

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

3  
4                   COLUMBIA RIVERKEEPER and  
5                   1000 FRIENDS OF OREGON,  
6                   *Petitioners,*

7  
8                   vs.

9  
10                  COLUMBIA COUNTY,  
11                  *Respondent,*

12  
13                  and

14  
15                  PORT OF COLUMBIA COUNTY,  
16                  *Intervenor-Respondent.*

17  
18                  LUBA No. 2021-097

19  
20                  FINAL OPINION  
21                  AND ORDER

22  
23                  Appeal from Columbia County.

24  
25                  Teryn Yazdani filed the petition for review and reply brief and argued on  
26                  behalf of petitioner. Also on the brief was Maura Fahey.

27  
28                  No appearance by Columbia County.

29  
30                  Spencer Q. Parsons filed the intervenor-respondent's brief and argued on  
31                  behalf of intervenor-respondent. Also on the brief was Christopher D. Crean and  
32                  Beery, Elsner & Hammond, LLP.

33  
34                  ZAMUDIO, Board Chair; RUDD, Board Member; RYAN, Board  
35                  Member, participated in the decision.

36  
37                  REMANDED

05/09/2022

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

**NATURE OF THE DECISION**

Petitioners appeal a county board of commissioners approval of an exception to Statewide Planning Goal 3 (Agricultural Lands) to allow rural industrial development.

**FACTS**

Intervenor-respondent Port of Columbia County (the Port) owns the Port Westward Industrial Park, an existing 905-acre rural industrial exception area with deep-water frontage and associated docks along the Columbia River. The Port Westward site is subject to goal exceptions taken in the 1970s and is zoned Rural Industrial Planned Development (RIPD). Most of the existing site is leased to Portland General Electric (PGE) on a long-term basis. The rest of the existing site is occupied by a tank farm, a biomass refinery, and an electrical substation.

The Port seeks to expand the Port Westward site to include 837 acres of adjacent land (the exception area). The exception area is located to the southwest, south, and southeast of the existing Port Westward site. Land within the exception area is designated Agricultural Resource in the county's comprehensive plan and zoned Primary Agriculture (PA-80). Adjoining the exception area are lands also zoned PA-80, which include tree farms, a mint farm, undeveloped forested areas, and several residences.

The Port has long sought to expand the Port Westward Industrial Park. In *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171, *aff'd*, 267 Or App

1 637, 342 P3d 181 (2014) (*Riverkeeper I*), the Port sought and the county  
2 approved an exception to Goal 3 to redesignate the exception area to Resource  
3 Industrial and rezone it RIPD, a zone which allows a wide range of rural industrial  
4 uses. We remanded for a number of reasons.

5 On remand, the Port limited the application to permit only five categories  
6 of industrial uses that are dependent on the Port’s deep-water facilities: (1)  
7 forestry and wood products processing, production, storage, and transportation;  
8 (2) dry bulk commodities transfer, storage, production, and processing; (3) liquid  
9 bulk commodities processing, storage, and transportation; (4) natural gas and  
10 derivative products, processing, storage, and transportation; and (5) breakbulk  
11 storage, transportation, and processing. The county approved the application and  
12 petitioners appealed to LUBA.

13 In *Columbia Riverkeeper v. Columbia County*, 78 Or LUBA 547 (2018)  
14 (*Riverkeeper II*), *aff’d*, 297 Or App 628, 443 P3d 1184, *rev den*, 365 Or 721  
15 (2019), we remanded for more adequate findings, supported by substantial  
16 evidence, to address the “compatibility” standard at ORS 197.732(2)(c)(D) and  
17 OAR 660-004-0020(2)(d), which both require a finding that “[t]he proposed uses  
18 are compatible with other adjacent uses or will be so rendered through measures  
19 designed to reduce adverse impacts.”<sup>1</sup> We explained:

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<sup>1</sup> ORS 197.732(2)(c)(D) provides: “The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce

1 “[A]dequate findings regarding compatibility would start by  
2 identifying the likely adverse impacts of typical uses authorized  
3 under the five approved use categories, evaluating each use category  
4 separately, and if necessary specific types of uses within each use  
5 category. As petitioners argue, the potential adverse impacts of  
6 different types of liquid bulk terminals, *e.g.*, an oil terminal versus a  
7 fertilizer export operation, could be different enough to require a  
8 separate analysis. The findings should also address the  
9 characteristics of uses on adjoining areas, and assess vulnerability  
10 to potential externalities from industrial uses in the exception area,  
11 such as impacts on water quality. Informed by those analyses, the  
12 county can then reach sustainable conclusions regarding whether the  
13 proposed uses are compatible with adjoining uses, or can be  
14 rendered compatible via identified measures. We generally agree  
15 with petitioners that because the county failed to conduct the  
16 required analyses, its determinations regarding compatibility with  
17 adjoining agricultural practices are conclusory, and the resulting  
18 over-reliance on conditions such as Condition 4, which require  
19 applicants to submit an agricultural impacts analysis, thus represents  
20 an impermissible deferral of demonstrating compliance with OAR  
21 660-004-0020(2)(d).” *Riverkeeper II*, 78 Or LUBA at 569-70.

