



August 2, 2017

**VIA HAND DELIVERY**

Board Office Administrator  
Columbia County  
230 Stand Street  
St. Helens, Oregon 97052

**Re: Testimony for Remand Hearing on Port of St. Helens's Requested Major Plan Map Amendment and Rezone at Port Westward (File No. PA 13-02/ZC 13-01)**

To the Board of Commissioners of Columbia County:

The following comments are submitted on behalf of 1000 Friends of Oregon and Columbia Riverkeeper. 1000 Friends of Oregon is a nonprofit, membership organization that works with Oregonians to support livable urban and rural communities; protect family farms, forests and natural areas; and provide transportation and housing choice. We have members in all parts of Oregon including Columbia County. Columbia Riverkeeper is a local environmental organization that seeks to protect and restore the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. Representing over 8,000 members and supporters, Columbia Riverkeeper works to restore a Columbia River where people can safely eat the fish they catch, and where children can swim without fear of toxic exposure. Columbia Riverkeeper was a named petitioner in the LUBA proceeding that resulted in this remand back to the County. Both 1000 Friends of Oregon and Columbia Riverkeeper strongly oppose this proposed rezone.

**I. Introduction and Summary of Bases for Denial**

The Port of St. Helens ("Port") seeks to expand its Port Westward Industrial Park by requesting a reasons exception that generally plans land use for the subject property: seventeen tax lots consisting of 837 acres of land adjacent to the existing Port Westward site. Rather than utilizing existing industrial land within the area, the Port is improperly attempting to utilize the

limited vehicle of a reasons exception to rezone land for many uses that can fit easily within the existing industrial land available throughout the region. The county's original decision was remanded by LUBA, and now the Port seeks a reasons exception for the subject property to allow a modified list of eighteen uses. The county should deny this application because it constitutes general planning, would allow urban uses on rural land, would constitute the extension of urban-level facilities and services outside of an urban growth boundary, and the Port has failed to demonstrate that all of the proposed uses are compatible with existing farm uses, and that there are no viable options that can accommodate at least one of the proposed uses.

For the Board of Commissioners' convenience, below is a general summary of the substantive reasons why the Port's application must be denied.

- ORS 197.732(2)(c)(D): The application must be denied because the numerous proposed uses are not compatible with adjacent uses.
  - The proposed uses include uses that would create incompatible pollution and contamination for high-value agricultural lands that produce high-value crops.
  - The proposed use categories are so broad that it is impossible to do a meaningful compatibility analysis for each specific use. The Port is ignoring LUBA's direction to the County to request an exception for a narrow subset of uses.
  - The application lacks analysis on compatibility generally. The Port failed to adequately consider impacts of each use to adjacent properties including farm lands, waterways, rural commercial uses, restoration activity, fishery uses, wildlife refuges and public lands.
  
- ORS 197.732(2)(c)(B)/ OAR 660-004-0020(2)(b): The application must be denied because the Port has not demonstrated that "[a]reas that do not require a new exception cannot reasonably accommodate the use[.]"
  - The Port failed to analyze all alternatives that can reasonably accommodate each of its proposed uses, including industrial lands that do not have access to deepwater ports. The Port violated LUBA's direction on remand by rejecting sites that cannot accommodate multiple large lot industrial uses.
  - Existing Port Westward can accommodate some of the proposed uses. The Port failed to demonstrate, as required by LUBA, that PGE is categorically unwilling to sublease land or that in light of future acquisition or termination of PGE's leasehold, future use of the existing Port Westward is still not available for the proposed uses. Easements and wetlands have not been demonstrated to preclude development. Existing Port Westward land is developable for the proposed uses, demonstrated by the Port's recent lease option with a methanol refinery operator.
  - The Port improperly rejected alternative deepwater ports such as the Port of Coos Bay, the Port of Astoria and the Port of Portland. The Port improperly narrows the scope of the unique resource upon which all proposed uses are supposedly significantly dependent. The Port cannot create a locational quality for the unique

- transportation resource to reject non-Columbia River ports. Moreover, the Port is inconsistent in rejecting alternatives based on location: some sites are rejected because they do not directly serve the Columbia River corridor, or do not directly serve Portland, but the Port of Portland is rejected for being on the Columbia River, but lacking a “locational advantage.”
- The Port failed to consider a number of alternative sites that could reasonably accommodate some of the proposed uses such as industrial land in Astoria, the North Coast Business Park in Clatsop County, and land in Cowlitz County, Washington that has access to the Columbia River.
  - The Port cannot reject other ports because leasing or purchase negotiations are occurring for those port lands.
- OAR 660-004-0022(3)(a): The application must be denied because not all proposed uses are significantly dependent on a unique resource.
    - This issue must be addressed because it is the sole basis for the Port’s reasons exception. LUBA did not resolve the issue of whether the Port’s proposed uses were dependent on a unique resource because the original application and LUBA’s resolution was based on three additive reasons under OAR 660-004-0022(3)(a)–(c). LUBA concluded that it need not determine whether all uses are port-dependent because they could be justified under other reasons. Now that the Port seeks an exception based on one sole reason (*i.e.*, the uses are dependent on a deepwater port), its validity must be analyzed.
    - The Port fails to identify any significant resource located on agricultural or forest land.
    - The Port fails to demonstrate that each of its proposed uses are significantly dependent on a deepwater port or a port generally. An attribute like proximity to a port that arguably makes an industrial operation more economical does not make all related uses significantly dependent on a deepwater port.
  - ORS 197.732(2)(c)(C)/ OAR 660-004-0020(2)(C): The application must be denied because the Port has failed to demonstrate that the long-term environmental, economic, social and energy consequences resulting from the numerous uses allowed at the subject property are not significantly more adverse than would result areas requiring a goal exception other than the proposed site.
    - Alternative sites such as the Port of the Dalles and Port of Klickitat have significantly fewer adverse impacts, as they are surrounded by less productive resource land. These ports currently serve several of the uses proposed in the Port’s application.
  - Goal 14: The application proposes urban uses, and an exception to Goal 14 is required, but the Port has not demonstrated that an exception to Goal 14 can be justified.
    - Under the *Shaffer* Factors, the application proposes uses that are urban in nature because they include urban-level employment densities based on the Columbia County Comprehensive plan, are typically found in urban areas, and require urban level of facilities and services.

- Goal 11: Because the proposed uses require an exception to Goal 14, and the uses will require urban levels of service and facilities on rural land, an exception to Goal 11 is required, but cannot be justified.
  - The adjacency of the subject property to existing Port Westward creates a presumption that the Port's suite of urban-level facilities and services will be extended to the subject property.

## II. Procedural Issues

As an initial matter, the county's notices of public hearing are deficient. Both the publication notice and property owner notice incorrectly explain the scope of remand, fail to describe the modified action that the Port requests the county to take, do not include all of the relevant applicable criteria such as Statewide Planning Goals 14 and 11, and improperly assert that LUBA "affirmed parts of the [county's original] decision[.]" *See* Notice of Public Hearing. In addition, the notices list the issue of whether the uses "cannot be located within an urban growth boundary due to impacts that are hazardous or incompatible in densely populated areas" as a relevant remand consideration, but it is not an issue as the Port is pursuing an application that is justified solely under the "significantly dependent" reasons exception, as the Staff Report acknowledges at page 17. The notice fails to identify the remand issue of whether the application can be approved under the "significantly dependent" reasons exception ("the use[s] are] significantly dependent upon a unique resource located on agricultural or forest land." OAR 660-004-0022(3)(a). The notice does not include the most basic issue for this remand: to what extent does the Port's application, as modified, comply with the applicable criteria. Reading the notice, one would not be aware that the Port's modified application is now only seeking a single reasons exception for a sub-set of uses permitted under the Resource Industrial Planned development ("RIPD") zone, as the notice states:

"The Applicant seeks to change the Comprehensive Plan Map designation of the expansion area from Agricultural Resource to Resource Industrial and to change the zoning from Primary Agriculture (PA-80) to Resource Industrial Planning Development (RIPD)"

*See* Notice of Public Hearing. Nowhere in the notice does it state that the Port is seeking an exception for a sub-set of uses permitted under the RIPD zone.

As discussed in greater detail below, to the extent that the modification of the original application creates new issues, those issues are open to discussion at this remand hearing.

Because the county has allowed new evidence, argument and testimony to be submitted into the record via this modified application, “any person may raise new issues which relate to the new evidence, arguments, testimony or criteria for decision-making which apply to the matter at issue[.]” ORS 197.763(7).

Moreover, the notice incorrectly describes the burden of proof that the applicant faces: the burden is not one of “proving that the application fails to meet one or more of the applicable approval criteria.” Notice of Public Hearing (Property Owner Notice, June 28, 2017) at 2 (emphasis added). Rather, the applicant’s burden is to demonstrate that the application complies with all relevant approval criteria. *Fasano v. Board of County Commissioners of Washington Cnty.*, 264 Or 574, 507 P2d (1973).

### III. Legal Framework

ORS 197.732 and administrative rules set forth in Chapter 660, Division 4 govern the goal exception process. There are limited bases for taking an exception to a Statewide Planning Goal, briefly known as the “physically developed,” “irrevocably committed,” and “reasons” exceptions. ORS 197.732(2). An “exception” to a planning goal cannot be a comprehensive plan amendment that “establish[es] a planning or zoning policy of general applicability[.]” ORS 197.732(1)(b)(A); OAR 660-004-0005(1)(a); *Hood River Valley Residents Committee v. Hood River County*, \_\_ Or LUBA \_\_, (LUBA No. 2017-014, June 29, 2017) slip op 15. When approving a reasons exception, the applicant is required to demonstrate that “[r]easons justify why the state policy embodied in the applicable goals should not apply[.]” ORS 197.732(2)(c)(A). An exception must be “exceptional.” *Central Oregon Land Watch v. Deschutes County and Oregon Department of Environmental Quality*, \_\_ Or LUBA \_\_, (LUBA No. 2016-020, Nov 1, 2016), *quoting 1000 Friends of Oregon v. LCDC*, 69 Or App 717, 731, 688 P2d 103 (1984).

Here, the Port is requesting an exception to Statewide Planning Goal 3<sup>1</sup> to generally rezone high-value farmland for a broad range of industrial uses in northern Columbia County based solely on the “significantly dependent on a unique resource” reasons exception. For each

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<sup>1</sup> Statewide Planning Goal 3 is “[t]o preserve and maintain agricultural lands.”

use, the “limited vehicle”<sup>2</sup> of a reasons exception requires that four standards be met in order for a local government to adopt an exception to a goal:

- (A) Reasons justify why the state policy embodied in the applicable goals should not apply;
- (B) Areas that do not require a new exception cannot reasonably accommodate the use;
- (C) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and
- (D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.

ORS 197.732(2)(c). These standards are further developed in OAR 660-004-0020 and -0022. As explained below, for numerous reasons, the Port’s application is deficient and cannot be approved by the county.

### **III. Prior County Decision and LUBA Remand**

On January 29, 2014, the Board of Commissioners of Columbia County approved a multi-layered reasons exception<sup>3</sup> to rezone approximately 837 acres from agricultural land to Resource Industrial – Planned Development (RIPD), which would have allowed a number of non-farm uses outright or as conditionally approved.<sup>4</sup> The decision was appealed to Oregon’s

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<sup>2</sup> LUBA considers the reasons exception to be a “limited vehicle” because “a reasons exception authorizes only those uses that fit the particular reasons advanced[.]” LUBA Opinion at App 12.

<sup>3</sup> In 2013 and 2014, the Port sought, and the County approved a reasons exception for the subject property based on all three reasons under OAR 660-004-0022(3).

<sup>4</sup> Columbia County Zoning Ordinance 680–683 allows a number of uses:

“682 Permitted Uses:

- “1. Farm use as defined by Subsection 2 of ORS 215.203.
- “2. Management, production, and harvesting of forest products, including wood processing and related operations.

“683 Uses Permitted Under Prescribed Conditions: The following uses may be permitted subject to the conditions imposed for each use:

Land Use Board of Appeals (LUBA) and remanded back to the county for several failures, many of which stemmed from the extreme difficulty in justifying such broad exceptions and the insufficiency of the county’s justifications for the general rezone. LUBA Opinion at App 1–62.<sup>5</sup> Because the county sought an exception for every use that was allowed under the RIPD zone, LUBA determined that the County failed to justify its broad exceptions as they related to the OAR 660-004-0020(2)(b) “reasonable accommodation standard,” and did not adequately explain whether all uses allowed under the RIPD zone (outright or conditionally) would be compatible with adjacent uses under OAR 660-004-0020(2)(d). App 42–49.

#### **IV. The Port’s Revised Application**

On remand, the Port revised its application for a rezone to be based on a single reasons exception under the OAR 660-004-0022(3)(a) “significantly dependent on a unique resource” reason for five categories of uses, which still include a broad suite of uses, save “research and development laboratories.” Remand Packet- Berry Elsner & Hammond LLP (BEH) Letter at 1; Remand Application at 1; *See* n 4. Because the Port modified its application, both in scope and applicable exception justification, those modifications must be consistent with all applicable criteria. To the extent that the modifications create new issues, those issues are open for debate on remand.

