BOARD OF COMMISSIONERS
COUNTY OF COOS
STATE OF OREGON

In the matter of a remand from the Land Use Board of Appeals in regards to the Oregon Shores Conservation Coalition v. Coos County, 76 OR LUBA 346 (2017) case in the matter of a conditional use permit and associated application (County File No. REM-19-001 remand of HBCU-15-05/CD-15-152/FP-15-09))	)	FINAL DECISION AND ORDER NO. 19-11-068PL

Whereas on August 30, 2016, the Coos County Board of Commissioners adopted Final Decision and Order No. 16-08-07PL, In the matter of approving conditional use applications for Jordan Cove Energy Project L.P., County File Numbers HBCU-15-05/FP-15-09. The application was granting approval for an Industrial and Port facility. The facility will include: an LNG terminal; slip and access channel; barge berth; fire station and training center; gas processing area; road and utility corridor; fill; shoreline stabilization; dredging; dredge material disposal; mitigation; restoration; excavation to create new water surface; tide-gating; and, fish and wildlife habitat management.

Multiple Opponents appealed the Board's decision to LUBA and submitted four well-coordinated legal briefs. These briefs collectively raised 16 assignments of error, some of which included multiple sub-assignments of error. LUBA remanded the matter to the County to address 8 of the 16 assignments errors. *OSCC v. Coos County*, 76 Or LUBA at 387. the Opponents appealed LUBA's decision to the Oregon Court of Appeals in an effort to expand the scope of the remand. The Court of Appeals denied these petitioners' arguments by affirming LUBA's decision without opinion. *Oregon Shores Conservation Coalition v. Coos County*, 291 Or App 251, 416 P3d 1110 (2018).

The appellants in this matter then petitioned the Oregon Supreme Court to review the case. The Supreme Court denied the petition without considering the case on the merits, allowing the Court of Appeals decision to stand. *Oregon Shores Conservation Coalition v. Coos County*, 363 Or 481, 424 P3d 728 (2018).

On September 20, 2018, the Court of Appeals entered an appellate judgment. On September 26, 2018, LUBA entered a notice of appellate judgment, finding that the appellate court decisions did not require any change in LUBA's final opinion and order. On March 15, 2019, Applicant submitted a letter pursuant to ORS 215.435(2)(a) requesting that the County initiate the remand. As discussed in more detail below, the procedural posture of the case demand that the County conduct a public hearing, accept new evidence, and then resolve the eight (8) remaining issues.

LUBA sustained eight assignments of error, in part, and determined that the Board erred in the following ways:

- Failed to Correctly Interpret and Adopt Adequate Findings Supported by Substantial Evidence in Response to Coos Bay Estuary Management Plan ("CBEMP") Policy #5 – The Board erred by:

  (1) interpreting CBEMP Policy #5.I.b to require an evaluation only of the public benefits of the dredging itself and not the public benefits of the upland use served by the dredging activity;

  (2) concluding that the "public need" standard is met if the dredging is needed to enable construction of a use that is permitted or conditionally allowed on adjacent upland or shoreland property; and

  (3) failing to adopt adequate findings supported by substantial evidence in the whole record that the Project would not unreasonably interfere with public trust rights.

OSCC, 76 Or LUBA at 352-358 (OSCC second assignment of error).

- Failed to Adopt Findings in Response to CBEMP Policies #4 and #4a - The Board erred by failing to adopt any findings addressing compliance with CBEMP Policies 4 and 4a. *OSCC*, 76 Or LUBA at 359-361 (OSCC third assignment of error).

- Failed to Adopt Adequate Findings in Response to CBEMP Policy #30 - The Board erred by failing to address whether subsidence due to dewatering is an issue under CBEMP Policy #30.I.c, and if so, adopt findings resolving that issue. *OSCC*, 76 Or LUBA at 361-363 (OSCC fourth assignment of error).

- Failed to Adopt Adequate Findings in Response to Special Condition 5 of the CBEMP 7-D Management Unit - The Board erred by failing to adopt adequate findings in response to Special Condition 5, which applies to the placement of fill in the CBEMP 7-D management unit. *OSCC*, 76 Or LUBA at 363-364 (OSCC fifth assignment of error).

- Failed to Adopt Adequate Findings Addressing Denial of Federal Energy Regulatory Commission ("FERC") Permit - The Board erred by adopting findings of compliance with local approval standards predicated upon Applicant obtaining a FERC permit without addressing whether FERC's 2016 denial of the permit application precluded Applicant, as a matter of law, from obtaining a FERC permit for the Project. *OSCC*, 76 Or LUBA at 364-365 (OSCC sixth assignment of error).

- ❖ Improperly Construed Applicable Law in Determining that the Southwest Oregon Regional Safety Center ("SORSC") is a Permitted as an "Accessory Use" to a Fire Station in the Industrial Zoning District - The Board erred by failing to adopt a reviewable interpretation that the SORSC is permitted in the Industrial zone as an "accessory use," as that term is defined in CCZLDO 2.1.200. *OSCC*, 76 Or LUBA at 365-369 (OSCC seventh assignment of error).
- ❖ Improperly Deferred CBEMP Policy #18 - The Board erred by improperly deferring an analysis of compliance with CBEMP Policy #18 concerning consideration of impacts to historical cultural, and archaeological sites to a second stage proceeding. *OSCC*, 76 Or LUBA at 374-381 (Tribes' first assignment of error).

- ❖ Failure by Commissioner Sweet to Disclose Substance of *Ex Parte* Communication - Commissioner Sweet failed to disclose the substance of any *ex parte* communication that occurred at a 2014 community luncheon presentation by Applicant about aspects of the Project. *OSCC*, 76 Or LUBA at 371-372 (McCaffree first assignment of error).

As a result, LUBA remanded the decision of the County Board of Commissioners to reconsider these issues. The Board of Commissioners appointed a hearings officer to conduct the hearing on remand and provide a legal analysis and recommendation as allowed under Coos County Zoning and Land Development ("CCZLDO") Section 5.0.600. Furthermore, the process of Section 5.7.100 Reviewing Authority was followed.

The Applicant filed a request to take up the remand on March 15, 2019. The Applicant requested to not take up the issues regarding Southwest Oregon Regional Safety Center ("SORSC") as that request has been modified in another application. This resolves the issues

regarding the seventh assignment of error raised by Oregon Shores Conservation Coalition. Improperly Construed Applicable Law in Determining that the Southwest Oregon Regional Safety Center ("SORSC") is a Permitted as an "Accessory Use" to a Fire Station in the Industrial Zoning District - The Board erred by failing to adopt a reviewable interpretation that the SORSC is permitted in the Industrial zone as an "accessory use," as that term is defined in CCZLDO 2.1.200 (2015 addition of CCZLDO). *See* Applicants March 14, 2019 narrative page 26 "Findings on Remand".

Upon review of the remand request the Board of Commissioners concluded pursuant to Section 5.8.800 to limit the issues to the assignment of errors raised in the LUBA remand and only take new evidence and testimony on those issues.

Hearings Officer Andrew Stamp conducted a public hearing on June 10, 2019, and held the record open for additional evidence and argument until July 9, 2019 with final argument received on July 16, 2019. The hearings officer issued his recommendation on November 4, 2019, recommending that the Board approve the application on remand with modifications to prior conditions of approval.

Whereas on November 15, 2019, the Board met to review the hearings officer's recommendation "on the record," without accepting additional evidence or argument from the parties, and to deliberate regarding: (1) whether to accept, reject, or modify the hearings officer's recommendation, and (2) whether to accept, reject, or modify the revised findings and conditions provided by staff.

WHEREAS, at the conclusion of the November 15, 2019 meeting the Board reached a decision to adopt the hearings officer's recommendation, with the modifications as discussed in the hearing by staff. The Board finds that the applicant has addressed the remand issues and that all applicable approval criteria are met with the suggested new conditions of approval. The

Board instructed staff to work with County Counsel and the Applicant's legal counsel to reduce the findings to writing to be incorporated into this order as Attachment "A". The findings in Coos County Order No. 16-08-07PL, adopted August 30, 2016 pertaining to issues that are not expressly included within the scope of this remand are re-adopted. The conditions in County Order No. 16-08-07PL, adopted August 30, 2016, are re-adopted, with the exception of Conditions A.1 and C.1, which are modified herein below.

ADOPTED this 26th day of November 2019.

BOARD OF COMMISSIONERS

Commissioner

Commissioner

Commissioner

ATTEST:

Recording Secretary

APPROVED AS TO FORM:

Office of County Counsel

Attachment "A"

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION OF THE COOS COUNTY BOARD OF COMMISSIONERS

THE JORDAN COVE ENERGY PROJECT, L.P. ("JCEP")
COOS COUNTY, OREGON

COUNTY FILE NO. REM 19-001
(REMAND PROCEEDINGS FROM LUBA)
ORIGINAL FILE NUMBER HBCU-15-05/CD-15-152/FP-15-09)
NOVEMBER 26, 2019

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I. Summary of Proposal and Process

A. Procedural Posture.

This case is on remand from the Oregon Land Use Board of Appeals ("LUBA"). *See Oregon Shores Conservation Coalition et al. v. Coos County*, 76 Or LUBA 346 (2017), *aff'd without op.*, 291 Or App 251, 416 P3d 1110 (2018), *rev den.*, 363 Or 481, 424 P3d 728 (2018). ("*OSCC v. Coos County*").

To recap: the Board of Commissioners ("Board") approved the original Applications on August 30, 2016, by adopting Final Decision and Order No. 16-08-071PL. Multiple Opponents appealed the Board's decision to LUBA and submitted four well-coordinated legal briefs. These briefs collectively raised 16 assignments of error, some of which included multiple sub-assignments of error. LUBA remanded the matter to the County to address 8 of the 16 assignments errors. *OSCC v. Coos County*, 76 Or LUBA at 387.

The Opponents appealed LUBA's decision to the Oregon Court of Appeals in an effort to expand the scope of the remand. The Court of Appeals denied these petitioners' arguments by affirming LUBA's decision without opinion. *Oregon Shores Conservation Coalition v. Coos County*, 291 Or App 251, 416 P3d 1110 (2018). The appellants in this matter then petitioned the Oregon Supreme Court to review the case. The Supreme Court denied the petition without considering the case on the merits, allowing the Court of Appeals decision to stand. *Oregon Shores Conservation Coalition v. Coos County*, 363 Or 481, 424 P3d 728 (2018).

On September 20, 2018, the Court of Appeals entered an appellate judgment. On September 26, 2018, LUBA entered a notice of appellate judgment, finding that the appellate court decisions did not require any change in LUBA's final opinion and order. On March 15, 2019, Applicant submitted a letter pursuant to ORS 215.435(2)(a) requesting that the County initiate the remand. As discussed in more detail below, the procedural posture of the case demand that the County conduct a public hearing, accept new evidence, and then resolve the eight (8) remaining issues.

B. Summary of LUBA decision.

LUBA sustained eight assignments of error, in part, and determined that the Board erred in the following ways:

- Failed to Correctly Interpret and Adopt Adequate Findings Supported by Substantial Evidence in Response to Coos Bay Estuary Management Plan ("CBEMP") Policy #5 –

  The Board erred by:

  (1) interpreting CBEMP Policy #5.I.b to require an evaluation only of the public benefits of the dredging itself and not the public benefits of the upland use served by the dredging activity;

  (2) concluding that the "public need" standard is met if the dredging is needed to enable construction of a use that is permitted or conditionally allowed on adjacent upland or shoreland property; and

(3) failing to adopt adequate findings supported by substantial evidence in the whole record that the Project would not unreasonably interfere with public trust rights. *OSCC*, 76 Or LUBA at 352-358 (OSCC second assignment of error).

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- ❖ Failed to Adopt Adequate Findings Addressing Denial of Federal Energy Regulatory Commission ("FERC") Permit - The Board erred by adopting findings of compliance with local approval standards predicated upon Applicant obtaining a FERC permit without addressing whether FERC's 2016 denial of the permit application precluded Applicant, as a matter of law, from obtaining a FERC permit for the Project. *OSCC*, 76 Or LUBA at 364-365 (OSCC sixth assignment of error).

- ❖ Improperly Construed Applicable Law in Determining that the Southwest Oregon Regional Safety Center ("SORSC") is a Permitted as an "Accessory Use" to a Fire Station in the Industrial Zoning District - The Board erred by failing to adopt a reviewable interpretation that the SORSC is permitted in the Industrial zone as an "accessory use," as that term is defined in CCZLDO 2.1.200. *OSCC*, 76 Or LUBA at 365-369 (OSCC seventh assignment of error).

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- ❖ Failure by Commissioner Sweet to Disclose Substance of *Ex Parte* Communication - Commissioner Sweet failed to disclose the substance of any *ex parte* communication that occurred at a 2014 community luncheon presentation by Applicant about aspects of the Project. *OSCC*, 76 Or LUBA at 371-372 (McCaffree first assignment of error).

As a result, LUBA remanded the decision of the Board to reconsider these issues. The Board appointed a Hearings Officer to conduct the hearing on remand and provide a legal analysis and recommendation as allowed under Coos County Zoning and Land Development

("CCZLDO") Section 5.0.600. Furthermore, the process of Section 5.7.100 Reviewing Authority was followed.

The Applicant requested to not take up the issue regarding Southwest Oregon Regional Safety Center ("SORSC") as that request has been modified in another application. This resolves the issues regarding the seventh assignment of error raised by Oregon Shores Conservation Coalition. Improperly Construed Applicable Law in Determining that the Southwest Oregon Regional Safety Center ("SORSC") is a Permitted as an "Accessory Use" to a Fire Station in the Industrial Zoning District - The Board erred by failing to adopt a reviewable interpretation that the SORSC is permitted in the Industrial zone as an "accessory use," as that term is defined in CCZLDO 2.1.200 (2015 addition of CCZLDO). *See* Applicants March 14, 2019 narrative page 26 "Findings on Remand".

C. Summary of Applications and its Modifications on Remand.

To recap, the Applications originally consisted of the following five (5) land use requests:

(1) Conditional use permit to authorize an LNG export terminal on the North Spit;

(2) Floodplain development permit for a portion of the Project located in the Industrial zoning district;

(3) Driveway confirmation permit for access connections to the Project site;

(4) Determinations that various permitted uses and activities, including a fire station, processing facility, land transportation facility, utility facility, excavation to create new water surface, fill, mitigation, and restoration, comply with applicable standards; and

(5) Time extensions for four conditional use permits previously approved by the County, including County File No. ACU-13-22 (upland LNG terminal), County File No. ACU-13-23 (port slip and access waterway), County File Nos. ACU-12-12/ABI-12-02 (fill in 6-WD management unit), and County File Nos. ACU-12-16/ACU-12-17/ACU-12/18 (fill in Industrial zone and 7-D management unit).

A complete summary of the Project components is set forth in the Board's original decision approving the Applications. LUBA Rec. 16-31. Except where expressly noted in this decision, the Project has not been modified on remand.

D. Timeline.

The review timeline for this application is as follows:

November 3, 2015	Application submitted
November 18, 2015	Application deemed complete
November 18, 2015	Hearing Notice
December 18, 2015	Hearing
January 11, 2016	Extension to both tribes followed by a response by the Applicants
January 12, 2016	Memo extending the first record period.
January 13, 2016	Close of first record period
January 26, 2016	Close of second record period
February 1, 2016	Applicant's final argument.
February 12, 2016	Final testimony from the CTCLUSI
February 22, 2016	Final argument concerning CTCLUSI testimony
March 17, 2016	Motion to Reopen record to accept FERC Order.
April 6, 2016	Order Allowing FERC Ord. into Record w/ 7 Day Comment Period
April 14, 2016	Record Closes
May 2, 2016	Hearings Officer Recommendation.
August 30, 2016	County Board of Commissioners Decision
November 27, 2017	LUBA Decision
February 15, 2018	Court of Appeals Decision
August 9, 2018	Supreme Court Decision denying review
September 20, 2018	Court of Appeals enters an appellate judgment.
September 26, 2018	LUBA enters a notice of appellate judgment.
March 15, 2019	Application to Initiate Remand
June 10, 2019	Public Hearing Held
June 24, 2019	First Open Record Period.
July 9, 2019	Second Open Record Period
July 16, 2019	Final Argument
August 23, 2019	Hearings Officer Reopens Record
September 9, 2019	First Open Record Period.
September 24, 2019	Second Open Record Period
October 3, 2019	Applicant's Final Argument on Limited Open Record Issues
October 17, 2019	Deliberation Hearing Notice Mailed
November 4, 2019	Hearings Officer Recommendation
November 6, 2019	Continuation of Deliberation Hearing
November 8, 2019	Supplemental staff report to the Board of Commissioners
November 15, 2019	Board of Commissioners Hearing for deliberation
November 26, 2019	Final adoption of Order 09-11-068PL

E. Procedural Issues Germaine to Remand Proceedings.

1. Remand Is Limited to the Eight (8) Issues Raised by LUBA.

Pursuant to ORS 215.435(2)(a), the County has jurisdiction to take action on remand from LUBA. As mentioned above, LUBA identified eight issues that the County must address on remand.

The Oregon Court of Appeals has held that although LUBA can require that certain issues be resolved on remand, LUBA does not *define* or *limit* the scope of a subsequent hearing, and the local government is free to address other issues. *Schatz v. City of Jacksonville*, 113 Or App 675, 835 P2d 923 (1992). However, as the Applicant notes, the "law of the case" doctrine generally prohibits the County from reconsidering issues that have already been addressed and are resolved:

> "The logical corollary is that parties may not raise old, resolved issues again. When the record is reopened at LUBA's direction on remand, the 'new issues' by definition include the remanded issues, but not the issues LUBA affirmed or reversed on the merits, which are old, resolved issues."

Beck v. City of Tillamook, 313 Or 148, 153, 831 P2d 678 (1992). "Resolved issues" include: "(1) [I]ssues presented in the first appeal and rejected by LUBA; and (2) issues which could have been, but were not raised in the first appeal." *Louisiana Pacific v. Umatilla County*, 28 Or LUBA 32, 35 (1994).

Although Oregon Shores Conservation Coalition requested that the Board broaden the scope of the remand proceedings beyond that limited set of issues, the Board elected to limit the issues to be addressed on remand to those issues identified by LUBA. The Board provided pre-hearing notice consistent with this election. The Board declines the invitation to expand the scope of this proceeding. *Hearne v. Baker County*, 89 Or App 282, 748 P2d 1016, *rev denied*, 305 Or 578 (1988); *Von Lubken v. Hood River County*, 19 Or LUBA 404, 419 (1990), *aff'd*, 106 Or App 266, *rev denied*, 311 Or 349 (1991).

State case law mandates that the parties to a remanded decision be afforded a hearing in certain circumstances. First, a hearing is generally required when the local government will make an interpretation of its land use regulations during the course of the remand proceedings. Second, when the local government fails to clearly articulate what standards are applicable to a quasi-judicial land use application, the Applicant has no opportunity to present evidence that he meets those criteria. Therefore, an evidentiary hearing is required on remand to allow the Applicant to present evidence and argument concerning the proper interpretation and application of those standards to his application. Finally, when an application is modified on remand but still processed as part of the same application, "interested parties" must be given ample notice and an opportunity to comment on the alterations. For these reasons, the Board correctly required the Hearings Officer to conduct a full de novo hearing.

Some parties submitted evidence and argument that went beyond the scope of the remand. As an example, Mr. John Clarke submitted evidence into the record related to airports. Exhibit 9. Because this information is beyond the scope of the remand proceeding, it does not prove helpful in resolving the remand issues and does not provide a basis at this time to approve, deny, or further condition the Applications.

2. The Remand Record includes the Record created in the Original 2016 Case.

Central to deciding procedural issues on remand is the concept that remand proceedings are generally considered to be a continuation of the original process, not a new process. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). Therefore, the record from the original decision that led to the LUBA decision is a part of this record. The record created at LUBA and the appellate courts, including all briefs submitted as part of those processes, are also a part of this record on remand.

3. Parties to the Remand.

Neither the Board nor the Hearings Officer made an effort to limit the standing to only those persons who appeared in the original proceeding that led to the LUBA appeal. *Siporen v. City of Medford*, 55 Or LUBA 29 (2007); *Lengkeek v. City of Tangent*, 52 Or LUBA 509 (2006).

4. The County Has Conducted the Hearing as If ORS 197.763 Applies.

Although LUBA case law makes clear that the County is not generally required to follow the same procedures on remand as it did in its initial decision, the Board choose to follow the format of hiring a Hearings Officer to conduct the public hearing portion of the process. This is the consistence method used by the County in the past, and there is no legal reason to depart from that format or any objections received.

II. Legal Analysis

A. Resolution of Procedural Issues.

1. The Remand Request is Timely.

Remand proceedings from LUBA are governed by ORS 215.435, which provides, in relevant part:

> ***ORS 215.435 Deadline for final action by county on remand of land use decision; exception.***
>
> ***(1) Pursuant to a final order of the Land Use Board of Appeals under ORS 197.830 remanding a decision to a county, the governing body of the county or its designee shall take final action on an application for a permit, limited land use decision or zone change within 120 days of the effective date of the final order issued by the board. For purposes of this subsection, the effective date of the final order is the last day for filing a petition for judicial review of a final order of the board under ORS 197.850 (3). If judicial review of a final order of the board is sought under ORS 197.830, the 120-day period established under this subsection shall not begin until final resolution of the judicial review.***
>
> ***(2)(a) In addition to the requirements of subsection (1) of this section, the 120-day period established under subsection (1) of this section shall not begin until the Applicant requests in writing that the county proceed with the application on remand, but if the county does not receive the request within 180 days of the effective date of the final order or the final resolution of the judicial review, the county shall deem the application terminated.***
>
> ***(b) The 120-day period established under subsection (1) of this section may be extended for up to an additional 365 days if the parties enter into mediation as provided by ORS 197.860 prior to the expiration of the initial 120-day period. The county shall deem the application terminated if the matter is not resolved through mediation prior to the expiration of the 365-day extension.***
>
> ***[1999 c.545 §2; 2011 c.280 §11; 2015 c.522 §1]***

To recap: certain Opponents of the project appealed the LUBA decision to the Oregon Court of Appeals, which affirmed the LUBA decision. *Oregon Shores Conservation Coalition v. Coos County,* 291 Or App 251, 416 P3d 1110 (2018). The Opponents petitioned the Oregon Supreme Court to review the case. On August 9, 2018, the Supreme Court denied the petition without considering the case on the merits, allowing the Court of Appeals decision to stand. *Oregon Shores Conservation Coalition v. Coos County*, 363 Or 481, 424 P3d 728 (2018). On September 20, 2018, the Court of Appeals entered an appellate judgment. On September 26, 2018, LUBA entered a notice of appellate judgment, finding that the appellate court decisions did not require any change in LUBA's final opinion and order.

On March 15, 2019, the Applicant submitted a letter pursuant to ORS 215.435(2)(a) requesting that the County initiate the remand. The Applicant's request is found to be timely based on the 180-day clock that started on September 21, 2018, which is the day after the Court of Appeals entered the appellate judgment.

Deciding the merits of this issue requires the last clause in the final sentence of ORS 215.435(1) to be considered: "If judicial review of a final order of the board is sought under ORS 197.830, the 120-day period established under this subsection shall not begin until *final resolution of the judicial review*." (Emphasis added). Specifically, an undated letter received by the County on June 10, 2019, Ms. Tonia Moro argues that the county did not receive the request "within 180 days of the effective date of the final order or the final resolution of the judicial review, and; therefore, the decision must be denied." Ms. Moro argues that the date of the Supreme Court decision – *i.e.* August 9, 2018 - was the key date that represents the "resolution of the judicial review" and thus is the date that started the 180-day clock. Relying on the definition of "decision" set forth in ORS 19.450(1)(a),[1] Ms. Moro concludes that the date of the Supreme Court decision is the "*final resolution of the judicial review.*" If Ms. Moro is correct that the clock started on August 9, 2018, then the March 15, 2019 letter is untimely, and, as a result, "the county shall deem the application terminated."

In this case, staff did not err by accepting the remand application. The "judicial review" process was not finalized until September 26, 2018, when LUBA entered a notice of appellate judgment. Otherwise, what purpose did the LUBA's notice or the judgment serve? The definition of "decision" in ORS 19.450(1)(a) is only important insomuch as it gives further meaning to that term as it is used in the definition of "appellate judgment" set forth in ORS 19.450(1)(b). Nobody argues that the document entered by the Court of Appeals on September 20, 2018 is not an "appellate judgment." The "appellate judgment" is by definition, a "decision." Therefore, the definition of "decision" is not dispositive.

The Applicant points out that, in theory, the Opponents could have further appealed to the United States Supreme Court. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice).

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[1] **19.450 Appellate judgment; when effective; effect of entry in trial court register; effect on judgment lien.** (1) As used in this section:

(a) "Decision" means a memorandum opinion, an opinion indicating the author or an order denying or dismissing an appeal issued by the Court of Appeals or the Supreme Court. The decision shall state the court's disposition of the judgment being appealed, and may provide for final disposition of the cause. The decision shall designate the prevailing party or parties, state whether a party or parties will be allowed costs and disbursements, and if so, by whom the costs and disbursements will be paid.

(b) "Appellate judgment" means the decision of the Court of Appeals or Supreme Court, or such portion of the decision as may be specified by the rule of the Supreme Court, together with an award of attorney fees or allowance of costs and disbursements, if any.

It is sufficient to note that "judicial review "was not "finally resolved" until LUBA entered a notice of appellate judgment. It is this date that triggered the time clock for the remand proceeding. Therefore, the Board finds that the Applicant's March 15, 2019 submittal / filing were timely.

2. Late Submittals Are Not Accepted Into the Record.

The deadline for rebuttal comments was close of business ("COB") on June 24, 2019. The County received Exhibit 51, Sub-Exhibits 102-110 on June 25, 2019. The comments are late and are not considered to be part of the record.

3. Application of CCZLDO §5.0.500.

In an undated letter received by the County on June 10, 2019, Ms. Tonia Moro argues that CCZLDO §5.0.500 requires the County to deem this application revoked in part. CCZLDO §5.0.500 provides:

> ***SECTION 5.0.500 INCONSISTENT APPLICATIONS:***
> ***Submission of any application for a land use or land division under this Ordinance which is inconsistent with any previously submitted pending application shall constitute an automatic revocation of the previous pending application to the extent of the inconsistency. Such revocation shall not be cause for refund of any previously submitted application fees.***

Ms. Moro argues that this application is inconsistent with more recent application submittal known as the "Omnibus II application" as well as "several applications currently pending resolution before the Board since the Board approved the relevant application." The Omnibus II application narrative is set forth in the record at Exhibit 47. However, Ms. Moro does not make any effort to detail specifically how the Omnibus II application or any of the other "several applications" are "inconsistent" with the current application, which leaves the Board with no meaningful understanding of the basis for this allegation of code non-compliance or what would be revoked in the current case. In short, the Board finds that this issue is not adequately developed for review or response and the Board therefore denies Ms. Moro's contention.

4. Application of OAR 660-033-0140

In an undated letter received by the County on June 10, 2019, Ms. Tonia Moro argues that the four conditional use permits that were sought to be extended were void by operation of OAR 660-033-0140. The Board notes that this issue is beyond the scope of the remand proceeding, and therefore is not permitted to be raised in this proceeding.

As an alternative, the Board finds that even if the issue should be considered as part of this remand proceeding, it is without merit. To recap, the permits for which the extensions were sought were as follows:

- ❖ County File No. ACU-13-22 (upland LNG terminal),
- ❖ County File No. ACU-13-23 (port slip and access waterway),
- ❖ County File Nos. ACU-12-12/ABI-12-02 (fill in 6-WD management unit), and
- ❖ County File Nos. ACU-12-16/ACU-12-17/ACU-12-18 (fill in Industrial zone and 7-D management unit).

By its express terms, OAR 660-033-0140 only applies to "proposed development on agricultural or forest land outside an urban growth boundary." None of the four proposed extensions concern permits located on farm or forest, and therefore OAR 660-033-0140 does not apply.

5. Citations to Websites.

Various Opponents to the application continue to make the mistake of attempting to incorporate materials found on the internet simply by referencing website addresses.

However, the Board notes that web-based materials are not part of the "record" when a party simply references a website address but does not submit the actual content in its record filings. LUBA has often cautioned that to merely refer to a document does not make the contents of that document part of the record in the proceeding. *See, e.g., Mannenbach v. City of Dallas*, 24 Or LUBA 618, 619 (1992) (simply referring to documents in testimony does not place such documents before the local decision maker.). As noted in a previous case:

> Web-based content is neither fixed nor permanent; rather, the content of a website can be changed or deleted without any notice. It is possible that web-based material could change, or be deleted, prior to consideration by you, or after you make your recommendation to the Board of Commissioners. Similarly, a party attempting to rebut website content based on a website address would have no certainty that the web-based content to which they are responding is the same content the other party intended to reference.

Furthermore, allowing parties to incorporate website materials by reference would frustrate administrative and judicial review of land use decisions. Under CCZLDO §5.0.600.C, for example, the Board may conduct its review on the record, considering "only the evidence, data and written testimony submitted prior to the close of the record .... No new evidence or testimony related to new evidence will be considered, and no public hearing will be held." Similarly, ORS 197.835(2)(a) provides that review of a land use decision by LUBA "shall be confined to the record." Nothing in the CCZLDO, or in the statutes governing land use proceedings, makes web content that is not printed or downloaded and physically submitted to the decision maker a part of the legal "record." Without a fixed and permanent record, the Board and LUBA will not be able to ascertain reliably the evidence on which the decision maker relied.

For these reasons, there was no effort to view links to websites listed by the parties. The "documents" are not part of the record of this case. If a party only supported an asserted factual

point with a link to the evidence intended to provide the foundation for that asserted fact, these mere references to links were not accepted by the Board as substantial evidence.

6. Alleged Bias of Planning Commissioner Goergen.

Ms. Natalie Ranker argues that Planning Commissioner Todd Goergen is biased, and requests that the Board "have him recuse himself." This is beyond the Board's charge in the case. As LUBA previously pointed out, the Board is the decisionmaker in this case. *Oregon Shores Conservation Coalition et al. v. Coos County*, 76 Or LUBA 346 (2017), *aff'd without op.*, 291 Or App 251, 416 P3d 1110 (2018), *rev den.* 363 Or 481, 424 P3d 728 (2018). ("*OSCC v. Coos County*"). Since the Planning Commission is not the decisionmaker in this case, and actually did not even review or act on the application at all, any allegations that a Planning Commissioner is biased provides no basis for denial of the application.

B. Substantive Responses to Remand Issues.

1. Response to Remand Issue 1 - CBEMP Policy #5

Statewide Planning Goal 16 Implementation Measure 2 creates a strict four-part test for allowing dredging or filling in an estuary. Dredging or filling is only allowed:

- ❖ If required for navigation or other water-dependent uses that require an estuarine location, or if specifically allowed by the applicable management unit requirements of Goal 16;
- ❖ If a need (*i.e.* a substantial public benefit) is demonstrated and the use or alteration does not unreasonably interfere with public trust rights;
- ❖ If no feasible alternative upland locations exist; and
- ❖ If adverse impacts are minimized.

CBEMP Policy #5 is the County's codification of this test. It requires findings of compliance with various criteria before dredging activities of fill are allowed in the Estuary (i.e. the 5-DA and 6-DA Districts at issue here). The Policy states:

*#5 **Estuarine Fill and Removal***

*I. **Local government shall support dredge and/or fill only if such activities are allowed in the respective management unit, and:***

- ***a. The activity is required for navigation or other water-dependent use that require an estuarine location or in the case of fills for non-water-dependent uses, is needed for a public use and would satisfy a public need that outweighs harm to navigation, fishing and recreation, as per ORS 541.625(4) [sic: now codified at ORS 196.825(4)] and an exception has been taken in this Plan to allow such fill;***
- ***b. A need (i.e., a substantial public benefit) is demonstrated and the use or alteration does not unreasonably interfere with public trust rights;***
- ***c. No feasible alternative upland locations exist; and***
- ***d. Adverse impacts are minimized.***
- ***e. Effects may be mitigated by creation, restoration or enhancement of another area to ensure that the integrity of the estuarine ecosystem is maintained;***
- ***f. The activity is consistent with the objectives of the Estuarine Resources Goal and with other requirements of state and federal law, specifically the conditions in ORS 541.615 and Section 404 of the Federal Water Pollution Control Act (P.L.92-500). (Emphasis added).***

*II. **Other uses and activities which could alter the estuary shall only be allowed if the requirements in (b), (c), and (d) are met.***

Identification and minimization of adverse impacts as required in "d" above shall follow the procedure set forth in Policy #4.

As required by Goal #16, only dredging necessary for on-site maintenance of

existing functional tidegates, associated drainage channels and bridge crossing support structures is permitted in Natural and Conservation Management Units (applies to 11-NA,18A-CA, 20-CA, 30-CA, 31-NA and 38-CA). Dredging necessary for the installation of new bridge crossing support structures is permitted in Conservation Management Units and may be allowed in Natural Management Units where consistent with the resource capabilities of the area and the purposes of the management unit.

In the Conservation Management Unit, new dredging for boat ramps and marinas, aquaculture requiring dredge or fill or other alteration of the estuary, and dredging necessary for mineral extraction may be allowed where consistent with the resource capabilities of the area and the purposes of the management unit.

This strategy shall be implemented by the preparation of findings by local government documenting that such proposed actions are consistent with the Comprehensive Plan, and with the above criteria "a", "b", "c", "d", "e" and "f"; however, where goal exceptions are included within this Plan, the findings in the exception shall be sufficient to satisfy above criteria "a" through "d". Identification and minimization of adverse impacts as required in "e" above shall follow the procedure set forth in Policy #4a. The findings shall be developed in response to a "request for comment" by the Division of State Lands (DSL), which shall seek local government's determination regarding the appropriateness of a permit to allow the proposed action.

"Significant" as used in "other significant reduction or degradation of natural estuarine values", shall be determined by: a) the U.S. Army Corps of Engineers through its Section 10.404 permit processes; or b) the Department of Environmental Quality (DEQ) for approvals of new aquatic log storage areas only; or c) the Department of Fish and Wildlife (ODFW) for new aquaculture proposals only.

This strategy recognizes that Goal #16 limits dredging, fill and other estuarine degradation in order to protect the integrity of the estuary.

Findings: The Applicant takes the position that in order for the County to approve dredging in the 5-DA and 6-DA CBEMP zones, the County must adopt findings that, among other things, the dredging is: (1) "required for navigation or other water-dependent use that requires an estuarine location," and (2) a "need (i.e., a substantial public benefit) is demonstrated and the use or alteration does not unreasonably interfere with public trust rights." CBEMP Policy #5.I. The Board finds that the "public need for dredging in the 3-DA, 5-DA, and 6-DA Districts has already been established in CCCP Vol II, Part 3 "Linkage Findings and Exceptions." Nonetheless, the Board adopts two set of findings in the alternative to one another.

a. Public Need.

The applications propose dredging in the 5-DA and 6-DA zones to develop an access channel from the navigation channel to the marine slip associated with the Project. As a result, CBEMP Policy #5.I applies to the applications. In the original decision, the Board determined that Applicant's proposed dredging activities were consistent with CBEMP Policy #5.I.

In reaching this conclusion, the Board found that the dredging was needed to support a "water-dependent" use that requires a location adjacent to water areas with a deep-draft slip and navigation channel. The Board's finding on this point was consistent with the manner in which the Board's interpreted the Ordinance in 2007. *See* Order 07-11-289 PL, at p. 6. This is a resolved issue.

However, the Board found, based on the Hearings Officer's recommendation, that the "need (*i.e.,* a substantial public benefit)" referenced in CBEMP Policy #5.I was limited to a "need" for the dredging activity:

> "The Board concludes that the term 'need (substantial public benefit)' used in Goal 16 and CBEMP Policy #5 refers to a public benefit for the dredging activity, and does not require the Applicant to prove that there is a public need or benefit for the underlying proposed land use (i.e. a marine slip and ship terminal, or more generally, an LNG export facility.)."

LUBA Rec. 86. As discussed below this was inadequate finding.

The Board also found that, in determining whether there was a "need," the Board was not required to balance the benefits with the detriments of the activity:

> "Furthermore, the Board specifically rejects the argument that the public need/benefit standard requires the County to balance need/benefit with (and weigh against) public detriments. In the previous sentence of Policy 5, the drafters required that an Applicant for a non-water-dependent use to demonstrate that dredging and fill 'is needed for a public use and would satisfy a public need that outweighs harm to navigation, fishing and recreation.' That specific language does not come out of Goal 16, but rather is taken from ORS 196.825(4). Had the drafters of the CBEMP intended to impose a similar balancing test requirement onto the 'public need/benefit' standard, they could have easily done so (as they expressly did in the prior sentence), but they chose not to do so."

LUBA Rec. 88. Finally, the Board found that if the dredging was to facilitate development of a permitted or conditional use, there was *per se* a need/benefit associated with the dredging:

> "The Board believes that the 'need/substantial benefit' standard is met if the Applicant demonstrates that the dredging or fill activity

> is needed to enable [construction of] a permitted or condition[al] use allowed in the neighboring coastal shoreland zone and related upland zones. In other words, Coos County has, via its enactment of the CBEMP (aka: Zoning Ordinance), set forth the panoply of uses that the County believes would serve a need and/or a substantial public benefit in each particular zone (*i.e.*, it has established a list of uses that are deemed appropriate in each zone in question.). If the Applicant is proposing one of those favored uses, and there is a need to conduct fill or dredging activity in order to facilitate that favored use, then there is, *ipso facto*, a substantial benefit to allowing the Applicant to conduct that fill/removal so that it can construct and operate the use."

LUBA Rec. 88 (emphasis in original). On the basis of these and other findings, the Board concluded that, for purposes of CBEMP Policy #5, there was a "public need" for the dredging associated with the access channel:

> "The locational question under CBEMP Policy #5, therefore, is much more simple: Goal 16 and Policy #5 ask if there [is] a public need for dredging so that this deep water industrial port facility [can] be located in this shoreline area.
>
> "The clear answer to the required question is 'yes.' The Applicant has shown that there is a need to perform dredging and filling activities at the proposed location in order to make the 5-WD and 6-WD zones usable as a deep-water port facility."

LUBA Rec. 89. On appeal to LUBA, OSCC challenged each of the Board's three primary findings identified above as well as the Board's ultimate conclusion that the dredging activities proposed in the Applications were consistent with CBEMP Policy #5. LUBA sustained OSCC's challenge, but only in part.

First, LUBA held that the "public need" analysis under CBEMP Policy #5 should be focused on the "public need" for the *use* the dredging serves, not on the need for the dredging *per se*:

> "If the 'substantial public benefit' analysis is limited to evaluation of the public benefits of the dredge or fill activity itself, then the standard would never be met, as it is difficult to conceive of any public benefit from dredging or filling that it distinct from the use that dredging or filling serves. * * * * *. We conclude that, contrary, to the county's finding, CBEMP Policy 5(I)(b) requires the county to evaluate the substantiality of the public benefits provided by the use that the proposed dredging serves, in this case the LNG terminal, or at least those components of the terminal that are properly viewed as water-dependent uses."

OSCC, 76 Or LUBA at 354. In retrospect, the formulation of the "public need" standard was unclear, and perhaps internally inconsistent. For example, at one point the decision stated "the question under CBEMP Policy #5 is not whether there is a public need for natural gas. Rather, the question is whether there is a public need or benefit in constructing this marine slip and ship terminal in this particular shorelands / estuary location." But at other time, the decision framed the inquiry more narrowly. The Board has made conclusive findings on the need/ public benefit issue below, consistent with LUBA's direction.

Moving on, LUBA denied OSCC's contention that regardless of the language of CBEMP Policy #5, that *Statewide Planning Goal 16* requires a balancing of the benefits and detriments of a proposed use before it can be allowed under CBEMP Policy #5.I.b, because that was not a fair reading of the standard:

> "Given the absence of an express or fairly implied requirement to balance or weigh benefits against adverse consequences under Goal 16 IR2(b), and the fact that adverse consequences expressly addressed under a different standard, we decline to read Goal 16 IR(2)(b) to include an implicit requirement to balance or weigh public benefits of the proposed use against adverse consequences."

OSCC, 76 Or LUBA at 355. Finally, LUBA concluded that the Board erred in finding that dredging associated with a permitted or conditional use necessarily provided a public benefit:

> "The county's view that the 'need/substantial public benefit' standard in CBEMP Policy 5(I)(b) and Goal 16 IR2(b) is met simply by the fact that the proposed dredging serves a use allowed under the county's code, conflates CBEMP Policy 5(I)(a) and (b) and gives no independent effect to the latter. Even if the proposed dredging serves a water-dependent use allowed under the county's code, the county can allow the dredging only if it also finds that the use provides a substantial public benefit."