22 On remand from *Riverkeeper II*, the Port submitted a Compatibility Report  
23 that evaluated potential impacts from the five categories of industrial uses on

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adverse impacts.” OAR 660-004-0020(2)(d) quotes and expands on that standard and provides:

“‘The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.’ The exception shall describe how the proposed use will be rendered compatible with adjacent land uses. The exception shall demonstrate that the proposed use is situated in such a manner as to be compatible with surrounding natural resources and resource management or production practices. ‘Compatible’ is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses.”

1 adjacent uses. Relying on the Compatibility Report and conditions of approval  
2 imposed, the county adopted supplemental findings concluding that the proposed  
3 uses are compatible with adjacent uses or will be so rendered through measures  
4 designed to reduce adverse impacts.

5 This appeal followed.

## 6 **FIRST ASSIGNMENT OF ERROR**

7 Petitioners challenge the county’s remand findings on three grounds. We  
8 address each in turn.

### 9 **A. Surrounding Natural Resources**

10 Petitioners argue that the county misconstrued OAR 660-004-0020(2)(d)  
11 and failed to adopt adequate findings that consider “surrounding natural resources  
12 and resource management or production practices.”

13 As noted, both ORS 197.732(2)(c)(D) and OAR 660-004-0020(2)(d)  
14 require a finding that “[t]he proposed uses are compatible with other adjacent  
15 uses.” The findings note that neither the rule nor the county code defines  
16 “adjacent.” Applying dictionary definitions, and borrowing from other land use  
17 contexts, the county chose to evaluate uses on all contiguous parcels, plus all  
18 lands within 2,000 feet of the exception area, even if not contiguous. Record 914.  
19 The Compatibility Report evaluated a number of uses within that study area,  
20 which consisted primarily of tree farms, a mint farm, undeveloped forested areas,  
21 and several residences. Record 915-18.

1           Petitioners do not argue that the 2,000-foot study area is insufficient in size  
2 or extent to evaluate compatibility with “adjacent” uses. However, petitioners  
3 argue that, in addition to requiring evaluation of adjacent uses, OAR 660-004-  
4 0020(2)(d) requires that “[t]he exception \* \* \* demonstrate that the proposed use  
5 is situated in such a manner as to be compatible with surrounding natural  
6 resources and resource management or production practices.” Petitioners argued  
7 below that evaluating compatibility with “surrounding natural resources and  
8 resource management or production practices” is a different inquiry from  
9 evaluating impacts on “adjacent uses,” one that may require evaluation of impacts  
10 on nonadjacent natural resources and resource management or production  
11 practices in the “surrounding area,” not limited to adjacent lands.

12           The county rejected that interpretation of OAR 660-004-0020(2)(d) as an  
13 impermissible expansion of ORS 197.732(2)(c)(D). As noted, ORS  
14 197.732(2)(c)(D) requires compatibility with “adjacent uses” and does not  
15 include the additional rule requirement that the proposed use be “situated in such  
16 a manner as to be compatible with surrounding natural resources and resource  
17 management or production practices.” The administrative rule was adopted by  
18 the Land Conservation and Development Commission (LCDC), pursuant to its  
19 delegated authority under ORS 197.040.<sup>2</sup> The county concluded that, because the

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<sup>2</sup> ORS 197.040(1) provides, in relevant part:

“[LCDC] shall:

1 focus of the statute is on “adjacent uses,” reading the administrative rule to  
2 require evaluation of natural resources and resource management or production  
3 practices that are unconnected to adjacent uses would exceed LCDC’s delegated  
4 authority. Consequently, the county interpreted OAR 660-004-0020(2)(d) to  
5 require consideration of compatibility with nonadjacent natural resources and  
6 resource management or production practices only if those resources and uses  
7 impact adjacent land uses. According to the county, “to the extent non-adjacent  
8 ‘surrounding natural resources and resource management or production  
9 practices’ have impacts that in turn impact ‘adjacent’ uses under ORS 197.732,  
10 those impacts fall under the scope of ORS 197.732.” Record 34.

11 On appeal, petitioners challenge the county’s narrow interpretation of ORS  
12 197.732(2)(c)(D) and OAR 660-004-0020(2)(d), and the county’s conclusion  
13 that giving effect to the rule’s additional requirement regarding compatibility

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“\* \* \* \* \*

“(b) In accordance with the provisions of ORS chapter 183, adopt rules that it considers necessary to carry out ORS chapters 195, 196 and 197[; and] \* \* \*

“(c)

“(A) Adopt by rule in accordance with ORS chapter 183 or by goal under ORS chapters 195, 196 and 197 any statewide land use policies that it considers necessary to carry out ORS chapters 195, 196 and 197.”

1 with natural resources is an impermissible extension of LCDC’s delegated  
2 authority.