At the remand stage, it appears that the Port and County planning staff have a basic misunderstanding of the operative effective of LUBA’s decision. LUBA affirmed no part of the County’s prior decision. Contrary to the plain language of LUBA’s opinion, the cover letter for the Port’s revised application asserts that LUBA “remanded, in part” the county’s prior approval of the rezoning of the subject property. BEH Letter at 1. In addition, the County’s notice of public hearing provided to property owners also misleadingly asserts that “[t]he County’s decision was appealed to LUBA, which affirmed parts of the decision and remanded others (see

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“1. Production, processing, assembling, packaging, or treatment of materials; research and development laboratories; and storage and distribution of services and facilities \* \* \*”

<sup>5</sup> Because of the repeated citation to *Columbia Riverkeeper v. Columbia County*, \_\_ Or LUBA \_\_\_, (LUBA No. 2014-017/018, August 27, 2014), that opinion is appended to this comment letter, and is cited to as “LUBA Opinion at App X.”

LUBA final order 2014-17/18).” County Notice of Public Hearing (Property Owner Notice) at 1. On the contrary, LUBA affirmed no part of the county’s decision. The word “affirm” does not appear once in LUBA’s opinion. Rather, LUBA admonished the County for its approach of seeking a reasons exception for broad categories of industrial uses, characterizing the County’s approach as “highly problematic.” LUBA Opinion at App 38. LUBA attempted to provide the County with useful feedback, which read in its entirety, provides the impression that LUBA considered the County to be biting off significantly more than it could chew, and abusing the reasons exception process to achieve results that are to occur through general planning, periodic review and well-planned urban growth expansions. *See* LUBA Opinion at App 9 (“It may be that the Port and the county have bit off more than they can chew, or more than can practicably be accomplished outside of periodic review[.]” *See also* ORS 197.732(1)(b)(A); OAR 660-004-0005(1); ORS 197.628.<sup>6</sup>

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<sup>6</sup> ORS 197.628 provides in relevant part:

“(1) It is the policy of the State of Oregon to require the periodic review of comprehensive plans and land use regulations in order to respond to changes in local, regional and state conditions to ensure that the plans and regulations remain in compliance with the statewide planning goals adopted pursuant to ORS 197.230, and to ensure that the plans and regulations make adequate provision for economic development, needed housing, transportation, public facilities and services and urbanization.

“ \* \* \* \* \*

“(3) The following conditions indicate the need for periodic review of comprehensive plans and land use regulations:

“(a) There has been a substantial change in circumstances including but not limited to the conditions, findings or assumptions upon which the comprehensive plan or land use regulations were based, so that the comprehensive plan or land use regulations do not comply with the statewide planning goals relating to economic development, needed housing, transportation, public facilities and services and urbanization;

“(b) Decisions implementing acknowledged comprehensive plan and land use regulations are inconsistent with the goals relating to economic development, needed housing, transportation, public facilities and services and urbanization;

“(c) There are issues of regional or statewide significance, intergovernmental coordination or state agency plans or programs affecting land use which must be addressed in order to bring comprehensive plans and land use

In essence, the Port is attempting to use the limited vehicle of a reasons exception to perform general planning for over 800 acres, and when this board reviews the facts and limited allowances of a reasons exception, it is clear that no reasonable person would conclude that the applicant has carried its burden to demonstrate that this land can legally be rezoned in the manner sought by the Port.

**IV. The Port is Required to Demonstrate the Legality of a Reasons Exception for Each of the Eighteen Uses it Seeks, Not an Analysis of Five “Use Categories.”**

The Port’s modified application requests a rezone for five “use categories.” OAR 660-004-0018(1) clarifies that an exception to a goal only authorizes the uses that are “justified by the applicable exception.” *See also* LUBA Opinion at App 12. The goal exception process does not provide an avenue for justifying “use categories.” Rather, each use must be justified under the applicable exception, and each use must satisfy every exception standard. *Id.* As LUBA noted, nothing precludes an applicant from seeking a reasons exception for a number of uses, but in order to approve an exception for numerous uses, such an approval must show that each use is warranted under the reasons exception analysis. In an attempt to circumvent this requirement, the Port misrepresents its five use categories as “five specific uses,” (BEH Letter at 8) but that characterization is inconsistent with the county’s zoning code and comprehensive plan. Interpreting the Port’s application to be requesting five specific uses in this circumstance when seeking such a broad reasons exception would be inconsistent with state law. ORS 197.732. One can easily see that the Port wants an exception for a great deal of uses.

The suite of proposed uses included in the Port’s revised proposal is fatal to the application because the Port simply cannot show that an exception is warranted for every discrete use proposed within the five uses categories. Picking and choosing certain qualities of uses from a broad category, and creating averages based on these many uses to support its application is not

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regulations into compliance with the goals relating to economic development, needed housing, transportation, public facilities and services and urbanization; or

- “(d) The local government, commission or Department of Land Conservation and Development determines that the existing comprehensive plan and land use regulations are not achieving the statewide planning goals relating to economic development, needed housing, transportation, public facilities and services and urbanization.”

how the goal exception process works. At its core, the Port's proposed use categories contain too great a number of discrete uses, many of which have no relation the unique resource the Port is attempting to depend on for its requested exception. The Port is requesting a rezone that would allow eighteen discrete uses, two of which appear to not actually be uses:

- 1) Forestry and Wood Product Processing\*
- 2) Forestry and Wood Product Production\*
- 3) Forestry and Wood Product Storage
- 4) Forestry and Wood Product Transportation
- 5) Dry Bulk Commodities transfer\*\*
- 6) Dry Bulk Commodities Storage
- 7) Dry Bulk Commodities Production
- 8) Dry Bulk Commodities Processing
- 9) Liquid Bulk Commodities Processing
- 10) Liquid Bulk Commodities Storage
- 11) Liquid Bulk Commodities Transportation
- 12) Natural Gas and Derivative products\*\*
- 13) Natural Gas and Derivative processing
- 14) Natural Gas and derivative storage
- 15) Natural Gas and derivative transportation
- 16) Breakbulk storage
- 17) Breakbulk transportation
- 18) Breakbulk processing

Remand Application at 2.<sup>7</sup> These uses are not so intertwined in a manner such that the discrete uses cannot exist independently. For example, a site can serve as storage and transport of bulk goods without having a processing facility on site. Accordingly, these numerous uses cannot be considered “five specific uses.” To the extent that the Port or County would rely on the structure of the county zoning code to assert these use categories constitute “specific uses,” that is inherently contradictory to the structure of the exception process. We are aware of no case that would support the use of a local zoning code use category to determine what constitutes a “use” for purposes of state law.

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<sup>7</sup> \* “Forestry and Wood Product Production” and primary processing are uses already allowed in the PA-80 zone. To the extent that the Port submits evidence of attributes of uses that are already allowed in the PA-80 zone to justify why this reasons exception should be approved, that evidence is not substantial, and cannot support the application.

\*\* Neither “Dry Bulk Commodities transfer” nor “Natural Gas and Derivative products” are uses. Accordingly, this portion of the application is void for vagueness. It is the applicant's burden to clearly demonstrate what it is requesting an exception for.

Notwithstanding the Port's mischaracterization, the County staff report and the Port's consultant indicates that the Port is seeking a reasons exception for close to twenty uses and not five uses, referring to "Forestry and Wood Products processing, production, storage and transportation" as a "category" and not a single use. *See* Remand Packet- Mackenzie Report "Port Westward Goal Exception, Comprehensive Plan Amendment, and Zone Change Alternatives Analysis (Mackenzie Report) at 9–10 ("PWW would also efficiently serve users within the categories above with domestic operations dependent on deepwater port access."); *see also* County Planning Staff Report at 4 ("The application is not for a specific use or development, but rather a zone change to RIPD to allow the aforementioned five categories of future uses[.]"). The Mackenzie Report muddies the waters by, at one point, stating that the "proposed use profiles are descriptive of the range of economic functions and physical activities typical of targeted rural industrial uses." Mackenzie Report at 10. There is no avenue for getting a reasons exception for a "use profile." As described by the Port and the County, the Port is seeking an exception for almost twenty uses, which is more akin to "general" planning than what a reasons exception is legally able to achieve. ORS 197.732(2)(c)(A); OAR 660-004-0005(1)(a) (defining "Exception" to not include amendments to a comprehensive plan "that establish a planning or zoning policy of general applicability[.]").

The Mackenzie Report's extensive discussion about the North American Industry Classification System (NAICS) is simply irrelevant. The Port's attempt to explain why it is proposing these broad use categories illustrates the fatal flaw in the Port's application: it is essentially impossible to demonstrate compliance with State statutes and administrative rules for rezoning resource land via a reasons exception for eighteen uses under OAR 660-004-0022(3)(A) unless the applicant can demonstrate each use is significantly dependent on the unique resource and fulfills every exception requirement. The Mackenzie Report's extensive discussion of NAICS indicates that the Port is attempting to generally rezone the property, not explain the specific reasons to rezone the property for each use. A reasons exception is not an available method to rezone a property without identifying the uses to which the reason applies. As explained in greater depth below, the Port's approach of using use categories hides the truth: the Port is attempting to rezone the property for a number of uses that are not significantly dependent on the port facility.

Also, the Port cannot seek an exception for a use that is already allowed in the existing zone. The Port is requesting an exception for a use category of “Forestry and Wood Products Processing, production, storage and transportation” although some forestry operations are already allowed in the existing zone. *See* CCZO 304.2 (propagation and harvest of forest products are allowed in PA-80); 305.19 (allowing primary processing of forest products).

**V. The Port’s Modified Application Cannot be Approved Because All of Its Proposed Uses are Not Justified by a Reasons Exception**

OAR 660-004-0022(3) lists appropriate reasons for siting a rural industrial use on resource land. Initially, the Port sought to justify the goal exception by proceeding under all three reasons identified in OAR 660-004-0022(3).<sup>8</sup> On remand, the Port has revised its application to seek a reasons exception based solely on the reason that the proposed uses are allegedly “significantly dependent upon a unique resource located on agricultural or forest land.” OAR 660-004-0022(3)(a). Specifically, the Port identifies “the deepwater port and existing dock facilities at Port Westward as the unique resource justifying an exception to Goal 3.” BEH Letter at 2.

In order to approve a reasons exception, “[t]here must be a close, direct relationship between the ‘reason’ that is advanced for the exception, the corresponding ‘proposed uses’ that fit within the reason and are analyzed under the exception criteria, and the uses that are

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<sup>8</sup> OAR 660-004-0022(3)(a)–(c) provides appropriate reasons for siting rural industrial development on resource land are:

- “(a) The use is significantly dependent upon a unique resource located on agricultural or forest land. Examples of such resources and resource sites include geothermal wells, mineral or aggregate deposits, water reservoirs, natural features, or river or ocean ports;
- “(b) The use cannot be located inside an urban growth boundary due to impacts that are hazardous or incompatible in densely populated areas; or
- “(c) The use would have a significant comparative advantage due to its location (e.g., near existing industrial activity, an energy facility, or products available from other rural activities), which would benefit the county economy and cause only minimal loss of productive resource lands. Reasons for such a decision should include a discussion of the lost resource productivity and values in relation to the county's gain from the industrial use, and the specific transportation and resource advantages that support the decision.”

ultimately authorized in the exception area.” LUBA Opinion at App 12. Here, the Port simply cannot show that all of its proposed uses have a close, direct relationship to the reason of being “significantly dependent on a unique resource located on agricultural or forest land.”

***A. The Port cannot provided an adequate factual basis to support a finding of compliance for a Goal 3 exception under OAR 660-004-0020(2)(a).***

OAR 660-004-0020(2)(a) provides that a Goal exception “shall set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations, including the amount of land for the use being planned and why the use requires a location on resource land[.]”

The Port provides no explanation why it needs 837 acres for its revised list of requested uses. The Port’s inability to demonstrate that it needs all of this acreage to accommodate its laundry list of uses is evidence that the Port is performing general planning, rather than asking for a reasons exception for a particular use. For example, the Port provides no explanation for why it requires 837 acres to allow for breakbulk storage. This is in and of itself a reason to deny the application.

In addition, the Port has not demonstrated that all of its proposed uses require a location on resource land under OAR 660-004-0020(2)(a). As explained below, the Port has failed to explain why it all of its requested uses are significantly dependent on a deepwater port. Because the Port cannot demonstrate its preferred uses are dependent on the asserted “unique resource,” the Port has failed to demonstrate that the uses require a location on resource land.

***B. The proposed uses are not all significantly dependent upon a unique resource as required under OAR 660-004-0022(3)(a).***

As a condition precedent for receiving the Port’s requested reasons exception, the Port must demonstrate that each proposed use is “significantly dependent” upon a unique resource. OAR 660-004-0022(3)(a). As noted above, the Port continues to create insurmountable hurdles for itself in proving the legality of its requested reasons exception because it is seeking approval of five use *categories* that include one and a half dozen different uses. To the extent that the Port’s application can be understood to not be achieving “general planning,” but could possibly fit within the framework of a reasons exception, the Port simply cannot show that every use it

seeks is significantly dependent on the unique resource of “the deepwater port and existing dock facilities at Port Westward.”