OSCC, 76 Or LUBA at 356. In reflecting back on this issue, LUBA's point is well-taken as: Policy 5(I)(b) must be interpreted to mean something different than Policy 5(I)(a). Otherwise, the two policies would be superfluous.

Having summarized the issue as it currently stands now is the time for the Board to resolve the issue presented on remand. As it turns out the Board states that, the parties may have missed some important considerations set forth in CBEMP Policy #5 and the Comprehensive Plan. CBEMP Policy #5 states that

> "This policy shall be implemented by the preparation of findings by local government documenting that such proposed actions are consistent with the Comprehensive Plan, and with criteria "a", "b", "c", "d", "e", and "f" above. However, where goal exceptions are

included within this plan, the findings in the exception shall be sufficient to satisfy criteria "a" through "d" above."

The County has already taken a Goal 16 exception for this site that covers the proposed use. Therefore, the "public need" findings relating to the proposed ____ activities already exist, and are incorporated into Vol. II, Part 3 of the Comprehensive Plan. This is discussed in more detail below.

Vol. II, Part 3 of the CCCP, which contains the "Linkage and Goal Exceptions" findings. The linkage findings "present an analysis of the management decisions in [CCCP Vol II, Part 1] as they relate to the prescriptive requirements of the Statewide Planning Goals administered by [LCDC]." *See* CCCP Vol II, Part 3. at p. 1.0-1.

There are three "Linkage" charts. The first of these is entitled "LCDC Goal 16 "Linkage Matrix." One of its subheadings addresses Goal 16 Implementation Measure 2. The Subheading is called "Other Considerations / Where dredge or fill activities are allowed, has there been a Demonstration..." CCCP Vol II, Part 3, Section 2.2(ii) explains the mechanics of this chart, as follows:

> (ii) "Other Considerations": This section consists of six columns assessing compatibility with adjacent areas, energy cost/benefit and the extent of commitment of the water surface, and four columns assessing proposals for dredge or fill against the Four findings required in Goal #16:
>
> (a) Required for water-dependent uses,
> (b) Public Need,
> (c) No upland alternatives, and
> (d) Adverse impacts are minimized
>
> The first three findings are addressed in a general sense in the "Linkage" narrative for each segment where applicable. However, the fourth finding cannot be made until a specific action is proposed, and is therefore made on a case-by-case basis during permit review. The four columns headed "Consistency Decisions" indicate whether each segment is consistent with the Goal with respect to the management designation it is placed in ("Natural", "Conservation" or "Development") and whether the appropriate findings have been made for dredge and fill actions. A check (✓) in this column means that this segment complies with the Goal; a cross (X) means that it does not, and an Exception is required.[2] In

[2] Note that the County took an "Exception" to Goal 16 for Segments 3-DA, 5-DA, and 6-DA: *See* CCCP Vol II, Part 3, Exception No 1. These Districts contain clam beds, tidal flats, and subtidal areas shoreward of -15 feet which are of importance for fish habitat, including juvenile salmonid feeding / rearing. The Exception suggest that the presence of these resources would have suggested that this segment should be assigned a "conservation management unit." However, Coos County determined that despite the presence of these resources, "a development

16 segments, the actual designation requires an Exception; in 12 segments..., dredge or fill actions also require Exceptions (four of these segments also require Exceptions for their designations). The remainder are found to be in compliance with the Goal; see section 1.5 below for this "Linkage" findings for each segment which supplement the "Linkage Matrix".

With the above-quoted tutorial in mind, the relevant portion of the "LCDC Goal 16 "Linkage Matrix" can be summarized as follows:

	That the activity is required for navigation or other water-dependent use that requires an estuarine location?	.... That a public need exists?	... That no alternative upland location exists?	... That adverse impacts are minimized as feasible.
5-DA	Yes (D/F)	Yes	Yes	✸
6-DA	Yes (D/F)	Yes	Yes	✸

Legend:
(D) Dredging only
(F) Fill only
(D/F) Dredging and fill
(✸) Findings on Impacts are made on a case by case basis during permit review.

This particular "Linkage Matrix" chart as providing a legislative finding that a "public need" for dredging and fill exists in the 5-DA and 6-DA zones. As further demonstrated below, the findings that accompany the matrix provide that the legislative determination is based on the purpose and expected uses in a particular segment as stated in its "Management Objective." The management objectives for these two areas is for navigation and to utilize these two aquatic areas in support of upland water dependent uses and industrial uses. Note that the required findings pertaining to "minimization of adverse impacts" are shown as being deferred until the time of permit application: the Legend states that " ✸ Findings made on a case by case basis during permit review."

A second chart is called the "Aquatic Uses and Activities 'Linkage' Matrix." As relevant here, this matrix can be summarized as follows:

	New Dredging (Activity) Allowed by Management Segment	New Dredging (Activity) Allowed by Goal 16	Consistency Decision: Are Uses / Activities Consistent with Goal 16 (Yes)	Consistency Decision: Are Uses / Activities Consistent with Goal 16 (No)
5-DA	✓	✓ n9	✓	[left blank]
6-DA	✓	✓ n9	✓	[left blank]

9. See Policy No 5 for Dredge and Fill. Also see Policy No. 20 for DMD and Policy No. 8 requiring mitigation.

management unit is needed in these- three segments to allow for dredge, fill and other necessary actions to develop deep-draft access to prime water-dependent development shorelands." In these segments, no exception was needed for Dredge & Fill activities]

Note that there are two columns that differentiate between what is what is allowed by the management segment and what is allowed by the Goal 16. The purpose of this chart is to graphically depict whether the uses and activities that the County desired in each management unit were consistent with Goal 16. In cases where a discrepancy was realized, the County usually determined that an exception was needed. For dredging activity in the 3-DA, 5-DA and 6-DA Districts, this Linkage Matrix chart shows a "✓" indicating that it is permitted by the management segment, but that Goal 16 requires additional analysis as set forth in CBEMP Policy #5. Note, however, that the "consistency" column shows whether the District is compatible with the Goal, and in the cases of 3-DA, 5-DA and 6-DA Districts, this is because the County adopted additional findings specific to those districts. Those findings are discussed below. In addition, the County took an Exception to Goal 16 to put these districts into a Development Management unit, instead to the Conservation Management unit. A conservation management unit would have otherwise been warranted due to the presence of clam beds, tidal flats, and shallow subtidal areas of -15 MLLW, which are important as fish habitat. However, the County specifically determined via the exception that dredging was more important than the clam beds, tidal flats, and shallow subtidal areas, because of the need for deep draft access for prime water-dependent development shorelands at this particular location.

This matrix shows that dredge and fill activity is allowed by the management segment, subject to the finding that "adverse impacts are minimized, which was a standard that was deferred until permit application. Although Footnote 9 states that Goal 16 requires compliance with Policy 5, for these two management segments, the "public need aspect of that determination was made for 3-DA, 5-DA and 6-DA Districts when the Comprehensive Plan was adopted, whereas the "minimization of adverse impacts" aspect of Policy #5 was deferred. Again, the findings that accomplish this are discussed below.

CCCP Vol II, Part 3 Section 2.3 further discusses the written "Linkage findings." It begins with another tutorial:

> 2.3 Introduction: Site-Specific "Linkage" Findings
>
> The following section provides "linkage" findings on a segment-by-segment basis, where they are necessary to substantiate the conclusions represented in the "Linkage Matrices". As mentioned above, some of the information in the "Linkage Matrices" is simply drawn from factual material in the mapped and written Plan inventories, while other information represents conclusions drawn from additional findings provided in the "Linkage" narrative. This section contains those findings.
>
> It should be pointed out that findings cannot always be made in the Plan to support all possible types of uses and activities that might occur in a particular segment. This is because it is not possible to anticipate all circumstances which might attend a particular proposal. In such cases, necessary findings would have to be made at the time the proposal is made. However, where a segment is intended for general classes of uses/activities, as stated in the Management Objective, it is possible to make the required findings, as the Plan inventory lays an adequate basis for them.

The "Linkage" findings discuss dredging and fill as follows:

2.5 Dredge and fill actions, other reductions, and potential Degradations

The following section describes dredge and fill actions in general terms, based on the purpose and expected uses in a particular segment as stated in its "Management Objective". In most cases, specific findings cannot be made in the Plan because impacts will vary with each individual project. Therefore, these findings must be made on case-by-case basis during permit review.

Note also that special Plan conditions require findings to be made some actions at the time a permit application is made. These include fills in Conservation and Natural Management Units (see Policy #6), rip-rap or bulkheads involving fill (see Policy #9), and uses and activities subject to Policy 5 as a special condition.

This is consistent with the "Goal 16 'Linkage' Matrix," which is discussed above. That matrix indicates that "findings on impacts are made on a case-by-case basis during permit review." Stated another way, with regard to the 5-DA and 6-DA Districts, the Linkage Matrix map shows that the County has already determined that a "public need" exists for dredge and fill activities in the 5-DA and 6-DA Districts, but that it "deferred" the "adverse impacts are minimized as feasible" determination.

Furthermore, the "Linkage Findings" refine the analysis contained in the "Linkage Matrix" chart by making a site- specific public need determination:

Segment 5 DA

(i) Dredge and fill actions are necessary for navigation access and future water-dependent development of the Henderson Marsh Site.

(ii) For public need and alternative upland locations, see findings for Segment 3 DA.

Segment 6 DA

(i) Dredge and fill actions are necessary for navigation and future water dependent development of the remaining undeveloped water front of this segment.

(ii) For public need and alternative upland locations, see findings for segment 3 DA.

Since the Linkage Findings for the 5-DA and 6-DA Districts cross reference to the findings for the 3-DA districts, those findings are set forth here as well:

Segment 3 DA

(i) Dredge and fill actions are necessary for navigation and future water-dependent development of Port's North Spit land.

(ii) A public need exists because this area is essential for future economic development in Coos County [see reference].

(iii) There are no alternative upland locations for the fill that will be required because it is necessary t

This should end the "public need" inquiry, because findings related to public need were already made in the plan for the types of uses proposed, and these findings are acknowledged and bindings on all parties. *See 1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 216, 124 P3d 1249 (2005) ("The comprehensive plan is the fundamental document that governs land use planning. Citizens must be able to rely on the fact that the acknowledged comprehensive plan and information integrated in that plan will serve as the basis for land use decisions, rather than running the risk of being "sandbagged" by government's reliance on new data that is inconsistent with the information on which the comprehensive plan was based. LUBA erred in concluding otherwise."); *Foland v. Jackson County* 311 Or 167, 180, 807 P2d 801 (1991) ("An acknowledged comprehensive plan is the controlling document for local government land use decisions made under that plan."); *Gunderson LLC v. City of Portland*, 62 Or LUBA 403, 413-18 (2011) (If City relies on an Economic Opportunities Analysis to conclude that a land use decision will not reduce the supply of industrial sites in the city, that EOA must be incorporated into the Comprehensive Plan) *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 22, 994 P2d 1205 (2000); *Residents of Rosemont v. Metro*, 173 Or App 321, 333-34, 21 P3d 1108 (2001); *See Southern Oregon Pipeline Information Project v. Coos County,* 57 Or LUBA 44, 57-8 (2008), *aff'd w/o op.,* 223 Or App 495 (2008), *rev. den.,* 346 Or 65 (2009)(CBEMP inventory maps control).

This said, the Board also notes the following language set forth in CBEMP Policy #4:

> ***Where the impact assessment requirement (of Goal #16 Implementation Requirements #1) has not been satisfied in this Plan for certain uses or activities (i.e., those identified above), then such uses or activities shall not be permitted until findings demonstrate the public's need and gain which would warrant any modification or loss to the estuarine ecosystem, based upon a clear presentation of the impacts of the proposed alteration, as implemented in Policy #4a.***
> (Emphasis added).

Additional finding to cover this issues have been covered in this section. However, the Board finds that the above quoted language in CBEMP Policy #4 was not intended to apply in all situations. Specifically, the first clause of the sentence limits applicability to circumstances "Where the impact assessment requirement (of Goal #16 Implementation Requirements #1) has

not been satisfied in this Plan for certain uses or activities (*i.e.*, those identified above) * * *." In this instance, the Board notes that the County did, in fact, make a finding of "public need and gain" associated with dredging in the 3-DA, 5-DA and 6-DA Districts in order to support deep draft development, as demonstrated in the exception language quoted and highlighted above. The Board does not read this language to require a duplicate "public need and gain" findings to be made in the deferred impact assessment analysis.

Nonetheless, due to the fact that the analysis set forth above and the issue itself is complex the County adopts the following set of findings in the alternative to the analysis set forth above. As part of this alternative set of findings, the relevant law leads the Board to believe that the determination of public need must be done on a case by case basis, and the County must now determine whether there is a substantial public benefit: (aka "public need") for the water-dependent aspects of the LNG terminal that require dredging of the access channel.

Before beginning that analysis, clarification needs to be made on why the County should not be using the "need/substantial public benefit" in the broad manner that the Opponents seek. The County should not be seeking to replicate FERC's role in the permitting process, because it simply does not have the expertise or staff resources to do so. Nor is it fair to the Applicant to have multiple decision-makers essentially deciding the same question.

FERC is uniquely qualified, due to its staff expertise and resources, to understand and evaluate the complex policy and permitting issues associated with interstate energy facilities. Coos County should not place itself in a position where it makes a decision that is directly contrary to FERC. Rather, Coos County's role in the permitting process is much more limited than FERC's, as the County is only concerned with issues that relate to land use regulatory requirements, which also constitute the County's implementation of the Federal Coastal Zone Management Act. In some aspects of the permitting process, this will necessarily lead to some overlap in the issues that are considered. However, the County should not, and legally, may not subject this application to review beyond adopted local standards and criteria into the more broad realm of federal energy policy.

The County should also be mindful that the 'need/substantial public benefit' standard in CBEMP Policy 5(I)(b) has its roots in Goal 16. In this case, the Applicant has to seek a fill / removal permit from DSL. Statewide Planning Goal 16 Implementation Requirement 3 states:

> *3. State and federal agencies shall review, revise, and implement their plans, actions, and management authorities to maintain water quality and minimize man-induced sedimentation in estuaries. Local government shall recognize these authorities in managing lands rather than developing new or duplicatory management techniques or controls. Existing programs which shall be utilized include:*
> * * * * *.
> *d. The Fill and Removal Permit Program administered by the Division of State Lands under ORS 541.605 - 541.665 [now renumbered ORS 196.810 et seq.].* (Emphasis Added).

In light of the fact that DSL enforces the Fill and Removal law, the County may not seek to replicate DSL's permitting authority beyond enacted local review criteria. Most of the opponent's arguments essentially ask the County to do just that: duplicate and replicate the role of FERC, DEQ, and DSL in the permitting process.

In the findings set forth below, the first step is to define the phrase "need (*i.e.* substantial public benefit)," followed by an evaluation of the substantiality of the public benefits provided by the LNG terminal as well as the specific components of the terminal that are properly viewed as water-dependent uses.

The CCCP Vol II, Part 1 contains a definition of "public gain." This definition originated in Goal 16, as first adopted on December 18, 1976. The original version of Goal 16 contained a different wording for Implementation Requirement No. 1 ("IR1") than the current version, as follows:

> Unless fully addressed during the development and adoption of comprehensive plans, actions which would potentially alter the integrity of the estuarine ecosystem shall be proceeded by a clear presentation of the impacts of the proposed alteration, and a demonstration of the ***public's need and gain*** which warrant such modification or loss. (Emphasis added).

See Statewide Planning Goal 16, Dec. 18, 1976, effective, January 1, 1977. The Statewide Planning Goals (1977) also defined "Public Gain" as follows:

> Public Gain. The net gain from combined economic, social, and environmental effects which accrue to the public because of a use or activity and its resulting effects.

Id. This same definition is still found in the Statewide Planning Goal Definitions and in the CCCP, Vol II, Part 1, Section 3, at p. 13. In the 1984 Amendments to Goal 16, IR1 was amended such that the phrase 'public need and gain" was changed to "public gain," which supports the interpretation as an effort not to change substantive policy but rather to make the language in IR1 consistent with the definition. In other words, "need" and "gain" are most likely considered to be synonymous.

The 1984 Amendments to Goal 16 also expanded the "Implementation Requirements" Section by creating a new "Implementation Requirement 2." IR2 remains unchanged in the current version of Goal 16. IR2 applies to dredging and fill activity and does not use the term "public gain," but instead uses the phrase "need (*i.e.* a substantial public benefit"). The Board accepts that interpretation that the term "need (i.e. a substantial public benefit") must mean something different than "public gain."

To define the phrase "need (*i.e.* a substantial public benefit"), the Board considers the dictionary definition of the words that make up the phrase:

- Need: "the want of something requisite, desirable, or useful. Webster's Third New International Dictionary, Unabridged, (2002), at p. 1512. *See also* Black's Law Dictionary, Sixth ed. at p. 1103 ("A relative term, the concept of which must, within reasonable limits, vary with the personal situation of the individual employing it, Term means to have an urgent or essential use for (something lacking); to want, require.").

- Substantial: "1a: consisting of, relating to, sharing in the nature of or constituting substance, b: not seeming or imaginary." Webster's Third New International Dictionary, Unabridged, (2002), at p. 2280. *See also* Black's Law Dictionary, Sixth ed. at p. 1428 ("Of real worth or importance, of considerable value, valuable.").

- Public: 1a: "of, relating to, or affecting the people of an organized community, b: of or relating to the international community or to mankind in general." Webster's Third New International Dictionary, Unabridged, (2002), at p. 1836. *See also* Black's Law Dictionary, Sixth ed. at p. 1227 ("Pertaining to a state, nation, or whole community, * * * relating to or affecting the whole people of a state, nation, or community; not limited or restricted to any particular class of the community.").

- Benefit. "2a: something that guards, aids, or promotes well being, 2b: a useful aid. 3. Payment , gift, as a: financial help in time of sickness, old age, or unemployment – see BENEFIT SOCIETY. 4: A natural advantage." Webster's Third New International Dictionary, Unabridged, (2002), at p. 204. *See also* Black's Law Dictionary, Sixth ed. at p. 1227 ("Advantage, profit, fruit, privilege, gain, interest).

Based upon these definitions, it is reasonable to blend or synthesize these four definitions into the following:

> "proving considerable and important advantages or gains to the people, as a whole, within a nation, state or community, as opposed to a particular class of persons within that nation, state or community."

This formulation does not require the weighing of benefits against detriments, nor does it require that the public benefit be entirely local in nature. It does recognize that to the extent a person wishes to conduct fill or removal operations in waters located within the CBEMP, that the

Applicant must demonstrate some substantive benefit, advantage or gain to the public at large, as opposed to a purely selfish or private interest. That does not mean that every individual member of the public will be afforded a direct benefit, advantage or gain, but rather that the collective nation, state, or community realizes some collective gain or advantage. It also recognizes that the benefits must be significant and not imaginary, although there is no requirement that the benefits be guaranteed.

As an example of how the "need (substantial public benefit) standard could be applied is provided by the following three hypotheticals: if a wealthy individual wanted to build a marina to solely to dock his private yacht, it might be fair to conclude that the public is not getting enough benefit from that project to warrant authorizing the fill and removal of publicly-owned waters. In contrast, an open-to-the-public marina would easily pass the "need / substantial benefit test." A private "yacht club" for wealthy patrons may be a gray area, but might provide enough jobs and generate sufficient tourism dollars to make a decision-maker say that the project meets the public benefit test.

As an example of how this phrase has been interpreted in the past, the EIS for the 1994 Channel Widening Project concluded that deepening the navigation channel of Coos Bay would satisfy the need / public benefit criterion due to the increased economic benefits to the region and maintaining the competitive advantage that the port has in relation to other west coast ports. Exhibit 5 to the "Feasibility Report on Navigation Improvements with Environmental Impact Statement," January 1994, at p. 3. *See* Exhibit 42, Sub-Exhibit C.

For the reason set forth above, the Board follows LUBA's holding in *Oregon Shores Conservation Coalition*, 76 Or LUBA at 355, and rejects any argument that is framed in terms of "the terminal's disadvantages will outweigh the advantages" or similar verbiage. *See e.g.*, Letter from Wim de Vriend dated June 10, 2019 (advancing this argument) (Exhibit 10); Letter from Steve Miller dated June 10, 2019 at p.1 (Exhibit 11); OSCC letter dated June 10, 2019 at p. 3-6. (Exhibit 2). In this regard, it is noted that FERC and DSL apply a different standard that does involve a weighing of public benefits against the potential for adverse impacts on landowners and communities." *See* OSCC letter dated June 10, 2019, at p. 3 (Exhibit 2).

The Board rejects the argument, advanced by attorney Katy Eymann, that the two phrases "need' and "substantial public benefit" create two separate and distinct standards. The phrase employs the abbreviation "*i.e.*", which is the Latin phrase "*id est.*" In Latin, the phrase *"id est"* means "that is" or "that is to say." Black's Law Dictionary, Sixth ed. at p. 746. It is synonymous with the phrase "in other words." Therefore, the Board rejects the argument that "need' and "substantial public benefit" create two different standards. Instead, the Board views "substantial public benefit" as a clarifying phrase to help further articulate and define what is meant by the term "need." None of the parties attempt to define the phrase in any other substantive way.

Similarly, for reasons discussed in more detail below, the Board rejects arguments that are premised on the idea that "[t]he existence of a market for LNG does not constitute a public need." *See* Letter from Christine M. Moffitt, PhD. dated June 10, 2019 at p. 3. (Exhibit 12). As discussed below, the energy market is unique insomuch as it has broad and far-reaching national

security implications, and the creation of an export market for LNG is of great strategic benefit to this country's national security.

A review of potentially applicable case law has been undertaken to see if LUBA or the courts have defined the term "need (i.e. substantial public benefit)" or similar terms such as "public need" to identify, if applicable, a well-accepted legal meaning of these terms, or whether some guiding principles for applying the phrase exist. The result of this case law search was generally inconclusive, because while some cases address the phrase, none seek to define it or explore the gray areas in any depth.

One of the more useful cases applying the public need standard is *Columbia Riverkeeper et al v. Clatsop County (Bradwood Landing, LLC),* 58 Or LUBA 190 (2009). In *Columbia Riverkeeper,* LUBA note that the "public need" standard is subjective.[3] *Id.* at 220. In that case, a need for an LNG import marine terminal was found based on the following benefits:

- ❖ Creation of additional natural gas supplies in the region,
- ❖ Ability to use an existing port facility, and
- ❖ Use will fund improvements for public infrastructure,

Id. at 219-220. All three of these reasons still have some potential relevance, albeit the "creation of additional natural gas supplies in the region" only would apply if the proposal was for an import terminal. However, once the LNG infrastructure is place, it could be used for future imports if the market conditions changed.

One line of cases that discusses the "public need" standard stems from the application of ORS 196.810, which is part of Oregon's fill and removal law. ORS 196.825(3) provides, in relevant part:

> ***(3) In determining whether to issue a permit, the director shall consider all of the following:***
> ***(a) The public need for the proposed fill or removal and the social, economic or other public benefits likely to result from the proposed fill or removal. When the Applicant for a permit is a public body, the director may accept and rely upon the public body's findings as to local public need and local public benefit.***

The case law interpreting this statute can provide only limited and generalized assistance, because the statute is worded somewhat differently. For example, ORS 196.825(3) expressly identifies factors that must be considered, including some future effects: The "social, economic or other public *benefits likely to result* from the proposed fill or removal." That standard is not found in Goal 16 or CBEMP 5(1)(b), but will be applicable when the Applicant seeks fill and

[3] In cases where conflicting evidence is submitted pertaining to a highly subjective standard, the choice of how that evidence is weighed is generally left to the decision-maker. LUBA is not allowed to substitute its judgment for the decision-maker. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland,* 25 Or LUBA 601, 617 (1993). *See also Knudsen v. Washington County,* 39 Or LUBA 492 (2001).

removal permits. Thus, although the fill and removal statute is somewhat different, and has been amended over the years, the caselaw may nonetheless provide some general guidance.

The case of *Morse v. Department of State Lands*, 285 Or 197, 590 P2d 709 (1979) addressed the expansion of the SORA airport into the Coos Bay estuary. The project (which, incidentally was eventually built and is currently in operation) did result in the "fill" of some 32 acres of the Coos Bay estuary. To some extent, it did interfere with navigation, fishing, and recreational uses in order to further an entirely non-water related use. The Supreme Court interpreted state law to require DSL to employ a weighing process and make an affirmative finding that the project would serve a public need in order for DSL to be authorized to issue the permit, and that such a need "predominated" over the interference with trust rights. The focus was on the question of whether the runway extension was "needed" based on economic considerations, which is to say that the airport extension would be important to the life and economy of the people living in the region. It is worth noting that the *Morse* case involved a non-water-dependent use, and therefore approval of the fill permit involved a slightly different test than the one applied here (e.g., in *Morse* the test requires the public need to *outweigh* the interference to navigation, fishing and other trust rights).[4]

The case of *Coos Waterkeeper v. Port of Coos Bay*, 363 Or 354, 423 P3d 60 (2018) involved a challenge to a fill and removal permit issued by DSL for the construction of a new marine terminal in Coos Bay. If approved, the permit allows the Port to dredge 1.75 million cubic yards of material from the bay, while also imposing a number of conditions to address environmental concerns. Petitioners challenged the DSL's conclusion that it was not required to consider the effects of operating the proposed terminal when it evaluated and approved Respondent's application for the permit. Specifically, the petitioners argued the word "project" in ORS 196.825(1)—which provides that the director shall grant a fill/removal permit if she determines "the project" described in an application is consistent with state policy to preserve and conserve water resources—encompasses ongoing operations. Respondents contended the term "project" does not include ongoing operations. After examining the text, context, and legislative history of ORS 196.825(1), the court found the term "project" relates only to the construction of a proposed development, and does not include the effects of operating that development after it is completed. Therefore, the court concluded the director correctly concluded that DSL was not required, under ORS 196.825, to consider ongoing operations of the proposed marine terminal when evaluating Respondent's application for a fill/removal permit.

The *Coos Waterkeeper* case is interesting because the Court notes the factual differences between fill in an estuary, such as was occurring with the *Morse / SORA* case, as opposed to a dredging case, such as this, especially where that dredging supports *increased* navigation:

> Even absent those changes, however, the very different facts of

[4]After *Morse*, the legislature has significantly amended the fill and removal statute. For example, in the next legislative session, the representative for the Coos Bay area introduced HB 2985 (1981) with the purpose of increasing the emphasis given to economic factors in the permitting process. *See* Exhibit A, Senate Committee on Trade & Economic Development, HB 2985, July 13, 1981 (letter from Rep. Bill Grannell) ("I am asking that economic benefits of a project and costs of non-approval be clearly reviewed in a balanced fashion in the decision-making process."). Ultimately, that bill added three factors to the list of criteria, including "the economic cost to the public if the proposed fill [or removal] is not accomplished." Or. Laws 1981, ch 796, § 1 (codified at ORS 196.825(2)(b)).

> *Morse* mean that it provides little support to petitioners. In *Morse*, the purpose of the fill permit was to extend an airport runway into the bay, thus necessarily reducing the extent of state waters and interfering with navigation, fishing, and recreational uses in order to further an entirely nonwater related use. Here, in contrast, the permit allows changes in the depth, contours, and other aspects of Coos Bay in furtherance of navigation—one of the three uses that is specifically intended to be "preserved" under the statute. Indeed, the permit here will *increase* the extent of state waters. That does not mean, of course, that the permit must be granted without making the determinations required by statute or that appropriate conditions need not be imposed on any permit. But the factual gaps between the project at issue here and the airport extension in *Morse* make that decision of little moment in this proceeding.

Id. at 360.

Several cases arising in the land use context address "public need" and may provide some guidance for the Board in interpreting this phrase. *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973); *Duddles v. City Council of West Linn*, 21 Or App 310, 535 P2d 583 (1975), *rev. denied* (July 5,-1975) (public need for a shopping center); *Kristensen v. City of Eugene Plan. Comm.*, 24 Or App 131, 544 P2d 591 (1976); *Braidwood v. Portland,* 24 Or. App. 477, 480, 546 P.2d 777, 778 (1976); *Neuberger v. City of Portland*, 288 Or 155, 170, 603 P2d 771 (1979). A few cases provide some limited guidance:

The case of *South of Sunnyside Neighborhood Ass'n. v. Board of Commissioners of Clackamas County,* 280 Or 3, 569 P.2d 1063 (1977) addressed proposed zone changes which were needed for the future development of what is now the Clackamas Town Center Shopping Mall. The Oregon Supreme Court discussed the "public need" standard set forth in *Fasano*:

> [t]he requirement of a showing of public need for change and that the change under consideration is the best way of meeting that need -- also had their genesis in the statutory pattern. In our opinion in [Fasano] we examined the statutory requirement of a comprehensive plan, and we quoted ORS 215.055(1) which listed the considerations upon which planning efforts were to be based. All of those considerations have to do with the characteristics and the welfare of the community at large. When we held that a single-tract zone change must be shown to meet a public need, and to be the best way of meeting that need, we were requiring only what was implicit in the legislation governing planning and zoning: <u>that land use decisions made at the instance of a private party be made only for reasons having to do with the needs and welfare of the community at large rather than for the accommodation of individual landowners or private developers.</u>

The Court's analysis in this instance is supportive of the Board's analysis of the applicable CCZLDO criterion, insomuch as it requires consideration of the needs and welfare of the public at large, not just the needs of the Applicant. Although this case speaks in terms of public need in the context of the "community," that seems to be simply a reflection of the nature of the proposed use (a shopping mall), and does not seek to establish a geographic limit on the public need test.

LUBA addressed a "public need" standard in *Roden Properties v. City of Salem*, 17 Or LUBA 1249 (1989) in the context of a plan amendment and zone change to allow a public storage facility. The petitioners argued that the city improperly focused on the market demand for such a facility. LUBA concluded that market demand was a relevant consideration:

> Petitioner contends the city improperly relies upon the existence of a market demand for self-service storage facilities in determining that a public need exists for more such facilities. Petitioner cites our decision in *Allen v. City of Banks,* 9 Or LUBA 218 (1983) for the proposition that a market analysis is not a proper substitute for a public need analysis. Petitioner maintains that the fact that a market exists for a particular use does not equate with a need for it. Petitioner cites *Still v. Marion County,* 42 Or App 115, 122, 600 P2d 433 (1979).
>
> Even assuming petitioner is correct that it would be error for the city to interpret public need under SRC 64.090(b)(2) to be satisfied by a demonstration of market demand for the proposed change, the city's findings do not analyze only market demand in establishing that a public need exists. While it is true that the city found "[t]he Applicant's statistics reflect the more accurate population, actual square footage in comparable use and the truer market demand of [sic] such storage space per capita" (emphasis supplied) (Record 44), the city's findings also state "from the existing demographic data and the inventory of the rentable space in other comparable existing self-service storage facilities in the user area, we conclude that there is a public need in the immediate area for the proposed use." Petitioner has not adequately explained the basis for its argument that the city only applied a market analysis to decide that a public need exists for the self-service storage facility proposed.

LUBA was correct to not view *Still* and *Allen* as controlling guidance, because those cases both originate in completely separate contexts where the inquiry is focused on other policy matters. *Roden* does show that it is possible for cities to consider market demand for a land use when determining need, at least in conjunction with other considerations

In *Ruef v. City of Stayton*, 7 Or LUBA 219, 229 (1983), LUBA discussed whether a "need" for land uses could be established by a community need for employment and diversification of the economy via the siting of a new employer:

> We recognize that "public need" is a very difficult matter to define. See *DLCD v Tillamook County*, 3 Or LUBA 138 (1981). It is not as though the issue had never been before us, however, In Friends of *Linn County v. Lebanon*, 1 Or LUBA 50 (1980), we discussed public need in terms of the community's need for an electronics facility that could employ a considerable number of citizens. In that case, public need was the community's need for a diversification of its economy and greater employment. Here, the city seems to have equated public need not with the need for the particular use, but with a need for landscaping and buffering in this particular neighborhood. We do not believe that discussion is sufficient to show that there is a need for the intended use, that is, the warehouse. For example, we are unable to find any discussion of any need that may exist for the community to support the cannery. There is, however, a statement in the findings that the cannery has a need for warehouse space. That is the cannery's need, however, and though the cannery's need may also be the community's need, that link is not established in the findings. We, therefore, believe the city has failed to comply with its ordinance requiring it to show that a public need exists for the use

Thus, LUBA has previously accepted diversification of the economy and greater employment as a basis for establishing public need. Stated another way, such attributes can constitute a substantial benefit or gain to the community.

In this proceeding, multiple local residents have testified to the importance of diversifying and expanding the local economy of Coos County in light of the decline in the fishing and lumber sectors. The Board finds this evidence to be highly persuasive, particularly since this seems to be a prevailing view in the community. *See* "Geopolitical Case for Jordon Cove," dated Sept. 12, 2018. Exhibit 13. **(Quoting Coos County Commissioner John Sweet as stating that the project would be vital for his county, which has struggled for decades with the slowdown in the logging industry, and would benefit from the high-paying jobs and big boost to the property tax base.**

To support its position that a need is fulfilled by this project, the Applicant focuses on the increase in jobs, tax revenues, and economic activity to support the conclusion that there is a public need for the water-dependent aspects of the use, that are dependent upon the dredging of the access channel in the 5-DA and 6-DA CBEMP zones. As support for this conclusion, the Applicant primarily seeks to have the County rely upon the following testimony in the record:

- The narrative for the Applications dated November 3, 2015, which described enhanced commerce, job creation, and ad valorem tax revenues generated by the Project (LUBA Rec. 9370);

- ECONorthwest's report entitled "Economic Impact Analysis of the Construction of an LNG Terminal and Natural Gas Pipeline in Oregon" and dated March 6, 2012 (LUBA Rec. 11753 - 11770), which made the following conclusions about the economic impact of the Project:

    - Direct economic output from the Project of approximately $6.641 billion in Oregon and Washington, including downstream impacts.

    - Overall net value added to the economy of approximately $1.738 billion over a three-year period.

The Board concludes that these types of benefits easily fall within the ambit of what should be considered a "need / substantial public benefit." *See also* Exhibit 50, Sub-Exhibit 18, at pp. 18-21 (discussing benefits).

Further, the Board believes that one significant public benefit of the project is the funding of public infrastructure. For example, the proposal, if implicated, will require upgrades to the port facilities, such as the creation of a vessel traffic information service (VTIS) for the port. The project will also fund channel deepening / widening efforts, transportation improvements, and similar public infrastructure. *Compare* Coos Bay Harbor Safety Plan, Sept. 2018 at p. 6 (no existing VTIS system) with LUBA Rec. 3765 (explaining planned VTIS upgrades); Exhibit 50, Sub-Exhibit 9. *See also* Exhibit 50, Sub-Exhibit 18, at pp. 13 (discussing VTIS benefits). The new turning lane to the TransPacific Parkway is another example of public improvements that will result from this project to the benefit of the local community.

OSCC and other Opponents do not argue to the contrary. However, they do challenge the evidentiary basis for some of the conclusions. For example, OSCC argues that the 2012 ECONorthwest report is outdated. They note that the economic impact studies covers the four calendar years 2014 through 2017. OSCC argues that the ECONorthwest's economic projection is now expired and no updated economic study currently exists, except for the McCulloch study, which, as discussed below, finds that there is a minimal likelihood that the project will succeed economically.

The fact that the ECONorthwest report is somewhat dated does not necessarily mean that it is unreliable. *Compare Burghardt v. City of Molalla*, 29 Or LUBA 223 (1995)(5 year old traffic study still reliable) with *League of Women's Voters v. Metro,* 17 Or LUBA 949 (1989), 99 or App 333, 781 P2d 1256 (1989), *rev den.*, 310 Or 70, 792 P2d 104 (1990) (10- year old traffic study no longer reliable under the circumstances of that case). But even if the 2012 information was somewhat stale, ECONorthwest updated those reports in 2017. Exhibit 50, Sub-Exhibit 1 through 9. *See also* Exhibit 50, Sub-Exhibit 18, at pp. 18-21 (Documenting tax revenue to counties, jobs, and similar benefits).

The Board concludes that the exact numbers of jobs that will be created, or the exact dollar amount of taxes that will be generated, etc. is not controlling, given that these are mere

estimates in any event. What is important instead for purposes of this analysis is that the numbers must be anticipated to be "substantial." In other words, if the project is anticipated, for example, to only create five jobs at the expense of a loss public trust rights, it might not be substantial enough to say that a "need (i.e. substantial public benefit)" is provided. But regardless of the fact that the 2012 ECONorthwest report is technically outdated, there is no evidence in the record refuting the notion that the project – if constructed - will create a *significant* boost to the local economy. Nor is there any evidence that suggest that the project will not provide a substantial number of temporary and permanent jobs. The Applicant's evidence on this point is either unrefuted or the Applicant's evidence outweighs the opponent's evidence to the contrary. The Board is satisfied that both the 2012 ECONorthwest report and the 2017 updates constitute substantial evidence of a very significant public benefits to Coos County and its residents. Exhibit 50, Sub-Exhibit 1 through 9.

Besides, even the State of Oregon has admitted that "the project has great potential to support the economy of the central and southern Oregon coast, creating jobs and a strong energy infrastructure in one of the areas of Oregon that is continuing to suffer from the recession and long-term structural changes in the economy." Letter from Richard Whitman, then-Natural Resources Advisor to Governor Kitzhaber, dated February 12, 2015. LUBA Rec. 7514.

Much of the Opponents' evidence focuses not on any lack of benefit, but rather on the feasibility and viability of the overall LNG terminal project. For example, Mr. Michael Graybill notes in comments to DSL that there are multiple examples of capital improvement projects that impacted the estuary but never lived up to expectations of the benefit they were supposed to provide. Exhibit 2. *See also* Wim de Vriend, LUBA Rec. 3103 (detailing Coos Bay's past failed efforts at economic diversification). The Opponents also argue that the chances of this LNG facility ever being constructed are low. For example, Ms. Moro states that if JCEP can't compete with competitors, it is not "needed." Exhibit 4. The Board disagrees with this analysis, because the planning horizon for this project far exceeds the time for which accurate energy "demand" forecasting can be accomplished.

OSCC notes that Robert McCullough, of McCullough Research, has twenty-five years of experience advising government, utilities, and aboriginal groups on energy, metals and chemical issues. Exhibit 2. Mr. McCullough's recently issued a memo entitled "The Questionable Economics of Jordan Cove LNG Terminal." *See* Exhibit 2 & 4. OSCC summarizes the McCullough report's conclusions as follows:

- The terminal, if constructed, would be at a 600-mile disadvantage compared to other west coast projects in transportation costs, the announced costs are high by market standards, and the proposed technology to be used will make JCEP less efficient than competitors in British Columbia and the Gulf Coast.

- JCEP will have a 25% cost disadvantage as compared to its competitors.

- ❖ Based on an economic model comparing all possible combinations of feed gas and Asian landed gas prices over the last decade, the chance of JCEP reaching operation is 33%.

Exhibit 2 at p. 4. *See also* Exhibit 52.

The Board reviewed the McCullough Report, and found no reason to think that is not facially credible despite the inherent speculative nature of any forecasting of future conditions. Nonetheless, the Board places little to no weight on the viability prognosis, because it addresses an issue (*i.e.* financial viability of the project) that is not relevant to the "need / substantial public benefit" criterion. In fact, reading this report reinforces the Board's conclusion that such "financial viability" analysis is far beyond the scope of any legitimate "public health safety welfare moral and aesthetics" concerns that local land use proceeding are intended to address. While analysis is certainly relevant to FERC's decision-making process, and the Board finds that there is no need for the County to duplicate FERC's role in the permitting process, and particularly where beyond the scope of the relevant local criterion.[5] The Board believes the more applicable interpretation of the analysis is required under Policy 5 and whether, if the project is built, it would provide a substantial public benefit. The inherently speculative question of the financial viability of the project over time is a wholly unrelated issue which does not control whether the project will provide a substantial public benefit if implemented.

For purposes of the public needs analysis, it is sufficient to note that Jordan Cove is still investing millions of dollars in an effort to secure permits for the project. Perhaps their time horizon looks far beyond what Mr. McCullough and other critics analyzed: a pipeline typically has a planning life of 40 - 50 years or more. *See* Ted Nace, Lydia Plante, and James Browning, "Pipeline Bubble, North America is betting over $1 Trillion on a Risky Fossil Fuel Infrastructure Boom, at p. 13. Exhibit 52.