3 We agree with petitioners that the county misconstrued the applicable law.  
4 ORS 197.040(1) grants LCDC wide discretion to adopt rules it considers  
5 necessary to carry out ORS chapter 197, among many other areas of  
6 responsibility in implementing the statewide land use planning program. In its  
7 findings, the county—and, on appeal, the Port—cites *Marolla v. DPSST*, 245 Or  
8 App 226, 230, 263 P3d 1034 (2011), and *Planned Parenthood Assn. v. Dept. of*  
9 *Human Res.*, 297 Or 562, 565, 687 P2d 785 (1984), for the proposition that an  
10 administrative rule is invalid if it “depart[s] from a legal standard” in the statute  
11 being administered or otherwise contravenes an applicable statute. Record 36;  
12 Intervenor-Respondent’s Brief 14. Both cases involved allegations that an  
13 administrative rule conflicted with a statutory requirement or the legislative  
14 policy embedded in a statute.

15 In the present case, the Port does not allege that the expanded compatibility  
16 inquiry in OAR 660-004-0020(2)(d) conflicts with ORS 197.732(2)(c)(D) or the  
17 legislative policy expressed therein. Instead, the county reasoned and the Port  
18 argues that the scope of the compatibility inquiry is confined to adjacent areas by  
19 the language of ORS 197.732(2)(c)(D), which refers only to “adjacent uses.” The  
20 requirement that the proposed use “be compatible with surrounding natural  
21 resources and resource management or production practices” is in *addition* to the  
22 requirement that the use be compatible with adjacent uses or rendered so via

1 identified measures. The Port has not established that giving effect to the full  
2 terms of that expanded inquiry conflicts with ORS 197.732(2)(c)(D) or the  
3 legislative policy expressed therein. The county's interpretation of OAR 660-  
4 004-0020(2)(d) has no basis in the text of the rule, gives little or no effect to its  
5 terms, and is inconsistent with the rule.

6 The county's findings do not identify any natural resources or resource  
7 management or production practices, within or outside of the 2,000-foot study  
8 area, that could be impacted by the location of the proposed industrial uses. The  
9 Compatibility Report is also silent on those matters. Petitioners cite evidence in  
10 the record regarding the existence of natural resources in the area, including  
11 wetlands; riparian areas; water areas, such as Bradbury Slough immediately  
12 adjacent to a portion of the exception area; and Crims Island, a state-managed  
13 wildlife refuge for Columbia White-Tailed deer across Bradbury Slough.  
14 Relatedly, petitioners note that the study area excludes adjoining water areas,  
15 such as Bradbury Slough north of the exception area or the main stem of the  
16 Columbia River immediately west of the exception area. Petitioners argue that  
17 such water areas are or include natural resources that are subject to management  
18 and production (*e.g.*, fisheries).

19 The Port does not respond to this argument, other than citing a footnote in  
20 the Compatibility Report stating that the county's zoning authority is limited to  
21 land uses and does not include zoning authority over waterways such as the  
22 Columbia River. Intervenor-Respondent's Brief 16 n 9. However, it is not clear

1 what bearing the geographic extent of the county’s zoning authority has on  
2 application of the compatibility test in OAR 660-004-0020(2)(d). The rule is  
3 concerned with impacts on adjoining uses and natural resources in the  
4 surrounding area, and is not limited to uses and resources that are located within  
5 the county’s zoning jurisdiction.<sup>3</sup> We note that the statewide planning goals  
6 define the term “natural resources” as “[a]ir, land and water and the elements  
7 thereof which are valued for their existing and potential usefulness to man.” That  
8 definition suggests that water areas may constitute, or include, “natural  
9 resources” for purposes of OAR 660-004-0020(2)(d). In any case, even if the  
10 county does not regulate water areas such as Bradbury Slough and the main stem  
11 of the Columbia River, the county presumably regulates uses on Crims Island,  
12 which is designated as wildlife habitat in the county’s inventory of Statewide  
13 Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open  
14 Spaces) sites.

15 In sum, remand is necessary for the county to adopt findings addressing  
16 the OAR 660-004-0020(2)(d) requirement to evaluate compatibility with  
17 “surrounding natural resources and resource management or production  
18 practices,” including identification of the “surrounding” area and any natural  
19 resources or resource management or production practices that occur in that area.

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<sup>3</sup> To illustrate, it is doubtful that, for purposes of OAR 660-004-0020(2)(d), a county could simply ignore adjoining uses or natural resources that are located in an adjoining city or county.

1           **B.     Evaluation of Adjacent Uses**

2           The findings identify and evaluate impacts on several agricultural and  
3 residential uses located within the study area, including tree farms, a mint farm,  
4 unmanaged forested lands, and several residences. Petitioners argue that those  
5 findings fail to adequately describe the adjacent uses and adequately evaluate  
6 potential impacts on those uses. Petitioners contend that the findings fail to  
7 describe the particular characteristics and vulnerabilities of adjoining agricultural  
8 uses and practices, and ignore testimony regarding the same. For example,  
9 petitioners argue that the record includes testimony that the adjoining 80-acre  
10 mint farm could lose gluten-free certification if the mint crop is contaminated by  
11 windborne wheat dust from dry bulk operations within the exception area. The  
12 findings briefly address the mint farm, but they do not describe any  
13 characteristics or practices thereon, or address issues raised regarding particular  
14 impacts such as wheat dust from proposed dry bulk operations. Record 45.  
15 Petitioners point to evidence that dust and other particulate emissions were raised  
16 as a concern for sensitive crops that cannot be washed or rinsed. Record 1094-95  
17 (testimony that moisture damages mint and berries).