With little evidentiary support or analysis particular to each of the eighteen discrete proposed uses, the BEH letter asserts that “each of the five proposed use[] [categories] \* \* \* are inexorably tied to the deepwater port and existing dock facilities at Port Westward for viability.” BEH Letter at 5. As discussed above, the many uses listed by the Port are extremely broad, nonspecific and numerous, and the justification relied on by the Port is conclusory at best. The McKenzie report incorrectly argues that “uses with foreign trade markets and marine-served domestic markets for products that are shipped by marine vessel are, by definition, reliant on deepwater port facilities.” McKenzie at 16. There are several problems with the Port’s arguments.

1. Issue Preservation and the Effect of LUBA’s Remand

The County’s notice erroneously omits OAR 660-004-0022(3)(a) as an issue on remand that must be addressed. The county’s original decision included a belt-and-suspenders approach that sought three different, but additive reasons for why Goal 3 should not apply. LUBA Opinion at App 12–13.<sup>9</sup> When LUBA resolved petitioners’ assignment of error that asserted that not all of the proposed uses allowed under the RIPD were significantly dependent on a unique resource, LUBA did not conclude that the county adequately demonstrated that all the proposed uses were significantly dependent on a unique resource. LUBA Opinion at App 20. Rather, LUBA concluded that for the original application, the approach of seeking three additive reasons resulted in the applicant and County not needing to show that every use was significantly dependent on a unique resource, because those uses could arguably be justified under one of the other two reasons exceptions. *Id.* Accordingly, the issue of whether all of the proposed uses are significantly dependent on a unique resource was raised, but LUBA did not conclusively answer the question.

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<sup>9</sup> LUBA characterized the County’s first decision as one that

“does not claim that all of the authorized uses are supported by a single reason[.] \* \* \* The categories of port-dependent uses, uses with hazardous or incompatible impacts, and uses that benefit from a significant comparative advantage due to location near certain resources may overlap considerably, but nonetheless they are distinct sets of uses.” LUBA Opinion at App 12.

Because the Port now advances a single reason to justify the goal exception, for a subset of uses that had been applied for in the original application, the Port and County are required to establish that all requested uses are justified under the single reason advanced. Because petitioner's raised the issue of whether the Port's laundry list of uses could be justified under this single exception, and LUBA never conclusively resolved that question because of the nature of the original application (which has now been modified), this issue is required to be addressed on remand. Accordingly, the County must offer all parties opportunity to submit testimony and evidence with respect to the proposed modifications. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466, 486, *aff'd*, 200 Or App 416, 116 P3d 220 (2005).

2. The Port Failed to Adequately Identify the Unique Resource Located on Agricultural or Forest Land under OAR 660-004-0022(3)(a).

First, the "unique resource" the Port relies on to justify the proposed uses is not "located on agricultural or forest land" under OAR 660-004-0022(3)(a). The Port does not explain how its application can be approved under the reasons exception, because the asserted unique resource is not "located on agricultural or forest land." OAR 660-004-0022(3)(a). The alleged unique resource is located either over jurisdictional waters, or on the exception land at the existing Port Westward Industrial Park, which is no longer agricultural or forest land.

Second, the term "deepwater port" is confusing and unclear. In federal law, a "deepwater port" is "any fixed or floating manmade structure other than a vessel, or any group of such structures, that are located beyond State seaward boundaries and that are used or intended for use as a port or terminal for the transportation, storage, or further handling of oil or natural gas for transportation to or from any State...." 33 U.S.C. § 1502 (9). There are very few actual deepwater ports authorized by the US DOT Maritime Administration (MARAD). In this case, the Port appears to be using the term "deepwater port" to refer to an onshore port that happens to have a certain level of depth such that certain types of ships can access it. The Port's intended meaning appears to be fairly arbitrary as the Port does not articulate what depth is required for all of its requested uses or explain why such a depth is necessary. Accordingly, the Port has failed to adequately describe the unique resource in a manner that is sufficient to allow a finding of compliance with OAR 660-004-0022(3)(a).

3. The Port Fails to Demonstrate that Each of its Proposed Uses are Significantly Dependent on a Unique Resource.

As noted above, the Port is requesting a reasons exception for eighteen discrete uses. The Port's application is an attempt to pull the wool over the eyes of the County by asserting that the Port is actually only seeking approval for "five proposed uses," yet it is clear that the Port proposes multiple use categories that include many uses that are not significantly dependent on a port. While certain discrete uses within the Port's proposed use categories may benefit from access to a deepwater port—such as Liquid Bulk Commodities transportation, Natural Gas and derivatives transportation, and Break Bulk transportation—most of the proposed uses do not require any port access. The Port simply cannot ignore the requirement that *every use* must be justified under a reasons exception. The Port cites no legal authority to support its approach of combining the various processing and storage uses within an industrial use category into a reasons exception, where those other uses are not also significantly dependent on a unique resource.

The Port has failed to, and cannot, demonstrate that all of its discrete requested uses are significantly dependent on a deepwater port. OAR Chapter 660 Division 004 does not define "dependent," but the dictionary definition of that term as relevant here is "determined or conditioned by another: contingent." *Webster's Collegiate Dictionary*, Tenth Edition at 310. Here, many of the uses are not contingent on access to a *deepwater* port. For example, many ports in Oregon house transportation facilities for the uses proposed by the Port and yet they are much shallower ports. See Ex. 66 (noting that there is grain and log/wood chip transport at the Port of The Dalles, which has dockside depths of 24 feet, 15 feet and 17 feet).

Based on the language and structure of the State Administrative rules, it is important to note that "economic factors" and an economic "comparative advantage" are not listed factors to be considered when determining whether a use is significantly dependent on a particular resource. *Compare* OAR 660-004-0022(3)(a) *with* OAR 660-004-0022(3)(c) and OAR 660-004-0020(2)(b). Accordingly, the Port's arguments that essentially try to establish that siting all of the requested uses at the subject property would create any economic advantage for future industries is not a basis to conclude that all of the uses are "significantly dependent" on the unique resource. Also, the Port's preference for large lot development has no relation to the broad reasons exception it is seeking, as its proposed uses are not all qualified as large lot

development, and any alleged dependence on a deepwater port does not necessitate large lot development. *See* Mackenzie Report at 34, Figures 12 and 13 (indicating preferred acreage for a number of the uses allowed within the Port's proposed uses categories of less than 100 acres; noting that the Port has received numerous requests for uses that require less than 25 acres).

The Mackenzie Report provides evidence that the Port has failed to adequately analyze whether each of the eighteen uses is significantly dependent on the existing port or any deepwater port. The Mackenzie Report's discussion regarding NAICS sectors demonstrates that the numerous uses for which the Port seeks an exception are not port-dependent. *See* Mackenzie Report at 11 ("The following set of industries is a subset of sectors that represent the Port's five proposed use[] [categories] that require unique characteristics offered by the Port Westward site[.]"). The report goes on to list a number of uses that are not port dependent such as: long-distance dry and liquid bulk trucking, support services for rail terminals, wholesale distribution of dry goods, warehousing and storage; ethyl alcohol manufacturing, nitrogenous fertilizer manufacturing. Mackenzie Report 11-13. Tables 2 and 3 of the Mackenzie Report further demonstrate the Port's basic misunderstanding of the analysis required under a reasons exception. For example, "Dry Bulk" is not a "use." *See* Mackenzie Report at 17-18. These tables cannot be considered substantial evidence because they are illogical; they are not based in reason, nor are they supported by actual analysis or facts, or by the County's comprehensive plan. For example, Table 2 asserts that deepwater ports are "vital for items denoted by 'Yes.'" The alleged use "Breakbulk" includes a product example of "crated materials" which is indicated as a foreign import and export from Oregon. How is the alleged use "Breakbulk- crated materials" significantly dependent on a deepwater port? Crated materials can be shipped via truck, air, marine and rail, but somehow the applicant is attempting to establish that deepwater ports are vital for shipping "crated materials." These unsupported assertions are simply indications that many of these uses (including shipping of breakbulk) are not significantly dependent on a deepwater port; rather breakbulk crates can be shipped in many manners that do not require a deepwater port.<sup>10</sup> The Mackenzie Report reveals that the Port is trying to establish general industrial zoning for the property through an exception process by arguing that all of

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<sup>10</sup> These arguments also apply to all of the alleged "uses" and all asserted "Product Examples" listed at Mackenzie Report 17 including "Forestry/Wood Products," "Dry Bulk," "Liquid Bulk," "Natural Gas," and "Breakbulk."

these non-port dependent activities are somehow inextricably tied to each other in a manner that requires rezoning this resource property to allow all of these eighteen uses. This is simply not how a reasons exception works.

In the Mackenzie Report's section analyzing the listed uses' dependence on a unique resource, the report asserts:

“Uses with foreign trade markets and marine-served domestic markets for products that are shipped by marine vessel are, by definition, reliant on deepwater port facilities. Table 2 demonstrates that each of the five proposed uses for PWW involve foreign import/export operations and are thus dependent upon a deepwater port. The proposed uses will achieve a significant operational advantage due to deepwater port access with nearby storage yards. As the proposed uses are low-margin businesses, port proximity is necessary to minimize operational costs for both import/export and domestic shipping operations. An external benefit of these firms' locations near port facilities is that locating their yards close to the port minimizes impacts on offsite transportation infrastructure.”  
Mackenzie Report 16.

The proposed uses are not all low-margin uses and do not require being near a deep-water port to be profitable. The Port argues that “the proposed uses” are low-margin businesses. Again, with respect to many of the uses that fall within these categories, this is simply not true. See Exhibit 64 (New York University's Stern School of Business: Data set providing net margins for industry sectors). The average net margin for all sectors, excepting the financial sector, is 5.22%. Notably, the margin for building materials (including flooring and other wood-based materials) is 6.77%. The margin for paper and forest products is 8.30%. The margin for transportation (which would include break bulk and transportation of liquid and dry bulk commodities) is 4.99%. The category called “power” (which includes Northwest Natural Gas) has a margin of 4.01%. Therefore, many of the specific uses that would be contained in the broad categories proposed by the Port are not low-margin uses relative to the average, and they do not have to be located near a port to be profitable. This is demonstrated further by the fact that many of these uses have facilities that are not near ports.

Moreover, the Port has failed to carry its burden to demonstrate that each of its discrete proposed uses are necessarily significantly dependent on the port. Even assuming that one low-margin vertically integrated set of uses (*e.g.* petroleum wholesale) would benefit substantially by siting all components of that industry on the subject property, the Port has failed to demonstrate that all of the other requested discrete uses and their relation to other components of a particular

vertically integrated operation requires citing at the subject property. The Port fails to analyze the particulars of every use and its reliance on siting at the subject site, and fails to adequately justify why these component uses cannot be sited, in part, on existing industrial land within the county, or existing industrial lands that have existing transportation networks that reach existing ports. The Port faces an insurmountable hill to achieve this, and the Port's mere preference to site every industrial use for each component of vertically-integrated industries at the subject property does not make each of these eighteen discrete uses significantly dependent on a deepwater port. To accept such an argument would make a mockery of the reasons exception process, and allow unrestrained industrial development on rural lands so long as there was some tangential relationship to an existing transportation facility (*e.g.* a deepwater port).

The section of the Mackenzie Report that is intended to explain why the eighteen uses are dependent on the port is plainly circular reasoning. *See* Mackenzie Report at 26 (arguing that the uses represent functions primarily engaged in transport, distribution, and processing of products for export, then asserting that these functions “have a critical shared site need” because “these functions require proximity and direct access” to a deepwater port where there is “an intermodal connection to rail and highway transportation facilities.”). The report continues to assert that the uses were chosen to comply with OAR 660-004-0022(3) because they are dependent on a port. Essentially, the Port is arguing that the uses are dependent on a deepwater port because, well, because they are dependent on a deepwater port. The only actual logic that can be derived from this section of the Mackenzie Report is that “multi-modal access at deepwater port sites, alongside the minimization of transport distance, is an essential operational and economic function as firms look to improve reliability of supply chain inputs and product delivery.”

The Port's desire to “improve reliability of supply chain” for the industries it seeks to attract does not create a significant dependence on a port for every aspect of those industrial operations. The mere fact that a component of an industrial operation (shipping) can use a deepwater port, does not make all of the industry's other components (production, processing, packaging, and land shipment) dependent on that port. This simply is not a reason to conclude that every step of production and transportation of goods to be shipped overseas is “significantly dependent” on a deepwater port and must be located adjacent to a deepwater port. An attractive attribute of an industrial park (*i.e.* availability to site all components of a vertically integrated enterprise), or anything that merely “improve[s] reliability” is not a valid justification for why

every use associated with an import or export enterprise is significantly dependent on a deepwater port to an extent that requires siting each of those component uses adjacent to the port. The Port does not provide any actual data regarding its claim that “minimization of transportation distance” is an essential operational and economic function for every one of its proposed uses.