This project has been in the planning stages for more than 15 years and appears to still be years away from starting construction. Given that long time horizon, it does not seem possible to rely on economic forecasts when planning a project of this magnitude, because no economic forecast can project out that far. In any event, if the project is truly not viable, then Jordan Cove will certainly apprise Coos County and FERC of that fact. In the meantime, Coos County should not deny permits on the basis of the opinions of one or two so-called "experts" whose motivations are not clear.

Turning to the issue of jobs: the Applicant further notes that over 5,000-6000 jobs will be created per year during the construction of the project. 8,500 spin-off jobs will be created, including 1,500 local jobs after start-up. 215 permanent family-wage jobs will be created. Exhibit 50, Sub-Exhibit 7.

Oregon Shores and other Opponents argue that such of the workforce will be both temporary and not local. OSCC states:

[5] In this regard, the Board believes that FERC is a far better position in terms of staff and resources to make an intelligent assessment of such complicated economic data.

> A workforce associated with constructing an LNG terminal and pipeline is specialized and no such workforce exists in Coos County currently, let alone in Oregon which has no other such facilities. It is likely that this workforce will come from outside of the state, will reside temporarily in workforce housing constructed by the Applicant onsite and then leave after construction is complete, providing minimal long-term economic benefit to the local community.

In making this comment, OSCC is implicitly arguing that the "need" or "benefit" must be one that is local in nature. There is no support for this argument in the language of Goal 16, and the Board rejects it. The Board finds that the County is well within its right to consider temporary jobs and the related benefits to the local economy as satisfying a "need," particularly when those jobs are in conjunction with other benefits. There is no question that even an influx temporary jobs would have positive secondary effects on the local economy. Exhibit 50, Sub-Exhibit 5.

In furtherance of its arguments related to the energy benefits of the LNG Terminal, the Applicant directs the Board's attention to a letter from Robert Braddock, which describes the following environmental benefits of LNG:

- "One public benefit of the Project is it will contribute to reduced air emissions by expanding the use of natural gas in areas of the western Pacific basin where coal has been the historically dominant fuel used for the generation of electric power. Natural gas results in fewer lifecycle greenhouse gas emissions than coal, even when natural gas production, transportation, liquefaction, revaporization and leakage are accounted for."

- The reduction in energy consumption associated with a West Coast LNG facility, which would result in shorter transit distance to Asian markets compared to East Coast facilities and as a result, lower the energy consumed to deliver the LNG to the point of consumption.

- The opportunity to accelerate the conversion to cleaner marine fuel by having a reliable and cost-effective supply of LNG fuel available.

LUBA Rec. 3753-3755. On the other hand, the Opponents argue the direct opposite: *i.e.* that LNG is bad for the environment. For example, the Opponents cite to evidence suggesting that natural gas may not be any better than coal when it comes to the issue of climate change because of widespread methane leaks. *See* Exhibit 2; Exhibit 52. *See* Ted Nace, Lydia Plante, and James Browning, "The New Gas Boom, Tracking Global LNG Infrastructure," at p. 13, 20. Exhibit 52 (citing a 2018 study published in Science, Vol 361, No. 6398, July 13, 2018, that suggests that US Natural Gas had a leakage rate of 2.3%).

OSCC argues that the project's impacts on greenhouse gas emissions will be negative:

- By enabling an increase in production and consumption of fossil gas, the Jordan Cove LNG terminal and Pacific Connector Gas pipeline will contribute significant amounts of greenhouse gas emissions that will exacerbate climate change.

- The total lifecycle emissions caused by the project to be over 36.8 million metric tons (MMT) of carbon dioxide equivalent (CO_2e) per year. This is equivalent to over 15.4 times the 2016 emissions from Oregon's only remaining coal plant, the Boardman coal plant, or equivalent to the annual emissions from 7.9 million passenger vehicles. The Boardman plant is scheduled to close in 2020 because of climate and air pollution concerns.

- Leaks in LNG tanks are common and are not always policed adequately by operators. *See e.g.* Cheniere Energy, the top US natural gas export company, which has recently had severe leaks in tanks at its Sabine Pass facility in Texas, given rise to methane emissions that are more potent than carbon dioxide emissions with respect to climate impacts.

See Letter from Phillip Johnson dated June 9, 2019, at p. 4-5. Exhibit 2. In one article, the author notes that "If the JCEP were to be built, its proportional share of the allowable emissions would necessarily grow while providing no energy benefit to the state." The Board finds that it wrong to think about benefits or detriments to the climate on a state by state basis, because climate is something that is affected or benefited on a worldwide basis on account of activity occurring throughout the world. Stated another way, if a use causes greenhouse gas emissions in Oregon to increase but correspondingly reduces emissions elsewhere, there is a net public benefit.

The Applicant does little, if anything, to refute the information provided by the Opponents on this topic. Nonetheless, the Board gives no decisive weight to a reference to a "study" of this nature that is not included in the record, because the methodology is unclear, and it is unclear who wrote the study and for what motivations, or if it has been adequately peer reviewed, etc. The Board is well aware of the fact that a lot of so-called science, and in particular climate science, has been heavily politized in the last thirty years, making it difficult for the public to get accurate information. The studies are all over the map with regard to their conclusions. Regardless, the Board does not believe that any of these studies cited by the Opponents undermine the other public need findings set forth herein.

Having said that, the Board believes the record is generally inconclusive on the issue of whether the project will have substantial public benefits from an environmental standpoint. In other words, both parties provide some evidence that could be viewed as "substantial evidence" when viewed in isolation, and the "whole record" does not lean decisively in any one direction.

In part, this is because the parties raise a mix or science and policy matters. Nonetheless, this is not a case where any negative environmental effects of natural gas offset other public benefits that justify dredging a marine slip in support of the siting an LNG Gas Terminal.

OSCC notes that in the 2016 FERC decision denying the approval, FERC stated that "Pacific Connector has presented little or no evidence of need for the Pacific Connector Pipeline." Docket Nos. CP13-483-00, CP13-492-000, Order Denying Applications for Certificate and Section 3 Authorization, FERC (March 11, 2016). OSCC states that FERC found:

> "Pacific Connector states that the pipeline will benefit the public by delivering gas supply from the Rocky Mountains and Canada to the Jordan Cove LNG Terminal and by providing an additional source of gas supply to communities in southern Oregon though, again, *it has presented no evidence of demand for such service.*

Id. at 3. However, on March 22, 2016, JCEP announced that it had executed a preliminary agreement with JERA Co., Inc., the largest LNG buyer in the world, for the acquisition of at least 1.5 mtpa of LNG capacity from the Project. Following the announcement of the JERA agreement, JCEP announced the execution of a preliminary agreement with ITOCHU Corporation, a significant Japanese investment and trading firm, for the procurement of 1.5 mtpa of LNG capacity from the Project. Negotiations continue with other LNG buyers for the balance of the marketed plant capacity. Exhibit 50, Sub-Exhibit 18, at pp. 17.

OSCC further notes that FERC stated that "[t]he generalized allegations of need proffered by Pacific Connector do not outweigh the potential for adverse impact on landowners and communities." Exhibit 2. Again, even if this is true, FERC is applying a different standard, and evidence of how FERC applied their standard is not helpful in this case.

OSCC also states that FERC also found without a pipeline connecting it to a source of gas to be liquefied and exported, the proposed Jordan Cove LNG Terminal can provide no benefit to the public. *Id.* While this is certainly true from a technical standpoint, it would also be applying circular logic to simply conclude that no "need / public benefit" exists simply because the Applicant has not yet secured the right to build the pipeline. For purposes of the Goal 16 analysis, the Board assumes that the pipeline can feasibly be built, and this decision is conditioned upon the successful acquisition of permits to build the pipeline.

OSCC notes that there are also substantial safety concerns relating to the facility that negate the public benefit of the project:

- The entire project would be sited in the region of the Cascadia Subduction Zone, deemed by foremost seismic experts to be the most likely area on the Pacific Northwest coast to experience a major (magnitude 8.7-9.2) earthquake and resultant tsunami during the lifetime of the project. The area is

also subject to navigational challenges made more difficult by weather and coastal configuration.

- The 229-mile pipeline could increase wildfire risks across a four-county region that already reels from wildfire costs and damage. The Draft Environmental Impact Statement (DEIS) for the new FERC application for the project (pp. 4-770-71) indicates that 95% of the pipeline would be built to Class 1 specifications--the lowest legally allowed in terms of design, materials, testing and operational standards.

- Leakages from LNG tanks are common which then increases fire risk. According to a ref [sic] a LNG tank catches fire, according to a senior regulator with the Pipeline and Hazardous Materials Safety Administration (PHMSA) there would be no way to put it out in which case, the only course of action would be to let the fire die out.

Id. at p. 5. While these matters are important and are certainly something that FERC and DSL must address, negative impacts are beyond the scope of the Goal 16 "need" inquiry. *See Oregon Shores Conservation Coalition et al. v. Coos County*, 76 Or LUBA at 355.

Another public benefit arises from the national security implications of LNG exports. For example, the Board notes documents in the 2016 record authored by the U.S. Department of Energy Order No. 3041 FTA Nations December 2011 (LUBA Rec. 4847 - 4862) and U.S. Department of Energy Order No. 3413 Non-FTA Nations March 2014 (LUBA Rec. 4863 - 5026). These Orders discuss one key aspect of the "public need" equation that virtually every other commenter, including the Applicant, neglects to discuss. These documents conclude that exporting LNG from the facility to either Free Trade Agreement Nations or Non-Free Trade Agreement Nations is consistent with the public interest.

OSCC acknowledges the DOE findings, but points out that FERC stated that "[a] DOE finding that authorization of the commodity export is consistent with the public interest is not sufficient to support a finding that the project is required for public convenience and necessity. *See* letter from Phillip Johnson, OSCC, dated June 9, 2019 at p. 3. Even if that is true, it bears repeating that FERC's standard is not the same as the Goal 16's "need / substantial public benefit standard."[6] LUBA has concluded that unlike FERC, the analysis required by Goal 16 does not

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[6] To demonstrate to FERC that its proposal is in the public convenience and necessity,

> "an Applicant must show public benefits that would be achieved by the project that are proportional to the project's adverse impacts. The objective is for the Applicant to create a record that will enable the Commission to find that the benefits to be achieved by the project will outweigh the potential adverse effects, after efforts have been made by the Applicant to mitigate these adverse effects."

Certificate Policy Statement, 88 FERC ¶ 61,227, at 61,748. Public benefits in the FERC context include the

need to balance need/benefit with (and weigh against) public detriments. *See Oregon Shores Conservation Coalition et al. v. Coos County*, 76 Or LUBA at 355.

At the July 10, 2019 public hearing, it was specifically asked questions about the geopolitical and national security aspects of the "public need" equation, but very little evidence was forthcoming thereafter. In fact, it was a bit surprising to only receive one responsive comment – and even it appears to be an inadvertent one insomuch as it was submitted by a project opponent. The article in question, submitted by Mr. Wim de Vriend, is entitled "Geopolitical Case for Jordon Cove," dated Sept. 12, 2018. It fully and undeniably supports the DOE conclusion discussed above. Exhibit 13.

In any event, the article quotes federal administration and elected officials who attended a round-table discussion meeting in Grand Junction, Colorado, where they were "tout[ing] not just the job benefits but the geopolitical case for liquefied natural gas export projects like Jordan Cove in Oregon." A number of key points are set forth in the article.

The first United States Assistant Secretary of State for Energy Resources, Francis "Frank" Fannon, is quoted as saying: "[t]his project and this kind of work, I can't overstate the importance of the contribution to global energy security." Specifically discussing Jordon Cove, he further states: "[t]his project is amazing. Colorado gas has the opportunity to really fuel the world."

Secretary Fannon succinctly sets forth the geopolitical argument for LNG exports, which is that the U.S. can deprive its geopolitical rivals of revenue and power by supplying natural gas to U.S. allies. Using Russia as an example, he stated: "Russians use their gas for power, they use their oil for money." U.S. Senator Cory Gardner further echoed this sentiment, by noting that Russia seeks to control and manipulate other countries that depend on its energy exports, and if the United States provides allies with energy to power their economies and save their sovereignty, "that's a pretty powerful tool."

Senator Gardner listed Taiwan as an example of an ally that is closing down its nuclear power production and will need to find energy to replace it. He stated: "We have an opportunity to provide geopolitical security to a great ally like Taiwan and to have those jobs being created here." Secretary Fallon cited Lithuania as another example, stating this this country was able to counter Russian power and influence by developing an LNG import facility that forced Russia's Gazprom gas supplier to lower its prices.

This article and the DOE Orders confirm that the exportation of LNG has important national security implications, and the Board is satisfied that these geopolitical and national security ramifications of LNG export are further evidence of an adequate "public need (*i.e.* substantial public benefit)" within the meaning of Goal 16 and CBEMP Policy 5. *See also*

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following: meeting unserved demand, eliminating bottlenecks, accessing new supplies, lowering costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability or advancing clean air objectives. The evidence necessary to establish the need for the project usually includes a market study.

Exhibit 50, Sub-Exhibit 18, at p. 18 ("Demand in Japan is not dependent upon demand growth but is driven by the rebalancing of the supply portfolios held by Japanese companies. Twenty-five percent of Japan's long-term contracts expire between 2020 and 2025. U.S. LNG exports to Japan are positive from a number of standpoints. Japan is the most important U.S. ally in Asia, and increased U.S. imports will strengthen this alliance and improve the balance of trade between these two countries.").

To support their conclusion, Opponents submitted a report by Ms. Rachel Wilson entitled "*Foreign or Domestic? The Source of the Natural Gas That Will Be Processed at the Proposed Jordan Cove LNG Facility*," dated July 2, 2019. Exhibit 52. This report concludes that due to a number of economic factors, "Jordan Cove intends to supply its proposed LNG export facility with Canadian Gas." *Id.* at p. 6. The gist of the comment is that Canadian gas is cheaper than US gas due to the efficiency of production, among other factors.

Another report written by Mr. McCullough is found at Exhibit 52, and is entitled "Natural Gas Supplies for the Proposed Jordan Cove LNG Terminal," dated July 3, 2019. The basic thrust of the report is to note that the price of LNG in Japan Korea, and China (collectively known as the JKC index) is down from its highs in 2011-2014, and this makes West Coast LNG terminals an unattractive investment. Mr. McCullough notes that only one west Coast LNG export terminal, LNG Canada, "has received a 'Final Investment Decision' and has started construction." Exhibit 52 (McCullough Report at p. 7.). He further notes that "Veresen and Pembina have tied the project to Alberta natural gas supplies" and that at least in the short term, most of the gas supply would be coming from Canada." *Id.* at 13-14.

The Applicant counters with the following evidence:

> Market demand for LNG is expected to grow 4% to 5% per year between 2015 and 2030, and LNG demand growth has exceeded expectations recently. While many expected the LNG market to be oversupplied in 2016, demand in Asia and the Middle East absorbed the increase in supply from Australia and the U.S. Chinese imports of LNG increased 33% in 2016 over the prior year, and India saw an increase of 25% over the same period. There were also six new importing countries in 2016 (Colombia, Egypt, Jamaica, Jordan, Pakistan, and Poland), bringing the total number of LNG importing countries to 35. Shortages in domestic gas supplies in Egypt, Jordan, and Pakistan led those countries to be among the fastest growing importers, importing a total of 13.9 million tons of LNG in 2016 during their first year of imports. Despite the resurgent LNG demand, global LNG prices fell dramatically over the last two years following the slump in oil prices. This drop in prices has led to new LNG supply projects being deferred or cancelled, and it will undoubtedly lead to a tightening of the global market after 2020. With few new supply projects and strong demand growth driven by India, China, and Southeast Asia, the LNG market is expected to recover by 2023,

> and LNG demand is expected to almost double by 2030, requiring an incremental 150 mtpa of new supply by the end of the next decade.
>
> U.S. LNG exports are one of the lowest cost supply sources in the world and are expected to maintain their competitive advantage going forward due to the size and quality of the upstream natural gas resources in North America and the availability of infrastructure. Projects such as JCEP and PCGP on the west coast of the U.S. offer a particular strategic advantage in that they are able to supply the strong Asian market demand with shorter shipping distances relative to other U.S. export projects. The distance from the Port of Coos Bay to Tokyo Bay requires 9 days shipping compared to 22 days from the Gulf of Mexico utilizing the Panama Canal.

Exhibit 50, Sub-Exhibit 18, at p. 18.

This much is clear: the economic prognostications included in the record are all very short term in their outlook, but the planning horizon and scope of the project is much more long term. The record makes clear that energy markets have changed quickly due to a variety of factors, and there is no reason to think that such changes will not occur in the future. However, with the supply of Rocky Mountain gas potentially lasting 50 years or more, it is virtually impossible to accurately predict the long-term future on this topic. The Board finds that it should not base its decision to authorize or deny the permits on questionable studies that may or may not have any basis in reality, let alone long-term accuracy. Moreover, it appears that most of the recent studies, including those set forth in Exhibit 52, were prepared with the intent that they would be submitted to the FERC proceeding pertaining to Jordan Cove, and to the extent they have merit, FERC is far better staffed and equipped to analyze this information in any event. The Board finds this information to be not relevant to the inquiry demanded by Goal 16 and Policy #5. Besides, even if LNG exports end up not being the economic boon that was hoped, the County will benefit from all of the infrastructure that would still be in place, such as the marine slip and the pipeline.

For all of these reasons, the Board finds that the project will provide significant public benefits to both the County and the nation if - and when - it is built.

b. Public Trust.

Board Findings: Both Statewide Planning Goal 16 Implementation Requirement 2 and CBEMP Policy #5 (1)(b) state that the "Local government shall support dredge and/or fill only if such activities are allowed in the respective management unit, and: * * * * b. * * * the use or alteration does not unreasonably interfere with public trust rights[.]" (Underline added.)

The "public trust rights" criterion was first added to Statewide Planning Goal 16 on October 11, 1984. The CBEMP portion of the original Coos County Comprehensive Plan was submitted for acknowledgment in September of 1982 and was recognized by LCDC as complying with the Goals at their June 11, 1984 meeting. This is why there is no discussion or findings related to "public trust rights" in the County's original Linkage Matrix, Linkage Findings, or the original Goal Exceptions documents.

The Board does not believe that the original acknowledged Goal Exceptions are any less valid or persuasive because they do not address the public trust doctrine criterion. The 1984 Comprehensive Plan Vol II, Part I dated July 5, 1984 specifically noted that although applications involving dredging and fill need to satisfy criteria "a" through "f" of CBEMP Policy #5, the plan goes on it say that "[h]owever, where goal exceptions are included in this plan, the findings in the exception shall be sufficient to satisfy criterion 'a' through 'd' above." This language does pre-date the "public trust rights" language that would later be added to the "c"[7] criteria, so it not addressing the public trust question directly. Nonetheless, it does, as a general matter, indicate a desire to grandfather in the Exceptions as to compliance with criteria a through d of CBEMP Policy #5. Furthermore, the fact that the exceptions were never changed despite the County undergoing periodic review in the 1990s is further evidence that they remain valid. For this reason, the Board finds the proposed activities do not require the County to address the public trust rights issue under CBEMP Policy #5.

The Board adopts the following set of findings addressing the public trust doctrine, in the alternative to the above conclusion.

As noted by OSCC, public trust rights with respect to submerged lands and navigable waters[8] is rooted in the principle that "navigable waterways are a valuable and essential resource and as such all people have an interest in maintaining them for commerce, fishing, and recreation." *Brusco Towboat v. State Land Bd.*, 30 Or App 509, 526 (1977). *See also Chernaik v. Brown*, 295 Or App 584, 593, 436 P3d 26 (2019), *rev granted*, 364 Or 849, 442 P3d 1119 (2019). "The doctrine is founded upon the necessity of preserving to the public the use of navigable water from private interruption and encroachment." *Illinois Cent. R. Co. v. State of*

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[7] At the time, criterion "c" was based on IR1 from Goal 16 (1977) and stated "c. the public need and gain are satisfied."

[8] In the initial decision from 2016, the Board noted that "[i]n a recent case, *Chernaik v. Brown*, Case 16-11-09273, a Circuit Court judge in Lane County narrowly defined the scope of the Public Trust Doctrine as only applying to submerged and submersible lands, and not to waters of the State, beaches and shorelands, fish and wildlife, and the atmosphere." That statement eventually was adopted by the Board in its Final Opinion and Order. The Opponents appealed that observation to LUBA, arguing that the county erred by limiting the scope of public trust assets to submerged lands, and failing to include the waters overlaying those lands."

To clarify, the Board never *formally adopted* the Circuit Court's position, but rather simply *restated* what the Circuit Court judge held. LUBA correctly pointed out that the Board's findings did in fact evaluate impacts on navigation, fishing and other uses of navigable water, and did not limits its analysis to impacts on submerged lands. It is also worth noting that the Court of Appeals stated that the state of Oregon conceded that the Circuit Court was wrong to limit public trust rights to submerged lands and to not include "title navigable waterways" in the list of areas covered by the public trust doctrine. *Chernaik v. Brown*, 295 Or App 584, 596 n10, 436 P3d 26 (2019), *rev granted*, 364 Or 849, 442 P3d 1119 (2019).

Illinois, 146 US 387, 436 (1892). Quoting Professor Michael C. Blumm, "Since the 1860s, the Oregon Supreme Court has consistently ruled in favor of public rights in waterways, based on language in the Oregon Statehood Act declaring navigable waters to be a public highways that would remain "forever free," not monopolized by private owners." *See* Exhibit 51, Sub-Exhibit 101, at p. 2.

In this case, JCEP wants to use the channel of the Coos Bay estuary for one of its essential protected purposes, a "public highway," but in the process of doing so it needs to limit other users within certain parts of the estuary during certain limited time periods as a result of a federally-mandated security zone enforced by the U.S. Coast Guard. The question presented on remand is whether the level of exclusion qualifies as a substantial interference with the public trust rights in these same waters. Stated another way, the county needs to determine whether the conditional use permits at issue here will authorize the exclusive use of trust lands in the way prohibited by the public trust doctrine. Any grant or permit afforded to a private party which results in such substantial impairment of the public's interest would be beyond the power of the legislature to authorize. As noted above, the essential core concept underlying the public trust doctrine is that the government cannot exclude the public from large portions of submerged lands or alienate (*i.e.* sell, gift, or grant an exclusive lease) large portions of submerged lands to private interests.

The Board must determine what constitutes an "unreasonable interference" with the public trust, as that term is used in Statewide Planning Goal 16 and the CBEMP. The legal standard at issue is fact-specific and does not lend itself to easy analysis.

The Board considered the evidence in the record and found that the evidence was sometimes contradictory and confusing. Accordingly, the Board exercised its discretion to reopen the record for additional testimony and legal briefing on this issue.[9] Exhibits 58-73 were submitted in this open-record period, and these exhibits collectively provide a much better picture of the factual situation at hand.

Most, if not all, of the Opponents frame the public trust issue in a self-serving way. To generalize the testimony, most opponents assert that they, as members of the public, possess public trust rights to engage in activities such as navigation fishing, crabbing, clamming, surfing, kayaking, scuba diving, etc., and they view these rights as absolutes beyond interference, however limited. Few seem to recognize the corollary right of JCEP to exercise public trust

[9] Some Opponents took issue with the Board reopening the record, saying that it was "highly unusual and prejudicial." Exhibit 71. Nonetheless, there is nothing in Oregon law that prevents a Board from reopening a record to clarify testimony or to solicit more testimony on a topic that the Board believes is not covered well enough by the existing record, or in a case where the record contains conflicting testimony that is difficult to fairly resolve, as was the case here with regard to the security zone. potentially functioning as an exclusion zone. This particular issue is too important to the citizens of Coos Bay to be decided on the basis of mere inferences and vague, conflicting, information. The main thing the Board wanted to confirm was the question of whether the security zone is an exclusion zone. The Board believed that the existing record strongly suggested that it was not an exclusion zone, but wanted clarification of this and other related points.

rights just as the "the public" does.[10] Unfortunately, much of the opponent testimony seems to assume that the legal standard for public trust is a "no impact" standard. For example, the Clam Diggers Association states that in addition to other harvesting pursuits, "our members also enjoy taking pictures of wildlife in Coos Bay" and "[t]hese large ships will interfere with this activity." This type of testimony is of little substantive value to the Board because it does not address the correct legal standard.

Similarly, most Opponents state that they are unwilling to "give up their use of the bay,"[11] and they do want to "sell or trade"[12] away their public rights. They also assert that JCEP's operations would "interfere with" or "encroach" upon these rights. However, as will be shown below, this is not the correct way to look at this issue. Rather, because JCEP has the same rights as any member of the public, it is imperative that the rights of the various uses be balanced in some way. The right of one user cannot be excluded under the public trust doctrine because it has the "same rights" as others, unless the effect of allowing that one use effectively eliminates the other uses. Stated another way, the right of use cannot be monopolized by one group of private landowners or industry. In this case, it is possible, in theory, that overuse by JCEP could at some point constitute a monopolization of the waterway. Although the current proposal seems far from that level, the inquiry essentially boils down to figuring out whether the number of LNG carrier vessel trips proposed by JCEP effectively precludes or substantially interferes with other protected uses. The analysis is not a "no impact on existing uses" standard.

In seeking to define what is an "unreasonable interference," OSCC attempts to draw parallels to common law public nuisance, which is often construed as protecting the public against unreasonable and substantial interference with a public right. *See* Rest. Second Torts § 821B(1). OSCC argues that the two doctrines, public trust and public nuisance, share the common goal of safeguarding community interests, and further states:

> Oregon caselaw demonstrates that *complete* interference is not necessary for the public trust to be violated. For example, in Oregon a locked gate, even where a key is made available, is considered to be an "unreasonable interference" with an access easement right. *Ericsson v. Braukman*, 111 Or App 57, 63 (1992). The Oregon Supreme Court also recognized that a private party cannot so exercise the right of navigation as to unnecessarily or unreasonably interfere with or injure the public's corollary rights to the use of the navigable waters for fishing. *Anderson v. Columbia Contract Co.*, 94 Or 171, 182-183, [184 P 240] (1919), [*reconsid. den*, 94 Or 171. 185 P. 231 (Nov 25, 1919)]; Here, OSCC argues that "blocking an entire community's ability to access public protected fishing grounds (and substantially destroying them through dredging) during the exact time the access

[10] One insightful opponent, Steve Miller, did recognize that competing users "can work in a harmonious way where the scale and impacts of one [use] does not preclude the others – where there is some balance." Exhibit 60.

[11] Exhibit 34.

[12] Exhibit 58.

> is needed to enjoy those rights, is an unreasonable interference with the public trust.

The Board finds that OSCC's analogy to public nuisance law might have been enlightening, had those arguments been developed. However, OSCC fails to do so. In fact, the primary case cited by OSCC, *Ericsson v. Braukman*, 111 Or App 57, 824 P2d 1174 (1992), *rev den.*, 313 Or 210 (1992), is not a public nuisance case. Rather, it addresses the issue of interference with contractual rights established by an express easement created by deed. Interestingly, OSCC misstates the holding in *Ericsson*: the court specifically *upheld* the ability of a servient landowner to lock a gate over and easement, so long as the easement holder is given a key. The case also does not establish a bright line rule as OSCC seems to suggest– the rights of the parties in any given case are dependent upon the nature of the easement and the specific factual context in which the case arises.[13]

On the other hand, the case cited by OSCC, *Anderson v. Columbia Contract Co.*, 94 Or 171, 182-183, 184 P 240 (1919) is much more relevant and deserves careful treatment and consideration. In *Anderson,* a fish trapper sued a tugboat captain for running into - and partially destroying - his fish trap. The holding of the case turned on the wording of jury instructions that aren't relevant here, but case is insightful because it addresses potential conflicts between competing users of public trust waters. The Oregon Supreme Court provides a general summary of the relationship between the right of navigation and the right of fishing, as follows:

> The Columbia River is a navigable stream and as such is a common highway "and forever free." This right is a public one and it is not only given by the common law but is preserved by the statute admitting the State of Oregon into the Union: *Johnson* v. *Jeldness*, 85 Ore. 657, 661 (167 P. 798, L.R.A. 1918A, 1074). The right of fishery is likewise a common right. The right of navigation is paramount, for the reason that it is of the most importance to the public weal: *Davis* v. *Jerkins*, 50 N.C. (5 Jones L.) 290, 293; *Post* v. *Munn*, 4 N.J.L. (7 Am. Dec. 570, 1 Southard's Rep. 61); *Flanagan* v. *City of Philadelphia*, 42 Pa. 219, 228. Stated in general terms the right of fishery must give way to the right of navigation. Expressed in more accurate language the paramountcy of the right of navigation does not extinguish the right of fishery although the former does, whenever there is a necessary conflict, limit the latter and compel it to yield so far as the right of fishery interferes with the fair, useful and legitimate exercise of the right

[13] *See Kalfas v. Adams*, 257 Or App 234, 306 P3d 706 (2013) (Servient tenement owner's placement of an unlocked gate as a demarcation of her property line and as a deterrent to trespassers was a reasonable use of the servient estate that did not unreasonably interfere with dominant tenement owners' use of the roadway easement.). *Craft v. Weakland*, 174 Or App 185, 23 P3d 413 (2001) (a servient owner may erect an unlocked gate across an easement for beach access in order to keep out trespassers; unlocked gate did not substantially interfere with rights of easement holder); *Jones v. Edwards*, 219 Or 429, 433, 347 P2d 846, 848 (1959) (holding that servient owners were entitled to maintain six gates along roadway "as long as the reasonable use of their land makes such gates necessary"); *Fendall v. Miller*, 99 Or 610, 196 P. 381 (1921)(four gates is an unreasonable interference with easement rights set forth in a deed.).

of navigation. Speaking of the abstract right of the public it may be said as expressed in 1 Farnham on Waters, Section 27:

> "The public is entitled to the free, uninterrupted, and unobstructed use of every part of the stream, from bank to bank and throughout the length of the channel, which at the ordinary stage of the water is of such depth and of such accessibility with respect to the current or main body of the stream as to be capable of navigation by boats * * either up and down or across, or from the main stream on to any particular part in question, or thence on to the body of the stream; and this whether such part has ever been so used, and whether there is any present or anticipated necessity for so using it. (Emphasis added).

Id. at 182-83. That discussion seems to distinctly favor the LNG vessels, insomuch as it states that navigation rights can act to limit fishing rights, and does compel fisherman to yield insomuch as the right of fishery interferes with the fair, useful and legitimate exercise of the right of navigation. *See also Bowlby v. Shively*, 22 Or 410, 412, 30 P 154 (1892), *aff'd*, 152 US 1, 14 S Ct 548 (1894) ("[O]ur courts have declared [the state's] absolute property in and dominion over the tide lands, and its right to dispose of its title in such manner as it might deem best, * * * subject only to the paramount right of navigation and the uses of commerce.").

However, the Supreme Court in *Anderson* was also careful to say that boat captains should exercise their rights with due regard and courtesy of the rights of fisherman and to not cause damage to fisherman via negligence:

> While a boat may "take her course" nevertheless a navigator cannot with impunity do unnecessary damage to a fisherman or his property; but upon the contrary the paramount right of navigation must be exercised fairly, and not arbitrarily, and with due regard to the subordinate right of fishery and a boat must be so navigated as not to do unnecessary damage. [Citations omitted] For example, if nets are placed across the channel of a river so as to be a bar to navigation, a vessel may, if reasonably necessary to do so, run over the nets; but if a navigator is warned or ought to have known of his approach toward the net of a fisherman, he is liable for damage resulting from his negligent failure to avoid doing damage if he can do so without prejudice to the reasonable prosecution of his voyage: *Horst* v. *Columbia Contract Co.*, 89 Or 344, 350, 352 (174 P. 161); [Citations omitted]; *Wright* v. *Mulvaney*, 78 Wis. 89 (46 N.W. 1045, 23 Am. St. Rep. 393, 9 L.R.A. 807). The ruling in *Wright* v. *Mulvaney* is of peculiar interest, for the reason that there as here a pound net fish-trap was injured by a boat with a tow and

some of the other material particulars were like the facts presented here. The court says:

> "But it does not necessarily result from this (the paramount right of navigation) that the navigator may carelessly and negligently run his vessel upon the nets of fishermen and destroy them, and escape liability therefor merely because he did not do so maliciously or wantonly. Such a proposition shocks any proper sense of justice. The benefit which the navigator is entitled to claim by reason of his paramount right is, we apprehend, that when the two rights necessarily conflict the inferior must yield to the superior right. But he may not by his own negligence unnecessarily force the two rights into conflict, and then claim the benefit of the paramount right."

Id. at 183-4. The *Anderson* case goes on to discuss whether a jury could find the tugboat captain negligent under the circumstances of that case, but none of that is relevant here. What is far more relevant is the Supreme Court is establishing a hierarchy of rights, and considers the right to navigation as being "paramount" as against fishing rights, because of the fact that it of "the most importance to the public weal," which means "well-being."

In a letter dated September 24, 2019, Ms. Meriel Darzen, an attorney at Crag Law Center, attempts to distinguish *Anderson* from the present case, as follows:

> In the *Anderson* case, the conflict was between fishing traps and gill nets and navigational vessels, not fishing vessels vis a vis other types of vessels.
>
> * * * * *.
>
> [I]n the instant case, there is no hierarchy of public rights favoring the Applicant. Fishing and crabbing boats, along with other commercial vessels, as they are in transit to their usual and customary fishing locations, are entitled to the right of navigation as identified in *Anderson*. Thus, the fishing fleet that uses Jordan Cove are on equal footing with any other vessel in the waterway.

Exhibit 71. There are a number of problems with the above quoted analysis. As an initial matter, the attempt to limit *Anderson* to its facts belies the broad policy direction articulated by the Supreme Court in that case. There is simply no way to ignore or otherwise limit the statement by the court that "[t]he right of navigation is paramount, for the reason that it is of the most importance to the public weal." The court literally discussed the two competing rights as an "inferior right" versus a "superior right" to the extent that the two rights are in conflict.

Certainly, with regard to arguments concerning conflict with actual fishing (as opposed to the "navigating" which must occur to arrive at a fishing location), these statements by the court seem to be conclusive, and that the rights are not "equal." Rather, there is a hierarchy of public rights *to the extent there is a conflict between them*, but one cannot eliminate the other.

A second problem with Ms. Darzen's analysis is that even if her point is well taken that the conflict is between two different types of navigation (and not navigation vs fishing), that argument fails to recognize that there is a further hierarchy recognized in both common law and statutory law between large shipping vessels and small boats. The testimony of the Pilots makes clear that under admiralty law, smaller vessels and vessels engaged in fishing cannot impede the passage of a deep draft vessel that can safely navigate only within a narrow channel. *See also* Coos Bay Harbor Safety Plan, February 2018, at p. 20-21. *See also* LUBA Rec. 3767 (testimony of Cpt Frank Whipple discussing issue).

The remainder of the analysis set forth in Ms. Darzen's letter is not persuasive because it is based on the incorrect factual premise that the security zone is an exclusion zone that will "obstruct" those fishing vessels ***." Furthermore, her analysis takes the phrase "free, uninterrupted, and unobstructed use" used in case law out of context. By the very nature of navigation, larger vessels have priority and right-of-way over smaller vessels, this rule being borne of practical necessity. Finally, her argument that the application's submissions are speculative falls well short of the mark. Far from being speculative, the Applicant's testimony from Cpt. Whipple constitutes expert testimony which the Board finds very compelling. In fact, the Applicant's evidence is the *only* credible evidence in the record on this issue of vessel conflicts. The Board finds that most of the opponent testimony on the question of vessel conflicts, on the other hand, is highly speculative and does not have the same weight of authority as that of a former Coast Guard Captain of the Port ("COTP").

The Board also rejects the idea that rights should be prioritized based on long-existing uses versus newcomers, which is essentially a "first in time, first in right" analysis. *See* letter from Steve Miller dated Sept 23, 2019 (Exhibit 70). The case law addressing the public trust doctrine does not divine legal rights on that basis. While there exists legal precedence in other areas of law that address the allocation of a limited resource (the law of prior appropriation and the "coming to the nuisance" doctrine being good examples),[14] the hearing officer has seen nothing in public trust doctrine law that supports the idea of first in time being first in right. *Morse v. Dep't. of State Lands*, 285 Or at 202 ("what one finds in the cases is not a niggling preservation of every inch of public trust property against any change, nor a precise maintenance of every historical pattern of use.").

The potential interference caused by the Coast Guard's 500-yard security zone presents a potentially serious question, particularly if it is in reality an "exclusion zone." Two cases provide guidance: In *Weise v. Smith*, 3 Or 445, 449-50 (1869), the Oregon Supreme Court opined that "navigable" waterways are "public highways" which every person has "an undoubted

[14] Some statutes prioritize rights based on "first in time, first ion right" principles. See *Strandholm v. Barbey*, 145 Or 427, 26 P2d 46 (1933) ("Section 40-313, Oregon Code 1930, directs that the Master Fish Warden shall not grant a license to any person for the maintenance of a fish trap in a location where it will interfere with a prior right of fishing.").

right to use * * * for all legitimate purposes of trade and transportation." *Id.* at 450. But in the same way that the government cannot permanently close a public highway to the public or grant a private interest a sole right to use a highway, the same is true of estuaries. While temporary closures may be permitted, there comes a point where the level of closure or lack of access would effectuate a "substantial interference" with the public's right of use.

At issue in *Weise* was whether the public had the right to float saw-logs down the Tualatin River, and to use a boom temporarily placed on private land to facilitate that use. The plaintiff owned the small island on which the defendant had placed the boom, and he alleged that the boom caused damage to his property and interfered with his use of the river. The plaintiff conceded that the portion of the Tualatin River at issue was "to some extent, or for some purposes" navigable as a factual matter. He nevertheless argued that it was not "navigable" in the legal sense because it was not tidally-influenced, and defendant therefore had no right to use it. *Id.* at 448-9. The court observed that the entire stretch of the Tualatin River at issue was in fact navigable as a conveyance for saw-logs, even though at least a portion of it was not navigable for boats. *Id.* at 448. Because the Tualatin River was capable of floating saw logs, the public had a right to reasonable use of the river as a passageway for that purpose. With regard to placement of the boom, the court stated that a person exercising ordinary care in using the waterway for "legitimate purposes of trade or transportation" may temporarily "impede or obstruct another" if doing so is necessary and unavoidable to that person's use. *Id.* at 450. This case is key because it recognizes that no person has an absolute right to use the public waterways, and that some temporary interference by one user over another user is allowed.

Although no party cites to it, the case of *Southern Oregon Pipeline Information Project v. Coos County,* 57 Or LUBA 301, 307-315 (2008) also provides critical guidance. It addresses the very same LNG terminal concept at issue here, but at a reduced scale of LNG shipping traffic. At the time, the proposal involved 80 LNG vessels a year for a total of 160 trips. However, at the time JCEP was proposing to have all movement in and out of the estuary occur during daylight hours, whereas now the concept is to "prioritize" travel at night. LUBA provided this important guidance:

> Although the precise duration of the delay that persons exercising public trust rights will experience cannot be calculated until the dimensions of the security/safety zone is established by the Coast Guard, and even though that delay could be affected by other factors as well, we believe a reasonable person could conclude that * * * CBEMP Policy 5 requirement that LNG tanker traffic not "unreasonably interfere with public trust rights" is satisfied, notwithstanding that for some persons their exercise of public trust rights will be prevented temporarily on the days when LNG tankers pass through the Coos Bay deep-draft channel. That another decision maker might have reached a different conclusion regarding the significance of those temporary delays under LDO 4.5.271, 4.5.281 and CBEMP Policy 5, based on this record, is not a sufficient basis for remand.

Id. at 314-15. As discussed in more detail below, the Applicant's current plan, which is to conduct a majority of its bay transit activity during periods of reduced visibility, is a critical and favorable change. It is that change that convinces the Board that the increasing of additional trips from 80 to 120 will not result in vastly different impacts, because the transition to night operations means that conflicts are reduced. The record makes clear that the majority of the current usage of the bay occurs during daylight hours, with commercial fishing vessels being the only significant night user of the bay for navigation.

Other cases proffered by the parties are less insightful. For example, OSCC, the Surfrider Foundation and Crag Law Center cite to *Guilliams v. Beaver Lake Club*, 90 Or 13, 175 P 437 (1918) and *Luscher v. Reynolds*, 153 Or 625, 635, 56 P2d 1158 (1936) for the unremarkable and well-settled concept that "recreational pursuits are just as protected as other forms of transportation." *See* Exhibit 43, 60. There is no doubt that the public has a right of navigation and that such right includes corollary rights of hunting, fishing and similar recreational pursuits. *See Kramer v. City of Lake Oswego*, 365 Or 422, 446 P3d 1 (2019).[15] However, these cases do not establish any law regarding the manner in which conflicting uses of the waterway must be prioritized or balanced. Rather, these cases involve the relationship between private landowners who seek to exclude the public versus the rights of the public to use private land inundated by waters of the state. That is not the situation confronted here. Here is issue the right of an LNG ship as against the rights of other smaller boats, fisherman, crabbers, etc.