18           The county’s findings reject the premise that the compatibility inquiry  
19 requires the county to consider specific agricultural uses that may be more  
20 sensitive to industrial impacts than others. The findings state:

21           “[R]egarding concerns that the Compatibility Report does not  
22 consider various kinds of agricultural crops (berries, mint, livestock,  
23 tree farms, etc.) grown on agricultural land[, staff finds] \* \* \* that

1 these considerations do not have any bearing on the compatibility  
2 analysis because seasonal crop rotations and typical changes in crop  
3 processing and/or management does not change the agricultural use  
4 of the land.” Record 52.

5 As we stated in *Riverkeeper II*, the findings must address issues raised  
6 regarding the specific characteristics of adjacent uses and the vulnerabilities of  
7 adjacent uses to the particular impacts of specific industrial uses. The findings on  
8 remand are inadequate in that regard, despite testimony in the record that would  
9 allow a more finely grained description and evaluation.

10 The first assignment of error is sustained.

## 11 **SECOND ASSIGNMENT OF ERROR**

12 Petitioners argue that the county failed to adopt adequate findings  
13 describing the scale and impact characteristics of the different types of proposed  
14 industrial uses. In *Riverkeeper II*, we noted that

15 “adequate findings regarding compatibility would start by  
16 identifying the likely adverse impacts of typical uses authorized  
17 under the five approved use categories, evaluating each use category  
18 separately, and if necessary specific types of uses within each use  
19 category. As petitioners argue, the potential adverse impacts of  
20 different types of liquid bulk terminals, *e.g.*, an oil terminal versus a  
21 fertilizer export operation, could be different enough to require a  
22 separate analysis.” 78 Or LUBA at 569.

23 Table 3 of the Compatibility Report, reproduced in the findings,  
24 summarizes the Port’s attempt to comply with *Riverkeeper II*. Record 49. The x-  
25 axis of Table 3 identifies 20 different categories of potential adverse impacts,  
26 such as airborne emissions, noise, stormwater runoff, fire/explosion, chemical  
27 spills, wildlife impacts, etc. The y-axis of Table 3 identifies five categories of

1 proposed new industrial uses: forestry/wood products, dry bulk, liquid bulk,  
2 natural gas, and breakbulk. The five categories of proposed industrial uses are  
3 predicted to generate almost all of the identified 20 potential adverse impacts, as  
4 indicated by an “X” in the corresponding cells of those five columns. Also  
5 displayed on the y-axis are columns for existing Port Westward industrial uses,  
6 agricultural/forestry uses, and residential uses. Table 3 indicates that some of the  
7 identified potential adverse impacts are also associated with these three columns  
8 of existing uses. For example, existing residential uses also generate “airborne  
9 emissions,” and existing agricultural/forestry operations may involve “chemical  
10 spills.” Record 49.

11 The main conclusion that the county drew from Table 3 is that most of the  
12 potential adverse impacts of new industrial uses are similar (1) among the five  
13 categories of new industrial uses, (2) to those generated by the existing Port  
14 Westward industrial uses, and (3) in some cases, to even the existing  
15 agricultural/forestry or residential uses in the study area. The findings state:

16 “As summarized in Table 3, the subsequent analysis of the 20  
17 potential compatibility impacts for operations within each of the five  
18 rural industrial use categories shows that not only are these potential  
19 impacts generally similar to each other, but there is also a large  
20 degree of overlap between the existing industrial uses on Port  
21 Westward’s approximate 905 acres and the five industrial uses in  
22 the proposed expansion area. Of the approximate 1,100 comments  
23 received between November 17, 2020 and February 17, 2021, the  
24 differences among these uses are largely a matter of scale and  
25 probabilities that are associated with the different production  
26 processes.” Record 51.

1           **A.     Scale of Proposed Industrial Uses and Impacts**

2           Petitioners argue that, while the county recognized testimony that there  
3           may be significant differences in “scale and probabilities” between the impacts  
4           of the proposed industrial uses and those of the existing industrial and other uses,  
5           the findings never address any differences in scale. Petitioners argue that Table 3  
6           suggests a false equivalence between stormwater discharges from a residence, for  
7           example, and stormwater discharges from a large industrial plant such as a wood-  
8           products factory. According to petitioners, Table 3 equates small-scale chemical  
9           or oil spills that might occur from vehicles at a dry bulk plant or an existing farm  
10          operation with large-scale chemical or oil spills from a ruptured tank at a liquid  
11          bulk facility such as an oil terminal. Even within a single use category such as  
12          liquid bulk, petitioners argue that the Compatibility Report and the findings do  
13          not distinguish between the risk of “fire/explosion” involved in the storage and  
14          transport of petroleum versus the storage and transport of other liquids such as  
15          milk.