After reading the Mackenzie Report, it is difficult to understand how the processing of dry bulk goods is even remotely dependent on a deepwater port, any more than such processing is dependent on access to any other transportation facility. Similarly, it is clear that the timber and commodity-related uses can exist and be successful without a deepwater port. See Exhibit 65 (map of Oregon wood processing facilities). As further evidence of the ability to operate forestry processing and transportation operations, consider Brightwood Plant in Madras, Oregon. These arguments apply to all alleged uses.

In essence, the Port is arguing that it is industry preference to site every component of producing, processing and shipping of forest products, dry bulk, liquid bulk, natural gas and breakbulk in an area adjacent to a deepwater port rather than having the components of vertically integrated operations located in any other area. This mere convenience argument is not a basis for establishing that all of the Port’s requested uses are significantly dependent on a deepwater port. At the most basic level, all of the proposed uses are not dependent on a deepwater port. Rather, it is merely the Port’s preference, and that of its industries it is trying to attract, to have every component of a vertically integrated operation in the closest proximity to a port. That is simply not sufficient under OAR 660-004-0022(3)(a) to establish that this rezone can be justified.

The Port has failed to demonstrate that the entire acreage of the subject property can access any significant resource, for each of the proposed uses. The Port has failed to demonstrate that all of its proposed uses are significantly dependent on a deepwater port. To the extent the Port has demonstrated that some of its uses are dependent on a port generally, that does not support a determination that the proposed uses are significantly dependent on a deepwater port.

## **VI. The Port’s Reasonable Accommodation/Alternatives Analysis is Inadequate.**

OAR 660-004-0020(2)(b) sets out the standards for the reasonable accommodation analysis required for a goal exception. In order to justify an exception for the Port Westward

property, the Port must explain, “why other areas that do not require a new exception cannot reasonably accommodate the proposed use.” OAR 660-004-0020(2)(b)(B). The rule provides “[e]conomic factors may be considered along with other relevant factors in determining that the use cannot reasonably be accommodated in other areas.” The applicant for a goal exception must demonstrate why the proposed use cannot be reasonably accommodated on non-resource land that would not require an exception, on resource land that is already irrevocably committed to non-resource use, or inside an urban growth boundary. “Site specific comparisons are not required of a local government taking an exception unless another party to the local proceeding describes specific sites that can more reasonably accommodate the proposed use.” OAR 660-004-0020(2)(b)(C).

The Port seeks to rezone the subject property in order to make land available for industrial uses that allegedly depend on close access to a deepwater port. As explained above, all of the proposed uses are not significantly dependent on a deepwater port. Accordingly, the Port is required to analyze all alternatives that can reasonably accommodate each of its proposed uses, including industrial lands that do not have direct access to deepwater ports. The Port has failed to do this, and accordingly, the application should be denied. In addition, because the Port has failed to demonstrate that every use is significantly dependent on a deepwater port, to the extent that the Port has demonstrated that any of the uses are dependent on a port generally, the Port must, and has not, properly analyzed alternative reasonable accommodation for general port-dependent uses.

Even if the Port is only required to analyze lands that have deepwater port access, the Port still has not demonstrated that its application is compliant with OAR 660-004-0020(2)(b). In framing the alternative site analysis, the Mackenzie Alternatives Analysis Report outlines the following needed site characteristics:

- 1) proximity and direct access to deepwater transportation, with intermodal connections to rail and highway facilities;
- 2) large, flat contiguous sites;
- 3) proximity to rural production inputs, rural destinations, and raw materials;  
and
- 4) a limited need for public facilities.

Mackenzie Report at 26–30. The Mackenzie report details the range of recent inquiries for development at Port Westward. Mackenzie Report at 15. Of the inquiries that fit within the

Port's proposed five use categories, the needed acreage ranges between 20 and 200 acres. *Id.* at 15, 22–25.

The Mackenzie Report rejects every alternative site considered for a variety of reasons. Many of the reasons provided for why alternative sites could not reasonably accommodate any of the proposed uses are not supported by any evidence provided by the Port or are not proper considerations for the alternatives analysis. Additionally, the Port failed to consider several other viable alternative sites that could accommodate the proposed uses. Most importantly, the Port again fails to demonstrate that the existing Port Westward property is unavailable for industrial development.

***A. The Existing Port Westward Industrial Park Can Reasonably Accommodate the Proposed Uses.***

In 2014, the County found that approximately 445 acres of vacant land at existing Port Westward were unavailable for development due to wetlands and a limited-term leasehold of Portland General Electric (“PGE”). LUBA Opinion at App 29–31. Riverkeeper challenged that finding and LUBA remanded for further evidence and findings on the availability of the existing Port Westward for additional rural industrial development. LUBA Opinion at App 31–33. On remand, the Port again asserts that Port Westward is unavailable for development due to PGE's leasehold, wetlands, and multiple encumbrances that limit contiguous acreage at the site. Mackenzie Report at 39.

The Port's revised application fails to present substantial evidence demonstrating that the existing Port Westward industrial property could not reasonably accommodate any of the proposed rural industrial uses and fails to address LUBA's instructions on remand.

1. PGE Leasehold

The Port previously cited PGE's leasehold over a majority of the vacant acreage at the PWIP as the reason that the land could not reasonably accommodate the proposed uses. LUBA rejected the Port's evidence and the County's finding and provided guidance on the exceedingly high threshold that was required to be overcome to demonstrate that the land was indeed not able to accommodate any proposed use:

“[A]bsent evidence that PGE is categorically unwilling to sublease part or all of its leasehold to other industrial users, or that the leased lands cannot otherwise be reasonably made available for development through the acquisition or termination of the leasehold interest, the fact that 445 vacant acres is subject to PGE’s leasehold does not mean that such lands are unavailable or cannot reasonably accommodate proposed rural industrial uses. In conducting the alternative sites analysis . . . the County cannot limit its analysis to lands controlled by the applicant, or conclude that an alternative site controlled by others is not available for industrial development simply due to different ownership.” App 31 (emphases added).

On remand, the Port provides a letter from PGE, which the Port asserts supports a conclusion that the undeveloped portion of PGE’s leasehold is unavailable for siting additional uses. Mackenzie Report at 7–8. However, a review of the PGE letter tells a different story. The letter provides:

“Given [PGE’s] investment at Port Westward and the critical nature of the site to support reliable electric service, third-party compatibility is a high bar which some proposed industrial facilities in the past could not meet. Due to this high bar, PGE supports the Port’s effort to bring additional industrial land outside the buffer into Port Westward.”

Appx. 2 to Remand Application Packet (emphases added). In other words, PGE intends to hold any potential sub-lessees to a high standard when considering whether to make land open for industrial use. PGE does not indicate that it is “categorically unwilling” to sublease any portion of the Port Westward property for any additional rural industrial use. The Port attempts to inject self-serving meaning into PGE’s letter that does not appear on its face.<sup>11</sup> Additionally, the Port makes no effort to address LUBA’s instruction to provide evidence that the leased lands could not otherwise be made available through acquisition or termination of PGE’s leasehold. Because any rezone would be long-term, and as explained by LUBA, any restrictions due to a limited-term lease do not necessarily demonstrate that existing Port Westward land cannot reasonably accommodate any of the proposed uses. LUBA Opinion at App 31–32.

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<sup>11</sup> The Port also fails to address PGE’s willingness to negotiate with Cascade Kelly Holdings LLC, a tenant at Port Westward, to facilitate other industrial uses at the site. *See* Ex. 13.

2. Wetlands

In its order, LUBA held that the County failed to make adequate findings based on substantial evidence to support its conclusion that PWIP land was unavailable for development due to the mere presence of wetlands on the property. App 33. On remand, the Port claims that those lands are not developable because 53% of the site contains wetlands, and the filling of wetlands is cost prohibitive. The Port sets forth its argument and limited evidence in one paragraph:

“Mapping analysis indicates that 479 acres, or 53% of PWW, contain wetlands, the placement of which leave limited area for large-scale rural industrial development unless the wetlands are filled and mitigated per U.S. Army Corps of Engineers (Corps) and Oregon Department of State Lands (DSL) regulations. The state requires a minimum of 1.5 acres of new wetland creation for every acre filled. [*citing* Oregon DSL, A Guide to the Removal-Fill Permit Process, (Dec. 2016)] After deducting the approximately 40 acres of wetlands that lie within conservation easements, filling the remaining 439 acres of wetlands to create developable area would require at least 658 acres of land, which is not feasible within the boundaries of the existing PWW exception area. Significantly, wetland mitigation costs serve as a nearly-insurmountable hurdle to utilization of the remaining acreage at PWW, as wetland creation costs run on the order of \$77,000-\$82,000 per acre. [*citing* Oregon DSL, Report on Off-site Compensatory Mitigation, Fiscal year 2015 (Dec. 1, 2015)] Filling the wetland acreage noted above, and acquiring the requisite mitigation acreage, would cost on the order of \$50 million above and beyond the acquisition costs—assuming that the Corps and DSL granted authorization to fill the wetlands.”

Mackenzie Report at 7.

The Port’s argument that the PWIP land is not developable fails for four reasons. First, the Port fails to address LUBA’s directive to consider alternative sites on an individual use basis. *See* App 36 (“if one or more alternative sites can reasonably accommodate one or more of the proposed large lot industrial uses, then the County cannot reject such sites”). Thus, the Port must evaluate the feasibility and cost of developing only part of the existing Port Westward property and wetlands in order to accommodate each of its proposed industrial uses. The Port does not get to pick and choose examples of the largest possible projects it can imagine to determine that the vacant PWIP land is not available. Rather, it must consider the smallest economically viable proposal that could be permitted under the proposed uses and determine if any portion of the acreage at the existing PWIP site can accommodate that use. Again, the Port creates its own

difficulty by requesting five broad categories of industrial uses under the limited vehicle of the reasons exception. If it had requested a rezone for a particular use or better yet, a particular project, it would have a significantly easier time analyzing whether the vacant land at the PWIP site can accommodate that use. Clearly, there are uses that fit within the proposed reasons exception that could be accommodated at PWIP. For example, the Port could develop Port Westward using a similar business model applied by Clatsop County for the North Coast Business Park. Exhibit 32. As noted by the Port, many of the uses the Port proposes require parcels of less than 100 acres. Mackenzie Report at 15.

Second, the Port fails to address the possibility of off-site mitigation. The Port cannot assume that the Oregon Department of State Lands (DSL) and the U.S. Army Corps of Engineers (Corps) would require on-site mitigation when the agencies routinely permit off-site mitigation. The Port's claim that "filling the remaining 439 acres of wetlands to create developable area would require at least 658 acres of land, which is not feasible within the boundaries of the PWW exception area[]" ignores the reality that wetland fill at Port Westward could be permitted, conditioned on off-site mitigation. *See e.g.*, Ex. 13. As noted above, the Port's argument also ignores the fact that uses proposed under the rezone could occur on less than 439 acres and, therefore, not require 658 acres of wetland mitigation.

Third, the Port fails to acknowledge that, despite the cost of wetland mitigation, the Port and its tenants have obtained removal-fill permits and developed wetlands at PWIP. For example, PGE obtained permits and filled wetlands to develop its natural gas plants. Ex 56. Likewise, the Columbia County Road Department obtained permits and filled over six acres of wetlands to develop roads to serve the Global Partners oil-by-rail/ethanol terminal. Ex. 51 (removal-fill permit for Hermo Road wetland fill); Ex. 55 (Joint Aquatic Resource Permit Application for proposed Hermo Road wetland fill); Ex. 61 (transfer of Columbia County Road Department removal-fill permit to Cascade Kelly Holdings LLC d/b/a/ Columbia Pacific Bio-Refinery). The Oregon Energy Facility Siting Council (EFSC) issued a removal-fill permit to PGE to fill wetlands for development of a natural gas-fired power plan at Port Westward. Ex. 56. The history of Port tenants filling wetlands at Port Westward for uses included in the Port Westward rezone undermines the Port's argument that Port Westward is not developable due to the cost prohibitive nature of developing sites with wetlands. The Port submits no evidence of

efforts to obtain removal-fill permits for the Port Westward property and cost estimates for mitigation.

The Port's argument conflicts with a report from DSL showing that, despite the costs of wetland fill in Oregon, the number of wetland fill applications—particularly for large-scale projects—is on the rise. *See* Ex. 27.<sup>12</sup> DSL issued 39 wetland fill individual permits in 2016. *Id.* at 5. Despite the cost of wetland mitigation, ports on the Columbia River routinely fill wetlands for industrial development. *See generally* Ex. 30 (Port of Portland's Mitigation Management Program Site Status Report 2013-2014 (Oct. 2015) (describing the Port of Portland's extensive history of wetland mitigation and plans for future wetland mitigation to develop industrial properties); Ex. 36 (individual permit data from the Corps' Portland District website showing wetland fill and other permits issued by the Corps in Oregon, including some permits issued on the Columbia River in Washington, from Jan. 1, 2012 to June 30, 2017). Developers are willing to pay the cost of large-scale wetland mitigation for the benefit of operating on the Columbia River for uses proposed in the Port's application. Examples of developers that have proposed to fill over 100 acres of wetlands and conduct associated mitigation are natural gas processing facilities: Bradwood LNG and Oregon LNG. Ex. 34; Ex. 41. Natural gas processing facilities, including liquefied natural gas (LNG), are potential uses under the rezone application.