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[15] In *Kramer*, the Oregon Supreme Court summarized the public use doctrine as follows:

> In addition to that doctrine of public ownership of the lands underlying navigable bodies of water, Oregon also enforces the public's right to use other waterways that are "navigable in a qualified or limited sense." *Luscher*, 153 Or at 634. Waterways subject to that doctrine are sometimes referred to as water that is "navigable in fact," which distinguish them from waterways that are "navigable" under federal law. *Shaw v. Oswego Iron Co.*, 10 Or 371, 375, 45 Am Rep 146 (1882). The doctrine, known as the right of "public use," initially was applied primarily to facilitate the floating of logs down rivers that did not meet the federal test for navigability. *See, e.g., Lebanon Lumber Co. v. Leonard*, 68 Ore. 147, 136 P 891 (1913); *Weise v. Smith*, 3 Or 445, 450, 8 Am Rep 621 (1869). The same doctrine, however, has long recognized that the public has a "superior right" to use the water for other navigational purposes, including a "boat used for the transportation of pleasure-seeking passengers[.]" *Luscher*, 153 Oe. at 635; *see also Guilliams v. Beaver Lake Club*, 90 Or 13, 27, 175 P 437 (1918) ("Even confining the definition of navigability, as many courts do, to suitability for the purposes of trade and commerce, we fail to see why commerce should not be construed to include the use of boats and vessels for the purposes of pleasure."). As to those bodies of water subject to the doctrine of "public use," this court has explained that "the public has an easement" because the waters are "deemed public highways" for purposes of navigation and commerce. *Luscher*, 153 Or at 635 (quoting *Guilliams*, 90 Or at 19).

Slip op. at p. 9-10. The Supreme Court also noted that "the doctrine of public ownership of the beds and banks of navigable waters and the so called "public trust doctrine" are independent doctrines, as the Supreme Court cautioned in *PPL Montana*, 565 U.S. at 603-04." *Id.* at 22-23.

OSCC states that "any loss of access for fishing, recreation, or navigation would constitute a loss of rights protected by the doctrine." *See* letter from Philip Johnson dated June 24, 2019, at p. 2. Exhibit 43. However, the public's "right" is not as absolute as OSCC suggests. Neither the Surfrider Foundation nor Crag Law Center discuss *Morse v. Oregon Division of State Lands*, 285 Or 197, 202, 590 P2d 709 (1979), a case which the Oregon Supreme Court succinctly summarized recently in *Kramer*:

> In *Morse*, this court held that the public's trust interest in the tidal waters of Coos Bay did not prevent the Department of State Lands from allowing the city of North Bend to fill and use a part of the Coos Bay Estuary to build a new runway for the local airport. 285 Or at 199-200. This court observed that the fill would not cause "substantial impairment of the public's interest" and emphasized that the Director of the Department of State Lands had found that the project served a public need that "outweigh[ed] the detriment to the use of the waters in question for navigation, fishing and recreational purposes[.]" *Id.* at 203, 207. Under the circumstances, this court explained, the public trust doctrine did not preclude the legislature from permitting the fill project. *Id.* at 207. Thus, *Morse* demonstrates that the public trust doctrine does not absolutely preclude the state from interfering with the public's ownership interest in the navigable waters of the state, at least if the impairment is not "substantial" and serves a greater public need.

In *Morse*, the Oregon Supreme Court held that the public trust doctrine did not prohibit the state from issuing a permit to fill 32-acres of Coos Bay for the purpose of extending a runway at its municipal airport. The Supreme Court quoted Professor Joseph Sax's discussion of the *Illinois Central*[16] case, as follows:

> "The Supreme Court upheld the state's claim and wrote one of the very few opinions in which an express conveyance of trust lands has been held to be beyond the power of a state legislature. It is that result which has made the decision such a favorite of litigants. But the Court did not actually prohibit the disposition of trust lands to private parties; its holding was much more limited. What a state may not do, the Court said, is to divest itself of authority to govern the whole of an area in which it has responsibility to exercise its police power; to grant almost the entire waterfront of a major city to a private company is, in effect, to abdicate legislative authority over navigation."

Id. at 202-3 (quoting Sax, "*The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*," 68 MICH L REV 473, 489 (1970). The Supreme Court in *Morse* further stated:

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[16] *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 13 S Ct 110 (1892).

> The article states, after a review of the cases, that "* * * what one finds in the cases is not a niggling preservation of every inch of public trust property against any change, nor a precise maintenance of every historical pattern of use. * * *.
>
> "* * *.
>
> "These traditional cases suggest the extremes of the legal constraints upon the states; no grant may be made to *a private party* if that grant is of such amplitude that the state will effectively have given up its authority to govern, but a grant is not illegal solely *because it diminishes in some degree the quantum of traditional public uses*." (Emphasis added.)

Id. at 202-3. While there are some factual distinctions in the *Morse* case, such as the fact that the airport at issue was a public use and not a private industry, these distinctions do not demand a different result here.

In the original 2016 decision, the Board accepted the recommendation of the Hearings Officer and concluded that 100 LNG trips a year would not violate public trust rights. The Board found that, subject to conditions, the 500-yard security zones placed around LNG vessels in Coos Bay would not unreasonably interfere with the public trust. The Board drew what it believed then were reasonable inferences from the testimony, as follows:

> "The testimony from Amergent Techs provides clarifications regarding the limited impacts caused by LNG vessel passage and docking in Coos Bay. Importantly, the memo clarifies that the Safety/Security zones are not 'exclusion zones.' Rather, they are regulated navigation areas. Essentially, that means that the Coast Guard will control traffic near the LNG ships but will still allow boat pilots [to] transit the zone on a case-by-case basis. The Board's understanding of this explanation is that the Coast Guard will let known vessels pass but can forcibly exclude vessels or delay [those] that it does not recognize. As a practical matter, local commercial fisherman operating known vessels should experience no significant delays as they will receive permission from the COTP to proceed. Less frequent users of the bay, such as recreational boaters, may experience some delay as the COTP makes efforts to identify them and conduct a threat assessment. Given that clarification, the Board believes that there will be no unreasonable interference with public trust rights."

LUBA Rec. 100-1. The Board adopted those findings. On appeal to LUBA, *OSCC* contended that the Board's conclusion on this point was erroneous because the Board's inference from the testimony that "known" vessels could proceed without delay was not supported by substantial

evidence in the whole record. *OSCC*, 76 Or LUBA at 357. LUBA sustained OSCC's contention based upon the reasoning that the testimony in the record did not support the factual inference the Board made in its findings:

> "Nothing in the record cited to us explains the distinction between a 'known' and 'unknown' boat. That problem aside, as Oregon Shores argues, the county's understanding that all 'known' boats would be able to transit the security zone with minimal delay is not supported by the Amergent Techs memo, much less by the Coast Guard statements in the record. Neither the Amergent Techs memo nor the Coast Guard statements suggest that the Coast Guard's case-by-case evaluation would rely on a distinction between 'known' and 'unknown' boats, and allow the former passage through the security zone without delay, although that may well be the case. The county's findings rely on its understanding of the Amergent Techs testimony as the primary basis for its conclusion that the transit of approximately 100 LNG tankers per year through the narrow estuary will not unreasonably interfere with navigation or public trust access to the estuary. * * * * We agree with Oregon Shores that remand is necessary for the county to adopt more adequate findings, supported by substantial evidence, on this point."

OSCC, 76 Or LUBA at 357-8. LUBA acknowledged that there was additional evidence in the record that could potentially support the Board's conclusion that the expected volume of vessel traffic would not unreasonably interfere with public trust rights. The Board identifies and relies upon some such evidence in this decision.

LUBA remanded the issue back to the Board for further proceedings and the Hearings Officer acknowledged the need to reopen the record as to this issue rather than restate inferences based upon the existing record. *Id. See* Letter from Hearings Officer dated Aug. 23, 2019. (No Exhibit # Assigned). The record on remand has been expanded and now, with the benefit of additional information, the Board adopts the additional findings set forth below.

To recap the original evidence, Captain F. G. Myer, the author of the Coast Guard's 2008 Water Suitability Report for the Jordan Cove Energy Project, stated as follows:

> A moving safety/security zone shall be established around the LNG vessel extending 500-yards around the vessel but ending at the shoreline. No vessel may enter the safety/security zone without first obtaining permission from the Coast Guard Captain of the Port (COTP). <u>The expectation is that the COTP's Representative will work with the Pilots and patrol assets to control traffic, and will allow vessels to transit the Safety/Security zone based on a case-by-case assessment conducted on scene.</u> Escort resources will

> be used to contact and control vessel movements such that the LNG Carrier is protected. (Emphasis added).

LUBA Rec. 3033. The statement that the COTP will "work with the Pilots to control traffic" is an indication that the Coast Guard will be attempting to coordinate the timing of ship passage to accommodate the various competing needs. The "case by case assessment" is accomplished by gathering intelligence on both friendly assets and threats, and to then create a system for "friend or foe" differentiation.

Captain Frank Whipple (USCG, ret.) of Amergent Techs also reiterated that that the U.S. Coast Guard has 'the power to allow vessels to transmit through the security zone when no threat is presented. These are all determined on a case by case basis * * * based on the safety of the vessel approaching the security zone and maintaining the security zone and maintaining the security of the LNG carriers." LUBA Rec. 3764. Again, that statement indicates that a threat assessment is going to accomplished on the scene and that individual vessels will be evaluated based on criteria developed by the COTP.

On remand, Cpt. Whipple of Amergent Techs expanded upon his earlier testimony and clarified that [t]he US Coast Guard policy * * * clearly states the purpose of the security zone * * *" and that "the guidance clearly expects persons to be allowed in the security zone as long they do not pose a threat to the LNG carrier." Exhibit 67, Sub-Exhibit 2 at p. 5. Persons in the security zone need to be aware that they are required to obey any direction or order issued by the COTP. There is no credible testimony to the contrary.

Various Opponents submitted candid testimony that is consistent with Cpt. Whipple's testimony noted above, as well as being consistent with the Board's key inference in the 2016 decision. One commenter stated that there was a meeting of the Harbor Safety Committee on January 15, 2019, and that the Coos County Sheriff's office stated that "deconfliction with local users was a critical issue for the Southwestern Oregon Regional Safety Center. *They will have a data base of all local vessels.*" (Emphasis added). Furthermore, the minutes of that meeting state the "the County will be working on a list of local fishing vessels to use in determining local fishermen." Exhibit 59. *See also* Exhibit 60 (Opponent Steve Miller stated that a Coos County Sheriff's deputy stated in an interview with the World Newspaper that "if a boat was known to him or did not appear to him to be a threat to an LNG carrier, the boat would be allowed to continue."). Again, these statements are all consistent with, and conclusively confirm, the Board's initial inference.

On remand, the Applicant initially argued that the distinction between "known" and "unknown" vessels is immaterial, since the overall duration of the operation of the security zone is low (at the time, the Applicant proposed 100 trips a year for a maximum of six hours out of a total of 168 hours in a week). The Applicant has since raised that number to 120 trips a year. In its application narrative, the Applicant states:

> The Board should find that the Project will not unreasonably interfere with public trust rights. As support for this conclusion, the Board should rely upon the U.S. Coast Guard Waterway

> Suitability Report, which provides that security zones around LNG vessels would not be exclusion zones and, in fact, upon gaining permission from the U.S. Coast Guard Captain of the Port's representative, fishing vessels would be allowed to enter the security zone: "The expectation is that the COTP's Representative will work with the Pilots and patrol assets to control traffic, and will allow vessels to transit the Safety/Security zone based on a case-by-case assessment conducted on scene." LUBA Rec. 3033.
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> Further, Amergent Techs, a maritime security expert firm, explained that, based upon expected transit time for an LNG vessel (approximately 90 minutes each from breakwater entrance to dock), maximum delay to fishing caused by an LNG vessel would last only 20-30 minutes per vessel trip. [LUBA] Rec. 3764. Further, the number of LNG vessels would be limited to 100 per year. [LUBA] Rec. 3763. At the rate of 100 vessels per year, and a 20-30 minute delay associated with each trip of each vessel, over the course of a seven-day period, there would be a maximum of six out of a possible 168 hours when use of the Bay would be potentially restricted due to LNG vessel passage. [LUBA] Rec. 3763. This is less than one hour per day. That leaves a total of 162 hours per week of unrestricted use of the Bay. The Board should find that this is not an unreasonable interference with public trust rights. Further, the dates and times that LNG vessels would be in transit in the Bay would be announced in advance and would be posted online and on a message board, which allows local vessels to make plans to avoid the narrow portions of the estuary at those times. *Id.*
>
> Based upon these facts, the Board should find that the Project will not unreasonably interfere with public trust rights. Further, in light of the limited time when use of the Bay is even potentially restricted, the Board need not concern itself with whether vessels are "known" or "unknown" to the Coast Guard. Stated another way, even if a vessel must wait out the passage of an LNG vessel, it is of such a short duration that the Board should find that it is not an unreasonable interference.

Application Narrative, at p. 11-12. In its final argument, the Applicant repeats these same arguments and then adds a clarification that only the outbound trips will need to use the high tides to ensure enough water under keel:

> Many of the Opponents' contentions are based upon the incorrect premise that LNG vessels serving the Project will only transit at high tide, which is a common time to conduct crabbing and other activities in the Bay. However, Project LNG vessels are only

> required to transit at high tide when they are loaded with gas, meaning when they are leaving port. *See* Resource Report 8 at 29 in Exhibit 15 of JCEP's June 24, 2019 submittal. Incoming vessels are not bound to the high tide restriction and thus will not interfere with high-tide activities. This factual clarification alone eliminates half of the potential interference identified by most opponents.

See Final Argument dated July 16, 2019 at p. 6 (Exhibit 57). Continuing, the Applicant states:

> Further, Opponents' contentions largely fail because they are based upon generalized statements about using the Bay and speculative possible interference without demonstrating a specific likelihood that it will occur. In fact, the likelihood is low.
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> * * * * *
>
> Finally, Opponents' testimony also fails because it does not acknowledge the mitigation measures JCEP has proposed and summarized above, including announcing LNG vessel transit times in advance, which will allow the public to plan their activities around the LNG vessels' use of the Bay. Another such mitigation measure is that LNG carrier transit will be prioritized at night, when there is typically less recreational boating and fishing traffic in the Bay, which will reduce the impact of the moving safety/security zone on public activities in the Bay. *Id.*

Id. at 6-7. The Board agrees with the Applicant's analysis. The Coast Guard's 2008 Water Suitability Report does say that the LNG transits will initially occur during daylight hours during the first six (6) months of operation. LUBA Rec. 3033. However, beyond that clarification, the overall point is well-taken: If the LNG ships are able to enter the estuary during the nightly high tide, it will greatly reduce conflicts with recreational crabbers, fisherman, and boaters. *See also* Exhibit 50, Sub-Exhibit 18, at p. 12-13. In addition, LNG vessels entering Coos Bay will be empty, and can therefore avoid high tide.

Before the Hearings Officer reopened the record on August 23, 2019, the then-existing record seemed to suggest that one possible way to reduce conflicts between LNG vessels and recreational crabbing was to formally limit, via a condition of approval, the majority of the LNG transits to periods of limited visibility. The Board suggested such as condition in his August 23, 2019 letter. The Applicant opposed the condition on the grounds that would severely limit operations, would not allow for exceptions due to weather or tidal conditions, and would further complicate coordination efforts by the Coast Guard. Exhibit 67. This testimony convinced the Board that such a condition was unworkable. Nonetheless, the Board believes that the Applicant's commitment to prioritizing a majority of the egress trips to hours of limited visibility will go a long way towards deconflicting potential uses in the bay.

The record as it existed on August 23, 2019 did not contain much information about whether recreational crabbing occurs at night. One commenter, Larry Mangan, argued that for a "working family," crabbing must occur at a "reasonable hour," which they describe as "daylight, not too early or late in the day." Exhibit 36, at p.1. During the second open-record period, quite a few commenters provided information on night-time use of the bay. They suggested that people engage in night surfing, night kayaking, night scuba diving, and night fishing. Exhibit 60. No numbers are attached to these claims, and the Board surmises that such night recreational activity is extremely limited. The one possible exception is fishing, since it makes sense that fisherman like to get an early start on the day by leaving before dawn. This is especially true on the opening day of key fishery seasons. In any event, the record as a whole does support the conclusion that the vast majority of existing boat and recreation-related activity occurs in the daytime, and that prioritizing LNG vessels for bay-related travel during periods of limited visibility will reduce conflicts.

In reviewing the record, the Board sought to gain an understanding of the size and scope of the security zone. In this regard, Mr. Chuck Erickson of Power Hooker Tackle LLC created a very helpful scaled map to show the size of the security zone in relation to the estuary. Exhibit 53. His scale model of the zone measures 1317 yards long by 1050 yards wide. As his map points point, the estuary is rarely, if ever, wider than 1000 yards in the vicinity where the LNG ships would use the estuary, and therefore, as a practical matter, the security zone covers the entire width of the estuary in most places. *See also* Exhibit 54 (State of Oregon DLCD Staff Comments on FERC DEIS, at p. 204).

Second, the Board sought to understand the nature and scope of the LNG shipping operation. The Applicant offered the following key facts:

- 110-120 tanker arrivals and 110-120 departures per year.
- Departures of fully loaded tankers will occur during high tide, in order to maintain a "10% under keel" clearance level. Resource Report 8 at p. 29. Exhibit 50, Sub Exhibit 15, page 5 of 6, Exhibit 73, Sub-Exhibit 1 at p. 2.
- 50 to 75% of the high tides will be high enough to permit the passage of a fully-loaded LNG carrier.[17]
- LNG Tanker arrivals may occur during low tide. *Id.*
- LNG carrier transits will be prioritized during nighttime hours. *Id.*
- Transit time through the estuary is estimated at 90 minutes. (Note: some of the time estimates in the record start at the Buoy "K," which is located some distance in the open ocean). Exh. 17, p. 85 of 1120 (DEIS at p. 2-14).

[17] As mentioned above, departures of fully loaded LNG tankers can only occur during a high tide. Resource Report 8 at p. 29. Exhibit 50, Sub Exhibit 15, page 5 of 6. Conversely, arrivals of "empty" tankers may occur during low tide. *Id.* Some commenters have noted that Coos Bay experiences semi-diunral tides, which is to say that there are two high and low tides each day. These commenters further note that there are height differences between the two high tides, and in fact, the differences may be several feet in height. These commenters questioned whether the LNG tankers can use *both* of the daily high tides, and suggest that the tankers may be limited to using only the higher of these two tides. The Applicant clarified that issue, as well as the related discussion of whether the seasonal or other variations in tide heights (such as moon phase) play a role, by noting that 50-75% of the high tides would support an LNG departure. Exhibit 67, Sub-Exhibit 1 at p. 2. The Opponent's testimony seems to confirm this analysis. *See* Letter from Dr. Jan Hodder, P.hD., at p. 7. Exhibit 59.

- ❖ An additional 90 minutes is needed to turn the LNG tanker into the park at the terminal booth. Exh. 17, p. 85 of 1120 (DEIS at p. 2-14). However, the security zone in effect that this time will not prevent passage of other vessels. Exhibit 67, Sub-Exhibit 1. at p. 4.

From this data, it appears that at a rate of 240 trips ends per year, the Applicant will make roughly (4.6) trips a week, and each trip with create a security zone that will be in effect for roughly 1.5 hours. This equals roughly seven hours a week. This 7-hr. figure is consistent with information submitted by Dr. Jan Hodder on the same topic, facts which she attributed to a "Resource Report 5." *See* Hodder letter at p. 3 (Exhibit 16). Although this does not, in and of itself seem substantial (7 hours out of 168 hours per week is roughly 4%, or 8% of daylight hours), it is true that the slack tide is the most critical usage time for some users (esp. recreational crabbing) and the LNG ships need to use some of those critical high-tide hours. Assuming 240 trips at 90 minutes for each trip, the security zone will be in effect for roughly 360 hours per year or 15 days total time. The Board concludes that a security zone of this limited duration will not pose a substantial interference with crabbing, particularly if the security zone as discussed below, is not an exclusion zone.

The Board notes that the amount of deep draft vessels using has seen a sharp decline in the past 30 years. Evidence submitted by CTCLUSI showed that "[o]utbound deep draft traffic through the channel consisted of 333 transits in 1988. Exhibit 42, Sub-Exhibit C, at p. 10. This is consistent with evidence submitted by Jody McCaffree, which shows usage down from over 300 round trips in 1988-89 to roughly 50 trips in 2016. *See* Coos Bay Harbor Safety Plan, Sept. 2018 at p. 30. Exhibit 47. Since the Applicant only proposes 120 trips, even that number of additional trip (50+120=170 total round trips) is only a bit more than ½ of the historic high level (333 trips) of bay use by deep draft levels. *See also* Exhibit 50, Sub-Exhibit 18, at p. 12-13. This fact severely undercuts any notion of a public trust doctrine violation occurring as a result of LNG-related shipping traffic. *See* Draft EIS at p. 4-622. Exhibit 50, Sub-Exhibit 17, at p. 900-1.

The DEIS acknowledges that the Coast Guard would have discretion to vary the degree of security zone enforcement, based on "the threat level in effect at the time," and the "specific perceived threat of any vessel in the security zone." This more-or-less restates the point about the Coast Guard conducting a case-by-case threat assessment on each individual vessel which seeks to enter or remain in the security zone. Except in times of elevated threats, the Coast Guard can – and says it will – "allow vessels to transit the Safety/Security zone based on a case-by-case assessment conducted on scene."

> During operation of the Project, recreational boaters would have to avoid LNG carriers in transit within the waterway. Jordan Cove anticipates that up to 120 LNG carriers would visit the LNG terminal each year. Recreational boaters using the bay at the same time that an LNG carrier is in transit within the waterway may encounter delays due to the moving security zone requirements around an LNG carrier, as specified in Jordan Cove's Waterway Suitability Assessment (WSA) and the Coast Guard's Waterway Suitability Report (WSR) and LOR. Jordan Cove estimated that it

> may take an LNG carrier up to 90 minutes to transit the waterway from the buoy to the terminal at speeds between 4 and 10 knots. Pilots guiding commercial ships in the Federal Navigation Channel currently encounter approximately six recreational boats during the transit into and out of the Port. These numbers are typically lower in winter and on weekdays than during the summer and on weekends. The Coast Guard and OSMB would continue to remind boaters of their obligation not to impede deep draft ships, regardless of the cargo. LNG carriers may take up to 30 minutes to pass resulting in limited potential delays to recreational boaters.

See Draft EIS at p. 4-541. Exhibit 50, Sub-Exhibit 17, at p. 819.

On the other hand, the majority of the Opponents insist that the security zone is in fact a an "exclusion zone," or at the very least a *de-facto* exclusion zone. *See, e.g.,* Exhibit 29, 30, 31, 33, 35, 64. The Draft EIS does contain one statement that causes some alarm: it states that "[d]uring LNG carrier transit in the waterways to the terminal, fisherman would be required to move out of the security zone, which would result in delays in transit." *See* Draft EIS at p. 4-597, Exhibit 50, Sub-Exhibit 17, at p 875 of 1120. However, as shown below, the statement in the DEIS is refuted by more specific evidence, and the record as a whole does not lead to the conclusion that the security zone will function as an exclusion zone.

Tonia Moro argues that the record is "clear" that the security zone is an exclusion zone. She relies primarily on layperson evidence she obtained from the internet, some of which is outdated, showing how other LNG facilities are operated. As an example, she references the Dominion Cove Point terminal in Maryland and the Distrigas facility in Everett Massachusetts as proving proof that the Coos Bay LNG facility would also be an exclusion zone.

The evidence concerning the Dominion Cove Point terminal is not helpful because it factually distinguishable based upon the record as a whole. First, the security zone in that case was temporary in nature. The Coast Guard established the Cove Point security zone in 2003, which was only two-years removed from the infamous Islamic "9-11" terrorist attacks. The security posture of the entire nation was on higher alert at that time, since the operational capability of Al-Qaeda had not yet been diminished worldwide. Moreover, the security zone in effect at Cove Point contained the same exception for vessels that are "specifically authorized by the COTP." Ms. Moro makes no effort to explain the extent of that "exception," and it appears from the Applicant's testimony that such an exception can be quite broad. Finally, it is worth noting that the geography of the Cove Point facility and surrounding waterways are different that Coos Bay, so an exclusion zone in that area would not be as burdensome of maritime traffic at that location as it would be in Coos Bay. The Applicant's experts made clear that the Coast Guard takes a custom approach to each facility based on the security threat that are anticipated at that time. Exhibit 67, Sub-Exhibit 1; Exhibit 73, Sub-Exhibit 1.

Similarly, as the Applicant's experts note, the Everett facility near Boston, Massachusetts also poses a much different situation than the proposed facility in Coos Bay. That facility operates at a much higher security posture because it exists in a much more fluid and dynamic

threat environment *See* Exhibit 73, Sub-Exhibit 1 at p. 3-4. The Freeport Texas example is also distinguishable, since the channel is only 400-foot-wide at that location. The Board believes that the record makes clear that each terminal location is different and demands a different security solution. It is not analytically useful to point to what is going on at other LNG facilities and expect the same security solution to be imposed in Coos Bay. For this reason, when Opponents point to other locations and assert that the Coast Guard will implement similar restrictions at Coos Bay, such testimony amounts to speculation.

Furthermore, Cpt. Whipple further noted that only a limited number of vessels operate out of Coos Bay, and there are limited number of boat ramps. Thus, it is easier to monitor this area for threats posed by small boats. *See* Exhibit 73, Sub-Exhibit 1 at p. 5. Again, this fact shows why it is incorrect to attempt to draw analogies about the security zones and risk models to places like Everett, Cove Point, or other similar LNG facilities.

Impacts on Recreational and Commercial Crabbing.

Oregon Shores and other Opponents note that Coos Bay and Jordan Cove are utilized by a Dungeness crab fishery as well as other fishery interests. They note that Dungeness crab fishing is an important part of the Oregon economy. In a good year, crab harvesting can yield $100 million to the Oregon economy. *See "The Oregon Recreational Dungeness Crab Fishery, 2007-2011,"* ODFW Information Report Number 2012-04 at p. 10, Exhibit 16 (Saying that the ex-vessel value of commercial crabbing alone is worth $25-50 million a year). *See also* Exhibit 54 (ODFW states that the 2017-18 crab season generated $74 million in ex-vessel value). According to OSCC, there are in excess of 350 vessels involved in commercial crab fishing along the Oregon coast. *See* OSCC letter dated June 10, 2019, at p. 3, Exhibit 2. *See* Draft EIS at p. 4-539. Exhibit 50, Sub-Exhibit 17, at p. 817.

The record seems to indicate that most *commercial* crabbing is done in the ocean, and not in the bay itself. Exhibit 59 at p. 11-12. Therefore, the biggest potential conflict between LNG transport and commercial crabbing is not with the fishing itself, but rather with potential navigation conflicts in and out of the bay. OSCC describes the alleged impact on the commercial crab fishery as follows:

> The Dungeness crab fishery in Oregon has been characterized as a "derby fishery." During the first days and weeks of the season, a substantial portion of the total annual commercial crab landings are caught in the first days and weeks of the season. Having gear in the water for "the first pull" is critically important. In the days just prior to the start of the commercial crabbing season, fisheries management agencies provide a very narrow window of time for commercial fishers to set out their gear before the first pull of the season. Smaller vessels in the fleet must make multiple trips to sea in order to get all their gear in the water. Thus, in the days leading up to the opening of the commercial crab season and in the days and weeks immediately following the season opening, there are hundreds of commercial vessel crossings over the Coos Bay Bar by

> boats loaded to capacity with crab pots and live crab. The restrictions imposed by LNG carriers transiting the lower portion of the Coos Bay federal navigation channel will result in significant, quantifiable, negative impacts on use of the channel by commercial fishing vessels. The permit should be denied because the work proposed will result in unreasonable interference with use of state waters for fishing and recreation. (Emphasis added).

See Letter From Phillip Johnson, OSCC, dated June 9, 2019, at p. 9. Exhibit 2. *See also* Letter from Dr. Jan Hodder dated September 4, 2019, at p. 11-12 (describing the local commercial crabbing fishery operations in detail). (Exhibit 59). The premise of OSCC's conflict argument is not clear. OSCC does not explain exactly what the "restrictions imposed by LNG carriers" are. Other than the obvious (such as large, deep draft vessels having right-of-way over smaller, more mobile shallow draft vessels), it is simply not apparent what the alleged "significant, quantifiable, negative impacts on use of the channel by commercial fishing vessels" are. Again, the argument appears to be based on the incorrect premise that the security zone is an exclusion zone.

Cpt. Whipple of Amergent Techs stated that "[t]he LNG carriers entering the channel entrance will be similar to all other deep draft vessels entering the harbor and should not impeded fishing/ crabbing vessels." Exhibit 73, Sub-Exhibit 1 at p. 2. He goes on to note that the arrival and departure times of LNG vessels will be published weeks in advance, and that the vessel traffic information services (VTIS) will assist waterway users and deep draft ships in avoiding each other. The hearing officer notes that the crabbing vessels may have to modify their current practices to a certain extent, but that this does not constitute a substantial interference with the meaning of public trust doctrine law. *Morse v. Dep't. of State Lands*, 285 Or at 202 ("what one finds in the cases is not a niggling preservation of every inch of public trust property against any change, nor a precise maintenance of every historical pattern of use.").

It appears that *recreational* crabbing activity occurring within the estuary itself has the most likely potential to be affected by the security zone. Most of the crabbing activity occurs in the lower bay, which is marine dominated. The record suggests that crabbing does not occur in the navigation channel itself, but rather in the adjacent waters to the channel.

Crabbing is an activity that occurs most frequently in the high slack tide. Exhibit 8, 16. In this regard, Larry Mangan writes that "[t]he assertion by the Applicant that there will be very limited effect on recreational crabbing has no merit, and sounds like it was written by someone at a desk in Portland, or perhaps more likely, in Calgary." Mr. Mangan's statement is premised on the assumption that the security zone is an exclusion zone, which, as the Board has repeatedly discussed, is an incorrect premise.

Although recreational crabbing can potentially occur year-round, by far the bulk of the crabbing activity occurs between July and November, with August and September being the most successful months. *See "The Oregon Recreational Dungeness Crab Fishery*, 2007-2011," ODFW Information Report Number 2012-04 at p. 37-9, Exhibit 16. According to a report

entitled "The Oregon Recreational Dungeness Crab Fishery, 2007-2011," crabbers in Coos bay typically practiced a soak time of 3 hours.[18] *Id.* at p. 37, Exhibit 16.

The Draft FEIS addresses the impacts that the LNG carrier vessels will have on recreational crabbing, as follows:

> However, if crabbing or clamming activities were to occur within the established security zones, those activities may be required to cease, with attending vessels required to temporarily move out of the security zone while the LNG carrier in transit moves by. The requirement for any commercial or recreational boat operating within the security zone near the channel, but not impeding the safe navigation of the LNG carrier in the channel, to move and vacate the security zone area would be up to the Coast Guard on-scene commander and decided on a case-by-case basis. The Coast Guard has informed Jordan Cove that the degree of security zone enforcement would be based on the threat level in effect at the time and the specific perceived threat of any vessel in the security zone. Crab pots outside of the navigation channel should not be affected by LNG carrier traffic in the waterway. Passive equipment, such as crab pots, would be permitted to remain within the security zone while an LNG carrier is present.

See Draft EIS at p. 4-540. Exhibit 50, Sub-Exhibit 17, at p. 818. The Board does not believe that such impacts constitute a substantial interference within the meaning of Oregon public trust doctrine law. Rather, the "paramountcy of the right of navigation * * * does, whenever there is a necessary conflict, limit [fishing / crabbing] and compel it to yield so far as the right of fishery interferes with the fair, useful and legitimate exercise of the right of navigation." *Anderson v. Columbia Contract Co.*, 94 Or 171, 182-183, 184 P 240 (1919); *Morse v. Dep't. of State Lands*, 285 Or at 202 ("what one finds in the cases is not a niggling preservation of every inch of public trust property against any change, nor a precise maintenance of every historical pattern of use.").

There are approximately 14 high tides in an average week, and roughly ½ of them occur during periods of darkness. Given that crabbing presents a three-hour window of opportunity, it appears that potential effective crabbing is limited to around 42 hours during any given week (14 high tides x 3 hours each). This amount of time is further limited by the fact that most recreational crabbing is done in daylight hours, it further appears that the realistic and practical opportunity for recreational crabbing is limited to around 21 hours per week.

If the Applicant is correct that the preferred time period to traverse the estuary is at night and that only ½ of the trips will be at high tide, the Board does not believe that the interference will be substantial enough to create a violation of public trust rights. Given that there are

[18] The Board notes that virtually *all* of the persons testifying in opposition to this application stated that the soak time is limited to two hours. The Board finds that the three-hour window set forth in the ODFW Information Report is more credible because it is based on interviews of crabbers and the information was collected in a non-adversarial proceeding.

roughly seven (7) high tides that occur at night each week, and the Applicant only needs to use 2-3 of these high tides a week for its departures, it seems that the interference with recreational crabbing is fairly limited.

Most of the comments from the public seem to view the security zone as an exclusion zone, and argue that vessels would have to vacate the area during the time the LNG tanker passes through the channel. While the Draft EIS does state that "fisherman would be required to move out of the security zone," *See* Draft EIS at p. 4-597, Exhibit 50, Sub-Exhibit 17, at p 875 of 1120, more specific information provided by . Furthermore, most of the commenters seem to view their public trust right to fish, crab, surf etc. as being more absolute than it is in reality. The Board reads the public trust case law as providing a balancing between various competing users of the public resources, and that it does not prioritize existing uses and users.

OSCC argues that one particular type of crab trap will not be able to be used during periods when the LNG ships are entering the channel because this particular type of pot needs to be checked every 30 minutes.

> Most recreational and all commercial crab fishing in the estuary is undertaken using rings. Deploying a string of baited crab rings and then requiring fishers to vacate the deployment area leaving the rings unattended for 30 minutes around slack high tide while an LNG tanker and its associated safety zone passes will seriously diminish the effectiveness of one of the most important methods used to capture crabs in the Coos Estuary. For bay crabbing, as the tide approaches slack high water it is important to check rings on a more frequent basis as this is the time of greatest crab movement and feeding activity. Because crab rings do not retain crabs while the ring is at rest on the bottom, the only way to capture crabs using rings is to bring them rapidly to the surface while actively feeding crabs are present on the baited ring. In contrast to a recreational fishery using traps, the effectiveness of capture using crab rings is based on the frequency upon which the rings, once deployed, are recovered/brought rapidly to the surface. Requiring rings to "soak" for a period of 30 minutes or more will not improve their capture success rate. If transiting LNG carriers require recreational fishers to leave deployed rings unattended for 30 minutes, this requirement will likely render this type of harvest method infeasible/impractical.

See OSCC letter dated June 10, 2019, at p. 7 (Exhibit 2). This information is refuted by "The Oregon Recreational Dungeness Crab Fishery, 2007-2011," which states that "recreational crabbers harvest crab with traps ('pots'), rings ('hoops') or snares," and that crabbers in Coos Bay "typically used pots." *See* Information Report Number 2012-04 at p. 9, 37, Exhibit 16.

OSCC also cites to the case of *Johnson v. Hoy*, 151 Or 196, 47 P 252 (1935) for the proposition that "fishing rights do not have to be completely blocked in order to be a substantial

interference with the public trust." *See* Letter from Philip Johnson, OSCC, dated July 10, 2019, at p. 3. In *Johnson*, the rights of fisherman who used gill nets was pitted against the rights of fish trappers. The Oregon Supreme Court applied the "Privileges and Immunities" clause of the Oregon Constitution and found that a certain type of fish trap caused an "unreasonable interference" to commercial gill fishing. The Supreme Court concluded that fish trap was a "danger and a menace to the gill net fisherman while engaging to pick up their nets."

The *Johnson* case is inapposite here, because there is no suggestion in this case that the LNG ships will pose a "danger and a menace" to fisherman. In fact, OSCC is attempting to argue that the estuary cannot be used for the passage of LNG ships because crabbers have a vested right to use a particular type of technology that is inconsistent with a security zone. From the record, it seems relatively clear that the Coast Guard would enforce the security zone in a manner that prohibits recreational crabbers from checking their pots within the security zone while the LNG carrier ship is passing that location, However, even if that were to be the case, public trust rights do not vest in the public a right to any particular fishing technology, as *Johnson v. Hoy*, 151 Or 196, 47 P 252 (1935) aptly proves. *See also Morse v. Dep't. of State Lands*, 285 Or at 202 ("what one finds in the cases is not a niggling preservation of every inch of public trust property against any change, nor a precise maintenance of every historical pattern of use.").

In any event, the Board does not believe that the public trust doctrine is implicated merely because crabbers might have to transition to a different type of crab trap technology that does not need to be checked every 30 minutes. Under *Johnson v. Hoy*, 151 Or 196, 47 P 252 (1935), the public has no absolute right to use a particular type of fishing technology, particularly where that technology interferes with other users. In this case, it may be the case that crabbers will have to transition from the collapsible "rings" to the more robust crab "pot" design that can soak for longer periods of time. The most credible evidence in the record states that crabbers in Coos Bay "typically used pots," so the potential impact on crabbers seems overstated in any event. *See* Information Report Number 2012-04 at p. 9, 37, Exhibit 16.

OSCC argues that any 30-minute or longer interruption with crabbing is itself is a "substantial interference" with public trust rights:

> A 30-minute interruption caused by a transiting LNG carrier at in the peak period of fishing activity having a 2 hour feasible time window centered over high tide can readily and reasonably be characterized as a *major* disruption of one of the most important (and valuable) recreational uses of the Coos Estuary.

The Board completely disagrees with this conclusion. As an initial matter, the security zone would not be in effect for 30 minutes *of each day*. Rather, as the Applicant notes, it would be established only when LNG vessels enter or exit the estuary, which is for 30 minutes roughly 4.6 times a week, and the majority of the transits will occur at night. Furthermore, the Coast Guard has stated to JCEP that passive equipment, such as crab pots, would be permitted to remain within the security zone while an LNG carrier is present. DEIS at p. 4-450-51, Exhibit 50, Sub-Exhibit 17, at p 875 of 1120. Moreover, under *Weise*, a person exercising ordinary care

in using the waterway for "legitimate purposes of trade or transportation" may temporarily "impede or obstruct another" if doing so is necessary and unavoidable to that person's use. *Weise*, 3 Or. at 450. And, as previously discussed, navigation has priority as against fishing to the extent of any conflict between the two uses. *Anderson,* 94 Or at 182-183.

Continuing, OSCC further states:

> Requiring recreational vessels to clear long established and preferred crab fishing areas for a half hour to accommodate the passage of an LNG tank vessel will greatly disrupt and interfere with both recreational and commercial crab fishing in the Coos Estuary. While the record describes a moving 500-yard security/safety zone surrounding LNG vessels transiting the estuary, the application does not say where recreational vessels involved in recreational crabbing and fishing activities will be required to go. The description of areas of the estuary of importance to commercial and recreational crabbers in the Coos Estuary presented in the record is an incomplete list. Perhaps the most important area for commercial bay crabbers is a region of the estuary on the margin of the Federal Navigation channel which parallels the south edge of the North Jetty. The Federal navigation channel makes its closest approach to the North Jetty in this region of the bay. Crabbers working in the area between the North Jetty and the Federal navigation channel will be unable to vacate the moving 500-yard safety/security safety zone surrounding a transiting LNG vessel as there is not room to move away from the channel without grounding on the rock jetty. The Applicant fails to identify important crab fishing locations in the lower bay where small vessel operators that may become "trapped" between the shore and the moving safety/security zone of an LNG vessel transiting the Federal navigation channel.

See OSCC letter dated June 10, 2019, at pp. 7-8, Exhibit 2. Again, in the above passage, OSCC presumes facts that are not supported by the record. Whether crabbers would need to exit the security zone would largely depend on the threat level in effect at that time. DEIS at p. 4-450 to 4-451, Exhibit 50, Sub-Exhibit 17, at p. 817. The Coast Guard has stated that "[t]he expectation is that the COTP's Representative will work with the Pilots and patrol assets to control traffic, and will allow vessels to transit the Safety/Security zone based on a case-by-case assessment conducted on scene." LUBA Rec. 3033.

OSCC makes the same wrong assumption in the following passage.