16          The county’s approach to demonstrating compliance with OAR 660-004-  
17          0020(2)(d) relies heavily on the premise that most of the new and existing  
18          industrial uses, and even some nonindustrial uses in the area, generate the same  
19          *kinds* of potential adverse impacts, as identified in Table 3. “‘Compatible’ is not  
20          intended as an absolute term meaning no interference or adverse impacts of any  
21          type with adjacent uses.” OAR 660-004-0020(2)(d). If new and existing uses are  
22          capable of generating the same kinds of adverse impacts, the county reasons, then

1 the new uses must be compatible with the existing uses. That reasoning  
2 erroneously ignores significant differences in scale and intensity. As petitioners  
3 argue, the potential adverse impacts of a farm truck leaking oil are very different  
4 from the potential adverse impacts of a leaking million-gallon oil storage tank.  
5 We agree with petitioners that the county erred in ignoring the scale and intensity  
6 of the proposed industrial uses and their potential adverse impacts.

7         The Port responds that the county is not required to evaluate the scale or  
8 intensity of the potential adverse impacts of the proposed industrial uses on the  
9 existing adjacent uses because most of the proposed industrial uses will be  
10 regulated by state and federal entities, including regulations designed to prevent  
11 or mitigate environmental impacts caused by chemical spills. However, the Port  
12 does not explain why potential future application of state and federal regulations  
13 to some or all of the proposed industrial uses obviates the need to evaluate the  
14 scale or intensity of the industrial uses, and their potential adverse impacts, to  
15 satisfy the required compatibility analysis. The state and federal regulations to  
16 which the Port refers are intended to reduce the likelihood or severity of certain  
17 adverse impacts on the environment. The Port presumes that such reductions in  
18 environmental impacts might also reduce impacts on adjacent agricultural,  
19 forestry, or residential uses. However, nothing cited to us in the findings and  
20 evidence establishes that connection. For example, petitioners point out that the  
21 findings do not attempt to explain how state air quality standards are protective  
22 of sensitive crops.

1           In *Lundeen v. City of Waldport*, we remanded a city approval that relied  
2 on unspecified Department of Environmental Quality (DEQ) construction  
3 discharge and erosion control standards to find that the development, including  
4 grading and paving for road construction, would satisfy a local code criterion  
5 which required the applicant to establish that the planned development would not  
6 cause drainage or pollution problems outside the planned area. \_\_\_ Or LUBA  
7 \_\_\_, \_\_\_ (LUBA No 2019-046, Oct 24, 2019) (slip op at 10). We explained that  
8 compliance with other regulations *may* be a basis for the city to conclude that the  
9 specific criterion would be satisfied. However, the city had failed to adopt  
10 findings explaining the relationship between the DEQ standards and the city  
11 criterion. *Id.* Similarly, here, the findings do not explain the relationship between  
12 any state and federal environmental regulations and the compatibility standard.<sup>4</sup>

13           **B. Comparison with Existing Port Westward Industrial Uses**

14           Relatedly, petitioners argue that the county’s simplistic comparison of  
15 impacts generated by the proposed and existing Port Westward industrial uses  
16 ignores the differences among those uses. According to petitioners, the few  
17 existing Port Westward industrial uses consist primarily of power-generating  
18 facilities, which are not among the proposed uses allowed in the exception area,

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<sup>4</sup> To the extent that state and federal regulations will be applied to specific industrial uses and could reduce the likelihood or severity of adverse impacts on adjoining land uses, the county may consider such presumed reductions in impact in its compatibility analysis.

1 and do not consist of uses that typically generate significant impacts on adjacent  
2 uses. The existing Port Westward industrial uses are also located generally north  
3 of the exception area, farther away from the mint farm and other agricultural and  
4 residential uses adjacent to the exception area. Despite the dissimilar types of  
5 industrial uses, and the greater distance, the county relied on the lack of reported  
6 conflicts between existing industrial uses and the mint farm and other uses in the  
7 area as critical support for its conclusion that the proposed industrial uses are  
8 compatible with adjoining uses.

9       In *Riverkeeper II*, we rejected a similar attempt to infer from the lack of  
10 evidence regarding conflicts between existing industrial uses and adjacent uses  
11 that the proposed industrial uses will be compatible. The Port argues that Table  
12 3 and the findings on remand provide a much stronger basis for that inference.  
13 However, as discussed above, the county's analysis fails to consider the different  
14 scale and intensity of impacts generated by different types of industrial uses. A  
15 power-generating station may share some of same types of potential adverse  
16 impacts as an oil terminal, but, if the potential adverse impacts of an oil terminal  
17 are greater in scale or intensity compared to those of a power station, then the  
18 comparison between the proposed and existing industrial uses does not support  
19 the inference the county draws. Until the county conducts the fuller analysis  
20 required by OAR 660-004-0020(2)(d), it is not in a position to infer anything  
21 from the lack of reported conflicts between the existing Port Westward industrial

1 uses and nearby uses with respect to compatibility between the different, and  
2 more proximate, proposed industrial uses.