The Port considers wetland fill and mitigation as a normal aspect of development: it is investigating wetland fill and mitigation for its McNulty Creek Industrial Park. Ex. 4 at 3. According to the Port's Spring 2016 newsletter, "In October 2015, the Port was awarded a \$51,000 grant from Business Oregon's Infrastructure Finance Authority to conduct site design and wetland removal/fill planning for its McNulty Creek Industrial Park, in St. Helens[.]" a 19-acre site. *Id.* For the instant application, the Port, however, claims that wetland mitigation is cost prohibitive. The Port submits no evidence to substantiate this claim with a wetland fill and mitigation investigation analogous to the investigation underway for McNulty Creek Industrial

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<sup>12</sup> "The Department saw declines in permit application and wetland delineation numbers following the 2008 economic downturn. This reporting period shows a continued reversal in this trend. Individual permits show an 82 percent increase over the last biennium (315 individual permits in FY 2013 and 2014, and 573 in FY 2015 and 2016), which is particularly telling as individual permits tend to be required for larger scale projects (see Table 1). Combined, 2015 and 2016 total permit numbers (excluding recreational placer mining) show a 58 percent increase over the prior biennium (603 total permits in FY 2013 and 2014, and 954 in FY 2015 and 2016)." Ex. 27 at 3.

Park. The Port's willingness to investigate wetland mitigation for the McNulty Creek site demonstrates that the Port can conduct a similar investigation for Port Westward, rather than relying on non-site-specific summary conclusions.

Moreover, the Port's rezone proposal includes the 50-acre Thompson Property, which is entirely made up of wetlands. *See* Mackenzie Report, Figure 3. The Port has indicated that it intends to develop the Thompson Property with an additional dock and that the Port will obtain all necessary permit from the Corps and Oregon DSL. 2014 Rec. 2193.<sup>13</sup>

Finally, the Port has not taken any permanent actions to prohibit PWIP land from being further developed, if it indeed thinks it is undevelopable. The Port has not committed 479 acres of wetlands, or even 53% of Port Westward, to permanent conservation easements. Therefore, even if an additional 837 acres are rezoned, the Port and future tenants could still fill and develop the remaining vacant PWIP land. As discussed above, businesses and ports in Oregon routinely proceed with wetland fill and mitigation as a cost of doing business. *See e.g.*, Ex. 53 (Removal-fill permit for U.S. Gypsum Corporation, located in Columbia County); Ex. 54 (removal-fill permit for Warrenton Fiber Company, located in Clatsop County). Many business models, including uses proposed in the rezone property, proceed with land development despite the cost of wetland fill permitting and mitigation. *See e.g.*, Exs. 30, 34, & 35. In turn, the County cannot assume that wetland fill will not occur in the future at Port Westward absent conservation easements definitively preventing such fill. Based on the lack of conservation easements and extensive evidence demonstrating that industrial tenants and ports in Oregon routinely obtain permits and fill wetlands, the County must conclude that vacant PWIP land is available for development of industrial uses in the future. In fact, the Port continues to advertise the availability of large-lot industrial land at Port Westward. *See* Exs. 1 & 2.

### 3. Available Land Outside of PGE Leasehold

In its remand application, the Port admits there is "perhaps one last small development site" in the southeast corner of the existing PWIP, but claims that it "is too small to effectively

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<sup>13</sup> The Port's intention to develop the Thompson Property with an additional deepwater dock undercuts the Port's assertion that the proposed uses are dependent on the "unique resources" at the Port Westward property, including the existing deepwater dock and facilities. If a deepwater dock can be installed at numerous locations, the Port's existing deepwater dock simply is not unique.

site one of the five uses proposed by the Port.” Mackenzie Report at 7. However, evidence showing the Port has an agreement for a lease option for this site undermines the Port’s argument and demonstrates that land within the existing PWIP is available for development and can support the type of uses proposed for the rezone area. In 2015, the Port entered a lease option with Northwest Innovation Works LLC (NWIW) to lease 82 acres in the southeast corner of Port Westward. Ex. 37 & 38; *see also* Ex. 4 & 5. NWIW renewed the lease option earlier this year. Ex. 14. The option would allow NWIW to build and operate a large natural gas-to-methanol refinery at the existing Port Westward site. Ex. 6 & 7. Natural gas and its derivative product, methanol, processing are proposed uses under the rezone.

Further, as noted above, the required analysis compels the Port to demonstrate that each use, not one of the five use categories, cannot be accommodated on vacant PWIP land. The Port cannot demonstrate that every one of the particular uses it seeks cannot be accommodated on that land.

#### 4. Encumbrances on Existing Port Westward Site

The Port’s remand application states: “The site is also encumbered by a number of easements for roadways, utilities, drainage facilities, levees, pipelines, and 46 acres of conservation areas, which serve to divide developable areas into smaller sections less conducive to large-scale rural industrial development. *See* Remand Application Appendix 1. Together with the required security fencing, gates, and other infrastructure, these encumbrances serve as barriers to development.” Mackenzie Report at 7. The Port also provides a title report for existing encumbrances on the existing Port Westward property. Remand Application, Exhibit A.

The Port’s argument that the existing PWIP is not available for development due to encumbrances is not supported even by the Port’s own evidence of those encumbrances. First, the Port’s title report fails to include any information regarding any terms or limitations on existing easements, leases, rights of first refusal, or other encumbrances on the Port Westward property. *See* Remand Application, Exhibit A. Further, the title report does not include the location of any of the listed encumbrances. *Id.* While the Mackenzie Report includes a map purporting to detail all existing and proposed encumbrances on the Port Westward property, the map includes illegible text and does not appear to include the designations listed in the map’s legend. *See* Mackenzie Report, Appendix 1. Even assuming the accuracy of the map, it shows

what appear to be large swaths of relatively unencumbered land in the majority of the western and southern portions of the existing Port Westward property, both within and outside of the boundaries of PGE's leasehold. *Id.* Moreover, the map does not constitute a survey per ORS 209.250 and therefore cannot constitute substantial evidence. In addition, the map states that it includes "Existing and Proposed Easements." *Id.* Proposed easements have no relevance to the ability to site a use on the PWIP property.

Notably, the bottom of the encumbrances map includes a series of notes indicating that nine of the listed easements and other encumbrances from the title report are "blanket in nature" and are therefore not shown on the map. *Id.* Presumably, "blanket in nature" means that the identified encumbrances cover the entirety, or large portions, of the Port Westward property, including those areas that are already developed. This fact undercuts the Port's assertion that encumbrances render the existing Port Westward property unavailable for development. Moreover, several of the listed encumbrances on the title report, including the majority of those that are "blanket in nature," pre-date the original goal exception for the PWIP. *See* Remand Application, Exhibit A (Listed items Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, & 15); *see also* Mackenzie Report, Appendix 1. Despite those existing encumbrances, at the time of the original goal exception, the County deemed the Port Westward site capable of supporting up to four new industrial uses totaling over 700 acres in addition to the then existing PGE generating plant and tank farm. CCCP at 119. In fact, despite existing encumbrances at PWIP, Global Partners recently conducted additional development at the site. Ex. 13.

As with its prior application, the Port fails to explain how PWIP could not "reasonably accommodate" any of the proposed rural industrial uses. Many of the proposed uses require only 20 to 25 acres of land. Mackenzie Report at 15. The Port fails to demonstrate that the mere presence of wetlands, limited-term leaseholds, or encumbrances precludes the use of the otherwise vacant land for industrial development.

***B. Other Deepwater Ports can Reasonably Accommodate the Proposed Uses.***

The Port's remand application and Mackenzie Report review a handful of alternative sites that provide access to the type of unique resource the Port relies on to justify the reasons exception—a deep water port. The Port ultimately rejects each of the alternative sites for various reasons, many of which are improper under LUBA's direction on remand and the regulations

governing goal exceptions. For instance, several of the alternative sites are rejected on the basis that they do not provide a comparable amount of vacant acreage as the proposed rezone area.

LUBA clearly rejected this approach by the Port and the County in its decision:

“[T]he County has not established that alternative sites cannot reasonably accommodate the proposed uses because no individual site is large enough to accommodate in the same place all of the large-lot industrial uses that the proposed 837-acre exception area could accommodate. As far as the findings establish, there is no magic number about the size of the exception area; it simply happens to match the size of the property that the Port has acquired. Relatedly, the findings also do not establish that multiple large lot industrial uses must be located together at a single site. We agree with petitioners that if one or more alternative sites can reasonably accommodate one or more of the proposed large lot industrial uses, then the county cannot reject such sites solely on the basis that they cannot provide 837 acres for multiple large lot industrial uses at a single location.”

App 36. Accordingly, an alternative site in proximity to a deepwater port that can accommodate the minimum acreage necessary for any of the proposed uses would constitute a site that can reasonably accommodate the use. For other alternative sites, the Port impermissibly attempts to narrow the scope of the “unique resource” it depends on to include not only a deepwater port, but also a port with existing dock facilities, located along the Columbia River, with access to the I-84 and I-5 transportation corridors and employment hubs. Rejecting alternatives based on a lack of any one of these additional attributes has no basis in statute or the administrative rules governing goal exceptions. In essence, the Port impermissibly rejects alternative sites because they are not Port Westward. The Port’s rejection of each alternative site is address in detail below.

1. Port of Astoria

The remand application rejects the Port of Astoria as an available alternative site based on a number of factors including insufficient acreage, negative community response to development, wetlands, and other prospective development. Mackenzie Report at 44. The Port’s rejection of alternative sites at the Port of Astoria is unsupported by available evidence.

North Tongue Point: The Port of Astoria advertises the availability of Tongue Point for industrial marine development. Ex. 18. The Mackenzie Report relies on a phone conversation with a property manager at Oregon DSL to conclude that North Tongue Point is not available for

large-lot, marine industrial development. Evidence of the Port of Astoria's active efforts to lease North Tongue Point contradict the Port's conclusion and demonstrates that, in fact, the Port of Astoria has a well-situated industrial site meeting the criteria for at least some of the Port's proposed uses, but at a location closer to the Pacific Ocean (*i.e.* more desirable for many commodities in the import-export business). Ex. 42 (describing potential tenant at Tongue Point with attributes similar to those described in the Port's proposed uses).

South Tongue Point: The Port claims that the South Tongue Point property is not available for any of the proposed uses because there are negotiations and investigations underway for third parties to acquire or develop the property and due to wetlands and "extensive negative feedback from the community" regarding development of the property for industrial uses. Mackenzie Report at 44. However, the Port fails to provide supporting evidence or to explain how any of these factors render the site undevelopable such that it could not reasonably accommodate any of the proposed industrial uses.<sup>14</sup>

The Port cannot eliminate the site based on information, without any supporting evidence, that the Clatsop Community College is currently in negotiations to purchase the property. Negotiations break down. *See e.g.*, Ex. 42. South Tongue Point is zoned for industrial development and the Port of Astoria has expressed interest in developing the land for industrial uses. Ex. 43. Prior interest in developing the property included a proposal for a log storage and export facility, a use proposed in the Port's application. *Id.*

Moreover, many of the South Tongue Point habitat values described in the Mackenzie Report apply equally to the forested wetland (*i.e.* Thompson property) that the Port seeks to rezone on Port Westward. *See* Ex. 44 & 45 (describing the habitat values of a similar riverfront property near Port Westward at River Mile 57). South Tongue Point is a reasonable alternative that the Port erroneously eliminated from analysis.

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<sup>14</sup> The prior record for the Port's application shows that there is similar extensive negative feedback from the community regarding industrial development of the proposed rezone property. If negative community feedback renders a site undevelopable, the County should reject the Port's proposal to rezone prime agricultural land at Port Westward.

The Port of Astoria is closer to the Pacific Ocean and, therefore, eliminates Columbia River transit time and associated costs. The County should reject the Port's conclusion that the Port of Astoria could not reasonably accommodate any one of the proposed uses.

## 2. Port of Portland

The Mackenzie Report's analysis of the availability of land at the Port of Portland focuses almost exclusively on the Port of Portland's failed plans to develop West Hayden Island. Essentially, the Report concludes that the Port of Portland is not available for industrial development. The Port's application, therefore, ignores multiple parcels available at the Port of Portland's existing industrial land complex for uses proposed in the rezone application. *See* Exs. 15–17; 21a–21h. The Report eliminates the Port of Portland terminals in three sentences of analysis, stating:

“The Port of Portland facilities are approximately 50 miles upriver from the Port Westward site. As noted earlier, the Port of St. Helens' Port Westward facility therefore has a locational advantage over Port of Portland. As the Port of Portland deepwater facilities are largely built out without the necessary acreage to site the kinds of uses proposed by the Port of St. Helens, the Port of Portland is not a viable candidate for PWW proposed uses.”

