

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

3
4 ROCK SOLID SAND AND GRAVEL, LLC, ROCK IT, LLC,
5 WADE AYLETT SR., and WADE AYLETT JR.,
6 *Petitioners,*

7
8 vs.

9
10 UMATILLA COUNTY,
11 *Respondent,*

12
13 and

14
15 GIRTH DOG, LLC,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2023-033

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Umatilla County.

24
25 Andrew H. Stamp filed the petition for review and reply brief and argued
26 on behalf of petitioners. Also on the briefs were Matthew A. Martin, T. Beau
27 Ellis, and Vial Fotheringham LLP.

28
29 No appearance by Umatilla County.

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31 Sarah Stauffer Curtiss filed the intervenor-respondent's brief and argued
32 on behalf of intervenor-respondent. Also on the brief were Emily K.
33 Schimelpfenig and Stoel Rives, LLP.

34
35 ZAMUDIO, Board Member; RYAN, Board Chair; RUDD, Board
36 Member, participated in the decision.

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38 REMANDED

10/25/2023

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

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NATURE OF THE DECISION

Petitioners appeal a county board of commissioners decision approving amendments to the county’s comprehensive plan text and map and zoning map designating the subject property a large significant aggregate site and applying an Aggregate Resource (AR) overlay.

FACTS

The subject property is composed of 225 acres and five tax lots identified as 900, 1100, 1200, 1300, and 1800.¹ The property is zoned Exclusive Farm Use (EFU) and is currently in farm use. Surrounding development includes two dwellings, commercial agricultural operations, aggregate mining and processing, Interstates 82 and 84, potato storage facilities, food processing and shipping operations, a truck stop, a FedEx freight facility, and a UPS Customer Center.²

Intervenor-respondent (intervenor) filed an application with the county requesting that it add the subject property to the county’s list of significant aggregate sites. After a hearing, the planning commission recommended approval. The board of commissioners conducted a hearing and approved the designation of the entire property as a significant aggregate resource site, applied

¹ The relative location of these tax lots is shown in a site plan later in this opinion.

² Petitioners own and operate an adjacent aggregate facility, which was approved by the county in 2022.

1 the AR overlay to the entire subject property, and allowed aggregate mining,
2 stockpiling, and processing, including concrete and asphalt batching. Umatilla
3 County Development Code (UCDC) 152.485.³ This appeal followed.

4 **INTRODUCTION**

5 We set out the legal framework before proceeding to the assignments of
6 error. Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas,
7 and Open Spaces) requires the county to inventory significant aggregate sites and
8 identify and protect sites for mining and processing aggregate resources. The
9 county must plan for use of an aggregate area after mining and processing has
10 ceased. Goal 5 requirements are implemented through Land Conservation and
11 Development Commission (LCDC)'s administrative rules. Counties may adopt a
12 local Goal 5 program as part of their comprehensive plans and land use
13 regulations. Here, the county has not adopted a Goal 5 program with respect to
14 aggregate resources. Thus, the county directly applied the applicable LCDC
15 administrative rules.

³ UCDC 152.485 provides:

“The purpose of the AR [overlay] is to allow for the utilization of known aggregate resources in a manner that is consistent with the County Comprehensive Plan and allows the greatest flexibility to aggregate producers. The overlay zone is to provide for alternatives for the extraction and processing of aggregate resources where there will be a minimum of conflicts between existing uses, without requiring a public hearing for each use.”

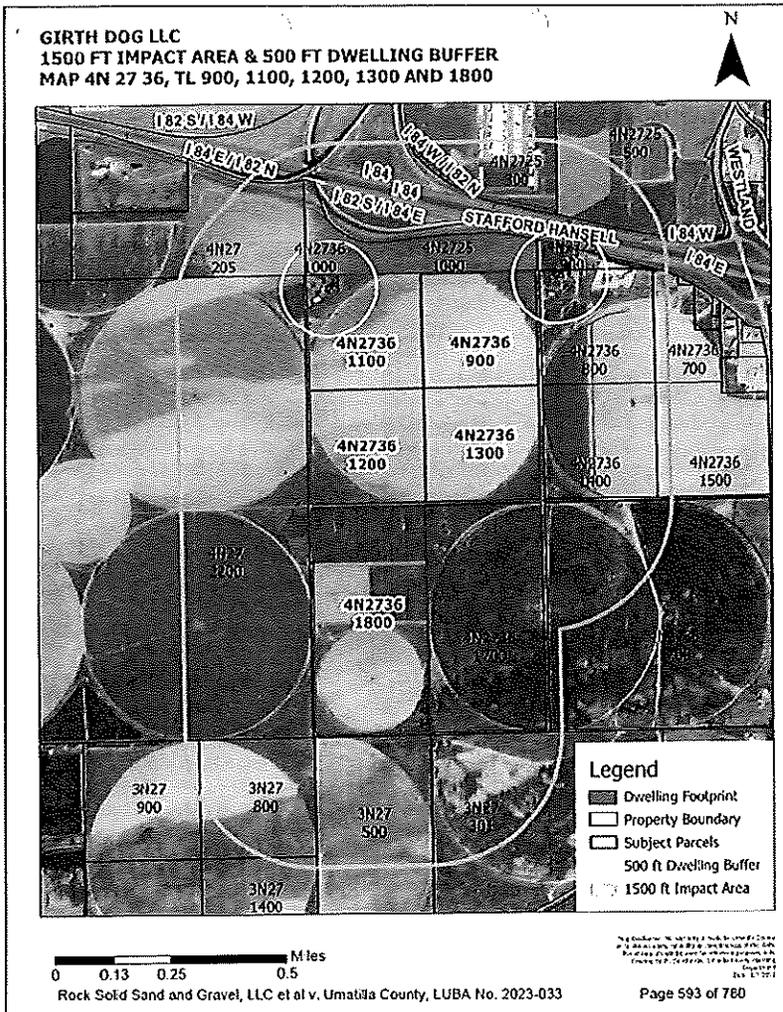
1 If a resource qualifies for inventory, then the county must identify
2 conflicting land uses within an appropriate impact area, which is “limited to 1,500
3 feet from the boundaries of the mining area, except where factual information
4 indicates significant potential conflicts beyond this distance.” OAR 660-023-
5 0180(5)(a); *see also* OAR 660-023-0180(5)(b) (listing predicted conflicts that
6 local governments must consider). A “[c]onflicting use’ is a use or activity that
7 is subject to land use regulations and that would interfere with, or be adversely
8 affected by, mining or processing activities.” OAR 660-023-0180(1)(b). For
9 identified conflicts that are significant, the local government must seek to
10 minimize the conflicts to an insignificant level. OAR 660-023-0180(5)(c). If that
11 cannot be accomplished, then the local government must evaluate the economic,
12 environmental, social, and energy (ESEE) consequences of allowing mining of
13 the resource, limiting mining of the resource, or not allowing mining of the
14 resource. OAR 660-023-0180(5)(d); *see* OAR 660-023-0040 (describing the
15 ESEE process). The local government must then determine whether to allow
16 mining, limit mining, or not allow mining. *Id.* With that general overview, we
17 proceed to petitioners’ assignments of error.