> Recreational and commercial crabbers and boaters operating vessels to the North and West of the Federal navigation channel required to vacate the moving safety/security zone of a transiting LNG vessel may be faced with a choice of grounding their vessel

> in the natural shallows at the margin of the bay or on rock revetment structures at the margin of the bay. The other choice available to vessel operators working in areas to the north and west of the federal navigation channel that lack sufficient space to vacate the moving safety/security zone of a transiting LNG carrier is to cross the navigation channel in front of the path of the oncoming LNG vessel. The North Jetty and the shoreline of the North Spit are within the 500-yard safety/vessel exclusion zone of the Federal Navigation channel in numerous locations meaning that these locations are unsuitable for use as refuge/safety areas for recreational vessels to muster during the passage of an LNG vessel. As a result, it may be necessary for recreational vessels to cross the navigation channel in advance of an LNG tanker passage in order to find a suitable muster area that is outside the 500-yard LNG vessel safety/vessel exclusion zone.
>
> Because LNG vessels will likely be in operation during all months of the year, the LNG vessel will necessarily interfere with Dungeness crab harvest during both off and peak seasons. Recreational harvesters will also be restricted in their harvesting activity during both off and peak seasons. This will ultimately result in the interference of public trust rights of Dungeness crab harvesters as well as the ultimate decline in economic stability and benefits to Coos County that Dungeness crab harvesters provide.

See OSCC letter dated June 10, 2019, at p. 3, Exhibit 2. Again, the suggestion that the security zone is an exclusion zone is simply incorrect.

The record includes a paper submitted by Ms. Sylvia Yamada entitled "Potential Impact of Jordan Cove LNG Terminal Construction on the Nursery Habitat of Dungeness Crab" dated January 14, 2019, Exhibit 37 The paper states that the crabs were "consistently abundant" from 2002 through 2014 in the area sites near the Jordon Cove project site. It further states that:

> Not only will the turbidity during the construction phase be of concern to the ecological community, the ongoing dredging to maintain the berth and shipping channels will continue to be a disturbance to the ecosystem. It will result in habitat loss for native species, including the valuable Dungeness crab. In one study between 45 and 85% of the Dungeness crabs died during a simulated dredging operation (Chang and Levings, 1978).

This conclusion is unhelpful to the Opponents in several ways. First, Ms. Yamada offers such vague and nebulous statements that no conclusions can be drawn from them. Phrases like turbidity "*will be of concern to* the ecological community" or "*could* impact the important Oregon Dungeness fishery" are far too indeterminate to be considered substantial evidence. Yamada cites to a forty-year old "simulated dredging" study that apparently showed some partial

Dungeness crab habitat loss, somewhere at some unknown time, but without knowing more about this study no comparison may be drawn with the current land use applications at issue. It is common knowledge that the Coos Bay channel has been dredged many times in the recent past, and the opponent's own evidence does not even attempt to account for such dredging. Certainly, the Yamada study does not undermine the strength of the Applicant's case.

Impacts to Fishing and Fishing Boat Traffic.

The Applicant asserts that sixty-eight percent of the boating activities in Coos Bay in 2007 originated from the Charleston Marina and the Empire ramp, 19 percent at the California Street boat ramp, and 4 percent at the North Spit ramps. Charleston Marina, the Empire ramp, and North Spit ramp are located approximately 7.3 miles, 3.3 miles, and 2.1 miles southwest of the Jordan Cove LNG Project; the California Street boat ramp is about 2.5 miles southeast. *See* Draft EIS at p. 4-540. Exhibit 50, Sub-Exhibit 17, at p. 818. Given the close proximity of the Charleston Marina to the jetty, it seems that there is only limited opportunity for conflicts, and most of that can be resolved via scheduling and the use of VTIS systems.

The opponent's alleged impacts to commercial fishing are best articulated by OSCC. *See* OSCC letter dated June 10, 2019, at pp. 8 -9, Exhibit 2. OSCC argues that the security zone will cause a substantial interference with fishing operations. The argument is detailed and complex and is worth quoting in its entirety. OSCC begins by carefully describing the conditions of the bar and jetty, and by noting the critical nature of timing the transit through the jetty:

> For a variety of reasons, including fishing seasons and ocean conditions, individual boats involved in commercial fisheries including but not limited to the crab, salmon and pink shrimp work as a fleet. This means that when the season is open and weather conditions are right, many of the boats in the fishery all head out to sea together. Particularly in winter, during commercial crab season, when weather imposes more limitations on the bar than any other time of year, boats at sea work their crab pots while watching the weather conditions decline. Members of the fleet are talking with one another and everyone is paying attention to bar conditions and the tides. Particularly in declining and marginal weather conditions, the vessels at sea in the commercial fleet all begin to head home around the same time. The previous outbound parade of boats reverses direction and the whole fleet heads for the bar. It can take the entire window of suitable incoming high tide conditions on the bar for the fleet to get back into the harbor. When the tide reverses and begins to ebb, conditions on the bar degenerate rapidly and in a matter of minutes the bar conditions can change from marginal to impassable. Boats that miss this window are forced to ride out the storm at sea until the next high flood tide.

Letter from Phillip Johnson dated June 9, 2019, at p. 8. Exhibit 2. OSCC then argues that there is simply no way to introduce LNG shipping into the existing mix of fishing uses:

> There is not sufficient time to add an LNG ship transit to this scenario without having negative impacts on the existing use of the navigation channel by fishers. If the bar is closed for a half an hour over the high flood tide, to accommodate passage of an LNG carrier and multiple tractor tugs, somebody is going to get stuck at sea in bad weather conditions. JCEP has stated the total time required for an LNG carrier to transit between the harbor entrance and the proposed berth is 90 minutes and that no individual location in the estuary will be impacted for more than 30 minutes. Roughly one third to one half of the LNG carrier's total transit time will occur when LNG vessels transit the lower portion of the bay that is also used by commercial and recreational vessels based in the Charleston harbor. Taking a half hour chunk out of the extremely limited time that the commercial fleet uses to cross the bar to enable an LNG tanker to transit the bar will only have negative impacts on fisheries. Those impacts are serious and potentially life threatening.

OSCC letter dated June 9, 2019, at p. 9. Exhibit 2. *See also* Exhibit 68 (expressing similar concerns). The Board finds a number of problems with this testimony. First, this analysis wrongly assumes that existing users have legal rights over proposed uses, and does not take in account the balancing of rights that pervades Oregon public trust doctrine case law. Second, it wrongly assumes, factually, that the commercial fishing boats will be "excluded" from making a jetty crossing for a certain period of time.

Cpt. Whipple of Amergent Techs counters this testimony by stating that "[t]he LNG carriers entering the channel entrance will be similar to all other deep draft vessels entering the harbor and should not impeded fishing/ crabbing vessels." Exhibit 73, Sub-Exhibit 1 at p. 2. He goes on to note that the arrive and departure times of LNG vessels will be published weeks in advance, and that the vessel traffic information services (VTIS) will assist waterway users and deep draft ships in avoiding each other. The Board notes that the fishing vessels may have to modify their current practices to a certain extent, but that this does not constitute a substantial interference with the meaning of public trust law.

Further, the Applicant notes that the Coos Bay Pilots testified that they anticipate that the effects of LNG carriers on fishing and other boats would closely track those of the other deep-draft ships that call on the Bay, including vessels that export wood chips and logs. Exhibit 57. In the Pilots' experience, the typical deep-draft ship encounters only six recreational boats and two commercial shipping boats during the typical transit into and out of the Port. *Id.* Thus, the Board finds that this information supports the conclusion that the impacts from LNG carriers will be significantly less than the far-reaching allegations from opponents. *See* Draft EIS at p. 4-597, Exhibit 50, Sub-Exhibit 17, at p 875 of 1120.

Dr. Jan Hodder provided ODFW data concerning the number of recreational fishing boats using the bay. She noted that tuna fisherman average 2000-4000 "angular trips" (which is based on person fishing, not vessels) per year leaving from Charleston harbor, which most of this activity occurring in the dry season between June and September. Exhibit 59. The data is not very useful since it is an estimate of people fishing, not boats trips, but it probably translates to round trip 500-700 boats trips per season, or just a handful of trips per day. Dr. Hodder also cites ODFE data from 2017 that shows a combined private and Charter angular trip total of 19,235 angular trips for Coos Bay /Charleston. Again, given that charter boats typically have large numbers of fishermen and women on board, this does not strike the Board as being a particularly high number. Even assuming a conservative average of four (4) persons per boat, that equates to 13.1 round trips per day. Even assuming all the trips happen in a 6-month window, that is not a very high level of activity.

Granted, the Board has no doubt that there are days when many more boats are in the water. For example, the Surfrider Foundation states that during salmon season there may be upwards of one hundred boats in the water between Exhibit 60. However, the Board officer does not find a "substantial interference" of public trust rights if sport fishermen need to vacate the deepwater channel to let an LNG vessel pass by. Again, the "paramountcy of the right of navigation * * * does, whenever there is a necessary conflict, limit [fishing / crabbing] and compel it to yield so far as the right of fishery interferes with the fair, useful and legitimate exercise of the right of navigation." *Anderson v. Columbia Contract Co.*, 94 Or 171, 182-183, 184 P 240 (1919).

One final argument bears discussion as related to the security zone as it relates to fishing vessels. In Exhibit 72, Ms. Tonia Moro argues that fishing vessels have priority over LNG exports, because exports are less favored under Oregon law than fishing. Ms. Moro's argument hinges on a negative inference she believes can be gleaned from OAR 660-037-0040(6)(a)(C)(ii). This administrative law states that "Water-borne transportation" means uses of water access * * * (ii) Which require the *receipt* of shipment of goods by water." (Emphasis added). The Board does not believe that this language is intended, by negative implication, to exclude from the phrase "water borne transportation" such use of water access for the *export* of goods by water." Rather, it simply recognizes that a manufacturing or commercial use can be considered "water dependent' if it requires raw materials that can only be delivered by ships. Beyond that point, OAR 660-037-0070(2)(b) specifically contemplates a "coal export facility" as a type of water-dependent development. Finally, Coos County's Comprehensive Plan specifically planned for potential coal exports, which is the final contextual nail in the coffin of the "import only" argument. CCCP Vol II, Part 3, at p. 3.0.53 -54.

Even if that were the intent, it would beyond the police power of the state to limit the export of goods while allowing the importation of goods. Ms. Moro fails to explain why she thinks the police power is so broad as to allow a state to prohibit exports, and this is a critical shortcoming in her analysis. Moreover, even if the police power were so broad, Ms. Moro's interpretation would also violate Art. I, Section 10 of the United States Constitution.[19]

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[19] *See generally, Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Development Comm.*, 464 F.2d 1358 (3rd Cir.1972), *cert. denied* 409 U.S. 1118, 93 S.Ct. 909 (1973); *Oregon Waste Systems, Inc. v.*

Impacts on Kayaking and Surfing.

Some commentators argued that the security zone would limit their ability to kayak in the bay. *See e.g.*, Exhibit 15, 40, 60. The problem with most, if not all of the opponent testimony is that it is based on the incorrect assumption that the security zone is an exclusion zone. Second, the testimony also wrongly concludes that kayaking is a superior public trust right that rumps commercial shipping. For example, Chuck Erickson states in his letter dated June 17, 2019 that "I also kayak in Coos bay and these LNG ships will interfere with this recreation. This also violates my public trust rights." Exhibit 15. The Board strongly disagrees. *Morse v. Dep't. of State Lands*, 285 Or at 202 ("what one finds in the cases is not a niggling preservation of every inch of public trust property against any change, nor a precise maintenance of every historical pattern of use.").

The Board notes that it is not clear from the testimony and record as a whole how a large tanker can "interfere" with the operation of a kayak. Obviously, kayakers need to stay out of the way of all ship and boat for safety reasons, but that does not necessarily adversely implicate public trust doctrine rights. Also, all large ships and many wakeboarding boats create large waves that can tip over a kayak, but that problem is not unique to LNG vessels. Based upon the testimony received, the Board does not see anything that is particular to an LNG carrier vessel that precludes kayaker from utilizing the Bay in a manner consistent with public trust rights.

Department of Environmental Quality of the State of Oregon, 511 U.S. 93, 95–98 (1994); *Cachia v. Islamorada*, 542 F.3d 839 (11th Cir.2008), *Island Silver & Spice, Inc. v. Islamadora*, 542 F3d 844 (11th Cir 2008)

Although laws that broadly prohibit exports would undoubtedly fail constitutional muster, there is some recent case law that suggests that local governments may have the authority to implement non-discriminatory laws prohibiting energy-related transportation and storage in city limits based on environmental grounds. In 2016, the Portland, Oregon City Council unanimously approved two resolutions that represented an effort to protect residents from fossil fuel projects. The City Council banned construction or expansion of certain large-scale infrastructure to transport and store fossil fuels in the city. The City Council also voted to oppose rail projects planned to carry crude oil through the cities of Portland, Oregon and Vancouver, Washington. Although the Oregon Court of Appeals remanded the Ordinances back to the city on unrelated land use grounds, it declined to find a commerce clause violation. *Columbia Pacific Building Trade Council v. City of Portland*, 289 Or App 739, 412 P3d 258 (2017), *rev. den.*, 363 Or 390, 434 P3d 29 (2018). The court held that the city's alleged discrimination against out-of-state producers and refiners of fossil fuels and favoring in-state end users of fossil fuels did not constitute discrimination under the dormant Commerce Clause because the alleged discrimination was not between "substantially similar" out-of-state and in-state entities.).

In another recent case, *Portland Pipe Line Corp v. City of South Portland*, 332 F. Supp. 3d 264 (D. Me. 2018), a federal district court for the District of Maine ruled that the City of South Portland's ordinance prohibiting the loading of crude oil onto tankers and related activities and structures did not violate the Dormant Commerce Clause or the Foreign Commerce Clause. The ordinance, known as the "Clean Skies Ordinance," was adopted after the plaintiff pipeline operator made plans to reverse the flow in a pipeline that extended from the harbor in South Portland to refineries in Quebec so that instead of transporting crude oil from the harbor to the refineries, the pipeline could transport crude oil from Canada to the harbor for export shipment. The district court affirmed the ordinance based mostly on environmental grounds, and the pipeline company has appealed to the First Circuit. *See also* S. Shane Stroud, "The Keystone XL Pipeline and the Dormant Commerce Clause: Would Action by Congress Preclude Adequate Environmental Regulation at the State Level?," *Utah Law Review*: Vol. 2015 : No. 1 , Article 6. (2015); Patricia Weisselberg, *Shaping the Energy Future in the American West: Can California Curb Greenhouse Gas Emissions from Out-of-State, Coal-Fired Power Plants Without Violating the Dormant Commerce Clause?*, 42 U.S.F. L. REV. 185, 204-05 (2007).

Specific to the security zone, the Board finds that the proposed zone, based upon the record, is not likely going to have an impact on kayaking and surfing. As the Applicant notes, the extent security zone is based on a threat assessment designed to exclude subversive forces, and unless there is some intelligence which suggest that the surfers and kayakers are a threat, they will not be excluded from the security zone. The best evidence in the record to this point is provided by Coast Guard Captain Frank Whipple of Amergent Techs, Inc. He states in his Sept. 9, 2019 letter that kayakers in general would not be deemed to be a threat to LNG tankers unless they interfered with the carrier's passage. Cpt. Whipple further stated:

> "If a surfer or kayaker was to intentionally interfere with the transit of the LNG carrier, they would be subject to actions and penalties as stipulated in the regulations for violation of a security zone. If they were merely paddling without stated intent to interfere with the passage of an LNG carrier, no action would be taken."

Whipple letter dated Sept. 9, 2019 at p. 3. Exhibit 67. Likewise, it seems highly doubtful that the U.S. Coast guard would view surfers as a threat to LNG tankers. *Id.*

The Applicant is correct when it states that "this testimony refutes Opponents' contention that the security zone will prevent their activities or require them to stop and then restart their activities." The Applicant notes, correctly, that Captain Whipple's testimony is highly credible on this point given the limited purpose of security zones (to prevent subversive activities) and his extensive experience implementing security zones and developing the security zone at issue in this case with applicable regulatory authorities.

The Board notes that one commentator, Mr. Brian Jones of Muddler Enterprises, states that "[t]he proposal is to trash (by dredging) the bay fishery of Coos Bay, to allow Canadian natural gas to be loaded onto huge tanker ships, to be delivered to China." He questions why Oregonians would want to be the "middle-man" between Canada and China, and further laments that he tends "to doubt that [his comment] will be read or considered in the final decision." Exhibit 26. In response, the Board notes that Mr. Jones is really making a policy argument, not a legal argument. In any event, the Coos Bay estuary has been dredged extensively since the early 1900s, and there has been no evidence submitted which suggests that this extensive and yearly dredging activity has any long-term negative impacts on the estuary. *See e.g.*, Exhibit 34 at p. 21; Exhibit 42.

The Board finds testimony related to the existence of night surfing and scuba diving to be overstated and generally less credible. While very small levels of such night activity may occur, it is undoubtedly de-minimis in scope and does not warrant special consideration here.

Impacts Caused by Dredging.

The OSCC broadly asserts that "substantially destroying [public protected fishing grounds] through dredging * * * is an unreasonable interference with the public trust" with little supporting evidence as to either point. OSCC begins by making an analogy to a 1939 case which addressed whether fisherman could sue the City of St Helens and two privately-owned factories

in tort for directing untreated sewerage and other industrial waste into the Columbia River. *Columbia River Fishermen's Protective Union v. City of St. Helens*, 160 Or 654, 87 P2d 195 (1939).

In *Columbia River Fishermen's Protective Union,* the commercial fishermen brought an action in nuisance against the operators of two plants, an insulating board company and a paper company, for discharging pollution into the river. The plaintiffs alleged that the pollution destroyed the fish, aquatic life, and its fishing nets. The plaintiffs contended that this caused irreparable injury. The Oregon Supreme Court concluded that the commercial fishermen had a cause of action because they had a special interest, distinct from that of the public, in fishing the rivers. In finding a cause of action, the Supreme Court found that deleting the fish from the rivers prevented the fishermen from in public nuisance pursuing their vocations and earning their livelihood. The court noted that the state owns the fish [in trust], and that "[t]he regulatory power of a state extends not only to the taking of its fish but also over the waters inhabited by the fish. Its care of the fish would be of no avail if it had no power to protect the waters from pollution: 11 R. C. L. 1047, § 35. *See Eagle Cliff Fishing Co. v. McGowan*, 70 Or 1, 137 P 766."

In *Chernaik v. Brown*, 295 Or App 584, 600, 436 P3d 26 (2019), *rev granted*, 364 Or 849, 442 P3d 1119 (2019), the Oregon Court of Appeals stated that "the Oregon public-trust doctrine is rooted in the idea that the state is *restrained* from disposing or allowing uses of public-trust resources that substantially impair the recognized public use of those resources." (Emphasis in Original). However, the court rejected the idea that the public trust doctrine imposes a fiduciary duty on the state: **We can find no source under the Oregon conception of the public-trust doctrine for imposing fiduciary duties on the state to affirmatively act to protect public-trust resources from the effects of climate change.**" The court further stated that "the public-trust doctrine uses the word 'trust' as an imperfect metaphor to capture the idea that the state is restrained from substantially impairing the common-law public right to use public-trust resources for certain purposes." *Id.*

In a very recent case, however, the Oregon Supreme Court seems to accept the idea of the having fiduciary duties under the PTD: "As the trustee", the State "has a duty to 'protect[ ] trust property' and to ensure, consistently with any requirements and prohibitions specific to the trust, that [trust property is] managed in a way that will benefit all trust beneficiaries." *Kramer v. City of Lake Oswego*, 365 Or 422, 446 P3d 1 (2019). This tension in the law may be the reason that the Oregon Supreme Court accepted review of *Chernaik.*

In any event, the Board assumes, without deciding, that dredging could, in theory, cause sufficient damage to the environment to require the state to invoke protections of the public trust doctrine. Note, however, with regard to the dredging needed to improve the deep water navigational channel, LUBA stated in *Southern Oregon Pipeline Information Project v. Coos County*, 57 Or LUBA 301 (2008) that "[w]e have some question whether allowing dredging to improve navigation (a public trust right) could ever run afoul of the public trust doctrine simply because it may favor one public trust right over another or favor one type of maritime traffic over another."

Furthermore, the best crab habitat is located further down the bay. *See* Draft EIS at p. 4-240, Exhibit 50, Sub-Exhibit 17, at p. 428 of 1120 (map).

In this case, however, the Board finds that the premise of OSCC's argument (*i.e.* that "the estuary or bay will be "substantially destroyed by dredging") is simply not correct, based on the record before the Board. In fact, given the extensive history of dredging in Coos Bay, including annual maintenance dredging over the past 20+ years, OSCC's suggestion that dredging causes "substantial destruction" to fishing grounds is patently absurd. Exhibit 42, Exhibit 56, Sub-Exhibit 5 & 9.5 (discussed below).

The evidence in the record makes clear that the Coos Bay estuary has been dredged since the early 1900s (and in the case of the upper reaches, since the mid-1800s). *See* Coos County Comprehensive Plan Vol II, Part 2, Section 4.1.7.4. *See also Feasibility Report on Navigation Improvements with Environmental Impact Statement*, January 1994, Chapter 1, p.3-4 and p. 3-1 to 3-22. Exhibit 42, Sub-Exhibit C; Exhibit 59 (discussing annual maintenance dredging). The Comprehensive Plan notes that millions of cubic yards of material were dredged annually in the years prior to plan adoption, all with no apparent long-term ill-effects to the environment. One author notes that "dredging has a relatively minor influence on fauna in the lower reaches of the estuary." Katherine Jefferts, *The Vertical Distribution of Infauna: A Comparison of Dredged and Undredged Areas In Coos Bay, Oregon* (March 15, 1977). (Exhibit 56, Sub-Exhibit 5). *See also* Wilber & Clarke, *Defining and Assessing Benthic Recovery Following Dredging and Dredged Material Disposal* (Exhibit 56, Sub-Exhibit 9.5, at p. 9 of 16) (Describing the recovery time in terms of several months to several years, depending on a variety of factors, with dredged channels having a relatively short recovery time). *See* Robert Jeffery Arneson, *Seasonal Variations in Tidal Dynamics, Water Quality, and Sediments in the Coos Bay Estuary* (1976), at p. 16 (Exhibit 43) (Describing the Charleston small boat basin dredging project completed in 1956, with dimensions 900 ft x 500 ft x 10 depth). *See also* Exhibit 42, Sub-Exhibit C, at p. 16, 21 (Describing extensive historic dredging operations in Coos Bay Estuary).

The Applicant's studies demonstrate the impact on the estuary from dredging will be minimal and temporary, and describes BMPs to minimize turbidity. *See* Draft EIS at p. 4-243 to 4-249, Exhibit 50, Sub-Exhibit 17, at p. 431 to 437 of 1120; Exhibit 50, Sub-Exhibit 12, at p. 26-35; Exhibit 56, Sub-Exhibit 4 (showing only localized turbidity increases rom dredging in the federal navigational channel, and recommending BMPs to reduce those impacts by up to 50%); Exhibit 56, Sub-Exhibit 7 (tidal range remains unchanged); Exhibit 56, Sub-Exhibit 7 (comparative change of shoaling and/or erosion rates within the majority of the federal navigational channel and most of the non-project areas are less than .2 feet).

OSCC included into the record a number of scientific studies into the record, including Newell, et al., the Impact of Dredging Works in Coastal Waters: *A Review of the Sensitivity To Disturbance and Subsequent Recovery of Biological Resources of the Sea Bed.* (1977) (Exhibit 43). The Newell study is not specific to estuaries; rather it primarily addresses the open ocean floor. The study summaries a number of prior studies from around the world, and it does make mention of a study that was completed in Coos Bay in 1972. While the Newell study is complex, some general conclusions can be made about the areas it studied:

- ❖ Recovery was general fastest in areas where finer sediments (muds and silts) are deposited (generally less than a year), with sandy areas taking a longer time to recover (1-4 years) and gravel and reefs taking the longest (2-10 years) *Id.* at p. 4, 37.
- ❖ In tidal channels, both the rate of infill and recolonization were related to the speed of currents. Areas with faster currents showed greater recovery and shorter time periods of recovery. *Id.* at p. 4, 16, 37
- ❖ Areas of high latitude such as the arctic may have longer recovery times. *Id.* at p. 4.

In this case, the areas that are going to be dredged are primarily sands in the .2 mm to .3 mm range. *See* Robert Jeffery Arneson, *Seasonal Variations in Tidal Dynamics, Water Quality, and Sediments in the Coos Bay Estuary* (1976) (Exhibit 43). The bay is a high energy environment subject to strong tides, and flow velocities approaching one meter per second. *Id.* at 35-44. For this reason, Newell suggests that a shallow sandy areas subject to high velocity flows will generally recover relatively quickly, perhaps in a year or two. *See also* Wilber & Clarke, Defining and Assessing Benthic Recovery Following Dredging and Dredged Material Disposal. Exhibit 56, Sub-Exhibit 9.5, at p. 608 (p. 6 of 8) (citing to a study of the Columbia River, OR, where recovery times were under 10 months, and another from Yaquina Bay, OR, where the recovery time was one year.). These studies are summarized in the draft EIS. *See* Draft EIS at p. 4-248, Exhibit 50, Sub-Exhibit 17, at p. 436 of 1120 (Predicting a one-year recovery time for Coos Bay based on the results of data collected in the sandy substrate of Yaquina Bay, Oregon).

OSCC notes that Dungeness Crabs are a slow-growing, long K-selected "equilibrium species" that, according to Newell, require up to 10-years to recolonize the bay. *See* OSCC letter dated June 24, 2019 at p. 5. However, the Newell study only mentions crabs in a general sense, and does not support any specific conclusion about Dungeness crabs in general or in Coos Bay specifically. The specific mention in Newell of a "ten-year recovery" is in relation to coral reef communities:

> Finally, the community recovery curve for reef communities indicates that a period of 8-10yr may be required for the process of establishment and growth of the longlived and slow-growing K-selected equilibrium species and for the development of the biological interactions that are familiar to those who have observed the immense diversity and complexity of life on undisturbed reef structures. This long process of establishment of an equilibrium community reflects partly the time required for colonization by rarer components of the community, but is also influenced by the nature and stability of the substratum following cessation of dredging, and the time required for complex stabilization processes involving both physical compaction and biological interactions. The relationship between biological community structure, sediment composition and seabed stability is considered in more detail below.

See Newell at p. 40 (Exhibit 43). In contrast, Newell also states the following:

> The time taken for recovery of the full species composition and for subsequent exclusion of some of the transition community following the growth of larger K-strategist equilibrium species in a particular area will depend largely on the components that occur under natural conditions. In shallow water and estuarine conditions, where the community is in any case dominated by opportunistic species, recovery to the original species composition may be very rapid and coincide with the Peak of Opportunists point in Figure 4. In the stable environmental conditions of deeper waters, the replacement of the initial colonizers in the transitional community following complex biological interactions between the K-selected equilibrium species may take several years.

See Newell at p. 40 (Exhibit 43). The Newell study concludes as follows:

> Knowledge of the components that comprise the benthic community on the sea bed, whether these are r-selected opportunistic species or K-selected equilibrium species, thus gives important information not only on key resources that may require protection, but on the likely rate of recovery following dredging. Inspection of the schematic colonization succession shown in Figure 17 (p. 38) suggests that a recovery time of 6-8 months is characteristic for many estuarine muds whereas sands and gravels may take from 2-3yr depending on the proportion of sand and the local disturbance by waves and currents. As the deposits become coarser, estimates of 5-10yr are probably realistic for the development of the complex biological associations between the slow-growing components of equilibrium communities characteristic of reef structures.

See Newell at p. 43 (Exhibit 43). Because, as shown above, the Newell study does not state what OSCC claims, the Board rejects the OSCC testimony interpreting the science. Having said that, the Board does agree with OSCC insomuch as they point out that the 1976 McCauley study does not support the idea that the JCEP-related dredging will result in recovery of benthic communities within 4 weeks. In their comments to FERC, ODFW points out this same concern:

> The JCEP DEIS acknowledges that dredging, removal, and disturbance of the soft-sediment habitats will directly remove benthic organisms from the bay bottom, and the DEIS also states that it is likely that recovery would 71 occur in about one year for benthic resources particularly in the area of navigation channel modifications (4- 248). This estimate of the rapid rate of community recovery is problematic, however, because the technical references cited by the JCEP DEIS (4-248) are drawn from earlier investigations of dredging impacts that generally used

> a group small-bodied, rapidly-growing invertebrates (including amphipods, polychaete worms, small bivalves, etc. that have life-spans on the scale of months to a few years) as the focal species to provide metrics for the estimates of species and habitat recovery. These small opportunistic species are not representative of the large-bodied, long-lived bay clams that typically exhibit episodic recruitment and have lifespans on the scale of 10-20 years in the Oregon estuaries. (Emphasis added).

See State Agency Comments at p. 71. Exhibit 54. The McCauley study was conducted in an area of fine silts near Isthmus Slough, not in the sandy substrates encountered in the lower bay. Furthermore, the area studied by McCauley was a much more shallow area that is subject to high amounts of periodic dredging prop wash, anchor scraps, and similar disturbances. *See* McCauley *et. al.*, Bentic Fauna and Maintenance Dredging, A Case Study (1976). *See* Draft EIS at p. 4-248, Exhibit 50, Sub-Exhibit 17, at p. 436 of 1120.

However, even if the recovery time for these aquatic communities is one-three years, or even longer, the Board finds no violation of public trust rights stemming from such circumstances. There is simply not enough dredging occurring to create a concern over having deleterious effects beyond the immediate area being dredged, and the potential loss of these limited areas to commercial fishing or recreational activities dependent on such reasons for 1-3 years is not sufficient to constitute such substantial interference. The Board also acknowledges that there are certain K-strategist equilibrium species that would not likely ever fully recover in areas subject to periodic dredging. ODFW submitted the following comments to FERC pertaining to the effect of dredging on clams.

> Moreover, filter-feeding by dense populations of living clams can sometimes play an important role in the removal of phytoplankton and smaller particulate materials, thereby decreasing turbidity and increasing light penetration through the estuarine water column. Consequently, maintenance of suitable soft-sediment habitat is essential for survival of the moderately long-lived (life-span 10-15 years or longer) gaper, butter, and cockle clams, particularly in the sub-tidal zone. When soft-sediment habitat is chronically disturbed and altered by dredging of the subtidal zone, there may be a permanent loss and impact to benthic invertebrate populations and a decline in the biodiversity of benthic communities. Loss of some or all of these sub-tidal populations of bay clams has implications for both the ecological functioning of sub-tidal habitats and the ability of the bay clams to serve as broodstock to support the recreational and commercial shellfish fisheries in Coos Bay (D'Andrea 2012).

See State Agency Comments at p. 71. Exhibit 54. The Board agrees that it is unlikely that long-living clam species would effectively repopulate the areas that would be continually dredged on a 3-5 year basis. Nonetheless, the areas where the dredging will occur is not prime habitat, as

noted by the CCCP and the resource maps. *See also* Exhibit 56, Sub-Exhibit 9.1, at p. 61 of 70) (Noting areas for commercial harvesting of clams). Even a causal look at the maps of the estuary, and especially maps showing area of high clam distribution, provide strong evidence as to why this area is not very productive for benthic habitat: the curvature of the bay at this location puts high velocity currents close to shore, creating less of the shallow-water habitat that the clams and other benthic creatures prefer.

Ms. Jody McCaffree submitted a scientific study into the record that addresses the effect of dredging on fish. See Kjelland, Woodley, and Swannack, A Review of the Potential Effects of Suspended Sediment on Fishes: Potential Dredging Related Physiological, Behavioral, and Transgenerational Implications, (2015). This study collected and discussed previous studies addressing fish mortality. Its observations are complex and it is hard to make accurate generalizations about its findings. Nonetheless, it concludes that fish usually have the ability to avoid areas of high turbidity, and that fish mortality usually only occurs after days or weeks of high turbidity levels measured in the 1000's mg/L (although some fish species are more tolerant than others). Fish living in the Coos Bay Estuary during the fall and winter months are generally well-adapted to turbidity, because the estuary receives tons of suspended sediment every year during the winter rains.

The Draft EIS addresses turbidity as follows:

> Jordan Cove conducted modeling to estimate turbidity and suspended sediment that would result from access channel construction (Moffatt & Nichol 2006a) and the construction and maintenance dredging for all proposed bay activities (Moffatt & Nichol 2017c). The details of the model results on quantity and distribution of these parameters are discussed in section 4.3.2.1. The maximum TSS at a specific dredge site using a clamshell dredge was estimated to be about 6,000 mg/l decreasing substantially away from the dredge location. Moffatt & Nichol (2006a) also estimated that average turbidity levels during dredging operations (covering changing tidal directions) would not exceed background levels (about 10 to 30 mg/l) for the mechanical dredge at the slip. These levels would be even less for the hydraulic dredge beyond the actual dredge location, while elevated levels would occur outside of the actual dredge area for periods not exceeding 2 hours in duration depending on tidal direction. At lower tidal velocities, values would not exceed 30 mg/l outside of 200 meters, and at high tidal velocity less than 50 mg/l in 200 meters.
>
> The concentrations and distribution are partly dependent on the type of dredging method that would be used. Proposed methods for dredging include use of mechanical or hydraulic (suction) dredging equipment. While the hydraulic cutter suction dredge is preferred due to its lower turbidity generation, a type of mechanical dredge

> may be used, especially in portions of the nearshore area due to buried wood. Model results for the access channel and slip construction indicate that elevated TSS above background would extend about 0.2 to 0.3 mile beyond the dredge sites during a full tidal cycle with any method considered and would exceed about 500 mg/l for about 0.1 mile. Maximum concentrations outside of the specific dredge location would only occur for about 2 hours or less over the tidal cycle with the plume moving upstream or downstream of the dredge site on flood or ebb tide, respectively. TSS concentrations at the four navigation channel expansion sites (i.e., part of the marine waterway modifications) would reach background level (about 20 mg/l) over a distance of about 1.2 miles119 with any of the dredging methods. However, hopper style suction dredging would have much higher concentrations during construction with TSS over 500 mg/l extending about 1.0 mile across the dredging site, while the hydraulic cutter suction dredge or mechanical clamshell dredge would produce TSS of 500 mg/l extending about 0.1 mile from the dredge site. The distribution of and concentrations of suspended sediment would be the same for construction or maintenance dredging. If a mechanical excavator would be used for the eelgrass site construction, a confined area of elevated TSS would extend less than 0.1 mile from point of dredging (Moffat & Nichol 2017c). The more limited effect of tidal flow over the area would help confine the distribution of the elevated sediment plume. These elevated levels would be short term and highly localized to the nearshore area of the eelgrass site.

See Draft EIS at p. 4-246-7, Exhibit 50, Sub-Exhibit 17, at p. 434 of 1120. Given the analysis provided by Ms. McCaffree and the Draft EIS, it appears that dredging will not be a major source of fish mortality, and it will certainly not be sufficiently adverse to create violations of public trust doctrine.

Finally, to the extent the public trust doctrine requires some balancing between the public right of navigation and the public right of shellfish production, the Board finds that removal of a relatively small area of clamming and crabbing habitat does not rise to a public trust doctrine violation, particularly when so much other prime clamming habitat exists.

Based upon the facts of the Applicant's proposal as described in this decision, the evidence in the record and applicable law, the Board finds that allowing up to 120 LNG vessels per year to utilize Coos Bay in conjunction with the LNG terminal will not unreasonably interfere with any of the various public trust rights at issue. The Board finds that it is necessary to impose a condition limiting LNG traffic consistent with this finding in order to ensure compliance with this aspect of CBEMP Policy #5. As stated at the end of this decision, the Board revises Condition A.1 from the original decision to serve this purpose.

For all of these reasons, and subject to revised Condition A.1, the Board finds that these findings address LUBA's remand on this issue.

2. Response to Remand Issue 2 - CBEMP Policies #4 and #4a

#4 ***Resource Capability Consistency and Impact Assessment***

I. Local government concludes that all proposed actions (approved in this Plan) which would potentially alter the integrity of the estuarine ecosystem have been based upon a full consideration of the impacts of the proposed alteration. Except for the following uses and activities:

a. Natural Management Units
- ***~ Aquaculture***
- ***~ Log storage***
- ***~ Bridge Crossings***

b. Conservation Management Units
- ***~ High-intensity water-dependent recreation***
- ***~ Aquaculture***
- ***~ New or expanded log storage***
- ***~ Log storage dredging***
- ***~ Dike maintenance dredging***
- ***~ Minor navigational improvements requiring dredging or fill***
- ***~ Bulkheading***
- ***~ Water intake or withdrawal and effluent discharge***
- ***~ Riprap***

c. Development Management Units
- ***~ Aquaculture***
- ***~ New or expanded log storage***
- ***~ Mining and mineral extraction***
- ***~ Water-related and non-dependent, non-related uses not requiring fill***
- ***~ Dredging***
- ***~ Bulkheading (except for Aquatic Units #3DA, #5DA and #6DA)***
- ***~ Fill***
- ***~ In-water structures***
- ***~ Flow-lane disposal of dredged material and other activities which could affect the estuary's physical processes or biological resources***
- ***~ Application of pesticides***

d. Any other uses and activities which require the resource capability consistency test as a condition within a particular management unit.

For uses and activities requiring the resource capabilities test, a special condition is noted in the applicable management unit uses/activities matrix. A determination of consistency with resource capability and the purposes of the management unit shall be based on the following:

i. A description of resources identified in the plan inventory;

ii. An evaluation of impacts on those resources by the proposed use (see Impact Assessment procedure, below);
iii. A determination of whether the proposed use or activity is consistent with the resource capabilities of the area, or that the resources of the area are able to assimilate the use and activity and their effects and continue to function in a manner to protect significant wildlife habitats, natural biological productivity, and values for scientific research and education.

Where the impact assessment requirement (of Goal #16 Implementation Requirements #1) has not been satisfied in this Plan for certain uses or activities (i.e., those identified above), then such uses or activities shall not be permitted until findings demonstrate the public's need and gain which would warrant any modification or loss to the estuarine ecosystem, based upon a clear presentation of the impacts of the proposed alteration, as implemented in Policy #4a.

III. An impact assessment need not be lengthy or complex, but it should give reviewers an overview of the impacts to be expected. It may include information on:

a. the type and extent of alterations expected;
b. the type of resource(s) affected;
c. the expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary; and
d. the methods which could be employed to avoid or minimize adverse impacts.

This policy is based on the recognition that the need for and cumulative effects of estuarine developments were fully addressed during the preparation of this Plan and may be mitigated by the imposition, as necessary, of conditions through the administrative conditional use process.

Board Findings: CBEMP Policy #4 and #4a implement Statewide Planning Goal 16, Implementation Requirement No. 1, which is known as the "impact assessment of potential estuary alterations" requirement.[20] Goal 16 provides, in relevant part:

> **IMPLEMENTATION REQUIREMENTS**
>
> 1. Unless fully addressed during the development and adoption of comprehensive plans, actions which would potentially alter the estuarine ecosystem shall be preceded by a clear presentation of the impacts of the proposed alteration. Such activities include dredging, fill, in-water structures, riprap, log storage, application of pesticides and herbicides, water intake or withdrawal and effluent discharge, flow-lane disposal of dredged material, and other activities which could affect the estuary's physical processes or biological resources.

[20] *See* Edward J. Sullivan, *Protecting Oregon's Estuaries*, 23 OCEAN AND COASTAL L. J. 373, 408 (2018).

> The impact assessment need not be lengthy or complex, but it should enable reviewers to gain a clear understanding of the impacts to be expected. It shall include information on:
>
> a. The type and extent of alterations expected;
> b. The type of resource(s) affected;
> c. The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary; and
> d. The methods which could be employed to avoid or minimize adverse impacts.

LUBA has stated that Implementation Requirement 1 is best understood to require that the local government (1) review an impact assessment that adequately identifies potential adverse impacts on the estuary's physical processes or biological values from development allowed under proposed comprehensive plan or zoning amendments, and (2) ensure that such impacts are avoided or minimized. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015). In *Oregon Coast Alliance,* LUBA remanded the case back to the city for more adequate findings, because the finding did not describe potential adverse impacts, address expert testimony regarding those impacts, or explain why compliance with city standards is sufficient to minimize potential adverse impacts).

In areas subject to CBEMP Policy #5, an Applicant must minimize the adverse impacts of dredging activities. CBEMP Policy #5.I.d. Note that this criterion uses the terms "minimize" and "mitigate," which make it clear an Applicant does not have to *eliminate* all impacts. This standard means something less strict than the word "protect," which means inhibiting development that causes significant adverse impacts on the protected resource. *Columbia Riverkeeper v. Clatsop County (Bradwood Landing),* 238 Or App 439, 464-5, 243 P.3d 82 (2010) ("'Protect,' in [the Goal 16] context, means more than minimizing the adverse impacts of conflicting development through mitigation.").