Mackenzie Report at 46–47. The Port's dependence on so-called “locational advantage” to reject the Port of Portland is suspect. Elsewhere, the Mackenzie Report rejects alternative sites such as the Ports of Newport and Coos Bay because those ports do “not serve the M-84/Columbia River corridor or the Portland metropolitan area.” *Id.* at 47. The Port cannot pick and choose the desired conditions for its proposed uses in such a way as to effectively eliminate any viable alternative that is not Port Westward. Moreover, the Port fails to address the fact that while a 50-mile upriver location might add more marine traffic time, many proposed uses include transport of commodities that arrive via rail from the East, such as grain. In turn, an inland location carves off rail-transport time.

The Report conducts no analysis of the acreage available at the Port of Portland. However, the Port of Portland's website and planning documents demonstrate that the Port advertises available acreage for uses proposed in the rezone application. *See* Exs. 15–17; 21a–21h. The Port must also explain why land that is “largely built-out” but is otherwise available could not reasonably accommodate any of the proposed uses. The mere fact that there may be

existing development at a site does not automatically render it unavailable for additional development for industrial use.

3. Port of Coos Bay

The Port fails to conduct an adequate alternatives analysis for the Port of Coos Bay and instead relies solely on its comparative “locational advantage,” stating: “[T]he Oregon International Port of Coos Bay is not a viable candidate for PWW proposed uses as it does not serve the M-84/Columbia River corridor or the Portland metropolitan area.” Mackenzie Report at 47. The Report notes the fact that Coos Bay is 300 nautical miles from Portland but fails to articulate the significance of that fact as it relates to the Port of Coos Bay’s ability to reasonably accommodate uses that the Port of St. Helen’s claims are highly dependent on access to ocean marine transport to Pacific Rim counties. Mackenzie Report at 26. This fact arguably places the Port of Coos Bay at a better locational advantage than Port Westward. As the Port of Coos Bay’s website notes: “Since the port district lies along the coast line, transit time for deep draft vessels from open ocean is only about 90 minutes allowing safer and easier access than the Columbia River.” Ex. 63.

The Port ignores the fact that many uses proposed for the Port Westward rezone do not depend on the M-84/Columbia River corridor or the Portland Metropolitan area, and, therefore, the Port cannot impose this criteria as a factor to eliminate alternative sites. For example, a methanol refinery—a proposed use at the rezone property—does not depend on or serve the M-84/Columbia River corridor. The natural gas refined to create methanol arrives via pipeline from well fields outside the Pacific Northwest and methanol, the refined natural gas product, is shipped overseas to China. *See* Ex. 6. A similar example is an oil-by-rail terminal, another proposed use at the rezone property. The oil arrives via rail from outside the Pacific Northwest and is transported to refineries in California or Washington. *See e.g.*, Ex. 40 (describing the Tesoro Savage oil-by-rail terminal proposal). For this use, the Port of Coos Bay is arguably a better location due to its closer proximity to California.

The Port also ignores a number of other factors that make the Port of Coos Bay a viable alternative site for the proposed uses. The Port of Coos Bay has available properties that could accommodate the proposed uses. *See* Ex. 24 & 25. Coos Bay has access to the recently restored Port-owned Coos Bay Rail Link that connects freight to Eugene. Ex. 63. There are hundreds of

available acres for development at the Port of Coos Bay. Ex. 46. The Port of Coos Bay also has significant advantage over the Port of St. Helens as a designated Foreign-Trade Zone. Ex. 46. The County should reject the Port's thinly supported rejection of the Port of Coos Bay as a viable alternative site.

4. Port of Newport

The Port uses the same unpersuasive excuses employed for the Port of Coos Bay to reject the Port of Newport as an available alternative. The County should require the Port to conduct an actual analysis of the ability of the Port of Newport to reasonably accommodate any of the proposed uses.

***C. The Port Should Consider Additional Sites that Could Reasonably Accommodate the Proposed Uses.***

There are several potential alternative sites that could reasonably accommodate the proposed categories of industrial uses that the Port did not include in its analysis. Specifically, the Port did not consider the North Coast Business Park in Clatsop County or available industrial land in Astoria. In early 2017, the Oregon Economic Recovery Review Council announced the Clatsop County-owned North Coast Business Park in Warrenton earned a coveted designation as a Regional Significant Industrial Area (RSIA). Clatsop County's website states:

“The RSIA label, the result of a lengthy application process, gives the county several advantages in its efforts to promote the development of industries offering family-wage jobs on the 162-acre site \* \* \*

“ \* \* \*

“The RSIA program, approved by the Oregon Legislature in 2011, is designed to help preserve the state's best industrial lands. Criteria for RSIA designation include vacant land suitable for new or expanded industrial uses that would offer significant additional employment to a region; features not found in other properties in the region; direct rail, port, air and multimodal freight access; and proximity to labor markets.

“ \* \* \*

“The property that became the North Coast Business Park was cleared and graded in the 1960s for a proposed aluminum plant that was never built. The county

gained ownership of the roughly 270-acre property in 1991 and crafted a master plan calling for approximately 70 acres adjacent to U.S. Highway 101 to be sold for commercial development, with proceeds dedicated to infrastructure improvements on the rest of the land. Excluding existing uses, infrastructure and wetlands, approximately 117 acres are available for industrial development.”

Ex. 31; *see also* Ex. 32 (describing history of North Coast Business Park, authorized wetland fill to facilitate development, and future uses, which overlap with prospective uses proposed in the Port Westward rezone); Ex. 33 (describing proposed wetland mitigation and first tenant at business park, including plans for wetland fill to facilitate development); Ex. 52 (Clatsop County application to DSL to fill wetlands as part of Phase I of the North Coast Business Park development). The Port should provide additional analysis of the North Coast Business Park as a potential alternative site.

The Port also failed to consider available non-port-owned industrial land in Astoria. Until recently, the Port of Astoria leased industrial-zoned land at the East Skipanon Peninsula, which is owned by the State of Oregon. The site was previously proposed for development of a \$6 billion LNG terminal. In 2016, the company, Oregon LNG, abandoned the project. The land remains available for industrial development, but was not evaluated in the Port’s application. *See* Ex. 41 at 5–7; Ex. 19 & 20.

Additionally, the Port failed to evaluate any potential alternative sites on the Washington side of the Columbia River. Because of the geographical nature of the Columbia River, Washington State, Oregon, and the Pacific Ocean, it would be imprudent to ignore viable alternatives in Washington, particularly because the Port wants to access international markets from deepwater ports. The 2016 Shorelines Management Act planning document for Cowlitz County, Washington includes the following on vacant and redevelopable industrial in Cowlitz County, located across the Columbia River in Washington State:

#### “4. VACANT OR REDEVELOPABLE AREAS

“There are a number of large property holdings in the area along the Columbia River with potential access to the Columbia River Navigation Channel that are likely to be available for water-dependent industrial use in the future. There are about five linear miles of industrial zoned land [in Cowlitz County, Washington,] along the Columbia River which is vacant or redevelopable. Some, such as the Millennium site have active pending development applications. Other such as the

Wasser-Winters site may have depth and environmental constraints which limit development potential to barge operations.

“Overall, about 35 percent of the industrial zoned land with the potential for water-dependent use is vacant or designated by owners for development or redevelopment.

“That is substantially more land than has been developed in the past 20 years. The future demand for waterdependent [sic] uses, particularly port use is dependent on a wide range of factors, including world trade and competition for Upper Midwest grain exports from Gulf Coast ports.”

Ex. 22. Regarding the Millennium site, a portion of the former Reynolds Aluminum Plant site is proposed for redevelopment as a coal export terminal by Millennium Bulk Terminals, LLC. Ex. 47. Earlier this year, the Washington Department of Natural Resources (DNR) denied a key aquatic lands sublease required for the project to go forward. Millennium challenged DNR’s decision in court; the lawsuit is pending. *Id.* Even if Millennium obtains all permits for the coal export terminal, the project covers 190 acres of a 540-acre industrial site. Ex. 48 at 2–4. Regardless of whether the coal export terminal obtains permits to operate, the site is available for other large-lot industrial development. *Id.* at 2-29–2-31 (describing uses with and without the coal terminal).

The Port should be required to analyze potential available alternative sites in Washington with access to deepwater ports. Such sites could reasonably accommodate the proposed categories of uses.

To the extent that the Port has merely demonstrated that its proposed uses are only dependent on ports generally, the Port is required to, but has failed to, analyze all general port sites that could accommodate any of the proposed uses such as Columbia River ports in Umatilla, Morrow, Arlington, The Dalles, Hood River, and Cascade Locks, and Pacific Ocean ports in Nehalem, Garibaldi, Tillamook Bay, Alsea, Siuslaw, Umpqua, Bandon, Coquille River, Port Orford, Gold Beach and Brookings. *See* Mackenzie Report at 41.

Overall, it is clear that the Port has failed to consider numerous available sites that can reasonably accommodate a number of its proposed uses. Accordingly, the County should deny the Port’s application.

***D. Under OAR 660-004-0020(2)(c), Several Alternative Sites have Significantly Less Adverse Environmental, Economic, Social and Energy Consequences***

Under the ESEE analysis, the County must address “whether adverse ESEE consequences of developing the exception area would be significantly greater than the typical ESEE consequences of developing other resources lands. LUBA Opinion at App 41, construing OAR 660-0040-0020(2)(c). The rule states:

“A detailed evaluation of specific alternative sites is not required **unless such sites are specifically described with facts to support the assertion that the sites have significantly fewer adverse impacts during the local exceptions proceeding.** The exception shall include the reasons why the consequences of the use at the chosen site are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site. Such reasons shall include but are not limited to a description of: the facts used to determine which resource land is least productive, the ability to sustain resource uses near the proposed use, and the long-term economic impact on the general area caused by irreversible removal of the land from the resource base. Other possible impacts to be addressed include the effects of the proposed use on the water table, on the costs of improving roads and on the costs to special service districts[.]”

For the Port’s newly proposed use categories, the following alternative sites have significantly fewer adverse impacts because they are surrounded by less productive resource land: land surrounding Port of the Dalles and land surrounding Port of Klickitat. Both of these other ports currently serve several of the uses that are proposed in this application, including the transport of grain and other barge-based commodities, transport of saw logs, processing and storage of agricultural products. See Ex. 66.

**VII. The Port Fails to Demonstrate that all of the Proposed Uses are Compatible with Adjacent Uses.**

Under ORS 197.732(2)(c)(D) and OAR 660-004-0020(2)(d), and as confirmed by LUBA’s order, the County must determine whether each proposed use is compatible with the adjacent uses before authorizing the plan map amendment and zone change. The applicant fails to meet this requirement for two reasons. First, the broad categories of uses proposed by the Port make it impossible to even ascertain what the impacts will be from the uses that ultimately end up onsite, and whether those uses will be compatible. Second, to the extent that the impacts can

be ascertained, the applicant has utterly failed to demonstrate how such uses, which include dirty fossil fuel development, can be made compatible with highly sensitive, high productive agricultural and food production operations on adjacent properties.

***A. The Port's Compatibility Analysis is Incomplete and Insufficient because it fails to address the Full Suite of Uses Proposed by the Port***

In 2013 and 2014, it was clear that the Port and County were having a difficult time analyzing the impacts of every potential industrial use on adjacent uses and how those uses can be made compatible. See 2014 Record at 111–115. The Port's response to this difficulty was to defer the compatibility criteria to the site design and condition use processes. LUBA rejected this approach, saying: "Because the compatibility standard focuses on 'adverse impacts,' it cannot be meaningfully addressed unless the 'proposed use' is described sufficiently to identify and evaluate its likely adverse impacts. The County could possibly apply the compatibility standard to multiple categories of uses with similar impacts, but the County cannot possibly apply the compatibility standard to a large, open-ended range of unspecified and unknown industrial uses." LUBA Opinion at App 44. Very little has changed since the last application with respect to this issue. While the Port has submitted categories of proposed uses, these use categories are extremely broad and nonspecific. Subsumed within them are hundreds of possible specific uses, or at least eighteen types of uses. Within each the Port's five categories, the many possible uses will likely have different impacts. (Or at the very least, as discussed below, the Port has failed to show that the impacts within each category of uses are similar.) The Port has failed to meet its burden to show the compatibility of the potential uses with the adjacent uses and it cannot do so without further narrowing or specifying the uses. Otherwise, any impacts analysis or mitigation conditions imposed will be speculative and will not ensure compatibility.