18 In the first three assignments of error petitioners challenge the county’s
19 conclusion that the aggregate mining and processing use will not conflict with
20 other uses, or that any conflicts will be minimized to an insignificant level. These
21 three assignments of error involve interrelated and overlapping legal issues and
22 we address them in turn.

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. Impact Area**

3 The county is required to determine an impact area for the purpose of
4 identifying conflicts with proposed mining and processing activities. OAR 660-
5 023-0180(5)(a). The impact area is “limited to 1,500 feet from the boundaries of
6 the mining area, except where factual information indicates significant potential
7 conflicts beyond this distance.” *Id.* “‘Mining area’ is the area of a site within
8 which mining is permitted or proposed, excluding undisturbed buffer areas or
9 areas on a parcel where mining is not authorized.” OAR 660-023-0180(1)(i). The
10 county’s decision applied the AR overlay to the subject property and it is
11 undisputed that the county has allowed mining on the entire subject property,
12 subject to applicable setbacks and other regulations. Therefore, the entire
13 property is the “mining area” and the county applied a presumptive 1,500-foot
14 impact area measured from the perimeter of the property, as depicted on the
15 image below.



Record 593.

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Petitioners argue that the county erred by limiting its conflicts analysis to 1,500 feet from the property boundary. The county found that no factual information was presented to indicate that there would be significant conflicts beyond the 1,500-foot impact area. Record 15. Petitioners point to petitioners’ acoustical engineer Standlee’s expert witness testimony regarding the noise associated with an asphalt batch plant. Standlee

“noted that [intervenor] is proposing to include concrete and asphalt batch plants on the site in the future. The noise associated with an asphalt batch plant can often travel much further from the source

1 than is typically found with a crushing and screening operation due
2 to the low frequency sound associated with the plant. Under the
3 [Department of Environmental Quality (DEQ)] noise regulations,
4 the proposed aggregate site is considered a ‘previously unused
5 commercial or industrial site’ and due to that classification, the noise
6 radiating from the site has to be shown to not increase the ambient
7 noise at any noise sensitive receiver by more than a specified
8 amount. Also, under the Goal 5 rule, impacts associated with a
9 proposed mining and processing operation is to consider impacts
10 within a 1500 foot boundary from the site, unless there is reason to
11 believe there may be impacts further from the site than 1500 feet. In
12 the case of what we generally refer to as the ‘DEQ ambient
13 degradation rule,’ a study needs to first determine if there is a need
14 to consider homes further than 1500 feet from the site. In the
15 southerly direction, the ambient noise will likely be much lower than
16 that found at the two homes located near the freeway in the 1500-
17 foot boundary addressed in the application. I do not see any
18 discussion of any ambient noise study being done to show that
19 homes further should not be addressed, even though they are outside
20 the 1500-foot standard impact boundary defined in the Goal 5 rule.
21 Without that study, [intervenor] cannot state that they have
22 demonstrated that all requirements of the Goal 5 rule have been
23 met.” Record 80-81.

24 Petitioners argue that testimony is “factual information [that] indicates significant
25 potential conflicts beyond” the 1,500-foot impact area. OAR 660-023-
26 0180(5)(a).

27 Intervenor responds, and we agree, that Standlee’s testimony does not
28 constitute factual information that indicates significant potential conflicts beyond
29 the 1,500-foot impact area that requires an expanded impact area analysis. Rather,
30 Standlee opined that intervenor should conduct a study to determine whether
31 significant impacts extend beyond the 1,500-foot area. We conclude that the

1 county did not misconstrue OAR 660-023-0180(5)(a) in limiting the conflicts
2 analysis to the area within 1,500 feet around the perimeter of the property.