Further note that the County has already taken an exception to Goal 16 to permit dredging in this area, so this is not a case where the CBEMP Policy #4 impact assessment criterion can be used to deny a project on the basis that the biological resources on the site are more importing that the dredging activity. Rather, the criterion is focused on making sure that the Applicant is using best management practices to ensure that impacts are minimized, and where needed, mitigated. The Board construes the term "minimize" to mean, generally speaking, that an Applicant will not remove or significantly adversely affect more of the identified estuary than necessary to develop the site as approved, and that best management practices are used to prevent the dredging from affecting adjacent resources outside the actual dredging area, to the extent possible. To the extent an Applicant must significantly adversely affect the estuary in any way, the Applicant must mitigate those impacts.

Further, "[i]dentification and minimization of adverse impacts" must follow the procedure in CBEMP Policy #4. In turn, that policy requires that dredging in development aquatic units must be supported by findings demonstrating "the public's need and gain which would warrant any modification or loss to the estuarine system, based upon a clear presentation of the impacts of the proposed alteration, as implemented in Policy #4a." CBEMP Policy #4.II.d. Policy 4 mirrors Goal 16 by stating that "[t]he impact assessment is not required to be 'lengthy or complex,' but it should provide a summary of the expected impacts." CBEMP Policy #4.III. It also follows Goal 16 word for word by stating that the assessment may include information on:

"a. the type and extent of alterations expected;

"b. the type of resource(s) affected;

"c. the expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary; and

"d. the methods which could be employed to avoid or minimize adverse impacts."

Id. The impact assessment must follow the procedures and meet the standards outlined in CBEMP Policy #4a.

CBEMP Policy #4 is complicated because it addresses two different situations: (1) cases where the *resource capabilities test* was deferred until permitting, and (2) cases where the *impact assessment test* was deferred until permitting. This is a bit confusing because at the time the first Comprehensive Plan was written in the early 1980s, the only five uses in development management units for which the resource capabilities test was deferred until permitting was:

(1) aquaculture
(2) new or expanded log storage dredging.
(3) Mining and mineral extraction
(4) Water -related and non-dependent, non-related uses not requiring fill
(5) Bulkheading (except for the bulkhead needed in the 3-DA, 5-DA and 6-DA district, which was specifically addressed in the 1984 Comprehensive plan).

See CCCP Vol 2, Part 1, Sec. 3 (CBEMP) at p. 3-22 (Discussing Policy #4a). However, in later updates to the comprehensive plan, "dredging" and "fill" activities were added to the list, along with a few other categories of uses which are said to have been "deferred." This seems to have created an internal inconsistency in the Plan and Code, because Policy #4a goes on to say that "[f]or uses and activities requiring the resource capabilities test, a special condition is noted in the applicable management unit uses/activities matrix." However, the matrix tables were never modified to reflect, for example, changes to the way dredging is treated with respect to the resource capabilities test. The exception statements for 3-DA, 5-DA and 6-DA districts were

also never modified, and presumably remain valid. Also, CCZLDO §3.2.271 and CCZLDO §3.2.271 were also never changed to reflect that "dredging" in the 3-DA, 5-DA and 6-DA districts require additional resource capability test findings. In fact, it makes no sense to have set aside these zones for deep draft development and have there be any lingering loose ends about whether dredging is allowed in these zones, because the entire management objectives of these three districts is premised on dredging. The Board concludes that the inclusion of "dredging" as a deferred activity in the 3-DA, 5-DA and 6-DA districts was not intended to mean that the resource capability test was not satisfied. Rather, it merely reflects the fact that the "impact assessment" requirement was deferred.

The 5-DA and 6-DA CBEMP districts allow dredging "subject to finding that adverse impacts have been minimized (see Policy #5); and to Policy #8 (requiring mitigation)." As mentioned above, CBEMP Policy #5 incorporates the requirements of Policy #4 – "Identification and minimization of adverse impacts as required in 'd' above shall follow the procedure set forth in Policy #4." CBEMP Policy #4 provides that a decision to permit uses and activities (including fill in a development management unit) shall be "based upon a clear presentation of the impacts of the proposed alteration, as implemented in Policy #4a."

Note that unlike the "public need' inquiry, which was determined in the 1984 Comprehensive plan, Vol II, Part 3, the Goal 16 Linkage Matrix and accompanying findings state that the "minimization of adverse impacts" findings "cannot be made until a specific action is proposed, and is therefore made on a case-by-case basis during permit review." *See* CCCP Vol II, Part 3 Sec. 2.2.1.

In the original 2016 decision in this case, the Board relied on the Hearings Officer's recommendation and determined that adverse impacts associated with dredging for the access channel in the CBEMP 5-DA and 6-DA zones would be minimized because the Applicant would limit dredging to only that amount and those locations that are reasonably needed for dredging and Applicant would use best management practices when conducting such dredging. LUBA Rec. 105-106. In reaching this conclusion, the Board stated that it relied upon expert testimony submitted by Applicant. *Id.* The Board did not adopt findings directly addressing CBEMP Policies #4 or #4a.

On appeal, in its third assignment of error, OSCC contended that the County "failed to adopt any findings addressing CBEMP Policy 4 or 4a, or provide a 'clear presentation of the impacts of the proposed alteration[.]'" *OSCC*, 76 Or LUBA at 360. LUBA sustained this contention and remanded "for the county to adopt findings addressing compliance with CBEMP Policy 4 and 4a." *OSCC*, 76 Or LUBA at 361.

On remand, the Board's task is to consider and adopt findings in response to CBEMP Policies #4 and #4a.

The Applicant argues that the County should find that JCEP has identified and minimized impacts associated with its proposed dredging activities. As support for this conclusion, the Applicant asks the Board to rely upon the memorandum from David Evans and Associates, Inc.

("DEA") dated January 26, 2016. LUBA Rec. 1900-1903. The DEA memo follows the impacts assessment methodology under CBEMP Policy #4.

As noted above, the first step in the four-step methodology is to provide information on the "type and extent of alterations expected" by the proposed development. DEA's memo begins with an explanation of the type and extent of alterations expected:

> "Dredging within Coos Bay will be required for the Jordan Cove LNG Project as part of the construction of the LNG terminal's slip and access channel and for construction of a barge berth that will be used to receive shipments of large equipment needed for construction of Project facilities and maintenance of the facility."

LUBA Rec. 1900. The record reflects that JCEP is proposing the following dredging operations:

- 1.36 acres for the access triangle, which will include impacts to areas that are intertidal, algae/mudflats/sand, shallow subtidal, deep subtidal, developed below high mean tide, and eelgrass. LUBA Rec. 9652.

- 30 acres below the mean higher high water ("MHHW") line will need to be dredged within the access channel. Dredging of the access channel would affect about 15.2 acres of deep subtidal below -15.3 feet; about 5.8 acres of shallow subtidal to the mean lower low water ("MLLW") line;

- about 8.1 acres of intertidal strata between the MHHW and MLLW lines. LUBA Rec. 9304.

Step two in the four-step methodology requires the Applicant and County to provide information on the "type of resource(s) affected." This information has already been determined in the1984 Comprehensive plan, Vol II, Part 3. The resources identified in the plan inventory for the 5-DA and 6-DA CBEMP districts are listed in the "Linkage Matrix" and "Linkage Findings" portion of the Comprehensive Plan. The "Linkage Matrix" is summarized in this compressed version of the original Table:

	Significant Habitat Smaller or Less Biological Importance than "Major Resources" and Which	"Priority" Development Areas

	require a Conservation Designation, Unless otherwise Needed For Development or Preservation				
	Other Tidelands	Clam / Oyster Beds	Other Sig. Habitat Needing Conservation Designation (Subtidal)	Deep Water Areas Adjacent or in close proximity to the Shoreland	Areas of Min. Biological Needed for uses altering the Estuary
5-DA	✓	✓	✓	✓	✓
6-DA	✓	✓	✓	✓	✓

For the segments known as the 5-DA and 6-DA Districts, the resources identified in the CCCP are the same as the 3-DA District. The "resources" identified for the 3-DA District are as follows:

> Segment 3 DA. The primary resource of this area is its "deep water close to shore," which lends itself to deep draft development. Mining / Mineral extraction and recreation facilities (a boat ramp) are allowed subject to specific conditions that the are compatible with the main purpose of the unit: deep draft moorage." A bulkhead (out to the pier head line) of up to 2000 linear feet with backfill to support heavy marine dockside usage is allowed subject To special conditions regarding erosion control; minimization of impacts and provision of mitigation, and is therefore consistent with the resource capability of the management unit. Other activities allowed in the segment (docks, low and high intensity utilities, minor navigational improvements, pilings/dolphins and navigational aids) are ancillary to deep draft development, and therefore consistent with the resources in the area, and the purpose1 of a Development Unit. Vegetative stabilization may be preferable to structural means on parts of the shoreline that remain undeveloped, to prevent erosion or sand deposition. This activity is also consistent. All uses and activities allowed in the segment (other than those for which resource capability consistency findings have been deferred in accordance to Policy #4a) are therefore consistent with the resource capabi1ity of the area and the purposes of the management unit.

CCCP Vol 2, Part 3. Thus, based on the Linkage Matrix, there are five potential resources that may need to be addressed. To the extent that any party attempts to introduce evidence of a more broad set of resources in the 5-DA and 6-DA Districts not encapsulated within the CCCP, that attempt fails under *1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 216, 124 P3d 1249 (2005); *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 22, 994 P2d 1205 (2000); *Residents of Rosemont v. Metro*, 173 Or App 321, 333-34, 21 P3d 1108 (2001).

The next step is to look in the Resources Map and determine where those five resources actually exist at the area where dredging is proposed. The Board studied the resource maps and concludes as follows:

1. The "Estuarine Wetland Habitats: Tideflats and Aquatic Beds" map shows a small sliver of "Tidal flats / Shore" in the 5-DA and 6-DA Districts, which is likely co-terminous with 15-foot depth line.
2. The "Clam Species" map shows a similarly small sliver of Gaper Clams and Macome Sp. / Tellina SPP in the 5-DA and 6-DA Districts.
3. The "Other Significant Estuarine Habitats" Map shows inner tidal flats and a small area of sub-tidal flats.
4. Tentative Goal 16/Goal 17 Development Priority Areas" identifies a major portion of the deep water in the 5-DA and 6-DA Districts as being both a "Deep Water Areas Adjacent or in close proximity to the Shoreland " and also an area of minimal biological significance needed for uses requiring alterations of the estuary.

See also Natural Resources of Coos Bay, Estuary Resources Report Vol 2 No, 6 (1979). LUBA Rec. 6288-6296 (maps of clam beds showing similar distribution of clams).

The management objective of the 5-DA and 6-DA Districts is not to protect or conserve natural resources and habitat, but rather to provide for navigation and public, commercial, and industrial water-dependent uses consistent with the level of alteration allowed by the overall estuary classification. The management objective both *expects* and *accepts* a certain level of environmental impact by design and in furtherance of other development objectives. However, both the CBEMP and Goal 16 requires that such impacts be minimized and mitigated.

DEA's memo generally follows the CCCP's methodology in this regard, and focuses on the aquatic resources affected, including coho salmon habitat and benthic (clam / oyster bed) habitat, which would be found in the tidal and sub-tidal flats. LUBA Rec. 1902-1903. DEA's memo describes in detail the expected impacts associated with dredging, first noting activities and resources that will not be impacted by Project-related dredging. DEA concludes:

> "Dredging activities associated with the Project are not expected to adversely or unreasonably impact navigation, access to waterways for commercial fishing and crabbing, oyster harvesting and other resource extraction, and public rights to water resources."

LUBA Rec. 1900. The Board accepts the DEA description as findings for impact assessment purposes.

As noted above, the third step in the four-step methodology is to document "the expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary." The DEA's memo includes separate sections addressing each impact type in detail, including sediment transport, deposition, and flow velocity; erosion and sedimentation; turbidity; water quality; and aquatic species and habitat. LUBA Rec. 1901-1903.

Regarding water quality, the DEA memo states as follows:

> Coos Bay has been identified as water quality limited and was placed on the 2012 Clean Water Act Section 303(d) list due to elevated fecal coliform concentrations that do not meet water quality criteria for shellfish growing. JCEP does not anticipate that project activities will contribute to elevated fecal coliform or other bacteria concentrations In Coos Bay. Dredging will be conducted over a relatively short period of time during construction of the LNG terminal and associated facilities. Impacts from dredging, including turbidity and the potential release of bacteria, will be temporary and localized to the dredging area. Dredging activities will be conducted in an area of Coos Bay that is tidally influenced and where ample tidal mixing, flushing and freshwater inputs occur, which will serve to quickly dilute and distribute any potential bacteria released as a result of dredging. While dredging of the access channel and eelgrass mitigation site has the potential to cause the release of bacteria attached to sediment particles in the Coos Bay channel, it is not expected to significantly or permanently increase bacteria concentrations in the bay (JCEP 2015a). Sediment testing for total volatile solids (1VS) was also conducted in the area of Coos Bay where access channel construction will occur. Results of this sampling showed that no sample contained greater than 5% 1VS, with an average 1VS of 0.71 %. Based on Dredge Material Evaluation Framework (DMEF) guidelines for the Tiered Evaluation Approach for Aquatic Disposal, all sediment samples qualified for unconfined aquatic disposal and additional testing was not required (SHN 2007). Based on these results, dredging of the access channel will not result in the release of toxic substances into the water column that could affect aquatic species or spread contamination in the bay (JCEP 2015). No discharge of dredged or fill material is proposed that would alter the chemical and physical characteristics of the receiving waters at a disposal site through the introduction of chemical constituents. Sediment analyses have been performed in order to characterize soils and avoid placement in areas that might cause environmental damage to waters of the U.S. and the State of Oregon. Therefore, the Project's effect on receiving waters is not likely to cause or contribute to significant degradation of waters of the U.S (JCEP 2015).

LUBA Rec. 1902. There is no expert evidence in the record to the contrary.

Regarding living resources: the DEA memo conducts "an evaluation of impacts on the fish and benthic habitat by the proposed use, by explaining the expected type and extent of

impacts. DEA concludes that such impacts will be small, localized in nature, and will not result in population-level impacts:

> "All in-water work in Coos Bay will be conducted during the Oregon Department of Fish and Wildlife (ODFW)approved in-water work window, which extends from October 1 through February 15, to minimize impacts to aquatic species. While dredging activities will negatively affect salmon habitat, the habitat affected is not a limiting factor for salmon survival within the Coos Bay watershed. Impacts to coho salmon, which are listed as threatened under the ESA, will be addressed under Section 7 consultation with the National Marine Fisheries Service (NMFS) Dredging of the access channel and eelgrass mitigation site will also result in benthic habitat removal – portions of the sediment surface, some subsurface layers and associated benthic invertebrates. However, impacts are not expected to have population-level effects on benthic organisms in Coos Bay, and biological communities in the bay will likely re-colonize these areas in a relatively short period of time - likely less than one year (FERC 2015). In addition, the newly excavated slip, as well as the Kentuck Mitigation Site, will provide additional benthic habitat and may also be colonized in less than one year. According to Section 1.1.1.2 (page 1-15) of FERCs BA (2015):
>
> > Creation of the access channel would be a short-term impact, lasting not more than six months, and should not have population level effects on benthic organisms in Coos Bay. It has been reported that benthic communities on mud substrates in Coos Bay, when disturbed by dredging, recovered to pre-dredging conditions after about one month (Newell et al. 1998). Therefore, we conclude that removing benthic species from the bottom of the access channel would not have significant adverse impacts on the aquatic environment of the bay.
>
> While some aquatic habitat will be removed as a result of dredging activities, this impact will be mitigated for at the Kentuck, West Bridge, West Jordan Cove and Eelgrass mitigation sites. Additionally, these habitats are expected to recover and be re-colonized within a year, resulting in a long-term net benefit to aquatic species and habitat, as well as an increase in potential food sources for ESA-listed coho salmon and essential fish habitat in Coos Bay (FERC 2015). In DEA's best professional judgment, the dredging activities associated with the Jordan Cove LNG Project are consistent with Policy #5, Sections I.d and Le of the Coos Bay

> Estuary Management Plan - "adverse impacts are minimized" and "effects may be mitigated by creation, restoration or enhancement of another area to ensure that the integrity of the estuarine ecosystem is maintained."

LUBA Rec. 1903-4. As discussed both below and in the discussion of public trust doctrine, *supra*, the Board is not as optimistic that biological communities in the bay will likely re-colonize these areas in "a relatively short period of time - likely less than one year." However, all parties seem to be in agreement that the biological communities in the bay will re-colonize, and whether that takes one year, two years, or even five years is not important: what is important is that the impacts are only temporary and localized.

Regarding recreation and aesthetic use: dredging will have no impact on recreational use of the bay. Nor will it have any aesthetic impacts. In this regard, the dredging will not even be visible to persons boating in the waterway or walking along the bank. In any event. such impacts would be directly dependent on effects such as sediment transport, sediment deposition, flow velocities, erosion, and turbidity. The Applicant addresses all of these potential impacts in the DEA memo and concludes that none of these impacts are significant, widespread, or permanent. There is no credible evidence that suggests otherwise.

Regarding navigation: The dredging proposed by the Applicant is entirely consistent with the use of the use of "deep water close to shore" in support of "deep draft development." In fact, dredging is *required* to preserve that resource and meet the management objective of the 5-DA and 6-DA Districts, which is to provide for navigation and public, commercial, and industrial water-dependent uses consistent with the level of alteration allowed by the overall estuary classification.

Regarding other existing and potential uses of the estuary: the dredging project will not have any impact beyond the immediate boundaries of the dredging activity. All other uses of the estuary will still be able to proceed as previously allowed. No party has provided facts which fairly suggests that any other *use* of the estuary will be precluded.

Finally, under the fourth step in the impact assessment methodology, JCEP has proposed to comply with many measures to avoid and minimize adverse impacts, including the following:

- Limiting dredging to the smallest area possible to accommodate cargo vessels (LUBA Rec. 9652);
- Limiting work to the Oregon Department of Fish and Wildlife-approved in-water work window, which extends from October 1 through February 15 (LUBA Rec. 1902);
- Utilizing a turbidity curtain to minimize impacts to water quality (Rec. 9371-9372); and
- Carrying out dredging in accordance with the requirements of state and federal law, including Section 404 of the Clean Water

> Act ("CWA"); Section 7 of the Endangered Species Act; Section 401 of the CWA, which addresses water quality; and Oregon's Removal-Fill law (LUBA Rec. 1900).

Impacts that cannot be avoided or minimized will be mitigated for at the Kentuck, West Jordan Cove, West Bridge, and Eelgrass mitigation sites. *Id.*

The only evidence in the record that casts any serious doubt on the Applicant's conclusions is set forth in the ODFW comments submitted by Ms. Sarah Reif in the "Oregon State Agency Comments Jordan Cove Energy and Pacific Gas Pipeline Project, Draft Environmental Impact Statement," Exhibit 54. The portion of the State Agency comments authored by Ms. Reif are based on a number of laws, including Oregon's Wildlife Policy, ORS 496.012, which states that wildlife and fish will be managed to prevent serious depletion of any native species. The policy also states that Oregon's lands and waters should be developed and managed in a way that will enhance production and public enjoyment of wildlife. This is an enforceable policy of the OCMP and helps demonstrate consistency to obtain a CZMA federal decision. However, ORS 197.180(1) is not a criterion applicable to this review under the County's acknowledged comprehensive plan and applicable implementing regulations, the comments do not address ORS 197.180(1),[21] and the comments do not seem to be consistent with, much less acknowledge, the Coos County Comprehensive Plan and the Acknowledged Goal 16 Exceptions that have been adopted over 30 years ago.

The ODFW comments are also problematic for two other reasons. First, the author does not provide her credentials so that her comments can be considered expert testimony. Further, unlike the Applicant's experts, the ODFW comments draw conclusions but rarely state the basis for those conclusions. As an example, ODFW states the following about Olympia Oysters:

> Section 4.5.2.2 (page 427) of the DEIS states that suspended sediments from the dredging will not significantly affect oysters in Coos Bay. ODFW does not agree with FERC's determination. These at-risk populations of Olympia oysters are particularly sensitive to smothering and burial by silt and other suspended

[21] **197.180 State agency planning responsibilities; determination of compliance with goals and compatibility with plans; coordination between agencies and local governments; rules; exceptions.** (1) Except as provided in ORS 197.277 or subsection (2) of this section or unless expressly exempted by another statute from any of the requirements of this section, state agencies shall carry out their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use:
(a) In compliance with the goals, rules implementing the goals and rules implementing this section; and
(b) In a manner compatible with acknowledged comprehensive plans and land use regulations.
(2) State agencies need not comply with subsection (1)(b) of this section if a state agency rule, plan or program relating to land use was not in effect when the comprehensive plan provision or land use regulation with which the action would be incompatible was acknowledged and the agency has demonstrated that:
(a) The state agency rule, plan or program is mandated by state statute or federal law;
(b) The state agency rule, plan or program is consistent with the goals;
(c) The state agency rule, plan or program has objectives that cannot be achieved in a manner compatible with the acknowledged comprehensive plan and land use regulations; and
(d) The agency has complied with its certified state agency coordination program.

> materials, and it is likely that they will be exposed to heavy loads of suspended sediment and excessive siltation during dredging activities associated with excavation of the new JCEP Terminal.

State Agency Comments, at p. 68. Exhibit 54. The evidence in this record does not even confirm the *presence* of Olympia Oysters at or near the dredge site, much less confirm that any oysters living near the site are in danger. The closest the record gets is the following passage from ODFW:

> Commercial mariculture of Pacific oysters (Crassostrea gigas) does not occur anywhere in the intertidal zone near the airport runway, and patchy clusters of Olympia oysters (Ostrea lurida) only occur on the rocky rip-rap that extends around the periphery of the airport runway.

State Agency Comments, at p. 70. Exhibit 54. In another passage from 2008, ODFW states:

> "Page 4.5-52 - The FEIS states the following regarding Olympia oysters: "they are found Sub-tidally and intertidally: from the Southwest Oregon Regional Airport to Millington in Isthmus Slough in the upper bay, is not an area that would be affected by the proposed LNG terminal.' This statement is untrue. The impact area would be within expected oyster range."

LUBA Rec. 3783-4. The word "expected" is a key qualifier, and the Board interprets that is saying that ODFW does not know for certain whether Olympia Oysters exist in the 5-WD and 6-WD Districts.

But even if they do exist, ODFW does not explain why years and years of annual maintenance dredging has not harmed Olympia Oysters, but dredging related to the JCEP project is somehow going to create a different result. The ODFW statement that "it is likely that Olympia Oysters] will be exposed to heavy loads of suspended sediment and excessive siltation" simply lacks an adequate foundation based on the past history of extensive dredging in the bay. Moreover, the Applicant's turbidity plume modeling makes clear that the turbidity plumes are both localized in nature, and largely confined to the channel itself. Exhibit 56, Sub-Exhibit 4.

ODFW's comments also do not address the Applicant's point that "the portions of Coos Bay affected by dredging are a small fraction of the overall size of the bay; therefore, any impacts associated with dredging activities will likewise be relatively small geographically and will not result in population-level impacts to aquatic species and/or habitat or unreasonably harm navigation, fishing and recreation." The Board finds that ODFW's concerns are lacking in evidentiary support in the record and simply not credible in light of the fact that the Applicant is only proposing a modest amount of dredging consistent with Comprehensive Plans adopted as long ago as 1984. *See* Draft EIS at p. 4-243 to 4-249, Exhibit 50, Sub-Exhibit 17, at p. 431 to 437 of 1120; Exhibit 50, Sub-Exhibit 12, at p. 26-35; Exhibit 56, Sub-Exhibit 4 (showing only localized turbidity increases rom dredging in the federal navigational channel, and recommending BMPs to reduce those impacts by up to 50%); Exhibit 56, Sub-Exhibit 7 (tidal

range remains unchanged); Exhibit 56, Sub-Exhibit 7 (comparative change of shoaling and/or erosion rates within the majority of the federal navigational channel and most of the non-project areas are less than .2 feet).

The Board has already addressed "the public's need and gain" from the project, *supra, wherein* the Board finds that such public need and gain does warrant some modification and loss to the estuarine ecosystem. The Board has provided a "clear presentation of the impacts of the proposed alteration, as implemented in Policy #4a," as set forth above.

In their letter dated June 9, 2019, OSCC argues as follows

> In order to comply with Policies 4 and 4a and because the proposed uses will alter the estuarine ecosystem, the county must assess the impacts of the proposed alteration and making findings as to the consistency of the uses with the resource capabilities of the management unit. The impacts assessment must determine the type and extent of the alterations expected, the resources affected, the extent of the impacts on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic uses, navigation and other existing and potential uses of the estuary and the methods that could be employed to avoid or minimize adverse impacts. Policy #4.
>
> In undertaking this impacts assessment, because it looks at the impacts to the estuary as a whole including other potential uses of the estuary, the county should consider impacts in the context of and cumulatively with all other JCEP proposed uses of the estuary, including but not limited to the alignment of the pipeline itself, the NRIs and the road widening. The Applicant fails to address these cumulative impacts.

See Letter from OSCC dated June 9, 2019, at p. 9 (Exhibit 2). The Board reviewed the CBEMP and CCCP criteria and does not find any reference to the term "cumulative impacts." *But see Von Lubken v. Hood River County*, 118 Or App 246, 251, 846 P2d 1178 (1993) (Court of appeals construed ORS 215.296(1) as requiring an evaluation of the "cumulative impacts" of six different types of golf course impacts on the petitioner's orchard operation). OSCC cites no authority for its claim that a cumulative impacts analysis is required by CBEMP Policy #4.

Goal 16 does contain a "Comprehensive Plan Requirement" No. 5, which states: "Based on the inventory, the limits imposed by the overall Oregon Estuary Classification, and needs identified in the planning process, comprehensive plans for coastal areas shall * * * 5. Consider and describe in the plan the potential and cumulative impacts of the alterations and development activities envisioned." Presumably, this section would apply at the time of a PAPA, but the Board does not understand it to apply in the context of a CUP, *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181 (2006). For this reason, no "cumulative impacts" analysis is required.

OSCC also states the following with regard to the impact assessment:

> Notably, JCEP has not yet obtained its DSL/Clean Water Act permits for the dredging activities. It also recently received a denial from DEQ as to its Clean Water Act Section 401 permit. As part of the DSL permit, ODFW submitted a letter that is included herewith as Exhibit I. That letter describes how the Applicant must make efforts to avoid habitat impacts, and that the Applicant should work on a coordinated, interagency habitat mitigation plan for the entire project including both the terminal and the pipeline. No evidence regarding such a plan has been submitted by the Applicant.

See Letter from OSCC dated June 9, 2019, at p. 11 (Exhibit 2). While the Board has no quarrels with the correctness of the above-quoted passage, it is unclear what relevance that discussion has to the land use permit at hand. Continuing, OSCC states:

> The ODFW letter also discusses the uniqueness of the habitats located at the project site. Coos Bay is the largest estuary located entirely in Oregon. The letter lists a variety of species for which habitat would be impacted by the dredging. Notably ODFW contends in the letter that the JCEP and the Port of Coos Bay navigation channel modification project are connected actions and should be evaluated as such by all permitting authorities. The letter goes on to list impacts of the two projects. Applicant, despite having access to this letter from ODFW since its submission in February, submits nothing responding to this list of impacts, which differs from those outlined in the DEA memo. (Emphasis added).

See Letter from OSCC dated June 9, 2019, at p. 11 (Exhibit 2). However, ODFW's discussion in its February 3, 2019 letter of the "uniqueness" of the site lacks an adequate foundation because its discussion of subtidal, tidal, intertidal, and shoreline features are not site specific. The only site-specific statement is "the mudflats in the JCEP area support a commercial ghost shrimp fishery." It is not at all clear what exact geographic area the "JCEP area" is intended to encompass in that statement. Moreover, there is no evidence in the record that any commercial bait operation has obtained land use permits for such aquaculture use. Any such commercial use requires a use compliance determination in the CBEMP aquatic zone, and that permit would require the Applicant to make a resource compatibility determination (a test which the application would undoubtedly fail because a ghost shrimp fishery is not consistent with deep draft navigation). Beyond that, it is difficult to comprehend how a "ghost shrimp fishery" could be more important than an LNG Gas terminal, especially considering that the County took an exception to Goal 16 for this "area" *precisely for the purpose of locating a deep draft marine slip and terminal facility.*

OSCC further suggests a plethora of broadly stated and conclusory potential impacts which need to be considered under CBEMP Policy 4:

Other impacts that are not fully addressed are:

a. Bioaccumulation of toxins from the sediment that will be released with dredging in the slip. The record does not contain evidence discussing testing of that particular area and what the toxic substance levels are below 8 ft or at all.
b. The existing toxins at the Ingram Yard that are currently "dormant" but may be released with disruption from construction, including but not limited to a "yellow unknown substance" (LUBA Rec 11853); chromium and arsenic in wood waste (LUBA Rec 11858, 7538)
c. Toxic and hazardous substances may be present below 8ft, which was the depth of testing. LUBA Rec 11861.
    a. Pursuant to the Clam Diggers Intervention Letter (R. 6384) there seems to be records of many toxic substances in the Jordan Cove area (Tributyltin, metals, PAHs, PCBs). These would all be released with dredging and have a negative and lasting effect on benthic communities, bivalves, oysters, other invertebrates and the people who utilize them.
    b. Testing from 2013 showed: tributyltin, antimony, chromium, copper, mercury, nickel and zinc are still present in the sediments sampled (R. 6385). These will all persist in invertebrates, particularly oysters.
    c. Dredged soils will be relocated to a beach segment on the north strip. (R. 6151) These sediments have been proven to contain elevated levels of toxic materials, and would be risk exposure to human contact
    d. The fact that DEQ has a partial "no action" for the site does not mean it will be non-hazardous when re-disturbed.

d.) Turbidity impacts to spawning salmon that can begin in winter months. LUBA Rec 2054. Even short-term turbidity can affect predation on juvenile salmonids.

e.) The eelgrass mitigation plan is unsupported.
    a. Colonizing a robust benthic community in under a year seems dubious without any research.
    b. Mitigation has a negative effect on eel grass population.
    c. Any expansion by airport runway 4-22 would destroy the eelgrass mitigation area. The airport is applying for ROAR funding in an attempt to reinstate daily flights to PDX and seemingly would like to expand.
    d. Monitoring plans only include the mitigation area, no plans to monitor existing eelgrass for detrimental

> effects (LUBA Rec. 10035). Monitoring plans only account for 5-8 years (LUBA Rec. 10035) but 10 years is required (LUBA Rec 11747).

See Letter from Philip Johnson dated June 10, 2019, Exhibit 2, at p. 11-12. Although the Applicant does not appear to address this testimony in its final argument, the Board dutifully reviewed the record materials cited by Mr. Johnson.

The evidence in the record does not show that any areas that the Applicant proposes to dredge are so highly contaminated that adverse impacts from toxic materials would be expected. The Comprehensive Plan calls the sediments in the lower bay as being "clean sands," and that assessment was made in the 1970s when the area was much less "clean" than today due to all of the heavy industrial activity that was being undertaken at the time. CCCP Vol. II, Part 2, Section 4, at p. 20. It is also consistent with evidence submitted CTCLUSI. Exhibit 42, Sub-Exhibit C, at p. 21-22 (finding that sediment samples bulk of the sediments have been suitable for in-water disposal under Section 404 of the CWA and Section 103 of MPRSA).

Jordan Cove Energy Project, Pacific Connector Gas Pipeline, 401 Water Quality Certification Response to Oregon DEQ Comment Letter Dated June 8, 2015 dated July 13, 2015 states as follows:

> Sediment testing for total volatile solids (TVS) was also conducted in the area of Coos Bay where access channel construction will occur. Results of this sampling showed that no sample contained greater than 5% TVS, with an average TVS of 0.71 %. Based on DMEF guidelines for the Tiered Evaluation Approach for Aquatic Disposal, all sediment samples qualified for unconfined aquatic disposal and additional testing was not required (SHN 2007). Based on these results, JCEP does not anticipate that dredging of the access channel will result in the release of toxic substances into the water column that could affect aquatic species or spread contamination in the Bay.

LUBA Rec. 2076. This is the best evidence on this topic. Most of the evidence to the contrary was submitted by a former employee of SHN Consulting named **Barbara Gimlin,[22] and her credibility is greatly weakened by her status as a disgruntled ex-employee.** LUBA Rec. 6486.

The record also does not substantiate the that turbidity will have a substantial impact on spawning salmon. OSCC cites to the Biological Assessment and Essential Fish Habitat Assessment dated February 2015. LUBA Rec. 2054. The 2015 Biological Assessment states:

> Juvenile life stages of coho and Chinook salmon would be less common in Coos Bay during the fall and winter dredging, while upstream migrating adults would be more common in the fall and

[22] The Board specifically finds that Ms. Gimlin is not a credible witness, based on his evaluation of her written materials and other testimony.

> winter, when most Project construction and maintenance activity would occur (see life history figures 4.4-1and4.4-2 above for Chinook salmon and figures 3.5-2 and 3.5-13 for coho salmon). Due to lesser swimming ability, smaller juvenile fish would be less able to avoid elevated turbidity areas. However, most fish would avoid the dredging area and suspended sediment. Also, due to the limited turbidity magnitude, the generated dredging values being similar to background levels during this season, the short extent and frequency of increased suspended sediment, and likely avoidance of the active dredging areas by juvenile and adult fish, effects to fish from any of the three PPM groups due to elevated turbidity from dredging for slip and access channel construction or maintenance would be unsubstantial.

LUBA Rec. 2054. The Applicant submitted a revised "Draft Biological Assessment" dated September 2018, which states:

> Juvenile life stages of coho and Chinook salmon would be less common in Coos Bay during the fall and winter in-water work window. Exposure to sedimentation and turbidity from dredging, therefore, would be minimal. Adult coho and Chinook salmon, however, migrate into the estuary in the fall and early winter concurrent with in-water construction and maintenance activities (see life history figures 4.1.4-1 and 4.1.4-2 above for Chinook salmon and figure 3.5.3- 1 for SONCC coho and figure 3.5.4-1 for Oregon Coast coho salmon). Smaller fish, with a limited swimming ability, would be less able to avoid turbid waters within about 200 feet of dredging operations. Turbidity exposure to adult or juvenile fish would be short-term and localized and may be mitigated to an immeasurable extent as fish avoid underwater noise generated near dredging areas.

In short, both the 2015 and the 2018 biological assessments conclude that dredging for the marine slip and terminal will not raise turbidity to levels that would have substantial effects on juvenile and adult salmon. The testimony that the generated dredging turbidity values being similar to background levels during the winter season is persuasive and logical, esp. since the sediments in this portion of the bay are sandy and not silty. The Board finds that OSCC's arguments are without merit and supporting evidence in the record.

In a follow up letter, Mr. Johnson continues to argue that the minimization efforts and mitigation efforts are insufficient:

> As set forth in our previous comments, the 5-DA and 6-DA of the CBEMP allow dredging "subject to finding that adverse impacts have been minimized (see Policy #5); and to Policy #8 (requiring mitigation)." CBEMP Policy #5 incorporates the requirements of

> Policy #4 – "Identification and minimization of adverse impacts as required in 'd' above shall follow the procedure set forth in Policy #4." CBEMP Policy #4 provides that a decision to permit uses and activities (including fill in a development management unit) shall be "based upon a clear presentation of the impacts of the proposed alteration, as implemented in Policy #4a." The testimony submitted by the Applicant does not lend itself to findings that the adverse impacts of the proposed use have been minimized. As set forth in the Agency Comments (Exhibit A), there are substantial deficiencies and questions as to the details of how minimization and mitigation will occur. Oregon Shores encourages the Board to review this submission in depth with respect to the minimization criteria in Policies 4 and 4a. (Emphasis added).

See Letter from Philip Johnson dated July 9, 2019, at p. 4. Exhibit 54. The attached Oregon State Agency comments are 248 pages long, and the Board declines the offer to conduct such a fishing expedition. It is the responsibility of the parties to wade through such materials and direct the Board's attention to the relevant discussion. In this case, the Board read the attached State Agency Comments, and finds that they pertain to a different permit which is issued under different approval standards. For example, ODFW states:

> ODFW recommends that aquatic and upland impacts to fish and wildlife habitats be addressed consistent with the Oregon Wildlife Policy (ORS 496.012) and implemented through the ODFW Fish and Wildlife Habitat Mitigation Policy (OAR 635-415-0000 through 0025). This rule governs ODFW's provision of biological advice and recommendations concerning mitigation for losses of fish and wildlife habitat caused by development actions. Based on standards in the rule, the Applicant seeks ODFW concurrence on the appropriate category to apply to land or water where a development action is proposed. If the habitat is Category 1, ODFW must recommend that impacts to the habitat be avoided. If impacts cannot be avoided, ODFW must recommend against the development action. If ODFW determines that such habitat is Category 2, ODFW must recommend that impacts to the habitat be avoided and if impacts cannot be avoided, ODFW must recommend a high level of mitigation (as specified in more detail in the rule). If such mitigation is not required, 81 ODFW must recommend against the development action. Subsequent specific mitigation goals follow for habitats determined to be Category-3, 4, 5 and 6, and for which impacts cannot be avoided.

State Agency Comments, at p. 80. Exhibit 54. The Oregon Wildlife Policy (ORS 496.012) and the ODFW Fish and Wildlife Habitat Mitigation Policy (OAR 635-415-0000 through 0025) are not approval standards in this case. The quality of the ODFW testimony is further diminished because it is not framed in a Goal 16 construct, and does not recognize Goal 16 terminology of

the County's Goal 16 exceptions. For this reason, it is not at clear that any discussion of mitigation discussed in those comments is relevant to CBEMP Policy #4 and #4a. OSCC makes no effort to explain the connection between the comments and the approval standards.

Furthermore, while the land use permits and the fill/removal permits necessarily involve some overlap in scope and issues addressed, the Board does not believe that the County should be seeking to substantially replicate the permitting efforts of DSL, DEQ and FERC. This land use application is conditioned on the Applicant successfully obtaining required state and federal permits, which is what Goal 16 demands.

CTCLUSI argues that the in-water work period for dredging should end on February 1, not February 15, as proposed by the Applicant. The testifier provides no evidentiary support for such deviation from the established ODFW guidance for February 15 as the closing date, and they fail to identify as approval criterion which requires such a condition. This condition is not warranted. As an initial matter, this type of condition is better left to the regulators at DSL, DEQ, and ODFW to impose and administer as part of the Fill & Removal laws. If they believe such a condition is warranted, them it is best imposed in the context of that proceeding. The record discloses that ODFW is recommending to FERC that the in-water work window be from October 1 to January 31. Exhibit 54 at p. 104.

In this proceeding, laypersons submit studies that they find on the internet and submit them with little or no application of the specific factual circumstances identified in this record or the proper interpretation of these studies to such specific circumstances. They then expect the Board, who are not trained as marine biologists, to interpret these studies and impose far-reaching conditions on the basis of the record before him. The Board declines this invitation, and finds that such broadly stated conclusions do not undermine the evidentiary record established by the Applicant.

Again, even if the Board were so inclined, the record does not support the condition in any event. The record reveals that the Pacific Herring spawn occurs "most consistently in March." Exhibit 42. Also, most of the spawning occurs near Fossil Point and Sitka Dock, which are far away from the bulk of the dredging being proposed by JCEP. LUBA Rec. 6320-4. The record states that "Ford Dock near Jordan Cove" also is a prime spawning area for herring, LUBA Rec. 6306, but as far as the Board can determine, the record does not reveal the exact location of "Ford Dock."

Moreover, the evidence in the record and Comprehensive Plan demonstrates that Pacific Herring lay their eggs on eelgrass and similar vegetation. For this reason, it is not likely that eggs would get smothered by turbidly associated with dredging; the eggs are not simply going to get covered by sediment. Most of the dredging of the channel results in turbidity plumes that travel up and down the channel with the tides, and do not substantially drift off closer to shore where the eelgrass beds are prevalent. *See* Exhibit 56, Sub-Exhibit 4 (showing turbidity plume modelling); Exhibit 56, Sub-Exhibit 8 (explaining that eelgrass grows in very shallow water – usually only a few feet of depth.). The CCCP notes that the "Channel Maintenance Dredging EIS (Corps of Engineers, 1976) states that "[o]ne of the main impacts [of dredging] is a temporary increase in turbidity during dredging operations. The corps report states that "that below RM 12,

the bottom material is clean sand and does not produce serious turbidity effects." CCCP Vol. II, Part 2, Section 4, at p. 20. It makes sense that sandy material will create less turbidity than fine silts, because they fall out of suspension more quickly once water velocities recede.