An example serves to explain the problem: Within the category of "Liquid bulk commodities processing, storage and transportation" many uses are possible. This is because the category in and of itself is nonspecific. "Liquid bulk commodities" could include crude oil, tar sands oil, liquefied propane gas, gasoline, denatured fuel ethanol, cryogenic liquid Hydrogen, caustic soda, chlorine, clay slurry, corn syrup, ethanol, methanol, anhydrous ammonia, molten sulfur, phosphoric acid, propylene, sulfuric acid, cooking oil, milk, juice, or any liquid that can be transported. Ex. 69. Uses within this category could be anything from oil refining to cold

storage of juice. It is therefore still impossible to do a compatibility analysis with such broad categories of uses. The Port is required to demonstrate that each use is compatible with adjacent lands. Under the example given, an analysis of storage and transportation of juice and its impacts is required; as is a full analysis for petroleum storage and transportation. This expansive analysis at first blush may seem daunting, but it is of the Port's own making. As explained throughout, the Port has saddled itself with an insurmountable burden to demonstrate that each of its specific uses that would be permitted via this reasons exception is compatible with adjacent lands. The Port would not have such a difficult burden if it narrowed its proposed uses to a limited subset of the originally proposed uses, like LUBA directed it to do. LUBA Opinion at App 9. Because of the Port's broad use categories, which essentially capture the same amount of uses proposed originally, the Port must demonstrate compliance with the administrative rules for each specific use and it simply has not met that burden.

***B. The Port has not demonstrated the compatibility of any uses, let alone all of the uses within the proposed categories.***

The Port's submission appears to contain no compatibility analysis for the proposed uses; instead, the application references the conditions imposed by the County in the previous process. BEH memo at 24. The conditions previously adopted by the County are inadequate because they do not address specific impacts on neighboring uses, instead focusing on impacts on the rezoned property. This misses the focus of the compatibility standard: adjacent uses. Further, they are not specific to any specific uses.

The nearby and adjacent agricultural lands are unique and highly productive due to the high organic matter in the soils, access to surface water for irrigation, proximity to processors in Vancouver, Washington and a microclimate suited for fruit and vegetable production. The growers near the rezone property, which include blueberry and mint growers, comprise an important part of Oregon's and Columbia County's agricultural market and economy. They have invested large capital (up to \$40,000/acre or more) into their farms to bring them to the production capacity that they currently boast. Having access to clean irrigation water, uncontaminated soil, sunlight and clean air are critical to the success of these farm operations. The irrigation water for several neighboring operations, including Hopville Farms, comes from Beaver Slough, which is fed in part by McLean Slough, which originates close to Port Westward.

As a result this water, and the farms that depend on it for irrigation, is vulnerable to contamination and pollution from the Port that enters the Slough as well as the nearby Columbia River floodplain. Increased industrial development in this sensitive area comes with an increase in the likelihood of contamination coming from energy facilities on the Port's property. Uses that increase the likelihood of contamination are incompatible with the existing agricultural cultivation. Accordingly, at least some of the Port's uses are incompatible with neighboring agricultural cultivation, the application should be denied.

The County must also consider the cumulative impacts of all of the multiple types of uses that could be developed on the subject property. This analysis, like much of this process will be speculative because of the broad nature of the categories proposed by the Port, and is further evidence that the Port, again, has bit off more than it can chew.

Further, the County must consider the impacts of the proposed uses on other, nonagricultural uses on adjacent property (including the waterways) including rural commercial uses, restoration, fishery uses, wildlife refuges and public lands. For example, there are many restoration sites that would be impacted by industrial pollution and shipping traffic from a second, deep-draft port on the Columbia at Port Westward. *See* Ex. 62 (map of habitat restoration sites, including sites adjacent to and near Port Westward); Batwater restoration site: Ex. 44, Ex. 45; Kerry Island: Ex. 58, Ex. 60; *see also* Ex 50 (Batwater rural commercial site). Because the application lacks analysis of impacts to these sites, it should be denied.

### **VIII. The Port's Requested Rezone Requires an Exception to Goal 14**

The County should deny this application because it proposes urban uses on rural lands, and does not seek an exception to Goal 14. The Port's assertion that "no uses are proposed which require an urban level of facilities or services" is self-serving and not grounded in the broad use categories that the Port seeks. BEH Letter at 10. Statewide Planning Goal 14 (Urbanization) is "[t]o provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities." As noted in the compatibility section and further discussed in the Goal 11 section, nothing about the Port's approach to squeeze a broad

suite of uses into the narrow vehicle of a reasons exception is “orderly and efficient” or “provide[s] for livable communities.”

Goal 14 further provides:

“In unincorporated communities outside urban growth boundaries counties may approve uses, public facilities and services more intensive than allowed on rural lands by Goal 11 and 14, either by exception to those goals, or as provided by commission rules which ensure such uses do not adversely affect agricultural and forest operations and interfere with the efficient functioning of urban growth boundaries.”

The requirements for justifying a reasons exception to Goal 14 are set out at OAR 660-014-0040(3). For the reasons explained throughout this comment letter, it is clear that the Port could not justify a Goal 14 exception under that administrative rule. For example, the Port would not be able to show no less adverse effect by siting on other rural lands, considering the adverse effect the most intense uses permitted under the rezone would have on “the air, water, energy and land resources of the surrounding area.” OAR 660-014-0040(3)(b)(B).

The applicability of Goal 14 to a particular industrial use of land, and the need for a Goal 14 exception is evaluated on a “case-by-case determination, based on factors identified in case law.” LUBA Opinion at App 54-55, *citing Shaffer v. Jackson County*, 17 Or LUBA 922, 931 (1989). LUBA noted that in *Shaffer* when evaluating the applicability of Goal 14 to an industrial use, the relevant factors that may support a finding of a rural use rather than urban include whether the industrial use:

- “(1) employs a small number of workers,
- “(2) is significantly dependent on a site-specific resource and there is a practical necessity to site the use near the resource.
- “(3) is the type of a use typically located in rural areas, and
- “(4) does not require public facilities.”

LUBA Opinion at App 55, *citing Shaffer v. Jackson County*, 17 Or LUBA at 933–40.

For these proceedings, when remanding the decision back to the County, LUBA explained:

“None of the Shaffer factors are conclusive in isolation and must be considered together. Under the analysis described in *Shaffer*, if each of these factors is answered in the affirmative, then it is relatively straight forward to conclude, without more, that the proposed industrial use is rural in nature. However, if at least one factor is answered in the negative, then further analysis or steps are necessary.”

LUBA Opinion at App 55. If the *Shaffer* factors point to an urban use, the County either needs to effectively limit the allowed uses to those that are rural, or take an exception to Goal 14. *Id.*

LUBA remanded the County’s decision and explained:

“the county did not expressly consider any of the factors cited in *Shaffer*, or indeed offer any explanation at all for its bare conclusion that the amendments authorize no urban uses. Given the sheer breadth and the ill-defined parameters of the uses authorized under the amendments, that is an exceedingly inadequate and conclusory finding.”

LUBA Opinion at App 55–56. Accordingly, on remand, the relevant question is whether any use within the Port’s five proposed use categories can constitute an “urban” use. It is important to note that *Shaffer* analyzed the application of Goal 14 for a particular use (there, it was an asphalt batch plant). Here, the Port makes the Goal 14 analysis significantly more complex (and most likely impossible) by requesting an exception for eighteen different uses. Because an exception to any Statewide Planning Goal is to be exceptional, it is the Port’s burden to show that every single use requested is not an urban use. The Port fails to fulfill that burden, and its mischaracterizations, omission, and assertions of “averages” fail to acknowledge the exceptional nature of an exception to a statewide planning goal, and accordingly does not demonstrate that every use requested by the Port is rural. As explained below, because the Port requests uses that are urban in nature, and the Port did not request an exception to Goal 14, the application should be denied.

The BEH letter erroneously asserts that “[t]he Mackenzie Report provides a thorough *Shaffer* analysis for each of the five proposed uses, clearly establishing that each use is rural in nature and therefore appropriate for siting at Port Westward.” BEH Letter at 9. On the contrary, the Mackenzie Report is deficient because it fails to analyze each use the Port is proposing, and the use categories the Port requests a rezone for include urban-level uses.

**A. *The Port's Proposed Uses have Urban-Level Employment Densities.***

1. The Columbia County Comprehensive Plan demonstrates what Constitutes Urban-level Employment Densities in the County

The Columbia County Comprehensive Plan provides substantial evidence that the Port is proposing urban uses on rural land. The plan explains what constitutes urban-level densities for light industrial and heavy industrial uses. The Comprehensive Plan explains that an urban level of employment for light industrial in Columbia County is 4 jobs per acre and 1.5 jobs per acre for heavy industrial, not 18.1 jobs per acre as the Mackenzie Report asserts. *Compare* Mackenzie Report at 15 *with* Ex 67 (Columbia County Comprehensive Plan Part XII. Industrial Siting-Industrial Economic Analysis: Summary of Economic Data., subsection 5).<sup>15</sup> The applicable job density for heavy industrial uses (including fuel storage) within the city limits of Rainier has an employment density of 1.5.<sup>16</sup> Clearly, heavy industrial uses that have job densities of 1.5 employees per acre constitutes an urban use in Columbia County based on the Comprehensive Plan.

To apply the Mackenzie Report's asserted densities for urban and rural employment would be contrary to the County's Comprehensive Plan. The Port's proposed rezone requests allowance of both light and heavy industrial uses, and accordingly, to demonstrate that the proposed uses are truly rural in nature (and therefore do not require a Goal 14 exception), the Port must, but cannot, demonstrate that all of the proposed uses will only result in rural employment densities.

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<sup>15</sup> The Comprehensive Plan explains that:

“The density per gross acre figures in the [Employment Capacity of Vacant Buildable Industrial Sites] chart are 4.0 per acre for light industry and industry inside city limits, and 1.5 for heavy industry and industry outside city limits.”

The chart evaluates existing industrial lands in the County for the communities of Scappoose, St. Helens, Columbia City, Rainier, Clatskanie and Vernonia.

<sup>16</sup> Rainier's Zoning ordinance categorizes fuel storage and marine terminal uses and related facilities as heavy industrial uses. Rainier Zoning Ordinance Section 3.11. Ex 68. Similarly, the Columbia County Zoning Ordinance categorizes fuel storage, lumber yards and planing mills, rubber and plastic manufacturing, and grain storage as uses that are allowed within the heavy industrial zone. Columbia County Zoning Ordinance Section 930.

The source of the Mackenzie Report's data demonstrates why the Mackenzie Report's urban density estimate is significantly greater than the County's Comprehensive Plan. Instead of using data from Columbia County, the Mackenzie Report improperly extracts data relating to Portland Metropolitan suburbs to create a "Typical Urban Industrial Density" of 18.1 jobs per acre. *See* Mackenzie Report at 15, footnotes 14 and 15 (noting figures are based off of a 2014 Portland Metro Urban Growth Report and unexplained "stated floor area ratios (FAR) and square feet per employee assumptions"). Such an approach fails to acknowledge that what constitutes "typical urban" density in Columbia County is not the same as what is "typical urban" in the Portland Metropolitan area. Contrary to the Mackenzie Report's Portland Metro data, substantial and compelling evidence exists in the County's own comprehensive plan that an urban level of employment for light industrial is 4 jobs per acre, and 1.5 jobs per acre for heavy industrial, not 18.1 jobs per acre as the Mackenzie Report asserts.

Therefore, within the context of heavy industrial uses, the County's Comprehensive Plan can only be interpreted to mean that an employment density of 1.5 jobs per acre reflects an urban level of employment in Columbia County. For light industrial use, the appropriate urban-level employment density is 4.0 jobs per acre or less. The Mackenzie Report's inflated Portland Metro-based statistics are not substantial evidence for this rezone that applies to property within Columbia County.

2. The Mackenzie Report Demonstrates the Port is Seeking an Exception for Uses that have Urban-level Employment Densities.

The Mackenzie Report provides data that counters its conclusion that "the Port's proposed uses have job densities well below that of urban industries[.]" Mackenzie Report at 16. The report's "Table 1: Average Employment Density Among Port Westward Inquiries" provides that a proposed liquid bulk use could have an employment density of 4 jobs per acre. As noted above and provided in the County's comprehensive plan, 4 jobs per acre (or less) is a workable benchmark for light industrial urban uses. However, for the heavy industrial use of bulk fuel storage, the comprehensive plan indicates the threshold for urban level employment is significantly lower: 1.5 employees per acre or lower. Table 1 of the Mackenzie report provides substantial evidence that liquid bulk and natural gas use categories result in industrial operations with up to 4.0 employees per acre, which could only be determined to be urban in nature under

the comprehensive plan. The data provided by the Mackenzie Report demonstrates that a number of the proposed uses have urban levels of employment. *See* Mackenzie Report at 16. Accordingly, this Shaffer factor points to the proposed uses as being urban in nature.

3. The Port cannot depend on Average Employment Densities.

In an effort to evade failing this *Shaffer* factor, the Mackenzie Report creates an “average employment density for those uses that fall within the use categories proposed as part of this modified application.” Mackenzie Report at 15. This approach is fundamentally flawed because an applicant does not get to combine uses to get an acceptable rural employment density under this *Shaffer* factor. Rather, each proposed use must be analyzed independently. *Shaffer*, 17 Or at 935. By creating an average employment density based on size and employment levels derived from siting inquiries at the existing PWW (Appendix 3), the Mackenzie Report ignores the basic component of this factor: if any of the proposed uses have urban levels of employment, that factor points toward an urban use. The Port does not get to create an average employment level for a suite of uses to be used as evidence that all of the uses have rural levels of employment. That is simply not how the *Shaffer* factor works, and acquiescing to this approach would allow the Port to game the system by proposing multiple uses, some of which have urban levels of employment, where so long as the average of all the uses looks rural, the *Shaffer* factor would appear to support a finding of rural levels of employment. Contrary to the Port’s heavy reliance on averages, the Port is required to demonstrate that each of its 18 proposed uses are rural in nature, not that some average of a laundry list of uses gives the impression that the use categories have rural employment levels.

