It provides, in relevant part that

“rezonings \* \* \* shall be enacted to achieve the general purpose of this Chapter and shall not be contrary to the public interest.”

<sup>16</sup> OAR 660-023-0180(2)(c) provides, in relevant part:

“Local governments shall follow the requirements of [OAR 660-023-0180(4)] in deciding whether to authorize the mining of a significant mineral or aggregate resource site[.]”

OAR 660-023-0180(7) provides, in relevant part:

“Local governments shall amend the comprehensive plan and land use regulations to include procedures and requirements consistent with this rule for the consideration of PAPAs concerning aggregate resources. Until such local regulations are adopted, the procedures and requirements of this rule shall be directly applied to local government consideration of a PAPA concerning mining authorization[.]”



1 ordinance to impose criteria that are in addition to those set out at OAR 660-023-0180. Even  
2 if the language is not *dicta*, respondents contend that LUBA's and the Court of Appeals'  
3 decisions merely recognize that OAR 660-023-0180(2)(c) and (7) prohibit local governments  
4 from using local standards to add to the list of conflicts that must be considered under OAR  
5 660-023-0180(4), or from adding standards of approval that are not identified in the rule.  
6 According to respondents, OAR 660-023-0180(2)(c) and (7) do not categorically prohibit  
7 what the county has done in this case: conclude that because petitioner has not satisfied OAR  
8 660-023-0180 requirements, neither a plan map amendment nor a zoning amendment is  
9 justified.<sup>17</sup>

10 The Goal 5 rule for aggregate establishes a comprehensive regulatory scheme that is  
11 intended to supersede local review standards for aggregate. Here, the county appears to have  
12 based its denial of the application in part on local code provisions that are not intended to  
13 implement OAR 660-023-0180, and its reasons for denial are based in part on considerations  
14 that are not set out in the rule. For example, the county found that LC 16.252(2) had not been  
15 met because the rezoning is "contrary to the public interest." Record 75 (*see* n 17, setting out  
16 the finding). Therefore, the county erred to the extent it based its denial on those local code  
17 provisions. Petitioner's first assignment of error and OCAPA's eleventh assignment of error  
18 are sustained.

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<sup>17</sup> The county's findings state, in relevant part:

"33. Based upon the evaluation that the proposed mining plan does not meet the requirements of the Goal 5 Rule for mineral and aggregate resources in OAR 660-023-0180 and the proposal fails to meet the other listed reasons for amending the Rural Comprehensive Plan, the Board concludes that the Rural Comprehensive Plan should not be amended." Record 74.

"35. [With respect to LC 16.252(2), the Board of Commissioners] finds that the requirements for rezoning the property to Sand, Gravel and Rock Products Zone (SG) are not met because the proposal fails to meet the requirements of Lane Code 16.400 to receive a Rural Comprehensive Plan designation of Natural Resource: Mineral. The proposal also fails to meet the requirements of the Goal 5 rule for mineral and aggregate resources \* \* \* and the Board [of Commissioners] concludes rezoning would be contrary to the public interest." Record 75.

1 **XII. CONCLUSION**

2 We conclude that most of the conflicts that the county considered and found the  
3 applicant failed to demonstrate could be minimized were properly considered by the county.

4 We also conclude that the county's findings concerning those conflicts are adequate and  
5 supported by substantial evidence. However, we conclude that the county improperly  
6 considered dust and traffic conflicts with farm stands as conflicts with "agricultural  
7 practices" that may be analyzed under OAR 660-023-0180(4)(c) for compliance with ORS  
8 215.296. Because we conclude that dust and traffic conflicts with the farm stands are not  
9 properly analyzed as conflicts with "agricultural practices," those conflicts with the farm  
10 stands may not be considered by the county on remand as "significant conflicts \* \* \* that  
11 cannot be minimized" in considering "the ESEE consequences of either allowing, limiting, or  
12 not allowing mining at the site," under OAR 660-023-0180(4)(d). In addition, the county's  
13 decision and the record in this appeal do not adequately explain the county's conclusion that  
14 the proposed mining will lower groundwater level in a way that results in a significant  
15 conflict with riparian areas. Accordingly, the county must adopt findings that better explain  
16 its conclusion that conflicts between mining and riparian areas will not be minimized.  
17 Finally, on remand, the county must not consider or apply comprehensive plan and land use  
18 regulation criteria that go beyond OAR 660-023-0180 in reviewing the application.