Once they hatch, Pacific Herring larvae remain in nearshore waters close to their spawning grounds where they feed and grow in the protective cover of shallow water habitats. LUBA Rec. 6320. These larval herring should not experience inhibited feeding unless the suspended sediment dosage reaches 2,000 mg/L for 1d. LUBA Rec. 2862. That is a relatively high level as compared to other fish species, LUBA Rec. 2874, and likely reflects the fact that herring spawn in the lower portions of estuaries and therefore are more adapted to high turbidity than Salmon and similar species that spawn in less dynamic environments. February is a time of high freshwater flows and high turbidity. CCCP Vol. II, Part 2, Section 4, at p. 11. During that time, the herring are more likely to spawn closer to the mouth of the estuary to avoid the fresh water. Moreover, turbidity may even help herring in their larval stage because it may help them see their prey. One study suggested that turbid conditions may actually enhance the visual contrast of prey items and thus increase overall feeding rates * * * for larval Pacific Herring." LUBA Rec. 2860.

For these reasons, the Board does not find the suggested condition to be warranted based upon the evidence and analysis available.

#4a Deferral of (I) Resource Capability Consistency Findings, and (II) Resource Impact Assessments

Local government shall defer, until the time of permit application, findings regarding consistency of the uses/activities listed in Policy #4 with the resource capabilities of the particular management unit.

Additionally, the impact assessment requirement for those uses/activities as specified in Policy #4 shall be performed concurrently with resource capability findings above at the time of permit application.

I. This strategy shall be implemented through an Administrative Conditional Use process that includes local cooperation with the appropriate state agencies:

* * * * *.

II. Within twenty (20) days of receipt of the notification, the state agency shall submit in writing to the local government a statement as to whether the proposed use/activity will:

a. Be consistent with the resource capabilities of the management unit or,

b. If determined not to be consistent, whether the proposal can be made consistent through imposition of conditions on the permit.

III. The appropriate state agency shall also perform the impact assessment required in Policy #4. If no statement is received from the state agency by the expiration of the twenty (20) day period, local government shall:

a. Presume consistency of the proposal with the resource capabilities of the management unit; and

b. Make findings appropriate to that presumption; and

c. Perform the assessment of impacts required by Policy #4.

IV. For all other uses/activities specified above, local government shall:

a. Determine through appropriate findings whether the proposed use/activity is consistent with the resource capabilities of the management unit, and

b. Perform the assessment of impacts required by Policy #4.

V. This strategy recognizes:

a. That resource capability consistency findings and impact assessments as required by LCDC Goal #16 can only be made for the uses specified above at the time of permit application, and

b. That the specified state agencies have expertise appropriate to assist local government in making the required finding and assessments. This strategy is based upon the recognition that the need for and cumulative effects of estuarine developments were fully addressed during development of this Plan and that no additional findings are required to meet Implementation Requirement #1 of Goal #16.

Board Findings: As noted above, CBEMP Policy #4 requires findings demonstrating the public's need and gain that would warrant modification or loss to the estuarine ecosystem, based upon a clear presentation of the impacts of the proposed alteration, as implemented in CBEMP Policy #4a. As the Applicant correctly notes, none of the prerequisites to providing notice to state agencies under CBEMP Policy #4a are triggered by the Applications. Therefore, this policy requires the County to complete the impacts assessment consistent with CBEMP Policy #4. Upon completion of that assessment, the Board should find that its findings address this issue consistent with LUBA's remand.

3. Response to Remand Issue 3 - CBEMP Policy #30

#30 Restricting Actions in Beach and Dune Areas with "Limited Development Suitability" and Special Consideration for Sensitive Beach and Dune Resources (moved from Policy #31)

I. Coos County shall permit development within areas designated as "Beach and

Dune Areas with Limited Development Suitability" on the Coos Bay Estuary Special Considerations Map only upon the establishment of findings that shall include at least:

a. *The type of use proposed and the adverse effects it might have on the site and adjacent areas;*
b. *Temporary and permanent stabilization programs and the planned maintenance of new and existing vegetation;*
c. *Methods for protecting the surrounding area from any adverse effects of the development; and*
d. *Hazards to life, public and private property, and the natural environment which may be caused by the proposed use; and*
e. *Whether drawdown of groundwater would lead to loss of stabilizing vegetation, loss of water quality, or intrusion of saltwater into water supplies.*

Implementation shall occur through an administrative conditional use process which shall include submission of a site investigation report by the developer that addresses the five considerations above.

II. *This policy recognizes that:*

a. *The Special Considerations Map category of "Beach and Dune Areas with Limited Development Suitability" includes all dune forms except older stabilized dunes, active foredunes, conditionally stabilized foredunes that are subject to ocean undercutting or wave overtopping, and interdune areas (deflation plains) subject to ocean flooding;*
b. *The measures prescribed in this policy are specifically required by LCDC Goal #18 for the above-referenced dune forms, and that*
c. *It is important to ensure that development in sensitive beach and dune areas is compatible with, or can be made compatible with, the fragile and hazardous conditions common to beach and dune areas.*

III. *Permits for beachfront protective structures shall be issued only where development existed on January 1, 1977 (see Section 3. Definitions for "development"). Criteria for review of all shore and beachfront protective structures shall provide that:*

a. *Visual impacts are minimized;*
b. *Necessary access to the beach is maintained;*
c. *Negative impacts on adjacent property are minimized; and*
d. *Long-term or recurring costs to the public are avoided.*

IV. *Local government shall cooperate with state and federal agencies in regulating the following actions in beach and dune areas by sending notification of Administrative Conditional Use decision:*
a. *Destruction of desirable vegetation (including inadvertent destruction by moisture loss or root damage),*

b. The exposure of stable and conditionally stable areas to erosion,
c. Construction of shore structures which modify current or wave patterns leading to beach erosion, and
d. Any other development actions with potential adverse impacts.

Board Findings: CBEMP Policy 30 implements Statewide Planning Goal 18. CBEMP Policy 30 applies to the following uses and activities: Industrial and Port facilities, DMD, Fill, excavation to create new water surface, and shoreline stabilization in 6-WD (LNG terminal, slip, barge berth, West Bridge); and Industrial and Port facilities, DMD, Fill, Mitigation, Restoration in 7-D (road and utility corridor, storm water pond, gas processing facility, East Bridge, West Jordan Cove).

The Board has previously held that the types of potential adverse effects or hazards that must be considered under this policy are limited to a review of potential adverse geologic impacts that might result as a result of the proposed development. *Borton v. Coos County*, 52 Or LUBA 46, 52 (2006); Order 07-12-309P at p. 37. In *Borton*, the Board interpreted Policy 5.10(2), which is a counterpart to CBEMP Policy #30, and which has identical language. The Board found that Policy 5.10(2) only requires consideration of geologic impacts such as the stability and potential for movement of the dunes in order to ensure that the proposed development is consistent with the capabilities and limitations of the dunes. LUBA affirmed this interpretation, stating:

> The county's interpretation that Policy 5.10(2), which implements Implementation Requirement 1 of Goal 18, addresses development limitations, such as adverse geological or geotechnical impacts, that are specific to development in beach and dune areas is consistent with the text, context and policy of Goal 18. Policy 5.10(2) does not require consideration of general development issues, such as noise impacts or water availability, that are unrelated to the particular geological or geotechnical development issues posed by beach and dune areas. As explained earlier, consideration of such general development impacts will properly be made during a future permitting process. The county's interpretation of Policy 5.10(2) is reasonable and is consistent with the language of the goal that it implements.

As relevant on remand, CBEMP Policy #30 requires the County to only permit development in areas designated as "Beach and Dune Areas with Limited Development Suitability" on the County Special Considerations Map upon adoption of findings that identify "[m]ethods for protecting the surrounding area from any adverse effects of the development." CBEMP Policy #30.I.c. A separate provision of that policy requires findings "[w]hether drawdown of groundwater would lead to loss of stabilizing vegetation, loss of water quality, or intrusion of saltwater into water supplies." CBEMP Policy #30.I.e.

In the original decision, in response to OSCC's contention that dewatering activities during construction of the Project tank/slip facilities in the 6-WD zone would cause subsidence,

the Board concluded that site stability and subsidence were not regulated under CBEMP Policy #30.I.e, the only subsection of the policy that directly regulates drawdown of groundwater. LUBA Rec. 135.

On appeal, OSCC contended that subsidence due to dewatering could be a potential issue under CBEMP Policy #30.I.c as an "adverse effect" on the "surrounding area." LUBA agreed with OSCC and remanded for adoption of additional findings:

> "If there are findings concluding that subsidence from proposed dewatering is not a potential issue under CBEMP Policy 30(I)(c), JCEP does not cite them. We conclude that remand is necessary to address whether subsidence is a potential issue under CBEMP Policy 30(I)(c) and, if so, adopt findings resolving that issue. * * * * "The fourth assignment of error is sustained in part."

OSCC, 76 Or LUBA at 363.

On remand, the County is tasked with determining whether subsidence from dewatering associated with the Project construction will have an "adverse effect" upon the "surrounding area" for purposes of CBEMP Policy #30.I.c. The Applicant states that it is highly unlikely that subsidence resulting from dewatering associated with Project construction in the 6-WD and 7-D zones will occur because JCEP's expected dewatering rates during Project construction are well below the high capacity of the aquifer in this location. As support for this conclusion, the Applicant submitted JCEP's Resource Report No. 6 ("Geological Resources"), which explains that modeling indicates that the aquifer can withstand pumping of up to 10 million gallons of water per day, a high capacity:

> "The Coos Bay-North Bend Water Board will supply the LNG Terminal site with water during construction and operation. Additional water will be supplied during construction using temporary wells installed at Ingram Yard. Additionally, localized dewatering wells may be used to lower groundwater levels to facilitate soil improvement techniques during site preparation. All on-site construction wells will be operated only for the period of construction; therefore, any impacts to groundwater levels from pumping on-site during construction will be temporary, and water levels will recover when the pumping is terminated.
>
> "The Coos Bay-North Bend Water Board uses a portion of the Dune-Sand Aquifer for public water supply; the closest well is approximately 3,500 feet north of the LNG Terminal site (Groundwater Solutions Inc. 2006). Model simulations for the Dune-Sand Aquifer indicate that a maximum of 10 million gallons per day could be pumped with little risk of inducing seawater to flow into the wells (Jones 1992). * * * * The low risk of inducing seawater from pumping of the Dune-Sand Aquifer at high rates

> indicates that the aquifer has a high capacity. Therefore, reduction of the groundwater level at the LNG Terminal site is considered unlikely; therefore, ground subsidence is not anticipated to occur."

See Resource Report No. 6 at p. 17, Application Sub-Exhibit 2 and Applicant's Sub-Exhibit 10 of Exhibit 50, dated June 24, 2019. Further, the record reflects that, during Project construction, expected dewatering rates will range from about 2.14 - 5.62 million gallons per day and construction activities causing dewatering will be limited to approximately 165 days total. *See* LUBA Rec. 4138, 4155 (dewatering analysis prepared by GSI Water Solutions, Inc.). This figure is well below the daily capacity of the aquifer, and is relatively short in duration, which indicates that the risk of dewatering-induced subsidence is unlikely. The applicant has addressed the requirements on remand and the Opponents offer no rebuttal testimony on this issue. The Board further accepts the report from JCEP's registered Professional Engineer, Scott Schlechter, PE, GE, PE in the Applicant's Exhibit 50 as substantial evidence in support of the Board's conclusion that the risk of de-watering induced subsidence is unlikely to occur. This expert testimony is unrebutted, and accordingly the Board finds the applicable Policy 30 requirements are met.

7-Development Shorelands (7-D).

SECTION 3.2.285. Management Objective:

This shoreland district, which borders a natural aquatic area, shall be managed for industrial use. Continuation of and expansion of existing non-water-dependent/non-water-related industrial uses shall be allowed provided that this use does not adversely impact Natural Aquatic District #7. In addition, development shall not conflict with state and federal requirements for the wetlands located in the northwest portion of this district.

SECTION 3.2.286. Uses, Activities and Special Conditions.

Table 7-D sets forth the uses and activities which are permitted, which may be permitted as conditional uses, or which are prohibited in this zoning district. Table 7-D also sets forth special conditions which may restrict certain uses or activities, or modify the manner in which certain uses or activities may occur. Reference to "policy numbers" refers to Plan Policies set forth in the Coos Bay Estuary Management Plan.

B. Activities:

5. Fill *ACU-S, G*

GENERAL CONDITIONS (the following condition applies to all uses and activities):

1. *Uses in this district are only permitted as stated in Policy #14 "General Policy on Uses within Rural Coastal Shorelands". Except as permitted outright, or where findings are made in this Plan, uses are only allowed subject to the findings in this policy.*
2. *Inventoried resources requiring mandatory protection in this unit district are subject to Policies #17 and #18.*
3. *All permitted uses and activities shall be consistent with Policy #23 requiring protection of riparian vegetation.*
4. *All permitted uses shall be consistent with the respective flood regulations of local governments as required in Policy #27.*
5. *All permitted uses in dune areas shall be consistent with the requirements of Policy #30.*
6. *In rural areas (outside of UGBs) utilities, public facilities, and services shall only be provided subject to Policies #49, #50, and #51.*

SPECIAL CONDITIONS

Activities:

2a. New dikes may be constructed, provided that findings are developed which document that in proposed future development, the use of a dike, berm, or

buffer setback will protect the natural aquatic area to the south from major development impacts.

3. ***Dredge material disposal shall be allowed when consistent with Policy #20.***
4. ***Excavation to create a new water surface shall be allowed only for the purposes of an approved restoration project.***
5. ***The wetland in the southeast portion of this district can be filled for a development project contingent upon satisfaction of the prescribed mitigation described in Shoreland District #5.***

6b.,6c. These activities are permitted subject to the findings required by Policy #9, "Solutions to Erosion and Flooding Problems".

9a. Active restoration shall be allowed when consistent with Policy #22b.

10. Land divisions are only permitted where they meet the conditions in Policy #15.

Board Findings: The Applicant proposes to fill a small portion of a Wetland that they identified in their application as Wetland J. LUBA Rec. 9963 (map). The amount of fill and impact to Wetland J is alternatively set at either 0.033 acres or 0.07 acres. *Compare* LUBA Rec. 9939 (.033 ac.) with Exhibit 50, Sub-Exhibit 16 at p. 27 (.07 ac). The original application stated:

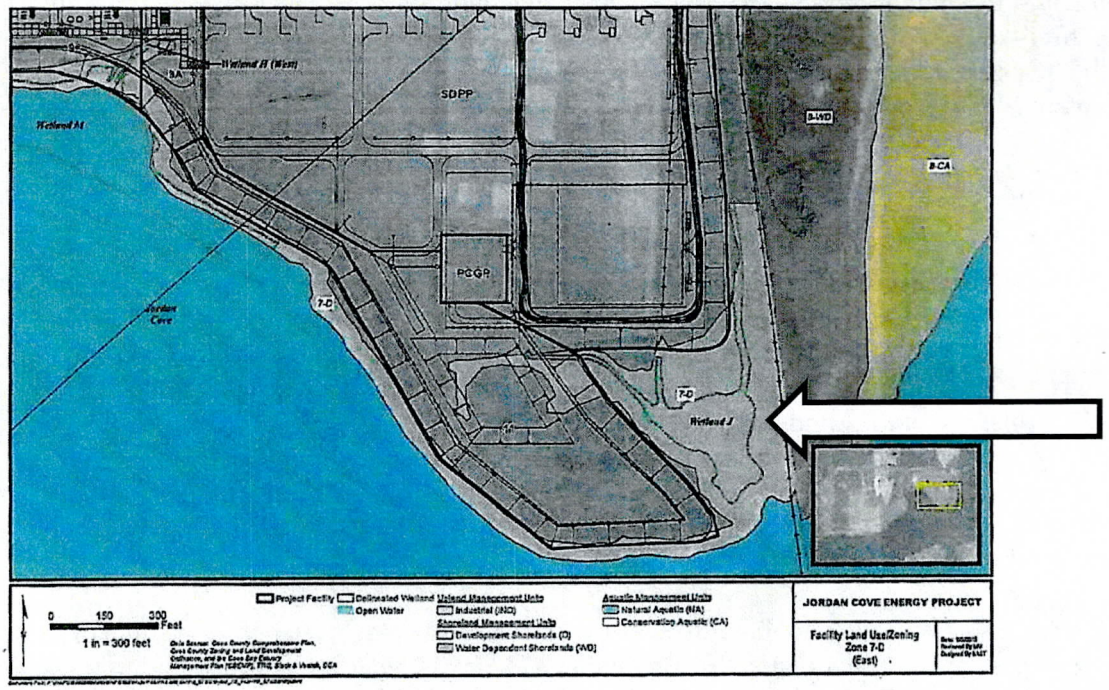
> A finger of Wetland J must be filled to an elevation of +46 feet MSL to avoid tsunami inundation. The South Dunes Power Plant will be built on the fill that will be placed on Wetland J. The Pacific Connector Gas Pipeline connects to a gas metering station located on the footprint of Wetland J.

LUBA Rec. 10429. In the original decision, the Board determined that Applicant's proposed fill in the 7-D management unit would comply with Special Condition 5:

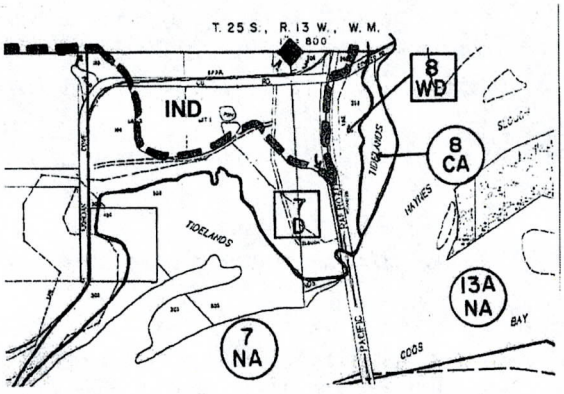
> "The Board finds that the application proposes fill in the southeast portion of this district for a development project and will mitigate in accordance with prescribed mitigation. Therefore, the Board finds that the proposed fill is consistent with Special Condition 5."

LUBA Rec. 70.

In its fourth assignment of error to LUBA, OSCC argued that the County's finding was inadequate and not supported by substantial evidence. LUBA concluded that "[t]he findings do not identify the proposed mitigation for fill in the wetland in the southeast portion of the 7-D district, or relate it in any way to 'the prescribed mitigation described in Shoreland District #5.'" *OSCC*, 76 Or LUBA at 364. In other words, LUBA stated that the County did not explain how it arrived at its conclusion. As a result, LUBA remanded for the County to adopt more adequate findings on this point. *Id.*



To recap: the Applicant is proposing to fill a very small portion of the wetland located in the southeast part of the CBEMP 7-D zone (known as "Wetland J") in conjunction with the Project. *Compare* LUBA Rec. 9408 (depicting "Wetland J") and LUBA Rec. 9403 (depicting fill areas in the 7-D District).



Wetland J, which is highlighted in the photos above, LUBA Rec. 9408, is - more than

likely - the same wetland identified in "Special Condition 5" of the 7-D zone. But this fact is not entirely clear, because no wetlands are shown on the inventory maps at that location. Some of the maps show a nearby cultural resource site (Site 9-CS 26), but no wetland. The only inventoried wetland is located in the northwest portion of the 7-D District.

CCCP Vol 2, Part 2, Section 4 at p. 76 states that:

> Freshwater wetlands comprise a relatively small portion of the land around the estuary. This scarcity of areas gives them added significance. Most of the wetlands occur on the North spit, wildlife studies there have revealed 153 bird species, 33 species of mammals and eight species of amphibians and reptiles using the area. A moderate percentage of these species can be considered typical of the other wetlands around the estuary and this information is a good indication of the habitat diversity crated by the wetlands and also includes many of the species found in the other areas.

Thus, the County was undoubtedly aware of these freshwater wetlands, and some of them were deemed to be significant enough to be mapped, whereas others were not found to be significant enough to inventory.

Further note that the 7-D district boundaries have been modified over the year, and these images below show the boundary as it existed at the time relevant policies were written. However, the reference to "southeast portion of this district" is not likely a typographic error, because the wetland "located in the northwest portion of this district" is separately called out by CCZLDO §3.2.285.

Special Condition 5 states that: "[t]he wetland in the southeast portion of this district can be filled for a development project contingent upon satisfaction of the prescribed mitigation described in Shoreland District #5." CCZLDO §3.2.286. As quoted above, any filling of a "wetland" located in the "Southeast portion of this district" (*i.e.* CBEMP 7-D) is subject to compliance with "satisfaction" of the "prescribed mitigation" set forth in "Shoreland District 5." What may not be obvious to persons not intimately familiar with the CBEMP and CCCP is that "Shoreland District #5" is commonly known as the CBEMP "5-WD" zone.[23]

The management objective for the 5-WD zone is taken from the CCCP, and states as follows:

> ***A large portion of this district, compared to other areas of the***

[23] The original Comprehensive Plan first created what it called "shoreland units," and "Shoreland Unit 5" was one of those units. Then the planners further parsed out each unit into one or more zoning "districts." In the case of Unit 5, the three districts are the 5-WD, the 5A-NS, and the 5-DA. Of these, only the 5-WD District is relevant here. Thus, the Applicant must demonstrate that, to the extent that any applicable regulations in Shoreland District #5 (aka: "5-WD" district) prescribe mitigation for the activity in question (i.e. fill), those regulations have been satisfied.

bay, possesses characteristics that make it an exceptional future development resource not only for the Bay Area, but for Coos County and the State of Oregon as well. The site's location on the deep-draft channel in the lower bay gives it even greater attributes as a water-dependent industrial development site. Therefore, the Plan reserves this portion of the district for an integrated industrial use that takes advantage of the site's unique characteristics, particularly its attributes for deep-draft development.

Utilizing the site for development purposes as described will require the filling of 123 acres of freshwater and saltwater wetlands, commonly known as Henderson Marsh (Dredged Material Site #4x).

The Coos County Comprehensive Plan describes Shoreland District No. 5-WD as consisting of a large portion of the No. 5 management unit. It notes that, as compared to other areas of the bay, the 5-WD District possesses characteristics "that make it an exceptional future development resource not only for the Bay Area, but for Coos County and the State of Oregon as well." CCCP Vol 1, Part 2, Section 5, p. 34. *See also* CCZLDO §3.2.260 (same language).

The management objective of the 5-WD zones champions "the site's location on the deep-draft channel" and that this prime location gives "it even greater attributes as a water-dependent industrial development site." *Id.* Therefore, the CCCP anticipates that the 5-WD District will be used "for an integrated industrial use" that is focused on taking advantage of the neighboring "deep-draft" shipping channel. Staff further notes in the staff report that any "[u]ses proposed for this site need not be limited to those example uses specifically mentioned in Exception #22." *See also* CCZLDO §3.2.260. However, the planners knew that utilizing the 5-WD site for development purposes would require the filling of a 123-acre freshwater and saltwater wetland located on the 5-WD site. This wetland area is commonly known as "Henderson Marsh" (aka: Dredged Material Site #4x). Portions of "Henderson Mash" are an acknowledged Dredge Material Disposal site.

When the CBEMP Zoning Ordinance was adopted in September of 1982, the planners knew that some version of the "Henderson Marsh Mitigation Plan" had either been agreed to or was in the process of being agreed to. The management objective of the 5-WD District set forth at former CCZLDO §5.1.270 previously stated that "such development must occur in phase with the Henderson Marsh Mitigation Plan agreed to by the landowner and state and federal agencies." *See* Ord. 82-8-016L. That 1982 Ordinance was never acknowledged, and that language was later removed from the management objective in 1984. *See* Ord. 84-7-019L. However, similar language was apparently added back into the Code, probably during periodic review in the 1990s. The current CCZLDO §3.2.226.1 now reads: "[t]hese activities are permitted in the portion of the site agreed on for mitigation as per the Henderson Marsh Mitigation Plan."

In addition, Vol II, Part 7 of the CCCP contains an inventory of the Dredge Material Disposal Site #4x, (aka Henderson Marsh), which states that "use of this site is subject to the Henderson Marsh Agreement, and is dependent upon its final signature." It further stated that the "It [i.e. Henderson Marsh] can only be used in conjunction with a specific project. Incremental filling not permitted with phased mitigation actions, as provided for in agreement."

As staff notes, "Special Development Condition No. 5" in the 5-WD district was put into place to address any potential mitigation that was required to fulfill development described in Statewide Planning Goal Exceptions 18, 22 and 25 (*See* Volume II Part 3 of the CCCP). These Goal Exception statements explain that the County was anticipating the development of North Bay Marine Industrial Park and North Spit Access Road and Fill. Goal Exception 22 states that specific Shoreland District 5 (aka CBEMP 5-D district) was to designate this for water dependent industrial use, and *to allow appropriate mitigation associated with that development in this and adjacent segments*. *See* CCCP Vol. II, Part 3, at p. 184. (Emphasis added).

To find out the link between the 7-D District and "Shoreland District 5," the Board followed staff's direction and has reviewed "Goal Exception 25" that was specifically taken for the access corridor needed to support potential development in both the 6-WD and 7-D districts. CCCP Vol. II Part 3, at pp. 3.0-142 to 3.0- 150. Goal Exception 25 states that:

> Mitigation for most of the access corridor is included in the Henderson Marsh Mitigation Agreement (See Coos County Exception #22 – Segment 5-WD and the June 7, 1983, memo of Chuck Holbert, Weyerhaeuser Co on this subject. Mitigation for the freshwater wetland that is the subject of this exception will be provided pursuant to the required Corps of Engineers permit.

However, that reference to a "freshwater wetland" is a different wetland, as made clear by the map included at CCCP Vol. II Part 3, at p. 3.0- 150. That wetland no longer exists, as it appears it was filled when the access corridor was improved.

Staff notes that the Applicant is not proposing to build the North Spit Access Corridor, and is *specifically not* using any of the planned mitigation that is addressed in the Goal Exception documents. Staff notes that the CCCP was very careful to "reserve" the mitigation for those specific "Exception" lands, so that the development of those exception lands could be developed and the "cumulative impacts" of that development could be adequately mitigated. Thus, staff concludes that in filling Wetland J, JCEP cannot use the lands addressed in the HMMP as mitigation, because those lands are "reserved" to be used as mitigation sites for other lands (i.e. the lands covered by Exception Areas 18, 22 & 15.). Staff states that it is important that if the Applicant is planning a project beyond what was contemplated by the Exceptions, that appropriate mitigation be completed through USACE. Therefore, staff concludes, it is appropriate for the County to find that any "filling" of Wetland J that occurs in the 7-D zone will be subject to requirement that the Applicant obtain and comply with DSL and USACE permits, including any associated mitigation requirements.

OSCC noted that "the Henderson Marsh Mitigation Plan does not appear to be in the record." *See* Letter from Mr. Phillip Johnson, OSCC, dated June 9, 2019, Exhibit 2, at p. 12. In response, the Applicant provided a copy of the HMMP to the Board in the first open-record period. Exhibit 50, Sub-Exhibit 11. In any event, the "Special Conditions" for the 5-WD District states, as noted above, with regard to mitigation and restoration activities, that: "[t]hese activities are permitted in the portion of the site agreed on for mitigation as per the Henderson Marsh Mitigation Plan."

OSCC further notes that "the map exhibits to the HMMP do not appear to have survived and are therefore not available to consult." *See* Letter from Mr. Phillip Johnson, OSCC, dated June 9, 2019, at p. 12. Exhibit 2. At least one map exists, as shown in Exhibit 50, Sub-Exhibit 11. It does not appear to represent a complete representation of all of the sites discussed in the HMMP.

In their letter dated June 9, 2019, OSCC further argues:

> the [HMMP] includes a Condition 16 which provides that "estuarine intertidal losses not already provided for in this plan will be handled on a project basis through the appropriate permit processes." This statement indicates that mitigation for losses to wetlands in the estuary and intertidal areas should be determined consistent with the HMMP at the time a project is permitted. Thus, in order to comply with the HMMP and in turn the CCZLDO, any approval should include a condition that the mitigation will be consistent with the HMMP and all other federal and state permitting requirements.

Id. at p. 12-13. The Applicant responds as follows:

> Wetland J lies east of and outside of Henderson Marsh and associated HMMP boundaries. *See* HMMP map (cover page to Exhibit 11 to JCEP's first open record period submittal on remand). As such, there is no prescribed mitigation associated with filling Wetland J in the HMMP. Moreover, the HMMP does not provide general guidance for fill or mitigation for wetlands not expressly identified in the HMMP area. While Condition 15 of the HMMP addresses specific wetlands outside of the main Henderson Marsh area and prescribes specific mitigation components for these additional wetlands as supplements to the main mitigation of the HMMP, Wetland J is not included in the list in Condition 15. Further, although OSCC contends on remand that Condition 16 of the HMMP requires mitigation for wetlands not otherwise listed in the plan, the Board should deny this contention because, as explained above, Wetland J is not located within the boundaries of the HMMP. Accordingly, Condition 16 is not applicable to Wetland J.

> For these reasons, the County should find that Shoreland District #5 does not prescribe any mitigation in this instance. As a result, Special Condition 5 does not limit JCEP's proposed fill in the 7-D zone. The County should find that the filling of Wetland J will still be subject to compliance with other applicable requirements of the CBEMP, which were found to be met in the original decision, as well as the requirements of the Department of State Lands and the U.S. Army Corps of Engineers, including JCEP's proposed Compensatory Wetland Mitigation Plan, which is included in Exhibit 16 to JCEP's first open record period submittal on remand. The Hearings Officer should recommend that the Board adopt these findings, which address this issue consistent with LUBA's remand.

See Final Argument dated July 16, 2019, at p. 13. Exhibit 57.

The Board agrees with the Applicant's analysis. For the reasons explained by the Applicant and quoted above, there simply is no specific mitigation prescribed in the HMMP for impacts to Wetland J, and Conditions 15 and 16 are not directly applicable to this circumstance either. Further, because the plain language of the HMMP establishes mitigation measures that are explicitly tied to impacts to specific wetlands, the Board finds it is not plausible to interpret the HMMP, either in whole or in part, to require specific mitigation for impacts to Wetland J, which is not otherwise identified in the HMMP. Additionally, the Board finds that, under these circumstances, imposing a condition on this approval requiring general compliance with the HMMP would impose an inappropriate exaction on the Applicant because, again, Wetland J is not identified in the HMMP. Therefore, the Board finds that Shoreland District #5 does not prescribe any mitigation in this instance.

The Board finds that the filling of Wetland J will still be subject to compliance with other applicable requirements of the CBEMP, which were found to be met in the original decision, as well as the requirements of the DSL and USACE, including Applicant's proposed Compensatory Wetland Mitigation Plan. Further, the Board finds that the HMMP will continue to apply when

5. Response to Remand Issue 5 - Consequences of FERC Denial

As the Applicant correctly notes in its application narrative, when a local government relies upon a land use Applicant obtaining permits from another agency as a means of demonstrating compliance with applicable approval criteria, the local government must find, based upon substantial evidence in the whole record, that the Applicant is not precluded as a matter of law from obtaining the permits from the other agency. *Bouman v. Jackson County*, 23 Or LUBA 626, 647 (1992). This standard does not require the local government to determine that "it is feasible to comply with all discretionary state agency permit approval standards because the state agency, which has expertise and established standards and procedures, will ultimately determine whether those standards are met." *Id.* Instead, the local government need only determine that the necessary agency permit is "available." *Miller v. City of Joseph*, 31 Or LUBA 472, 478 (1996). Exhibit 50, Sub-Exhibit 16.

In the original decision, the Board imposed a condition requiring Applicant to obtain state and federal permits for the Project:

> "The Applicant shall obtain any and all necessary state and federal permits, including required permits from USACE, DSL, and DEQ, among others."

LUBA Rec. 215. The Board relied upon this condition to find compliance with CBEMP Policies #5 and #8. LUBA Rec. 106-107, 108. The Board also relied upon evidence that, in turn, relied upon a FERC permit, to find compliance with CBEMP Policy #30. LUBA Rec. 134-135.

On appeal to LUBA, OSCC contended that because FERC denied Applicant's application for a permit for an LNG terminal on the North Spit, the County erred in relying upon FERC permits to demonstrate compliance with applicable approval criteria. In short, OSCC contended that the County's findings were erroneous because the record did not include substantial evidence that Applicant was not precluded as a matter of law from obtaining the FERC permit. LUBA sustained this assignment of error:

> "In our view, given that the required FERC permit had, in fact, been denied during the proceeding before the county, the county erred in adopting findings of compliance with local approval standards that are unconditionally predicated on the Applicant obtaining a FERC permit, without first addressing whether the denial means that JCEP is precluded, as a matter of law, from obtaining the FERC permit."

OSCC, 76 Or LUBA at 365. As a result, LUBA remanded the matter to the County to consider this issue. *Id.* LUBA expressly noted that the County could consider FERC applications and decisions that post-dated the County's original decision. *Id.*

On remand, the Board finds that Applicant is not precluded as a matter of law from obtaining a FERC permit for the Project, and that the FERC permit is still available. As support

for this conclusion, the Board relies upon the fact that FERC's 2016 denial was "without prejudice to Jordan Cove and/or Pacific Connector submitting a new application to construct and/or operate LNG export facilities or natural gas transportation facilities should the companies show a market need for these services in the future." LUBA Rec. 1320. As a result, FERC's decision did not preclude Applicant from applying for another FERC certificate for an LNG export terminal and related pipeline on the North Spit. The same is true of the DEQ permit which was denied earlier this year: That permit was denied without prejudice, and therefore the permit is still available.

The Board also relies upon the fact that, subsequent to FERC's denial, the Applicant applied for a new FERC permit, and that application is currently pending. *See* FERC Notice of Applications dated October 5, 2017 in Application Exhibit 3.

As explained above, the County is not required to ascertain whether it is feasible for Applicant's new application to satisfy FERC's approval standards. Therefore, a reasonable person would rely upon this evidence to show that a FERC permit is "available" and thus not precluded as a matter of law.

In its letter dated June 10, 2019, Exhibit 2, OSCC argues as follows:

> LUBA requires that there be "substantial evidence in the record that the Applicant is not precluded from obtaining [required] state [or federal] agency permits as a matter of law." *Bouman v. Jackson County*, 23 Or LUBA 626, 647 (1992). Although Oregon Shores agrees that there is a new FERC permit pending, Oregon Shores notes that Applicant was recently denied a separate state permit, the DEQ Clean Water Act Section 401 permit. *See* Exhibit J: DEQ Decision Letter. Thus, LUBA stated, as with the FERC denial, the County must make findings addressing whether the DEQ denial means that JCEP is precluded as a matter of law from obtaining the required Clean Water Act permits for the project.

See letter dated June 10, 2019, Exhibit 2, at p. 13. In this case, the Board notes that DEQ specifically denied the Applicant's fill & removal permit "without prejudice," and therefore the denial of that permit has no bearing on this permit. The Applicant is free to reapply with DEQ.

In a follow up letter dated June 24, 2019, Exhibit 43, OSCC argues that the current proposal before FERC is substantially different than the proposal for which land use approval is sought:

> As to the issue of whether Applicant can obtain other requirement permits, the Hearing Officer should find that the required federal FERC permit is unavailable because that permit was denied and when Applicant reapplied, it submitted an application for a *different* use that the one at issue in this proceeding. For example, the new FERC application is for an LNG terminal without a

> power station and which does include workforce housing. The inclusion or removal of the power plant as part of the development is a major change in the use because it substantially changes the economics of the project. As a result, there is no pending FERC application for the terminal as proposed is this proceeding and Applicant has not stated that it intends to apply for such a permit to match this proposal. JCEP has been further unwilling to update this application to reflect its change in plans. Thus, the Board should find that the FERC permit for this project is not available and the Applicant cannot meet the criteria in CBEMP Policies 5, 8 and 30.

See Letter from Phillip Johnson dated June 24, 2019, at p. 6-7. Exhibit 43. The Board agrees that the Applicant has submitted different plans to FERC, but disagrees that this fact warrants denial of the present application. The discrepancies will need to be resolved via a modification process, but that will occur if and when FERC approves the project. OSCC seeks to create a situation where is procedurally impossible to site large-scale energy projects such as the proposed LNG terminal, and the Board will not contribute to that effort.

Whether or not the LNG terminal and associated facilities ultimately include a power station and workforce housing is immaterial to the issue raised at LUBA. To focus the issue, the County relied upon the condition of FERC approval to find compliance with CBEMP Policies #5 and #8, and relied upon a FERC permit, to find compliance with CBEMP Policy #30.

In her undated letter submitted on June 24, 2019, Tonia Moro argues:

> For clarification, Opponents point out that their previous comments about how the county's code prevents the Applicant from pursuing two inconsistent applications or permits and about how the prior permits may not be extended are related to this remand issue. The FERC permit the Applicant has sought will not allow the project the Applicant has proposed to the county in the current application and as proposed in the almost decade-old permits. Therefore, the necessary agency permit is not available. The Applicant has the burden to demonstrate otherwise.

This concern has been adequately addressed both above and elsewhere in this decision.

6. Response to Remand Issue 6 - SORSC

Pursuant to the version of the CCZLDO applicable to the Applications, uses that are accessory to uses permitted outright in the Industrial zoning district are also permitted there. CCZLDO 4.4.200 (2015). Under the applicable definition, "accessory uses" are uses that: (1) are subordinate to and serve a principal use; (2) subordinate in area or purpose to that principal use; (3) contribute to the comfort, convenience, or necessity of occupants of the principal use; and (4) are located on the same unit of land as the principal use. CCZLDO 2.1.200 (2015).

In the original decision, the Board found that the Southern Oregon Regional Safety Center (SORSC) was permitted in the Industrial zone as an accessory use to the fire station:

> "The SORSC is permitted in the IND zone as an accessory use to the Fire Station because the SORSC meets the definition of 'Accessory Use.' The SORSC serves, and is subordinate in purpose to, the Fire Station because the SORSC is a training center for firefighters who will work at the Fire Station. The SORSC contributes to the comfort and convenience of the firemen who utilize the Fire Station because the SORSC offers training to current and future firefighters. The SORSC is located on the same unit of land as the Fire Station. *See* Applicant Figures 2, 3, and 9."

LUBA Rec. 144. The Board denied OSCC's contentions that the SORSC was not allowed in the Industrial zone because it would house government offices and schools, which OSCC contended were not allowed in the Industrial zone. LUBA Rec. 144-145.

On appeal, OSCC contended that the County's finding that the SORSC was "subordinate" to the fire station misconstrued applicable law and was not supported by substantial evidence:

> "According to Oregon Shores, no reasonable person could conclude that the various government office and educational components that make up the bulk of the SORSC, including a regional training facility for up to 100 persons, are 'subordinate' to a local fire station staffed by four firefighters."

OSCC, 76 Or LUBA at 367. LUBA sustained OSCC's assignment of error:

> "Because the findings are conclusory and do not address key language and considerations in the code definition of 'accessory use,' it is hard to say whether the county's conclusion that the SORSC components are accessory to the fire station embodies an interpretation of LDO 2.1.200 that is inadequate for review, or an interpretation that is simply implausible, i.e., inconsistent with the express language, purpose and policy underlying LDO 2.1.200. To the extent the county's decision interprets LDO 2.1.200 to the effect that a use is 'subordinate' to a primary use as long as it provides some support to the primary use, regardless of how minimal and tangential that support is compared to the putative accessory use's purpose and function, we reject the interpretation as implausible.
>
> "We do not intend to foreclose the possibility that the board of commissioners can adopt an interpretation of LDO 2.1.200 that is sustainable under the deferential standard of review we apply under

> ORS 197.829(1)(a), supporting a conclusion that some or all of the SORSC components are 'accessory' to the fire station, as defined at LDO 2.1.200. However, the present decision includes no such interpretation. Further, any sustainable interpretation of LDO 2.1.200 must give effect to all of its applicable terms. The findings do not include an interpretation, at least one adequate for review, explaining why the proposed SORSC components are subordinate to and serve a principal use, and subordinate in area or purpose to that principal use. Or, in the words of the version of LDO 2.1.200 on the county's website, whether the SORSC uses are 'customarily incidental and subordinate to the principal use,' and 'subordinate in extent, area and purpose to the principal use.' *See* n 17."

OSCC, 76 Or LUBA at 368-369. As a result, LUBA remanded this issue for further Board action. *Id.*

On remand, Applicant has withdrawn the request to include the SORSC in the Applications. Accordingly, the Board finds that the SORSC is not proposed to be located in the Industrial zoning district, and the county is no longer required to make a use interpretation that the SORSC is accessory to the fire station in the Industrial zoning district. Therefore, the Board withdraws the findings LUBA had an issue with in the original proceedings. These findings are located at pages 133-135 of the Board's original decision.