3 **B. Conflicts Within the 1,500-foot Impact Area**

4 The county must identify existing or approved uses in the impact area that
5 may conflict with mining and “specify the predicted conflicts.” OAR 660-023-
6 0180(5)(b).⁴ Within that 1,500-foot impact area, there are two existing dwellings
7 on property adjacent to the subject property, one to the northwest and one to the
8 northeast. There are commercial agricultural operations to the west, south, and
9 east of the subject property. Agricultural practices on those lands include circle
10 pivot irrigation and on-site agricultural workers. Record 8, 493. Other uses in the
11 1,500-foot analysis area include Interstates 82 and 84, potato storage facilities,
12 food processing and shipping operations, a truck stop, and commercial shipping
13 facilities. Record 8, 593.

14 Two other significant aggregate sites lie within the impact area. One site
15 is adjacent to the subject property on the east owned and operated by petitioners
16 and the other is adjacent on the west and owned by intervenor. Petitioners’ site is
17 an existing, active aggregate operation. The western designated significant

⁴ OAR 660-023-0180(5)(b) states that, “[f]or 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.” We understand the described surrounding uses to be existing uses, and that no approved land uses were identified by the parties.

1 aggregate site has not received county approval for mining activities and is
2 currently in irrigated crop circles. Record 20, 26.

3 Petitioners point out that the challenged decision variously decides that
4 there are no conflicts and that there are potential conflicts due to noise, dust, or
5 other discharges and that those conflicts that will be minimized so that no ESEE
6 analysis of unminimized conflicts is required.

7 The county found as follows:

8 “[N]o conflicts were identified within the 1,500 foot impact area.
9 Although no conflicts have been identified within the impact area,
10 [intervenor] has identified limited impacts from dust and stormwater
11 that can be managed or mitigated through various voluntary
12 measures and best management practices. During mining and
13 processing, if approved on site, [intervenor] or its contractors will
14 implement best management practices and, as necessary or required,
15 obtain necessary permits in the management of dust, stormwater or
16 other identified discharges.” Record 21.

17 “[A]ll potential conflicts will be minimized * * *.” Record 22.

18 “[Intervenor] has identified potential conflicts due to noise, dust, or
19 other discharges with regard to those existing and approved uses and
20 associated activities (*e.g.*, houses and commercial uses) that are
21 sensitive to such discharges exist within the 1,500 foot impact area.
22 Umatilla County finds with application of the management practices
23 (including obtaining State permits) described above, in addition to
24 the above stated subsequent conditions of approval, all potential
25 conflicts due to noise, dust, or other discharges will be minimized
26 within the 1,500-foot impact area.” Record 18.

27 Petitioners assert that the county’s findings regarding conflicts are
28 internally inconsistent in a manner that requires remand for further findings.

1 Intervenor responds that the county identified “potential conflicts” and concluded
2 that each identified conflict could be minimized so that existing uses in the impact
3 area will not be adversely affected by aggregate mining and processing on the
4 subject property. “For example, dust, noise and other discharges were discussed
5 extensively, including noting several improvements and protocols [intervenor]
6 provided that would minimize the potential conflicts.” Intervenor-Respondent’s
7 Brief 6. Intervenor argues that we should reject petitioners’ arguments regarding
8 the “no conflicts” finding because those arguments are based on a single sentence
9 taken out of context. Intervenor argues, and we agree, that the county identified
10 potential conflicts within the impact area. In other words, the county agreed with
11 intervenor’s evidence that identified conflicts. Thus, we agree with intervenor
12 that the county’s “no conflict” finding does not provide an independent basis for
13 remand. *Compare Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA
14 50, 92, *rem’d in part on other grounds*, 189 Or App 21, 74 P3d 1085 (2003)
15 (remanding where inconsistent findings are not adequately explained), *with*
16 *Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291, 295-96 (2012)
17 (finding that arguments relying on isolated sentences and ignoring other relevant
18 findings provides no basis for reversal or remand).