3 **C. Impacts Not Addressed**

4 Petitioners also argue that the county failed to address issues raised  
5 regarding specific industrial use characteristics or impacts. First, petitioners cite  
6 evidence that the exception area, and the entire Port Westward area, is at high  
7 risk of soil liquefaction in the event of a large earthquake. Record 1348, 1901.  
8 Petitioners argue that, among the proposed industrial uses, bulk fossil fuel storage  
9 and processing facilities are most vulnerable to seismic events and pose a  
10 particular risk of adverse impacts to adjoining uses.

11 The Port does not respond to this argument. We note that the findings recite  
12 the Port's position that seismic issues will be addressed at the time of  
13 development via application of state construction codes. Record 60. However,  
14 that finding does not purport to address the specific issues raised below regarding  
15 the seismic vulnerability of bulk fossil fuel facilities or explain why such issues  
16 need not be addressed in the compatibility analysis.

17 Petitioners next argue that the county failed to address issues raised  
18 regarding impacts on the hydrology in the area, citing expert testimony that the  
19 area has a high water table and that filling and grading associated with  
20 construction of the proposed industrial uses could elevate the water table higher  
21 and impact agricultural uses that are vulnerable to flooding or that require well-

1 drained soils. Petitioners argue that the findings the county adopted to ostensibly  
2 address impacts on hydrology in fact address only impacts on water quality.

3 Petitioners are correct that the findings at Record 23 to 25 focus mostly on  
4 impacts on water quality rather than hydrology. Neither those findings nor any  
5 others cited to us address the issues raised regarding impacts of development on  
6 the water table. We agree with petitioners that remand is necessary for the county  
7 to adopt findings addressing those issues. *See Norvell v. Portland Area LGBC*,  
8 43 Or App 849, 853, 604 P2d 896 (1979) (findings must address and respond to  
9 specific issues relevant to compliance with applicable approval standards that  
10 were raised in the proceedings below).

11 With respect to water quality impacts, petitioners raised below issues  
12 related to impacts on the irrigation and drainage system maintained by the Beaver  
13 Drainage District, which maintains a dike between the exception area and the  
14 Columbia River. Record 1347. The Compatibility Report argued that the dike can  
15 serve to contain pollution from spills in the exception area by turning off pumps  
16 that would otherwise transfer polluted runoff to the river. The findings rely on  
17 the dike to improve emergency response in the event of a spill. Record 62.  
18 However, petitioners argue that relying on the district's dike to contain runoff  
19 polluted by a chemical or oil spill would elevate and send contaminated water  
20 through the district's irrigation and drainage network, potentially contaminating  
21 agricultural areas in the study area. Petitioners argue that the findings addressing  
22 water quality do not address the testimony raising this issue.

1 The Port does not cite any findings addressing this issue or explain why  
2 the issue need not be addressed. We agree with petitioners that remand is  
3 necessary for the county to adopt responsive findings. *Norvell*, 43 Or App at 853.

4 The second assignment of error is sustained.

### 5 **THIRD ASSIGNMENT OF ERROR**

6 In *Riverkeeper I*, the county approved a vast range of industrial uses within  
7 the exception area and found compliance with the Statewide Planning Goal 2  
8 (Land Use Planning) exception standards based largely on what amounted to a  
9 wholesale deferral of Goal 2 exception standards to subsequent permit  
10 proceedings. 70 Or LUBA at 206. In *Riverkeeper II*, the county evaluated a more  
11 limited range of industrial uses and attempted to evaluate whether those industrial  
12 uses complied with the Goal 2 exception standards, including the OAR 660-004-  
13 0020(2)(d) compatibility standard. However, because the county's compatibility  
14 analysis was so limited and deficient, we held that, by imposing conditions of  
15 approval requiring applicants for specific industrial uses to demonstrate  
16 compatibility with adjoining uses, the county had, again, impermissibly deferred  
17 a determination of compliance with OAR 660-004-0020(2)(d) to subsequent  
18 permit proceedings.<sup>5</sup>

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<sup>5</sup> In *Riverkeeper II*, we held that, “because the county failed to conduct the required analyses, its determinations regarding compatibility with adjoining agricultural practices are conclusory, and the resulting over-reliance on conditions such as Condition 4, which require applicants to submit an agricultural

1           On remand from *Riverkeeper II*, the county adopted more robust  
2 compatibility findings. The county also readopted eight conditions of approval,  
3 including Condition 4. Condition 4 states that, “[t]o ensure compatibility with  
4 adjoining agricultural uses, the applicant/developer of new industrial uses shall  
5 comply” with nine listed requirements. Record 19-20. These include 4(c), which  
6 requires that all development adjacent to land zoned PA-80 include buffers  
7 between industrial uses and adjacent land uses; 4(e), which requires that dust  
8 suppression measures and hard surfaces be employed as needed to mitigate dust;  
9 and 4(i), which requires submittal of an “agricultural impact assessment report  
10 that analyzes adjacent agricultural uses and practices and demonstrates that  
11 impacts from the proposed use are mitigated.”<sup>6</sup> *Id.*

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impacts analysis, thus represents an impermissible deferral of demonstrating compliance with OAR 660-004-0020(2)(d).” 78 Or LUBA at 570.