19 The county's decision is remanded.

ESEE analysis. In particular, we concluded that the county erroneously considered conflicts between mining and farm stands under OAR 660-023-0180(4)(b)(E), and therefore we could not tell whether the county would reach the same conclusion if the conflict from farm stands was removed from the analysis. For that reason, we remanded for the county to conduct its ESEE analysis without considering conflicts with farm stands. 44 Or LUBA at 93.

In view of the Court of Appeals' decision in this matter and our decision that petitioners have not demonstrated that the county erred in finding that mining related conflicts with agricultural practices cannot be minimized to ensure that the standards set out in ORS 215.296 can be met, our decision to sustain petitioner's tenth assignment of error must be modified. It was not error for the county to consider conflicts with agricultural practices that it found were not adequately minimized, including identified conflicts with farm stands. The only remaining conflicts that the county may have improperly considered in performing its ESEE analysis are mining related conflicts with riparian resources. We sustained OCAPA's third assignment of error, which challenged the county's findings that there were conflicts with riparian resources that could not be minimized. 44 Or LUBA 91-92. If the county is unable on remand to adopt adequate findings that are supported by substantial evidence, which establish that there would be significant mining related conflicts with riparian resources that cannot be minimized, conflicts with riparian resources may not be considered in the ESEE analysis. In that event, the county must adopt a revised ESEE analysis that omits any consideration of riparian area conflicts.

Our disposition of the tenth assignment of error is modified and petitioner's challenge is sustained in part.

## CONCLUSION

In light of the Court of Appeals' decision, we have denied petitioners' challenge to the county's findings with respect to conflicts between mining-related traffic and agricultural practices. We continue to sustain petitioner's tenth assignment of error pertaining to the county's ESEE analysis, as modified in this opinion. The Court of Appeals' decision did not disturb our resolution of petitioner's first assignment of error and OCAPA's eleventh assignment of error, which sustained petitioners' allegations that the county erred in applying its own local approval criteria in considering an application to mine pursuant to OAR 660-023-0180. Therefore, the county must consider petitioner's application under only

the rule provisions. 44 Or LUBA at 96-97.

The county's decision is remanded.

[1] OAR 660-023-0180(3) and (4) provide, in relevant part:

"(3) An aggregate resource site shall be considered significant if adequate information regarding the quantity, quality, and location of the resource demonstrates that the site meets any one of the criteria in [OAR 660-023-0180(3)(a)-(c), except as provided in subsection (d)] \* \* \*

"(4) For significant mineral and aggregate sites, local governments shall decide whether mining is permitted. For a [post-acknowledgement plan amendment] application involving a significant aggregate site, the process for this decision is set out in subsections (a) through (g) of this section. For a PAPA involving a significant aggregate site, a local government must complete the process within 180 days after receipt of a complete application that is consistent with section (6) of this rule, or by the earliest date after 180 days allowed by local charter. The process for reaching decisions about aggregate mining is as follows:

"(a) The local government shall determine an impact area for the purpose of identifying conflicts with proposed mining and processing activities. The impact area shall be large enough to include uses listed in subsection (b) of this section and shall be limited to 1,500 feet from the boundaries of the mining area, except where factual information indicates significant potential conflicts beyond this distance. \* \* \*

"(b) The local government shall determine existing or approved land uses within the impact area that will be adversely affected by proposed mining operations and shall specify the predicted conflicts. For purposes of this section, 'approved land uses' are dwellings allowed by a residential zone on existing platted lots and other uses for which conditional or final approvals have been granted by the local government. For determination of conflicts from proposed mining of a significant aggregate site, the local government shall limit its consideration to the following:

"(A) Conflicts due to noise, dust, or other discharges with regard to those existing and approved uses and associated activities (e.g., houses and schools) that are sensitive to such discharges;

"(B) Potential conflicts to local roads used for access and egress to the mining site within one mile of the entrance to the mining site unless a greater distance is necessary in order to include the intersection with the nearest arterial identified in the local transportation plan. Conflicts shall be determined based on clear and objective standards regarding sight distances, road capacity, cross section elements, horizontal and vertical alignment, and similar items in the transportation plan and implementing ordinances. Such standards for trucks associated with the mining operation shall be equivalent to standards for other trucks of equivalent size, weight, and capacity that haul other materials;

"\* \* \* \* \*

"(D) Conflicts with other Goal 5 resource sites within the impact area that are shown on an acknowledged list of significant resources and for which the requirements of Goal 5 have been completed at the time the PAPA is initiated; [and]

"(E) Conflicts with agricultural practices[.]

"(c) The local government shall determine reasonable and practicable measures that would minimize the conflicts identified under subsection (b) of this section. To determine