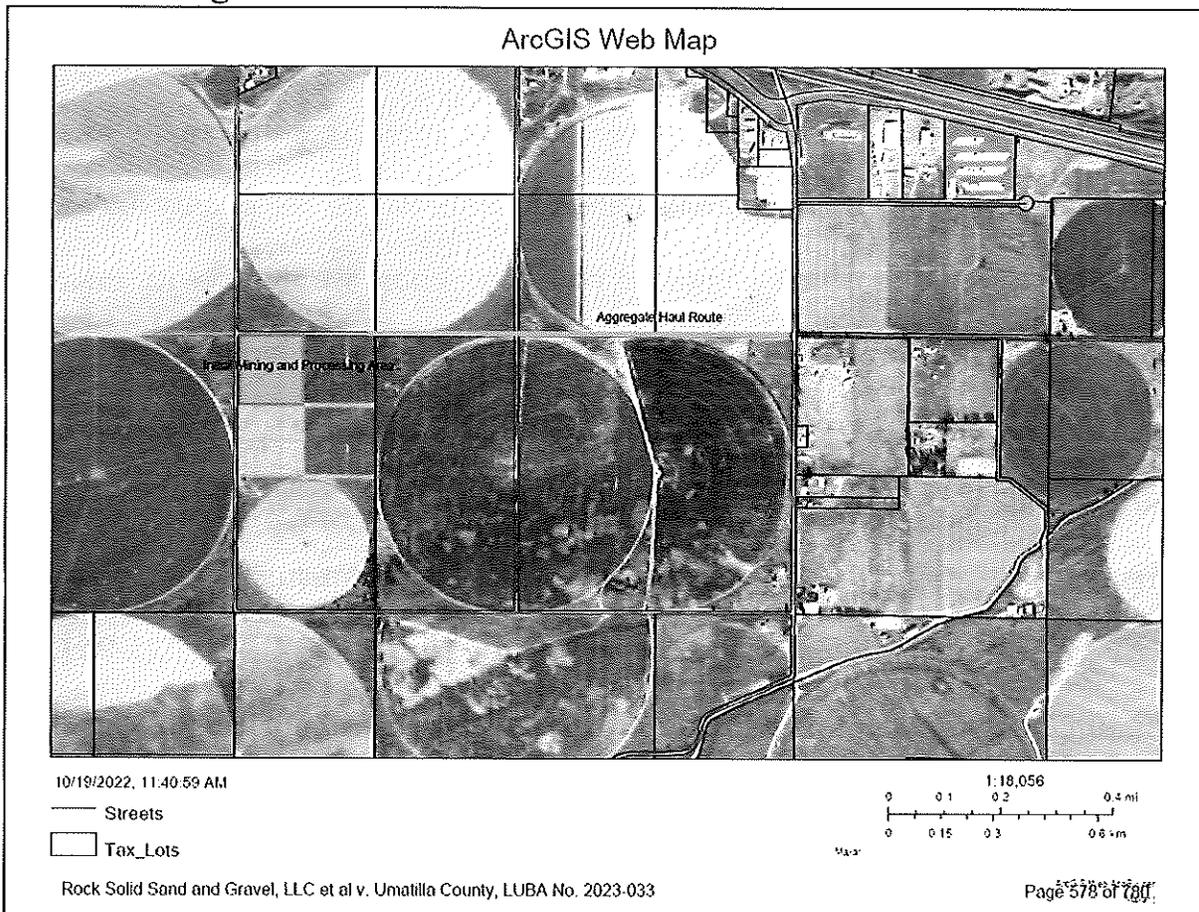
19 The first assignment of error is denied.

20 **SECOND ASSIGNMENT OF ERROR**

21 The county is required to consider “[c]onflicts due to noise, dust, or other
22 discharges with regard to those existing and approved uses and associated

1 activities (e.g., houses and schools) that are sensitive to such discharges.” OAR
2 660-023-0180(5)(b)(A). Petitioners argue that intervenor and the county failed to
3 identify the sources, nature, and extent of dust, noise, and other discharges, which
4 makes it impossible for the county to properly perform the required conflicts
5 analyses.

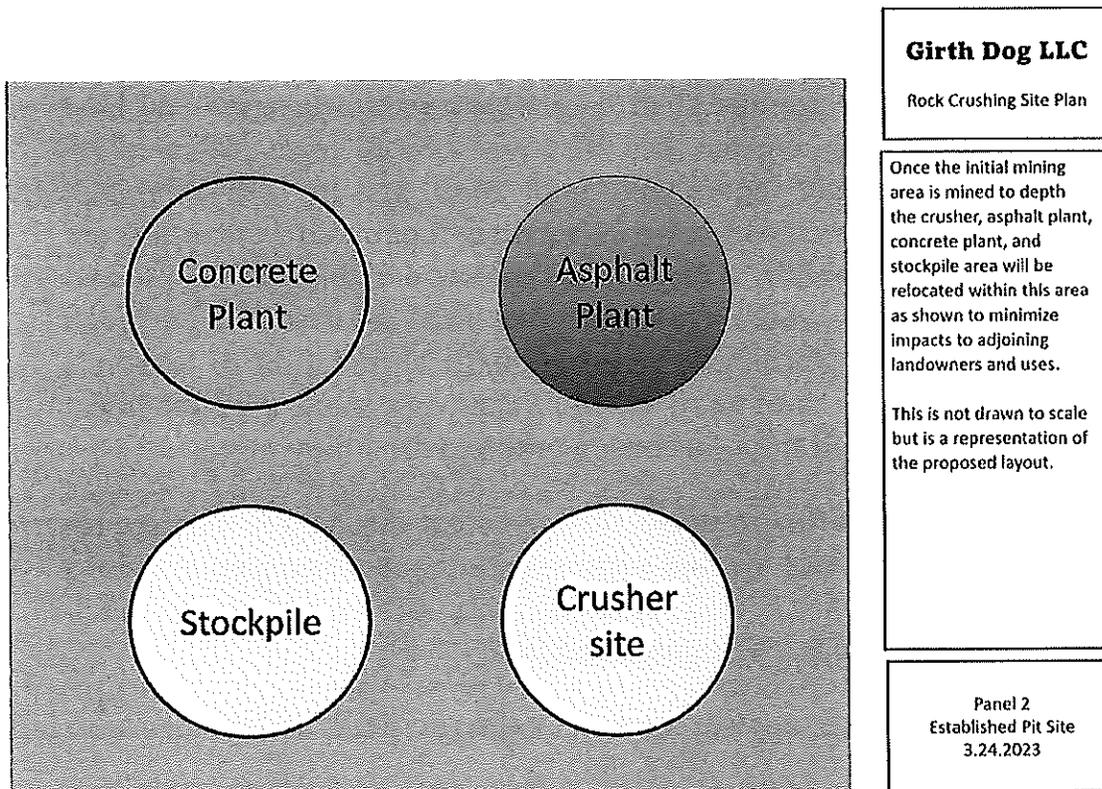
6 Intervenor’s initial site plan depicts a red square labeled “Initial Mining
7 and Processing Area.”