7. **Response to Remand Issue 7 - CBEMP Policy #18**

#18 Protection of Historical, Cultural and Archaeological Sites

Local government shall provide protection to historical, cultural and archaeological sites and shall continue to refrain from widespread dissemination of site-specific information about identified archaeological sites.

I. This strategy shall be implemented by requiring review of all development proposals involving a cultural, archaeological or historical site, to determine whether the project as proposed would protect the cultural, archaeological and historical values of the site.

II. The development proposal, when submitted shall include a Site Plan Application, showing, at a minimum, all areas proposed for excavation, clearing and construction. Within three (3) working days of receipt of the development proposal, the local government shall notify the Coquille Indian Tribe and Coos, Siuslaw, Lower Umpqua Tribe(s) in writing, together with a copy of the Site Plan Application. The Tribe(s) shall have the right to submit a written statement to the local government within thirty (30) days of receipt of such notification, stating whether the project as proposed would protect the cultural, historical and archaeological values of the site, or if not, whether the project could be modified by appropriate measures to protect those values.

"Appropriate measures" may include, but shall not be limited to the following:

- ***a. Retaining the prehistoric and/or historic structure in situ or moving it intact to another site; or***
- ***b. Paving over the site without disturbance of any human remains or cultural objects upon the written consent of the Tribe(s); or***
- ***c. Clustering development so as to avoid disturbing the site; or***
- ***d. Setting the site aside for non-impacting activities, such as storage; or***
- ***e. If permitted pursuant to the substantive and procedural requirements of ORS 97.750, contracting with a qualified archaeologist to excavate the site and remove any cultural objects and human remains, reinterring the human remains at the developer's expense; or***
- ***f. Using civil means to ensure adequate protection of the resources, such as acquisition of easements, public dedications, or transfer of title.***

If a previously unknown or unrecorded archaeological site is encountered in the development process, the above measures shall still apply. Land development activities, which violate the intent of this strategy, shall be subject to penalties prescribed in ORS 97.990.

III. Upon receipt of the statement by the Tribe(s), or upon expiration of the Tribe(s) thirty day response period, the local government shall conduct an administrative review of the Site Plan Application and shall:

a. ***Approve the development proposal if no adverse impacts have been identified, as long as consistent with other portions of this plan, or***
b. ***Approve the development proposal subject to appropriate measures agreed upon by the landowner and the Tribe(s), as well as any additional measures deemed necessary by the local government to protect the cultural, historical and archaeological values of the site. If the property owner and the Tribe(s) can not agree on the appropriate measures, then the governing body shall hold a quasi-judicial hearing to resolve the dispute. The hearing shall be a public hearing at which the governing body shall determine by preponderance of evidence whether the development project may be allowed to proceed, subject to any modifications deemed necessary by the governing body to protect the cultural, historical and archaeological values of the site.***

IV. Through the "overlay concept" of this policy and the Special Considerations Map, unless an exception has been taken, no uses other than propagation and selective harvesting of forest products consistent with the Oregon Forest Practices Act, grazing, harvesting wild crops, and low intensity water-dependent recreation shall be allowed unless such uses are consistent with the protection of the cultural, historical and archaeological values, or unless appropriate measures have been taken to protect the historic and archaeological values of the site.

This strategy recognizes that protection of cultural, historical and archaeological sites is not only a community's social responsibility, it is also legally required by ORS 97.745. It also recognizes that cultural, historical and archaeological sites are non-renewable cultural resources.

The County is required to follow the procedures set forth in CBEMP Policy #18 before approving any development proposal that involves an inventoried cultural, archaeological, or historical site. CBEMP Policy #18 has been the subject of two previous LUBA appeals, both of which stem from various iterations of the same project. *See Southern Oregon Pipeline Information Project v. Coos County,* 57 Or LUBA 44, 59-68 (2008), *aff'd w/o op.,* 223 Or App 495 (2008), *rev. den.,* 346 Or 65 (2009); *Oregon Shores Conservation Coalition et al. v. Coos County*, 76 Or LUBA 346 (2017), *aff'd w/o op.,* 291 Or App 251, 416 P3d 1110 (2018), *rev den.*, 363 Or 481, 424 P3d 728 (2018). ("*OSCC v. Coos County*").

Policy #18 is loosely modelled after Section 106 of the National Historic Preservation Act (NHPA). It is essentially a procedural / process-oriented policy. Policy #18 has two goals:

(1) to protect historic and archaeological sites, and
(2) ensure that site-specific information about identified archaeological sites is kept confidential.

This case primarily involves the first of these two goals. This aspect of Policy #18 is "process-oriented," which is to say that Policy #18 achieves its first primarily objective by requiring landowners who seek to develop land involving archaeological or historical sites to undergo additional land use process whereby the City evaluates and determines whether the project as proposed would protect the historical and archaeological values of the site.

When the County receives a development proposal that involves an "historical, cultural and archaeological site," it must a send a copy of the application to development proposal to the Confederated Tribes of the Coos, Lower Umpqua, and Siulsaw Indians ("Confederated Tribes" or "CTCLUSI."). The Confederated Tribes are then given 30 days to comment on the application. Those comments should be directed at whether the project, as proposed, would "protect the cultural, historical and archaeological values of the site." If the Confederated Tribes believe that the proposal will not protect such values, the Tribes are required to say whether, in their opinion, "the project could be modified by appropriate measures to protect those values."

After the 30-day comment period afforded the Tribes has passed, the County must take one of three possible actions:

(1) If no adverse impacts have been identified, the project may be approved;
(2) If adverse impacts have been identified, the project may be approved subject to appropriate measures agreed upon by the landowner and the Tribe, as well as any additional measures deemed necessary by the local government to protect the historical and archaeological values of the site.
(3) If adverse impacts have been identified, but the property owner and the Tribe cannot agree on the appropriate measures, then the Board shall hold a quasi-judicial hearing to resolve the dispute.

CBEMP Policy #18 states that the "[g]overning body shall determine by preponderance of evidence whether the development project may be allowed to proceed, subject to any modifications deemed necessary by the governing body to protect the historical and archaeological values of the site. In other words, the County Board is tasked with determining whether the project will protect the historical and archaeological values of the site. The County Board has the ability to impose conditions on the project (aka "modifications") if such requires are needed to protect the site.

The Applicant notes that all of the proposed uses and activities located within the CBEMP trigger the potential application of CBEMP Policy #18. In the original decision, at Applicant's request, the Hearings Officer recommended that the Board defer adopting findings addressing CBEMP Policy #18 on the merits, subject to the following condition of approval:

> "The Board shall hold a quasi-judicial hearing to determine compliance with CBEMP Policy 18. The hearing shall be a public hearing at which the governing body shall determine by preponderance of the evidence whether the development project may be allowed to proceed, subject to any modifications deemed necessary by the governing body to protect the cultural, historical, and archaeological values of the site. For purposes of this condition, the public hearing shall be subject to the provisions of section 5.7.300 of the CCZLDO with the Board of Commissioners serving as the Hearings Body. The Board's decision in that matter

shall constitute the Board's decision regarding the Applications' consistency with CBEMP Policy 18."

Rec. 216. On appeal, the Confederated Tribes made multiple challenges to the Board's findings, The Tribes alleged that the County erred by deferring its CBEMP Policy 18 project review obligations by:

> (1) refusing to recognize and consider the Tribe's testimony regarding identified archaeological sites and districts within the project area and significant adverse impacts from the project;
> (2) approving the LNG Terminal without requiring the Applicant to submit the site plan required by CBEMP Policy 18(II); and
> (3) deferring CBEMP Policy 18 determinations for an undetermined amount of time.

LUBA sustained these challenges. Central to LUBA's opinion was the concern that the County was wrong to defer an analysis of compliance with CBEMP Policy #18 when there was no second stage application proceeding to which the analysis could be deferred. LUBA was also concerned the County's proposed condition requiring future consideration of CBEMP Policy #18 did not adequately ensure that the process would be initiated and completed before development. *OSCC*, 76 Or LUBA at 378-379.

LUBA also held that the County did not determine, as required by applicable case law, that there was insufficient evidence in the record to determine compliance or the feasibility of compliance with CBEMP Policy #18 at that time. *OSCC*, 76 Or LUBA at 378-379.

Additionally, LUBA concluded that the County's analysis was flawed because it unfairly put the Confederated Tribes in a compromised position when CBEMP Policy #18 was finally taken up for consideration and because the County did not adequately explain its interpretation that CBEMP Policy #18 permits a deferral to a later proceeding:

> "Moreover, it is important to note that CBEMP Policy 18 requires coordination with and the resolution of disputes raised by a sovereign government. Unlike CBEMP Policy 18, the Tribes are not merely another participant in the proceedings. The Tribes are entitled under CBEMP Policy 18 to special notification and consideration of issues raised, as well as the power to compel the Applicant into negotiations to resolve those issues, and to compel county resolution of unsuccessfully negotiated issues. That power is considerably vitiated if the Applicant can first obtain county approval of the proposed development, and only then sit down with the Tribes to negotiate changes to the approved development. Given the inertia of an existing conditional use permit approval, the county is less likely in a deferred CBEMP Policy 18 proceeding to force the Applicant to accept changes to a development proposal that the county has already considered and

> approved. It is even less likely in such a deferred proceeding that the county would take seriously arguments that the application cannot comply with CBEMP Policy 18 and must be (retroactively) denied.
>
> "The county's findings include no interpretation of CBEMP Policy 18 explaining why it believes compliance with the policy can be deferred to a second stage proceeding, other than deferral 'seemed reasonable.' LUBA Record 126. It is not clear to us if the question of whether compliance with CBEMP Policy 18 can be deferred to a second stage proceeding is a matter of local or state law. Even if it is purely a matter of local law, in the absence of an adequate local interpretation, for the reasons set out above we conclude under ORS 197.829(2) that the county erred in deferring compliance with CBEMP Policy 18 to a second stage proceeding."

OSCC, 76 Or LUBA at 380.

LUBA remanded for the Board to either consider CBEMP Policy #18 on the merits or to provide an adequate interpretation why the policy could be deferred. *Id.* On remand, the Tribe and the Applicant concur that the Memorandum of Agreement ("MOA") that JCEP entered into with the Confederated Tribes to implement CBEMP Policy #18 satisfies Policy 18's mandate. A copy of the MOA is included in the record at Application Exhibit 5. The Applicant states:

> The MOA incorporates a Cultural Resources Protection Agreement ("CRPA") entered between Applicant and the Confederated Tribes. The CRPA provides a process for the exchange of Project-related information, confidentiality requirements, commitments to mitigation, monitoring agreements, agreements for the treatment of unanticipated discovery of cultural resources, site access agreements, and cost recovery agreements. The CRPA, in turn, incorporates an Unanticipated Discovery Plan ("UDP"), which provides procedures in the event of an unanticipated discovery of historic properties, archaeological objects, archaeological sites or human remains, funerary objects, sacred items, and items of cultural patrimony, during the construction and operation of the Project. The CRPA and UDP are included as exhibits to the MOA in [Exhibit 1 Sub-] Exhibit 5. In the MOA, Applicant and the Confederated Tribes agreed that the CRPA and the UDP constituted appropriate measures under CBEMP Policy #18 that would protect the cultural, historical, and archaeological values of the sites in the Project area. Applicant is willing to accept a condition of County approval of the Applications requiring compliance with the MOA and its attachments.

The Confederated Tribes have confirmed agreement with the Applicant on this point. In their letter dated June 9, 2019 (Exhibit 1), They state as follows:

> The MOA and CRPA represent "appropriate measures" to protect both cultural and archaeological resources as requires by the CMEMP Policy #18. Impacts to these sites can be mitigated by the adoption of the MOA and the CPRA as a condition of approval.

In a follow up letter dated June 20, 2019, the Confederated Tribes further state:

> "[B]ecause there is an agreement between the Parties, the County must adopt the MOA and CRPA as a condition of approval. CBEMP Policy #18 states "the local government shall conduct an administrative review of the development proposal and shall ... approve the development proposal subject to appropriate measures agreed upon by the landowner and the Tribe, as well as any additional measures deemed necessary by the local government to protect the historical and archaeological values of the site." There is no discretion to take an action other than include the MOA and CRPA as a condition of approval.

See Exhibit 42. The Board interprets these three quotes as establishing a consensus amongst those two parties that CBEMP Policy #18 is satisfied so long the County conditions any County approval of the applications on the continued compliance and implementation of the MOA and its attachments, including the critical CRPA.

One issue that came up at the hearing concerned the geographical scope of the term "archaeological site" as that term is used in Policy 18. The Tribe argues that the "County must look beyond its inventory of cultural resources in meeting its CBEMP Policy #18 obligations." *See* letter dated June 20, 2019, at p. 3. Exhibit 42. The Board generally agrees with the Tribe's position, because there can be no doubt that there are aspects of CBEMP Policy #18 that reach beyond inventoried sites. For example, as the Tribes point out, Policy 18 states that "[i]f a previously unknown or unrecorded archaeological site is encountered in the development process, the above measures shall still apply." But the issue that was discussed at the hearing was much more specific than that; the Board was questioning the parties about whether Section I of Policy 18 (*i.e.* the 30-day comment period) only applies to "development proposals" that involve an *inventoried* "cultural, archaeological or historical site," as well as the related concern of what is the geographic limit of such a "site." The issue came up at the hearing because the Board perceived from the letters in the record that the Tribe was arguing that the phrase "all development proposals involving a cultural, archaeological or historical site" as used in Section 1 of Policy 18 applies to more than just inventoried sites. However, maybe that is not what they were in fact arguing.

As noted above, there has been some debate about what constitutes a "site" for purposes of the notice provision set forth above. In the proceedings that led to the initial decision, the Confederated Tribe stated that it has "designated the entirety of Jordan Cove as a site of

archeological significance" under ORS 358.905(1)(b).[24] *See* Letter dated January 12, 2016. LUBA Rec. 2714-2729. This struck the Board as an overreach, and the Board rejected the idea that under state law, an "archaeological site" cannot be something as big as the entirety of Jordan Cove. The Tribes appealed that determination to LUBA, arguing that the county erred to the extent it rejected the Tribes' claim that the entirety of Jordan Cove is a cultural and archeological site for purposes of CBEMP Policy 18. As LUBA noted, "[t]hat claim is based in part on the fact that in 2015 the Tribes designated Jordan Cove as a "significant" archaeological site under ORS 358.905(1)(b)(B). However, LUBA did not resolve the issue, and nothing in LUBA's opinion changes the Board's opinion that a "site" must be defined with respect to certain geographic limits: it is a "geographic locality in Oregon * * * that contains archaeological objects and contextual associations * * *".

Rather, as the Board previously noted, ORS 358.905(1)(c)(B) envisions that the Tribes identify more specific "sites" such as house pit villages, camps, burial areas, etc. Based on that definition, the Tribes could not determine, for example, that all of Oregon or all of Coos County is a "archeological site." At some point there has to be a measured distance from a found object or physical evidence of prior cultural use.

On remand, the Confederated Tribes seem to have abandoned their argument that the entirety of Jordan Cove is an "archaeological site." The record developed on remand also does nothing to further support that idea that the entirety of Jordan Cove is a "cultural, archaeological or historical site." The Tribes provide no evidence to support the idea that the *entire* Jordan Cove site meets the definition set forth in ORS 358.905(1)(b). Rather, the Tribes now speak in terms of a number of smaller sites within Jordan Cove and the surrounding area. *See* Letter from Rick Eichstaedt dated June 9, 2019, at p. 2. Unfortunately, Mr. Eichstaedt's letter references three exhibits which were apparently not physically placed before the decisionmaker. This significantly lessens the weight the Board can give to this testimony. Further complicating the matter is that the letter references sources in footnotes, but does not include those materials into the record.

The Tribes argue that the term "site" in CBEMP Policy #18 should be defined using the same definition of "archaeological site" used by the National Park Service. For that definition, the Tribes cite to National Register Bulletin 15 that was first drafted in 1990. However, the 1990 bulletin cannot be a direct source of reference for the legislative intent for CBEMP Policy 18,

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[24] This statute defines the phrase "site of archaeological significance" as follows:

> ***(b) Site of archaeological significance means:***
>
> ***(A) Any archaeological site on, or eligible for inclusion on, the National Register of Historic Places as determined in writing by the State Historic Preservation Officer; or***
>
> ***(B) Any archaeological site that has been determined significant in writing by an Indian tribe.***

because Policy 18 predates 1990. But even if it were to be considered context, the National Register Bulletin 15 defines the term "site" as follows:

> SITE A site is the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself possesses historic, cultural, or archeological value regardless of the value of any existing structure. A site can possess associative significance or information potential or both, and can be significant under any or all of the four criteria. A site need not be marked by physical remains if it is the location of a prehistoric or historic event or pattern of events and if no buildings, structures, or objects marked it at the time of the events. However, when the location of a prehistoric or historic event cannot be conclusively determined because no other cultural materials were present or survive, documentation must be carefully evaluated to determine whether the traditionally recognized or identified site is accurate. A site may be a natural landmark strongly associated with significant prehistoric or historic events or patterns of events, if the significance of the natural feature is well documented through scholarly research. Generally, though, the National Register excludes from the definition of "site" natural waterways or bodies of water that served as determinants in the location of communities or were significant in the locality's subsequent economic development. While they may have been "avenues of exploration," the features most appropriate to document this significance are the properties built in association with the waterways. Examples of sites include: battlefield campsite cemeteries significant for information potential or historic association ceremonial site designed landscape habitation site natural feature (such as a rock formation) having cultural significance petroglyph rock carving rock shelter ruins of a building or structure shipwreck trail village site.

This definition is impractical because it relies on the presence of experts and scientific studies which do not exist. Even if the Board considers outside definitions, they are not helpful to CTCLUSI. For example, ORS 358.905(c)(A) defines the term "archaeological site" as follows:

> ***(A) "Archaeological site" means a geographic locality in Oregon, including but not limited to submerged and submersible lands and the bed of the sea within the state's jurisdiction, that contains archaeological objects and the contextual associations of the archaeological objects with:***
> ***(i) Each other; or***
> ***(ii) Biotic or geological remains or deposits.***

(B) Examples of archaeological sites described in subparagraph (A) of this paragraph include but are not limited to shipwrecks, lithic quarries, house pit villages, camps, burials, lithic scatters, homesteads and townsites.

The term "archaeological object," in turn, is defined at ORS 358.905(a):

(a) "Archaeological object" means an object that:
(A) Is at least 75 years old;
(B) Is part of the physical record of an indigenous or other culture found in the state or waters of the state; and
(C) Is material remains of past human life or activity that are of archaeological significance including, but not limited to, monuments, symbols, tools, facilities, technological by-products and dietary by-products.

Therefore, an "archaeological site" must contain "archaeological objects." The Guidelines for Conducting Field Archaeology in Oregon, Oregon State Historic Preservation Office, Salem, Oregon, November 2013 (Minor Revision June 2015) states:

In general terms, an Archaeological Site is defined as:
A) Ten or more artifacts (including debitage) likely to have been generated by patterned cultural activity within a surface area reasonable to that activity; or

B) The presence of any archaeological feature, with or without associated artifacts. Examples of such features include: a culturally modified tree, cache pit, hearth, house pit, rock shelter, cairn, historic mining ditch, petroglyph, or historic dendroglyph.

In general terms, an Isolated Find is defined as:
Any precontact or historic artifact occurrence that does not qualify for a site designation (i.e., < 9 artifacts). Subsurface investigation may be necessary to support an isolate's status.
In Oregon, an archaeological site is greater than 75 years of age (50 years of age on federal lands or related projects). Examples of archaeological sites would include: domestic/habitation sites, industrial sites, lithic scatters, middens, mounds, quarries, mines, stacked rock features, culturally modified trees, shipwrecks, petroglyphs, etc.

The presence of directly observed cultural material and/or feature(s) is the basis for recording a site. Archaeological sites are rarely defined solely on the basis of informant testimony. Direct observation of features and/or artifacts should always be sought to substantiate informant information. Generally, unsubstantiated

> informant testimony (i.e., tickler) should be noted within a survey/project report, but not on an archaeological site form. While exceptions to this policy may exist, they should be considered rare. For example, in cases where multiple informants offer independent, similar and/or supportive information on different dates with regards to the location and composition of a particular site (e.g., historic burial), a site form should be used to record this resource.
>
> Site boundaries should be defined by direct observation of features and/or artifacts. Topography may be used to suggest potential boundaries that should be verified by testing, but these should be illustrated differently on the site form than boundaries determined through direct observation. In addition, historic background information should be taken into consideration when defining the boundaries of a historic site. There is no "standard" size for determining a site's boundaries in relationship with observed artifacts. Artifacts do not have to lie within 30 feet or 30 meters of each other to be considered part of a single site. Such an assessment should be made by the archaeologist based on landform and possible past land use activities.

Essentially, the SHPO definition does not place a strict geographic limit on how close the ten or more "archaeological objects" need to be spaced. However, it does state that an "archaeologist" should make the assessment. In this case, the only evidence from an "archaeologist" was submitted by the Applicant. *See* Application, Sub-Exhibit 4.

Nonetheless, the language in the first paragraph of CBEMP Policy #18 has to be interpreted to be limited to "inventoried" cultural, archaeological or historical sites or other non-inventoried sites that are known to contain such resources and the Board so finds. *See Southern Oregon Pipeline Information Project v. Coos County,* 57 Or LUBA 44 (2008), *aff'd w/o op.,* 223 Or App 495 (2008), *rev. den.,* 346 Or 65 (2009). If this section were to apply more broadly to all development regardless of any knowledge or inventory of such sites, the County would have simply written Policy #18 in manner that requires every development in the CBEMP to be subject to a 30-day review process from the Confederated Tribes.

The Board finds that historical, archaeological, and cultural resources, as identified on acknowledged plan inventories, are protected in the Project area consistent with CBEMP Policy #18. The signed MOA and CRPA represent "appropriate measures" to protect both cultural and archaeological resources as required by the CMEMP Policy #18.

Second, as the Applicant correctly notes, the Project will not adversely affect inventoried resources. There is only one inventoried resource from the Shoreland Values Map located within the Project area. Applicant retained the professional archaeologists and researchers at Historical Research Associates, Inc. ("HRA") to survey the area where the resource is mapped to determine whether the Project would impact this resource. After conducting site-specific research,

reviewing the results of past excavations in the area, and completing a pedestrian survey, HRA found no evidence of the resource. Accordingly, HRA concluded that the resource was not located within the Project area and the Project would not have adverse impacts to the resource. HRA also concluded, based upon available information, that no modifications were necessary to the Project to protect the cultural, historical, and archaeological values of the site or the resource. Due to the sensitive nature of the cultural resources involved, HRA's full report is confidential and cannot be disclosed in this proceeding. HRA has prepared a summary of its methodology and findings, which is included in Application Exhibit 4.

Finally, the Board finds that the last paragraph of Section II of CBEMP Policy #18 concerns "unknown or unrecorded," i.e., non-inventoried "sites" that are encountered in the development process and requires that these sites also be protected with "appropriate measures." As explained in the JCEP testimony quoted above, the CRPA and UDP are incorporated into the MOA and provide procedures in the event of an unanticipated discovery of artifacts or sites during JCEP's development. The Board finds that compliance with the CRPA and UDP will constitute "appropriate measures" to protect these "unknown or unrecorded" sites for purposes of the last paragraph of Section II of CBEMP Policy #18.

For these reasons, and subject to the proposed condition, the Board finds that the applications are consistent with CBEMP Policy #18. Condition number E.1 of the original decision shall be modified as follows: "Prior to and during the conduct of all activities authorized under this proposal, JCEP shall comply with the requirements of the MOA, CRPA, and UDP as agreed upon and signed by JCEP and presented in the record. The agreement was signed by both the applicant and Confederated Tribes of Coos, Lower, Umpqua, and Siuslaw Indians."

8. Response to Remand Issue 8 - *Ex Parte* Communication & Bias.

Parties to a quasi-judicial land use proceeding are entitled to a tribunal that is impartial and has not engaged in *ex parte* contacts concerning the matter at issue. *Fasano v. Board of County Comm'rs*, 264 Or 574, 588, 507 P2d 23 (1973), *overruled on other grounds* 288 Or 585 (1980). If a member of the local government decision-making body receives communication outside the hearing process regarding the substance of a quasi-judicial land use application, the decision-maker may cure the issue by disclosing the substance of the communication on the record and then allowing an opportunity for rebuttal:

> ***"No decision or action of a planning commission or county governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:***
>
> ***"(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and***

> ***"(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."***

ORS 215.422(3).

Turning to this case, the Applicant provides the following information in the application narrative:

> Before making the original decision, at the Board deliberations on August 16, 2016, Board members had an opportunity to disclose conflicts of interest, bias, and *ex parte* communications. During that time, Commissioner Main disclosed his attendance at a civic luncheon in 2014 at which Applicant presented information to a broad group of attendees about some aspects of the Project now included in the Applications. Commissioner Main mentioned that Commissioner Sweet also attended the lunch. Commissioner Sweet did not disclose the substance of what occurred at the luncheon.

Petitioner Jody McCaffree appealed to LUBA Commissioner's Sweet's failure to disclose the luncheon event. LUBA questioned whether attendance at the luncheon resulted in any *ex parte* communication that required additional disclosure. Nonetheless, given that LUBA was remaining the case for other reasons, LUBA sustained Ms. McCaffree's contention and remanded the matter for Commissioner Sweet to disclose the substance of any such *ex parte* communication:

> "With respect to Chair Sweet's attendance at a 2014 luncheon presentation by JCEP on the LNG project, intervenor does not dispute that Sweet failed to disclose the content of the presentation, which the other attending commissioner, Main, treated as an *ex parte* communication. It may be that the presentation does not qualify as an *ex parte* communication, or if so that Main's disclosures was sufficient for both commissioners. However, because the county's decision must be remanded for other reasons, it is appropriate to remand also to allow Chair Sweet to disclose the substance of any *ex parte* communication that occurred at the presentation."
>
> "The first assignment of error (McCaffree) is sustained, in part."

OSCC, 76 Or LUBA at 372. The Board is of the opinion that the simply attending a meeting in Colorado addressing generally the topic of LNG, and seeking to learn more about the LNG industry does not constitute evidence of "bias" in a legal sense. The record reveals that Commissioner Sweet is a strong supporter of LNG. As LUBA has explained on many occasions,

> local quasi-judicial decision makers, who frequently are also elected officials, are not expected to be entirely free of any bias. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, 141-44, *aff'd* 183 Or App 581, 54 P3d 636 (2002); *Halverson-Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710 (2001); *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440, 445-47 (2000), *aff'd* 172 Or App 361, 19 P3d 918 (2001). To the contrary, local officials frequently are elected or appointed in part *because* they favor or oppose certain types of development. *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or 76, 82-83, 742 P2d 39 (1987); *Eastgate Theatre v. Bd. of County Comm'rs*, 37 Or App 745, 750-52, 588 P2d 640 (1978). Local decision makers are only expected to (1) put whatever bias they may have to the side when deciding individual permit applications and (2) engage in the necessary fact finding and attempt to interpret and apply the law to the facts as they find them so that the ultimate decision is a reflection of their view of the facts and law rather than a product of any positive or negative bias the decision maker may bring to the process.

Woodard v. City of Cottage Grove, 54 Or LUBA 176, 178 (2007)

In this case, the last election largely served as a referendum on Commissioner Sweet's support for LNG. His opponent in the election was an attorney, Ms. Katy Eymann, who has frequently appeared before the Board on matters related to the LNG project, and who undoubtedly characterize herself as an outspoken opponent of the project. The Board takes official notice of the election results, which Commissioner Sweet won by 57 percent to 42 percent.

LUBA does not lightly infer bias, *Catholic Diocese of Baker v. Crook County*, 60 Or LUBA 157, 165 (2009), and "bias sufficiently strong to disqualify a decision-maker must be demonstrated in a clear and unmistakable manner." *Woodard v. City of Cottage Grove*, 54 Or LUBA 176, 189 (2007). To demonstrate bias, a party must show the decision maker prejudged the application and did not reach a decision by applying relevant standards based on the evidence and argument presented during the proceedings. *Spiering v. Yamhill Co.*, 25 Or LUBA 695, 702 (1993).

Based on the case law decided to date, the type of conduct that has sufficed to demonstrate "actual bias" is really quite narrow, and includes the following:

- ❖ Personal verbal or written attacks on a party that indicate personal animus;
- ❖ Developing evidence outside the record, particularly when the goal in developing that evidence is to favor one side's position,
- ❖ Inflammatory statements, particularly those that indicate an inability of the decision maker to be fair and objective - or that suggest that the result is a foregone conclusion.

As LUBA has stated:

> [I]t is highly unusual and at least potentially improper for a decision maker to independently seek out or attempt to obtain additional evidence outside the scope of a public hearing with respect to a quasi-judicial application pending before that decision maker. The role of the local government decision maker is not to *develop* evidence to be considered in deciding a quasi-judicial application, but to impartially consider the evidence that the participants and city planning staff submit to the decision maker in the course of the public proceedings. The fact that councilor Haskell felt called upon to develop additional evidence not submitted during the public proceedings, and to cause that evidence to be presented to his fellow decision-makers, is an indication that Haskell had departed somewhat from his obligatory role as an impartial quasi-judicial decision maker. (Italics in original, underline added).

Woodard v. City of Cottage Grove, 54 Or LUBA 176, 186 (2007). Thus, general factfinding on broad topic of political interest to the community one thing, but using that knowledge to develop evidence for submission into the record of a quasi-judicial case is quite another.

The Board has considered evidence in the record, including Exhibit 5, and does not think the bias standard is met based on that evidence. In particular, evidence of campaign contributions can never be seen as evidence of bias, since campaign fundraising is a necessary component of every politician's job.

Also, Commissioner Sweet's statement in Exhibit 13 that he was pleased to find out that fracking is not a major contributor to air pollution is also no reason to find that he is "biased" in this case. Ms. Natalie Ranker confuses that issue by stating that he is making a "false and misleading" statement when he so states, because "JCEP will be the biggest polluter in the state." Exhibit 5. As an initial matter, Ms. Ranker confuses the topic of JCEP's LNG terminal with the entirely unrelated topic of fracking: JCEP is not proposing to conduct fracking activity. Therefore, Ms. Ranker seeks to make an apples to oranges comparison by confusing the two activities.

In any event, in order to cure Commissioner Sweet's failure to disclose, the Applicant correctly recommends the following actions be taken on remand:

> Before beginning deliberations on remand, the Board should call for Board members to disclose any conflicts of interest, bias, or *ex parte* communications. As part of these disclosures, Commissioner Sweet should disclose on the record the substance of any *ex parte* communications that occurred at the 2014 luncheon. The Board should then permit parties to rebut the substance of any such communication on the record. The Board

should then proceed with its deliberations and make a decision on the Applications on remand. Upon following these steps, the Board should find that it has followed the correct procedures and has complied with LUBA's remand on this issue.

It is important to recognize that in cases where ORS 215.422(3) does apply, it requires the decision maker who has engaged in *ex parte* communications to take two separate and distinct actions. First, the decision maker must place the *substance* of the conversation or communication on the record. Second, the decision maker must make a "public announcement of the content of the communication." Given that the statute sets this second act out as a separate and distinct act apparent from "plac[ing] on the record the substance of any written or oral *ex parte* communications." It would not be sufficient, as an example, to draft an email and send to staff to be entered into the "file" of the case.

In the following section, the Board addresses its disclosures

VI. *Ex parte* Contacts and Bias

At the November 15, 2019 Board deliberation hearing, Board members were provided an opportunity to disclose any *ex parte* contacts as described in ORS 215.422 and 197.835(12), conflicts of interest as described in ORS 244.120, and any actual bias regarding the application. *1000 Friends of Oregon v. Wasco County Court,* 304 Or 76, 747 P2d 39 (1987). Board members made disclosures of *ex parte* contacts, including Commissioner Sweet disclosing his attendance at a 2014 civic luncheon at which elements of the broader JCEP and Pacific Connector project were discussed.

The Board provided an opportunity for members of the public to respond to the disclosures and/or challenge the impartiality of any Board member. Natalie Ranker and Jody McCaffree contended that Commissioners were biased and should not participate in the deliberations or decision for the application. The Board finds that most of these allegations were previously raised and rejected by the Board in the original 2016 decision for these applications. Opponents then raised these issues on appeal to LUBA:

> "McCaffree alleges that Chair Sweet was biased in favor of the proposed LNG terminal. According to McCaffree, on April 22, 2016, Chair Sweet sent a letter, on county letterhead, to FERC expressing support for the Jordan Cove LNG terminal and Pacific Connector Pipeline Project applications then pending before FERC. Supplemental Record 527. In addition, McCaffree quotes Chair Sweet as making public statements in support of the Jordan Cove project. *Id.* at 529-30. McCaffree contends that the letter and statements demonstrate that Chair Sweet was incapable of deciding the land use application pending before the county with the requisite impartiality."

Oregon Shores Conservation Coalition v. Coos County, 76 Or LUBA 346, 369-370 (2017). After discussing the high bar for disqualifying bias in local land use proceedings, LUBA denied McCaffree's assignment of error and concluded that then-Chair Sweet was not actually biased:

> "We disagree with McCaffree that Chair Sweet's April 11, 2016 letter, or his public statements, demonstrate that Chair Sweet was incapable of determining the merits of the land use application based on the evidence and arguments presented.
>
> * * * *
>
> "As far as McCaffree has established, Chair Sweet's statements of support of the LNG terminal represent no more than the general appreciation of the benefits of local economic development that is common among local government officials. Those statements fall far short of demonstrating that Chair Sweet was not able to make a decision on the land use application based on the evidence and arguments of the parties."

Oregon Shores Conservation Coalition, 76 Or LUBA at 370-71. The Court of Appeals affirmed LUBA's decision on this issue. *Oregon Shores Conservation Coalition v. Coos County*, 291 Or App 251, 416 P3d 1110 (2018). The Supreme Court denied review on this issue. *Oregon Shores Conservation Coalition v. Coos County*, 363 Or 481, 291 Or App 251 (2018). The Board finds that none of the challengers explain why a different outcome is warranted in the present case.

The Board denies the current contentions as follows:

Agreement between Pacific Connector and County: The Board denies the contention that the Board members were biased due to a 2007 agreement between the Applicant and the County pursuant to which the Applicant pays the County $25,000 a month. The challengers did not adequately explain the terms of the agreement, how they were related to the specific matter pending before the Board, or how the existence of the agreement would cause any of the Board members to prejudge the application. As a result, the Board finds that the facts alleged by Ms. McCaffree are not sufficient to establish disqualifying actual bias by any Board members.

Reports of JCEP Funding for County Sheriff's Office: For two reasons, the Board denies the contention that the Board members were biased due to funding by JCEP for the County Sheriff's Office. First, challengers have not adequately explained how the existence of this funding would cause any Board members to prejudge the application (which is not related to funding of the Sheriff's Office), and they have not identified any "statements, pledges or commitments" from any Board members that the existence of the funding has caused them to prejudge the application. Second, the Sheriff's Office funding is not contingent upon approval of the application. Therefore, the challengers have not demonstrated that any Board member demonstrated "actual bias" due to this funding.

Letter from Commissioner Sweet to FERC: The Board denies Ms. McCaffree's contention that Commissioner Sweet was biased due to a letter he wrote to FERC in support of the project in April 2016. Ms. McCaffree did not adequately explain the content of the letter, or how it related

to the specific matter pending before the Board. Additionally, the Board finds that, even if the facts alleged by Ms. McCaffree are correct and Commissioner Sweet did express general support for the project in the letter to FERC, the requests pending before FERC are not of the same nature as the application at issue in this proceeding. In other words, the letter does not demonstrate that Commissioner Sweet has prejudged the specific applications pending before the County or that he is unable to objectively apply the County's approval criteria to the application. Finally, as noted above, the Board finds that LUBA, the Court of Appeals, and the Supreme Court all previously concluded that the statements in question simply reflected a generalized support for economic development in the community. As a result, the Board finds that the facts alleged by Ms. McCaffree are not sufficient to establish disqualifying actual bias by Commissioner Sweet.

Statements Made by Commissioners in 2014 and 2015: The Board denies the contention that Commissioners Sweet and Cribbins were biased due to statements they made to the media about the project in 2014 and 2015. The facts alleged by the challengers are not supported by substantial evidence because they did not provide enough details about the statements such as their substance, their timing, or their context, or how they demonstrate prejudgment by the Board members. Further, the Board finds that all of these statements appear to predate the filing of the application and thus they could not relate to the specific matter pending before the Board. Finally, the Board notes that LUBA, the Court of Appeals, and the Supreme Court all previously concluded that the statements in question simply reflected a generalized support for economic development in the community. The Board finds that the facts alleged by the challengers are not sufficient to establish disqualifying actual bias by any Board members.

Private Meetings Between Pacific Connector and Board Members: The Board denies Ms. McCaffree's contention that Board members were biased due to their attendance at private meetings with Pacific Connector. The facts alleged by Ms. McCaffree are not supported by substantial evidence because she did not provide any details about the meetings such as when and where they occurred, what was discussed, how they related to the matter pending before the Board, or how they would cause the Board members to prejudge the Application. As a result, the Board finds that Ms. McCaffree has not alleged facts sufficient to establish disqualifying actual bias arising from the alleged meetings.

Trip to Colorado: The Board denies the contention that Commissioner Sweet's trip to Colorado in September 2018 caused him to be actually biased in the matter. The record reflects that, on the trip, Commissioner Sweet learned more about the natural gas market and met with elected officials. Challengers did not present any evidence that tied the trip to Pacific Connector or the specific matter pending before the Board. Challengers also did not identify with specificity why the existence of the trip caused Commissioner Sweet to be biased.

Campaign Contribution by JCEP to Commissioner Sweet: The Board denies the contention that a cash contribution by JCEP to Commissioner Sweet's campaign caused him to be biased. Commissioner Sweet acknowledged the campaign contribution on the record. The challengers did not explain why this disclosure was inadequate or what bearing the existence of the contribution has on the ability of Commissioner Sweet to render an unbiased decision. Under similar circumstances, LUBA rejected a bias claim. *Crook v. Curry County*, 38 Or LUBA 677,

690 n 17 (2000) (mere existence of campaign contribution by a party to a decision-maker does not cause the decision-maker to be biased).

Meeting with Bureau of Land Management ("BLM"): Ms. McCaffree also raised a concern with Commissioner Main's disclosure of a meeting held on October 17, 2019 at the BLM office in North Bend. She questioned Commissioner Main about the people in attendance but that was found to be outside of the scope of the *ex parte* contact criteria. She requested a transcript of the meeting. However, Commissioner Main did not have a transcript to provide. In his disclosure, Commissioner Main was very clear he did not discuss the project with anyone or talk about the criteria during his limited attendance at this meeting.

Interactions with Harry Andersen: Ms. McCaffree asked Commissioner Main how he knew Harry Andersen. Commissioner Main responded that he was an employee of Pembina. She asked for clarification on, how Commissioner Main knew Mr. Anderson worked for Pembina. Commissioner Main stated that he was at the open house. Ms. McCaffree raised issues regarding outside influences trying to establish bias. The Board finds that these allegations did not demonstrate any specific *ex parte* communication or actual bias concerning the Application.

Finally, before taking final action to approve these findings, each of the Board members stated that he/she had not prejudged the application and that he/she could evaluate the testimony and evidence in the record and make a decision based upon whether the testimony and evidence demonstrates compliance with applicable criteria. For these reasons, the Board denies the bias and *ex parte* challenges in this case.

No other challenges were made, and Board members participated in the deliberations and the decision.

VII. Conclusion.

For the reasons stated above, and based upon the evidence submitted herewith, the Board finds that Applicant has addressed the remand issues identified by LUBA. This decision requires some modifications to the conditions of approval that were adopted as part of the original order as follows.

VIII. Conditions of Approval

The following conditions of approval from the original decision have been amended to read as follows in order to reflect the decision made by the Board on remand:

A. 1. The applicant's use of the Coos Bay shall be limited to approximately 120 LNG transport tanker per year. Smaller vessels such as barges, tug boats, or other cargo ships that do not require a security zone do not count for purposes of this conditions.

E. 1. Prior to and during the conduct of all activities authorized under this proposal, JCEP shall comply with the requirements of the MOA, CRPA, and UDP as agreed upon and sighed by JCEP and presented in the record. The agreement was signed by both the applicant and Confederated Tribes of Coos, Lower, Umpqua, and Siuslaw Indians.

All other conditions from the original decision for the Applications (County File Nos. HBCU-15-05/CD-15-152/FP-15-09) are re-adopted in conjunction with this decision.