<sup>6</sup> Condition 4 provides, in relevant part:

“To ensure compatibility with adjoining agricultural uses, the applicant/developer of new industrial uses shall comply with the following:

“\* \* \* \* \*

“c. All development adjacent to land zoned PA-80 shall include buffers that are established and maintained between the industrial uses and adjacent land uses on PA-80 zoned land, including natural vegetation and where appropriate, fences, landscaped areas and other similar types of buffers.

“\* \* \* \* \*

1           The county also adopted a new condition, Condition 9, which requires that,  
2 prior to occupancy, the applicant submit written confirmation that they have  
3 obtained “all necessary Permits from the applicable Federal, State and Local  
4 Regulatory Agencies.” Record 21, 63.

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“e. Controls, including suppression and requiring hard surfaces, shall be employed as needed to be determined by the County to mitigate dust caused by industrial uses that may emanate from the site and traffic to the site.

“f. Site run-off shall be controlled and any harmful sediments shall be contained or otherwise treated before being released to ensure potential impacts to irrigation equipment and area water quality (both ground and surface) are controlled.

“g. The industrial use impact on the water table and sloughs shall be monitored for water quality and surface water elevations to ensure that the area water can be maintained and managed for existing uses.

“\* \* \* \* \*

“i. Development applications shall include an agricultural impact assessment report that analyzes adjacent agricultural uses and practices and demonstrates that impacts from the proposed use are mitigated. The report shall include a description of the type and nature of the agricultural uses and farming practices, if any, which presently occur on adjacent lands zoned for farm use, type of agricultural equipment customarily used on the property, and wind pattern information. The report shall include a mitigation plan for any negative impacts identified.” Record 19-20.

1           Despite the more robust compatibility findings adopted on remand, we  
2 have sustained portions of petitioners' first and second assignments of error,  
3 agreeing with petitioners that the findings misconstrue the applicable law and are  
4 inadequate in several respects. In the third assignment of error, petitioners argue  
5 that the findings addressing the OAR 660-004-0020(2)(d) compatibility  
6 requirement remain comprehensively deficient, such that the county again  
7 impermissibly relies on the conditions of approval, specifically Conditions 4 and  
8 9, to support its conclusion that the proposed uses are compatible with adjacent  
9 uses, or can be rendered so. According to petitioners, the county has repeated its  
10 error in *Riverkeeper II*, deferring to subsequent permit proceedings the kind of  
11 detailed analysis of impacts on adjoining farm uses that must be conducted before  
12 approving an exception to Goal 3.

13           Petitioners argue that the specific agricultural impact analysis required by  
14 Condition 4(i) is the type of detailed analysis necessary to support the  
15 compatibility determination required by OAR 660-004-0020(2)(d). Because the  
16 county made, at best, a very generalized assessment of impacts, and relied heavily  
17 on Condition 4(i) to establish compatibility with adjoining agricultural uses,  
18 petitioners argue that the county has again impermissibly deferred a finding of  
19 compliance with OAR 660-004-0020(2)(d).

20           Similarly, petitioners argue that, while the findings generally discuss the  
21 use of buffers to mitigate impacts, there is no detailed analysis of which type or  
22 size of buffers are needed to adequately mitigate against the impacts of the

1 proposed industrial uses. Petitioners contend that Condition 4(c), which requires  
2 that buffers be approved “as needed to be determined by the County” in  
3 subsequent permit approvals, cannot substitute for that analysis. Similarly, with  
4 respect to Condition 4(e), which requires unspecified dust suppression measures,  
5 petitioners argue that there are no findings and there is no evidence establishing  
6 that any dust suppression measures will be sufficient to mitigate impacts,  
7 particularly on sensitive crops.

8         Petitioners also argue that the county erred to the extent that its finding of  
9 compliance with OAR 660-004-0020(2)(d) relies on the new Condition 9. As  
10 noted, Condition 9 requires applicants to confirm, prior to occupancy, that all  
11 necessary local, state, and federal permits have been obtained. While the decision  
12 at Record 53 to 56 lists a number of local, state, and federal regulations and  
13 permits that could potentially apply to or be required for future development,  
14 petitioners argue that there is no evidence or analysis of which regulations and  
15 permits in fact will be applied to or required for which of the proposed industrial  
16 uses, or how regulations and permits designed for many different policy  
17 objectives (*e.g.*, homeland security, endangered species, reducing smog) could  
18 function to prevent or mitigate impacts on adjacent agricultural uses.

19         The Port responds, initially, that petitioners failed to raise any issues below  
20 regarding deferral of compliance with OAR 660-004-0020(2)(d) and, thus, such

1 issues are waived. ORS 197.797(1).<sup>7</sup> Petitioners reply, and we agree, that the  
2 issues raised in the third assignment of error were raised below. Record 1350-55.