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9 Record 578. The county found that “mining will initially begin on the southern
10 portion of [Tax Lot 1800, which] is also where processing will occur[.]” Record

1 16. Condition 9 requires that all processing occur on Tax Lot 1800, as shown in
2 intervenor's initial site plan. Record 42.

3 Intervenor submitted a second site plan that indicates that the following
4 activities will occur: mining, crushing, stockpiling, and asphalt and concrete
5 batching.



6
7 Record 200. Nothing indicates what levels of noise or dust those activities will
8 generate and the county made no findings on that issue.

9 Further, the decision does not describe how mining activities will progress
10 within the approved mining area—the entire subject property—after being
11 initiated, other than limiting processing activities to Tax Lot 1800 and applying

1 the mining requirements in UCDC 152.488, including compliance with
2 Department of Geology and Mineral Industries (DOGAMI) regulations and
3 imposing setbacks from dwellings and public roads. Record 34-36, 42.
4 Accordingly, we assume for purposes of this decision that the county approved
5 aggregate activities on the entire property, subject to UCDC 152.488.

6 OAR 660-023-0180(5)(b) provides, in part:

7 “The local government shall determine existing or approved land
8 uses within the impact area that will be adversely affected by
9 proposed mining operations *and shall specify the predicted*
10 *conflicts*. For purposes of this section, ‘approved land uses’ are
11 dwellings allowed by a residential zone on existing platted lots and
12 other uses for which conditional or final approvals have been
13 granted by the local government. For determination of conflicts
14 from proposed mining of a significant aggregate site, the local
15 government shall limit its consideration to the following:

16 “(A) Conflicts due to noise, dust, or other discharges with regard
17 to those existing and approved uses and associated activities
18 (e.g., houses and schools) that are sensitive to such
19 discharges[.]” (Emphasis added).

20 Petitioners argue, and we agree, that the site plans and the decision fail to
21 describe the aggregate mining and processing activities and what levels of noise,
22 dust, or other discharges that those activities will generate. OAR 660-023-
23 0180(5)(b) requires the county to “specify the predicted conflicts.” That analysis
24 will necessarily require intervenor to analyze noise, dust, and other discharges
25 generated by separate activities at different locations on the mining site and
26 explain whether and how those activities will affect conflicting uses within the

1 impact area. For example, dust generated from concrete batching will likely have
2 distinct impacts from dust generated from a haul road. Noise from mining likely
3 will have different impacts than noise from asphalt batching. The county does
4 not satisfy the conflicts analysis required by OAR 660-023-0180(5)(b) by
5 assuming that all mining activities will produce some level of noise, dust, or other
6 discharges and finding that those impacts can be minimized.

7 The second assignment of error is sustained.

8 **THIRD ASSIGNMENT OF ERROR**

9 Petitioners argue that the findings that conflicts with roads, other Goal 5
10 resources, and agricultural practices from the proposed mining operation have
11 been minimized are inadequate and not supported by substantial evidence. After
12 the county has specified the predicted conflicts under OAR 660-023-0180(5)(b),
13 the county must “determine reasonable and practicable measures that would
14 minimize the conflicts identified.” OAR 660-023-0180(5)(c). To “minimize a
15 conflict” means to reduce an identified conflict to a level that is no longer
16 significant. OAR 660-023-0180(1)(g). For the types of conflicts addressed by
17 local, state, or federal standards (such as the DEQ noise and dust standards), to
18 “minimize a conflict” means to “ensure conformance to the applicable standard.”
19 *Id.* “To determine whether proposed measures would minimize conflicts to
20 agricultural practices, the requirements of ORS 215.296 shall be followed rather
21 than the requirements” of OAR 660-023-0180(5)(c). OAR 660-023-0180(5)(c).

1 ORS 215.296, which we refer to as the farm impacts test, allows local
2 governments to allow nonfarm use of agricultural land

3 “only where the local governing body or its designee finds that the
4 use will not:

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

7 “(b) Significantly increase the cost of accepted farm or forest
8 practices on surrounding lands devoted to farm or forest use.”
9 ORS 215.296(1).

10 The county found that impacts from noise, dust, and stormwater discharges
11 can be minimized through voluntary measures, undefined “best management
12 practices,” and DEQ permitting standards. Record 17, 21, 22. Petitioners argue,
13 and we agree, that the county cannot proceed to “determine reasonable and
14 practicable measures that would minimize the conflicts identified” without first
15 specifying the predicted conflicts. OAR 660-023-0180(5)(c). In other words, the
16 county cannot move on to subsection (5)(c) without first completing subsection
17 (5)(b). The county must first specify the predicted conflicts. The county then may
18 determine whether specified conflicts can be minimized.

19 Intervenor must establish and the county must find “that proposed
20 minimization measures [regarding the impacts of mining] are reasonable,
21 practicable and achievable.” *Eugene Sand and Gravel*, 44 Or LUBA at 76.
22 Findings must be supported by substantial evidence. Petitioners argue, and we
23 agree, that the county was required and failed to find that the minimization

1 measures are feasible, that is, achievable, and those findings must be supported
2 by substantial evidence. With respect to those conflicts that the county finds can
3 be minimized by compliance with state permitting standards, the county must
4 find that meeting those standards is achievable.

5 With respect to noise, Condition 4 requires intervenor to adhere to the DEQ
6 noise regulations. Record 41. Condition 9 requires processing to occur on Tax
7 Lot 1800, which presumably is intended to place some distance between
8 processing and the existing dwellings to mitigate noise impacts. Record 42.
9 However, the county did not find, and there is no evidence in the record, that
10 distance will sufficiently diminish noise to meet DEQ noise standards.⁵

11 Petitioners argue that the county's findings pertaining to dust conflicts are
12 inadequate and unsupported by substantial evidence. Intervenor's proposed dust
13 mitigation measures include chemical and water abatement. Record 17.
14 Condition 10 requires that intervenor "minimize fugitive dust emissions from the
15 property by application of dust abatement chemicals, water, or similar best
16 management practices recommended by DOGAMI and DEQ for control of dust
17 at aggregate mining sites." Record 42. Condition 11 of the decision imposes a 20
18 mile per hour speed limit on internal haul roads. *Id.*

⁵ A common method of establishing that DEQ standards can be met is an acoustic study, including decibel levels, distance, and comparison to DEQ standards. The record contains no such study.

1 With respect to the speed limit, petitioners argue, and we agree, that there
2 is no evidence in the record to support a finding that a 20 mile per hour speed
3 limit will reduce haul road dust to a point where that conflict is minimized.
4 Petitioners also argue that the county misconstrued OAR 660-023-0180(5)(c) by
5 delegating to intervenor the authority to decide whether there is a dust impact,
6 whether it is significant, and what, if any, minimization strategy will be
7 employed, and when, and to what degree. We agree.

8 Petitioners further argue that the county failed to make any findings
9 responding to concerns raised below regarding impacts from approved dust
10 mitigation measures, particularly traffic impacts from water trucks and impacts
11 from chemical abatement to groundwater and nearby agricultural and aggregate
12 workers on adjacent land within the impact area. Written testimony in the record
13 from petitioners' consulting engineering geologist sets out potential adverse
14 impacts that could flow from the use of chemical dust suppressants, including
15 negative impacts to workers and groundwater. *See* Record 188-90. The geologist
16 states that the proposed quarry is located in an area that does not have sufficient
17 groundwater to serve approved uses of groundwater at the current and projected
18 rates of withdrawal. Record 189. The testimony posits that "widespread use of
19 chemical dust suppressants could reduce the volume of water infiltrating to the
20 underlying aquifer." *Id.* The testimony further states that the chemicals could
21 infiltrate the underlying ground-water resource. The county did not address these
22 issues in the findings.

1 Petitioners point out that the county’s reliance on DEQ permitting with
2 respect to dust fails to address all dust conflicts that might arise from the approved
3 activities. Petitioners explain that DEQ air quality permits are only required for
4 “sources.” *See* OAR 340-216-0020(2). A “source” is a discrete facility that
5 produces regulated emissions, such as a rock crushing site or batch plant. *See*
6 OAR 340-200-0020(165) (defining “source” as “any building, structure, facility,
7 installation or combination thereof”); OAR 340-216-8010 (requiring sources
8 performing batch processing and rock crushing to obtain a basic air contaminant
9 discharge permit). Digging and hauling are not regulated sources of dust. Thus,
10 petitioners argue, an air contaminant discharge permit will not regulate dust
11 generated from those activities. In short, the findings fail to adequately identify
12 sources, scope, and severity of the dust generating activities and do not
13 demonstrate that dust conflicts will be minimized.

14 The county is required to identify and consider “[c]onflicts with other Goal
15 5 resource sites within the impact area that are shown on an acknowledged list of
16 significant resources and for which the requirements of Goal 5 have been
17 completed at the time the [post-acknowledgement plan amendment] is initiated.”
18 OAR 660-023-0180(5)(b)(D). Petitioners argue, and we agree, that the findings
19 do not adequately address impacts to petitioners’ adjacent Goal 5 aggregate use,
20 which is located to the east of the subject property. The county found that “[s]ince
21 this is an existing aggregate site, and is a similar operation to [intervenor’s]
22 request, [the county] finds there are no Goal 5 conflicts.” Record 20.

1 Petitioners’ consulting engineering geologist identified a potential adverse
2 impact from the use of chemical dust suppressants, explaining that “dust
3 suppressants that adhere to soil particles can be re-entrained into the air with
4 strong winds, potentially adding contaminants to the air in addition to particulate
5 matter.” Record 189 (internal quotation marks omitted). The findings explain that
6 “[p]revailing winds are from the southwest moving any dust or emissions from
7 the aggregate site away from agricultural lands towards an area that is used
8 predominantly for various commercial and industrial uses.” Record 21.
9 Petitioners’ aggregate operation is in that area, to the east of the aggregate site,
10 and includes employees working outside. Record 75. The findings do not address
11 the alleged conflict raised by the consulting geologist, that is, that dust control
12 chemicals may become suspended in the air and that employees of petitioners’
13 aggregate operation to the east of the subject property, may be exposed to those
14 chemicals. *Norvell v. Portland Area LGBC*, 43 Or App 849, 852-53, 604 P2d 896
15 (1979) (findings must address and respond to specific issues relevant to
16 compliance with applicable approval standards that were raised in the
17 proceedings below).