3 On the merits, the Port argues that the county adopted adequate findings  
4 of compliance with OAR 660-004-0020(2)(d), and the fact that it also relied upon  
5 conditions of approval to ensure compatibility does not mean that the county  
6 deferred a determination of compliance with the compatibility standard. The Port  
7 also argues that, to the extent Condition 4 represents a deferral of compliance  
8 with the rule, such deferral is consistent with cases such as *Gould v. Deschutes*  
9 *County*, 227 Or App 601, 206 P3d 1106, *rev den*, 347 Or 258 (2009), which held  
10 that, in the first of a two-step development proceeding, a county may completely  
11 defer findings of compliance with approval criteria to the second step as long as  
12 it adopts findings that compliance with the criteria is feasible, *i.e.*, capable of  
13 attainment. The Port cites findings invoking *Gould* and concluding that  
14 compliance with OAR 660-004-0020(2)(d) is “feasible.” Record 24-25.

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<sup>7</sup> Former ORS 197.763(1) (2019), *renumbered as* ORS 197.797(1) (2021), provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1           As we noted in *Riverkeeper I*, *Gould* did not involve a goal exception. We  
2 reiterate our holding in *Riverkeeper I* that deferral of compliance with Goal 2  
3 exception criteria to subsequent permit proceedings is not a permissible option.  
4 In adopting a goal exception, the county’s only permissible option is to fully  
5 address the goal exception criteria and determine whether the criteria are met  
6 based on adequate findings and substantial evidence.

7           That determination can, of course, be based in part on conditions of  
8 approval that limit or regulate future development in specified ways in order to  
9 ensure continued compliance with the goal exception criteria. Such conditions of  
10 approval can replicate, at a finer scale and to a greater degree, the analysis  
11 required under goal exception criteria such as OAR 660-004-0020-(2)(d). Such a  
12 “belt and suspenders” approach is not error, so long as the local government does  
13 not rely on conditions of approval or subsequent permit reviews to *substitute* for  
14 findings fully addressing the goal exception criteria at an appropriate level of  
15 detail.

16           The key question presented is the appropriate level of detail in the findings  
17 addressing goal exception criteria in the context of a decision that approves a goal  
18 exception and associated comprehensive plan and zoning changes but does not  
19 approve any particular development. In the present case, the challenged exception  
20 would permit a wide range of industrial uses, with many different characteristics  
21 and potential impacts. Because the county does not know exactly which industrial  
22 uses will be applied for within the exception area, or where they will be located

1 relative to adjacent uses and natural resources, the county’s findings will  
2 necessarily evaluate compatibility at a more abstract or general level than if a  
3 specific industrial use were proposed. Nonetheless, even in the absence of a  
4 specific proposal, the county’s compatibility analysis must evaluate in sufficient  
5 detail the likely characteristics of the uses allowed under the goal exception, the  
6 characteristics or vulnerabilities of uses in the adjoining area and natural  
7 resources in the surrounding area, and the likely adverse impacts of proposed  
8 uses on those adjoining uses and natural resources, along with any specific  
9 identified mitigation or other conditions necessary to ensure compatibility.<sup>8</sup>

10 Under the first and second assignments of error, we have sustained a  
11 number of petitioners’ challenges to the adequacy of the county’s findings of  
12 compliance with OAR 660-004-0020-(2)(d), including issues raised regarding

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<sup>8</sup> One way of doing this, without evaluating every conceivable industrial use, is to evaluate in detail the most impact-intensive use within each of the five categories, subject to reasonable “worst-case” assumptions about size, design, location, and other characteristics. Describe in detail the most vulnerable adjoining use or natural resource in the surrounding area and assume that the industrial use is located in proximity to that use or resource. Then evaluate the likely impacts of the industrial use on the adjoining use or resource. If that detailed evaluation indicates that the industrial use is not compatible with the adjoining use or resource, then evaluate what measures (minimum distance, buffers, size or design restrictions, etc.) may be necessary to render the industrial use compatible. If such measures are deemed sufficient, then impose conditions requiring them. Otherwise, impose conditions excluding that particular industrial use. Repeat the analysis for the next most impact-intensive use in that category until one is found that is compatible or can be made so. Complete that same analysis for all use categories.

1 the appropriate level of detail in those findings. We generally agree with  
2 petitioners that the county's approach to conducting the compatibility analysis,  
3 which minimizes the differences among the proposed industrial uses and between  
4 the proposed and existing uses, and which ignores differences in scale and  
5 intensity, is an insufficient foundation for the required analysis. Another pillar of  
6 the county's analysis lacks support in the record: the presumption that the lack of  
7 reported conflicts with existing Port Westward uses means that the different, and  
8 more proximate, proposed industrial uses are necessarily compatible with  
9 adjoining uses. The insufficiencies in the county's findings and analysis place a  
10 disproportionate burden on the conditions of approval and post-decision permit  
11 reviews to ensure, if not establish, compatibility. Conditions 4 and 9, while not  
12 erroneous in themselves, cannot save the county's decision from remand to  
13 correct the identified inadequacies in the findings and record.

14       The third assignment of error is sustained.

15       The county's decision is remanded.