18 The county is required to identify and consider conflicts with agricultural
19 practices within the impact area. OAR 660-023-0180(5)(b)(E). The county did
20 not make any findings considering whether dust from the haul road will conflict
21 with agricultural operations to the north and south of the haul road. Petitioners
22 below argued that dust from the haul road will negatively impact vegetation. The

1 findings do not address this issue. Intervenor responds that the county found that
2 the aggregate operation was “not expected to conflict with nearby agricultural
3 activities or practices” because “[n]earby existing aggregate sites have been
4 operating without conflicts to nearby agricultural practices for many years.”
5 Record 21. We agree with petitioners that this general finding is inadequate to
6 address the issue of whether this specific mining operation and haul road will
7 conflict with agricultural practices within the impact area.

8 In summary, the county’s findings concluding that all of the predicted
9 conflicts will be minimized are inadequate. On remand, the county must identify
10 the source and scope of conflicts from noise, dust, or other discharges from the
11 aggregate use and explain whether and how those conflicts will be minimized.

12 The third assignment of error is sustained.

13 **FOURTH ASSIGNMENT OF ERROR**

14 If identified conflicts cannot be minimized, then the county must determine
15 the ESEE consequences of either allowing, limiting, or not allowing mining at
16 the site. OAR 660-023-0180(5)(d). Petitioners argue that the county erred by
17 failing to conduct an ESEE analysis.

18 We conclude that the county failed to specify the predicted conflicts and
19 erred in concluding that all conflicts will be minimized. On remand, the county
20 must make new findings regarding conflicts and minimization measures.
21 Accordingly, it would be premature for us to resolve whether the county is
22 required to conduct an ESEE analysis.

1 We do not reach or decide the fourth assignment of error.

2 **FIFTH ASSIGNMENT OF ERROR**

3 Statewide Planning Goal 12 (Transportation) requires that post-
4 acknowledgment plan amendments that have a significant effect on a
5 transportation facility comply with further requirements of the transportation
6 planning rule, OAR 660-012-0060. Similarly, to approve aggregate mining on a
7 site, the county must consider whether significant conflicts with local roads exist
8 and can be minimized. The county must consider:

9 “Potential conflicts to local roads used for access and egress to the
10 mining site within one mile of the entrance to the mining site unless
11 a greater distance is necessary in order to include the intersection
12 with the nearest arterial identified in the local transportation plan.
13 Conflicts shall be determined based on clear and objective standards
14 regarding sight distances, road capacity, cross section elements,
15 horizontal and vertical alignment, and similar items in the
16 transportation plan and implementing ordinances. Such standards
17 for trucks associated with the mining operation shall be equivalent
18 to standards for other trucks of equivalent size, weight, and capacity
19 that haul other materials[.]” OAR 660-023-0180(5)(b)(B).

20 Intervenor is required to submit “[a] traffic impact assessment [(TIA)] within one
21 mile of the entrance to the mining area pursuant to section (5)(b)(B) * * * [.]”
22 OAR 660-023-0180(8)(c).

23 Intervenor submitted a TIA dated August 5, 2022. Record 630-705. The
24 TIA estimates that the aggregate operation will add 170 daily trips to the
25 transportation system under a “worst-case development scenario for the site.”
26 Record 641-42. The TIA explains that “there are no comparable land uses in the

1 standard reference Trip Generation Manual.” Record 641. The TIA traffic
2 estimates are based on discussions with intervenor and other aggregate operators
3 in the region. The 170 daily trips are assumed to be generated by four sources:
4 rock crushing; concrete batching; asphalt batching; and 15 total staff working at
5 the site. *Id.*; Record 685-86.

6 Based on that TIA, the county found that the requirements of both Goal 12
7 and OAR 660-023-0180(5)(b)(B) were satisfied. The county found that the
8 mining operation will add less than 250 daily trips on local roads and, thus, is not
9 anticipated to have a significant effect on the local transportation network.
10 Record 40. It relied on this finding to conclude that the proposal complies with
11 the county’s transportation Goal 12 planning obligations. Similarly, the county
12 found that increased traffic from the mining site would not conflict with uses in
13 the impact area under OAR 660-023-0180(5)(b)(B). Record 18-19.

14 Petitioners argued below that intervenor has no recognized water right that
15 allows it to pump groundwater at the mining site to use for gravel washing and
16 dust suppression. Intervenor argued in response that it could seek to change the
17 legal use of its agricultural water rights to aggregate uses and could undertake
18 certain aggregate activities without water. In the alternative, intervenor proposed
19 trucking water from the Port of Morrow to the mining site for dust mitigation.
20 Petitioners observe that the TIA was completed before intervenor proposed to

1 truck in water from off-site.⁶ Petitioners argue that the county’s findings relying
2 on the TIA are not supported by substantial evidence because the TIA fails to
3 account for the unknown number of water truck trips between the Port of Morrow
4 and the subject property.

5 Intervenor points to two documents in the record and argues that they
6 constitute substantial evidence that water trucking will not produce significant
7 truck trips to the site so as to undermine the TIA analysis and conclusions. The
8 first is a letter from intervenor’s planning consultant stating as follows: “If water
9 is hauled in it would not be more than one or two trucks per week to address
10 limited dust mitigation as part of the rock crushing operation. No change in the
11 [TIA] is warranted as four trips per week would not change the analysis.” Record
12 241. Second, is a declaration from an Eastern Oregon aggregate operator stating:

13 “[W]ater is used in the mining and processing of rock for several
14 purposes including: dust mitigation on roads and other traveled
15 surfaces, the control of dust created during the crushing of rock, and
16 to wash rock prior to processing to concrete.

17 “Dust on roads and other traveled surfaces can be mitigated with
18 water but chemical mitigation can also be used. Until sufficient
19 water is available at the proposed site, chemical abatement will be
20 used to manage this fugitive dust.

21 “Dust mitigation during the process of crushing rock does require
22 water but not a significant amount to achieve the desired results. The

⁶ Intervenor’s traffic consultant’s supplemental letter does not address the water truck issue. Record 483-84.

1 intent is to contain fugitive dust which can be accomplished with
2 less water than it takes to water a lawn. In similar operations of this
3 type, dust mitigation has been accomplished with approximately 80
4 gallons of water an hour.” Record 249 (internal numbering omitted).

5 Petitioners point out that intervenor’s planning consultant did not establish
6 any expertise on the use of water for dust suppression. In contrast, petitioners
7 operate an aggregate mining site that uses water for dust suppression and testified
8 that, at petitioners’ site, up to three trucks operate up to 24 hours per day to
9 control dust in the mining pit and on haul roads. Record 303-04. Petitioners
10 argued to the county that the amount of water required to control dust would
11 require more than four truck trips per week. Moreover, water for washing
12 aggregate for concrete batching will require either transporting the aggregate off-
13 site or more water truck trips to the site. Record 304. The county did not make
14 any findings addressing this conflicting evidence and instead relied on the TIA.

15 Intervenor responds that petitioners’ testimony regarding the volume of
16 trucking trips required is insufficient to contradict the TIA’s conclusions because
17 petitioners did not provide their own expert traffic analysis. We find that
18 petitioners’ testimony is based on experience and expertise in aggregate mining
19 and water truck dust abatement and is evidence that a reasonable person would
20 rely upon.

21 Intervenor responds that the trips related to dust suppression “are ancillary
22 or accessory” to the primary mining use and, thus, accounted for in the TIA.
23 Intervenor-Respondent’s Brief 28. Intervenor further argues that, even if the TIA
24 does not account for trips associated with dust suppression, the TIA was

1 sufficiently conservative that any error in failing to account for dust suppression
2 truck trips was harmless.

3 Petitioners argue, and we agree, that it is intervenor’s burden to establish
4 the number of truck trips attributable to water delivery to the site. We agree with
5 petitioners that the TIA does not address water truck trips in the trip count
6 estimate. We also agree with petitioners that the county must make findings
7 addressing petitioners’ evidence that the number of water truck trips will exceed
8 four trips a week. Thus, the county’s finding that the requirements of both Goal
9 12 and OAR 660-023-0180(5)(b)(B) are satisfied are inadequate.

10 The fifth assignment of error is sustained.

11 **SIXTH ASSIGNMENT OF ERROR**

12 OAR 660-023-0180(5)(f) requires:

13 “Where mining is allowed, the local government shall determine the
14 post-mining use and provide for this use in the comprehensive plan
15 and land use regulations. * * * Local governments shall coordinate
16 with DOGAMI regarding the regulation and reclamation of mineral
17 and aggregate sites, except where exempt under ORS 517.780.”

18 Intervenor was required to submit a conceptual site reclamation plan as part of
19 their application. OAR 660-023-0180(8)(b).

20 Intervenor did not submit a conceptual site reclamation plan. Instead,
21 intervenor explained that it was “considering the installation of a photovoltaic
22 solar energy generation facility as a post-mining use,” and that “[o]ther post-
23 mining uses * * * could also be considered.” Record 23. The county found that

1 OAR 660-023-0180(5)(f) was satisfied because intervenor identified a post-
2 mining use that the county may allow. Record 23.

3 Petitioners argue that intervenor's statement about how intervenor is
4 considering using the site after the aggregate use has ceased is insufficient to
5 constitute a conceptual site reclamation plan. We also understand petitioners to
6 argue that the county failed to determine the post-mining use as required by OAR
7 660-023-0180(5)(f).

8 Intervenor responds that intervenor's statement regarding considering a
9 potential post-mining use constitutes a conceptual site reclamation plan. While
10 "conceptual" implies an abstract or generic notion, as contrasted with a concrete
11 or certain design, we agree with petitioners that intervenor's statement is not a
12 conceptual site reclamation plan.

13 Intervenor further argues that the county's obligation is satisfied because
14 the county included a condition of approval requiring intervenor to "obtain
15 approval from DOGAMI for the reclamation plan and submit a copy of the
16 reclamation plan to the Planning Department." Record 41. OAR 660-023-
17 0180(5)(f) requires the county to coordinate with DOGAMI regarding the
18 regulation and reclamation of mineral and aggregate sites. The rule does not
19 delegate to DOGAMI the county's obligation to review a conceptual site
20 reclamation plan, determine the post-mining use, and provide for that use in the
21 comprehensive plan and land use regulations. We agree with petitioners that the
22 decision misconstrues OAR 660-023-0180(5)(f) and OAR 660-023-0180(8)(b).

- 1 The sixth assignment of error is sustained.
- 2 The county's decision is remanded.