***B. The Port Cannot Demonstrate That There is a Practical Necessity to Site the Use near Any Significant Resource.***

In remanding the County’s decision, LUBA noted that,

“whether a particular use is an urban or rural use under the *Shaffer* factors may depend in part on the reason under which it was justified. Because the “significantly dependent” on a unique resource language of OAR 660-004-0022(3)(a) closely parallels one of the relevant factors the county can apply to determine whether proposed uses are urban or rural, it may be somewhat easier for the county to conclude that none of the proposed uses allowed in the exception area are urban uses, if the proposed uses are narrowed to those that are justified

solely under OAR 660-004-0022(3)(a) rather than the broader universe of uses justified under OAR 660-004-0022(3)(b) and (c).”

LUBA Opinion at App 60. As explained above, because the Port is requesting a number of uses that are not port-dependent, it is easy to conclude that the proposed uses are urban. Even if the Port’s uses are dependent on the deepwater port, the uses are still urban, based on language in *Shaffer*. In *Shaffer*, LUBA held:

“Whether [a use] is ‘significantly dependent’ on a site-specific resource is one of the operating characteristics of an industrial use which is relevant to a determination of whether that use is urban or rural in nature. We, therefore, conclude that the challenged finding [on a batch plant’s significant dependence on a quarry] is relevant to such a determination. Foot note 11 [ Note provides: We do not believe, however, that the fact that a proposed use will be operated ‘in conjunction with’ other rural uses is indicative of whether the proposed use is itself urban or rural.]

“However, being ‘significantly dependent’ on a site specific resource must require more than showing a proposed industrial use utilizes the resource as a raw material, or the proposed use would be more profitable if sited at the location of a site specific resource. Many industrial uses employ raw materials which at one time were extracted from or produced upon rural land. Furthermore, to term uses ‘rural’ simply because they can be conducted more cheaply on rural land would undermine the purposes of Goal 14. At a minimum, to find an industrial use is "significantly dependent" on a site specific resource requires a showing that there is a practical necessity for siting the proposed use on rural land near the site specific resource. Footnote 12 [In making such a showing, it is necessary to consider not only the technological and other practical reasons for siting the industrial use near the site specific resource, but also any additional costs associated with locating the use on rural land near a site specific resource. For instance, an industrial use might not be ‘significantly dependent’ on a site specific resource, and there may be no practical necessity for locating the use on rural land near that resource, if the rural location results in significant additional costs to secure other needed raw materials or to transport the final product to market or its place of use.]”

*Shaffer*, 17 Or LUBA at 938 (footnotes inserted into main text as bracketed language; underline added). In *Shaffer*, the County had found that siting a batch plant located 1 1/2 miles away from a quarry would allow easy access to raw materials and reduce hauling and stockpiling, but LUBA determined that that finding was insufficient to demonstrate a practical necessity to locate the asphalt batch plant on rural land, or that the proposed asphalt plant would not be a viable operation if located on urban land, such as an urban location 2 miles away from the quarry.

LUBA further noted that the absence of available lands within a UGB has no bearing on whether a use is urban or not, and that a finding that a rural site is “superior” to an urban site is not a relevant consideration. *Id.* at 938 and n 14.

Here, the Port has failed to demonstrate that it is a “practical necessity” to allow all of its requested uses in close proximity to the deepwater port. As explained above, the Port is arguing that the rezone would provide an economic advantage because of the subject property’s proximity to a deepwater port. The choice to rezone has nothing to do with ability to access rural land or need to site on rural land. There is no practical necessity to site the use so close to the deepwater port. Accordingly, this factor does not significantly inform the analysis of whether the each of uses requested constitute urban uses. To the extent this factor is informative, the use characteristics point to urban: the majority of the uses and derivative goods the Port seeks to ship through its deepwater port have raw materials that originate not from rural communities of Columbia County, but from across the nation, and frequently pass through urban areas. This factor points to the processing and production of export goods to not constitute a rural use. This factor, as analyzed in *Shaffer*, points to the use being urban.

***C. The Broad Suite of Uses Proposed are not the Type Typically Located in Rural Areas.***

The Port’s proposed uses are not all typically located in rural areas. The Mackenzie Report attempts to paint the picture that all of the proposed uses are typically located in rural areas, and though it may be true that a small subset of those uses tend to be located in rural areas, three out of the seven examples provided by the Mackenzie Report are located within the Portland Urban Growth Boundary. *See* Mackenzie Report at 22–25 (including examples of properties at the Port of Portland, which are within the Portland Urban Growth Boundary). Accordingly, those examples actually demonstrate the uses sought by the Port are not unique to rural areas. Moreover, the Mackenzie Report, specifically Table 4 (Mackenzie Report 20), provides an incomplete analysis of whether all of the proposed uses are typically found in rural areas. The use of the word “some” throughout Table 4 indicates the fatal flaw of the Port’s insufficient analysis: the factor does not require a demonstration that some of the proposed uses may be able to be sited in rural areas, rather the Port is required to demonstrate that all of the

proposed uses are typically located in rural areas, and the Port simply has not, and cannot make that showing. *Shaffer*, 17 Or LUBA at 940.

The Port argues that its proposed uses tend to be in rural areas because “some” of them are “Land-intensive,” and “sited near raw materials, which originate in rural areas (e.g., Coast Range).” The table asserts that forestry uses are rural because “Rural Columbia County has mills, bark processors, and wood production manufactures[.]” *Id.* As noted above, propagation, harvest, and primary wood processing of wood product are currently allowed in the existing zone. Evidence associated with uses that are already permitted in the zone (e.g., primary wood processing) does not support a finding that secondary wood processing constitutes a rural use for this factor. To the extent the Port is relying on the use of raw timber materials in the coast range to support its proposition that its forestry-related uses are rural in nature, it ignores the reality of most Oregon cities being built up around forestry industries.<sup>17</sup>

The Port’s dependence on a characterization of “land-intensive use that requires large sites,” for all five use categories is suspect, as the Mackenzie Report clearly indicates that many of the proposed uses do not require sprawling sites. The report notes that some proposed uses need less than 100 acres, some of which only require 20 acres. Mackenzie Report at 15, 22–25. Regarding proposed uses involving Breakbulk, the Port admits that these uses exist “within urban areas due to the presence of marine facilities[.]” Mackenzie Report at 21. The Mackenzie report admits that siting in rural areas is merely “preferred[.]” *Id.* Preference does not support a determination that all of these uses are typically found in rural areas. The Port fails to demonstrate that all of the proposed uses are uses that typically occur in rural areas, rather than urban industrial parks.

Similarly, the Port alleges that Breakbulk-oriented uses are typically located in rural areas because they depend on “[f]acilities [that] are ideally located at the intersection of multiple modes of transportation.” Mackenzie Report 21. This argument is confused, and supports a finding that these uses are found in urban areas: consider some of the best locations where

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<sup>17</sup> The Port’s assertion that the proposed uses need to be sited near raw materials originating from the Coast Range supports the notion that an ocean coastal port would not only reasonably accommodate this use, but that ports on the ocean would serve these forestry uses better than the subject property, as they are closer to the coast range and do not require travel through the busy Columbia River corridor. Under the Port’s rational, the Port of Coos Bay, for example, would be better suited for coastal timber export rather than inland Port Westward.

multiple modes of transportation exist: Port of Portland (with easy connections to Interstate 5, Highway 84, Portland International Airport, and Columbia River corridor); Port of Coos Bay (with easy connections to Highway 101 and California Markets, the Southwest Oregon Regional Airport, and Pacific Ocean). Clearly, access to multiple modes of transportation does not determine that a use is rural or typically located in rural areas in this context.

***D. The Proposed Uses Require Public and Urban-Level Facilities and Services.***

The broad use categories sought by the Port, and the County Staff report support the notion that these uses will require urban-level facilities and services. It is clear from the staff report that the Port wants to rezone the subject property because of its proximity to a deepwater port, but also because of the many urban-level facilities and services present at the existing Port Westward site that the proposed uses require. The staff report indicates that the existing Port Westward site will provide process water from its existing water right, and that the Port operates a discharge system for industrial wastewater. Staff Report at 26. For further analysis on the numerous facilities and services that would be extended to the subject property, see the section below on Goal 11. It is easily assumed that many of the heavy industrial uses that would be allowed under the rezone would require access to process water and wastewater treatment facilities and services from the existing Port Westward. The inevitable extension of these urban-level facilities and services points to the proposed uses being urban. Accordingly, it is clear that urban-level facilities (including industrial wastewater sewer lines, water lines, and transportation facilities) that currently serve non-resource land (existing Port Westward site) will be extended to the subject property if the rezone is approved. This further supports the determination that the proposed uses require urban-level facilities, and the uses are urban.

It is notable that in the past, the Port and County have allowed urban-level facilities on the existing Port Westward Property, notwithstanding the lack of an exception to Goals 11 and 14. For example, a review of the existing uses on the Port Westward property demonstrates that a large amount of the property is not being utilized for rural industrial use, but rather, PGE's natural gas fired power plant. Extending lines from this urban-level energy operation to the subject property would clearly constitute providing urban-level electricity services to the subject property. Accordingly, the proposed uses would be served by urban-level services. The presence, availability and inevitable extension of urban-level services and facilities to the subject property

point to urban uses. Moreover, because of the broad array of uses sought by the Port, it is the Port's burden to demonstrate that all of the uses will not require urban-level facilities. The Port simply has not made that showing. Therefore, the presumption is that these uses would require urban-level facilities.

#### **IX. The Port's Proposed Rezone Requires an Exception to Goal 11.**

Goal 11 is: "To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development."<sup>18</sup> Goal 11 prohibits extending public facilities outside of urban growth boundaries: "[T]he requirements of Goal 11 go well beyond the limitation on the location of sewers \* \* \*; the goal also regulates the location, pace and direction of \* \* \* development, and it limits--and requires coordination between--the placement of urban-level development and urban-level services and facilities on rural land[.]" *Gisler v. Deschutes County*, 149 Or App 528, 536 (1997). *See also* OAR 660-004-0018(4)(b) ("When a local government changes the types or intensities of uses or public facilities and services within an area approved as a 'Reasons' exception, a new 'Reasons' exception is required.

As explained above, in order to allow for this reasons exception, the Port and County need to take an exception to Goal 14. Because an exception to Goal 14 is required, LUBA directs the County to "consider what facilities and services will be necessary to support those uses, and whether an exception to Goal 11 is necessary to provide those facilities and services." LUBA Opinion at App 61. The Port needs to provide this information for each use, and has not.

It is clear that proposed uses can and would use and need urban levels of public facilities and services. The County staff report, although internally contradictory, supports a determination that this rezone would result in extending public facilities and services outside of an urban growth boundary. The report first states that there are no urban facilities within six miles of the subject property, but then lists all of the facilities present at the Port Westward site:

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<sup>18</sup> The administrative rules implementing Goal 11 does not limit "public facilities" to facilities own by public entities. Rather, Goal 11 applies to urban-level facilities generally. *See* OAR 660-011-0005(5) (defining "Public Facility" as including "water, sewer, and transportation facilities" generally). Regardless of who owns the facilities (such as the public Port or private Portland General Electric), the extension of urban-level facilities and services is what is prohibited by Goal 11.

“Significant investments have already been made in the Port Westward area’s services and facilities, including water, sewer, new electrical substation, natural gas mainlines, and fire protection services. The area also has existing rail systems and a full-service 1,500 foot dock. There are also public and private energy transmission facilities in the Port Westward Area. \* \* \* Staff concurs that with this existing substantial investment in services and facilities already in the area, an expansion of industrial land as proposed would be efficient from a facilities and services standpoint.”

Staff Report at 12. The staff report provides that allowing this rezone would “maximize existing public and private investments.” Staff Report at 11. It is unclear how the rezone would maximize existing investments in all of these adjacent public and urban-level services and facilities, but somehow not constitute the extension of public facilities and services to non-urban land for the purposes of Goal 11. Clearly, a Goal 11 exception is required.

One can step back and see that the Port is seeking to rezone the subject property because it is adjacent to an existing industrial park with all of the bells and whistles that come with existing industrial infrastructure. The adjacent site does not have just a deepwater port, but also “on-site water-supply and sewage treatment system, and is served by existing fiber-optic, electrical and natural gas connections.” LUBA Opinion at App 3. Accordingly, the rezoned site has easy access to an urban level of transportation facilities and utilities: water, sewer, internet, electricity and gas. The Port does not explain how the inevitable extension of these urban level services to the subject property does not require an exception to Goal 11, particularly, in light of the analysis provided above demonstrating that the uses that the Port is proposing clearly constitute urban-level industrial operations. Moreover, in light of the lack of detail in the Port’s application, it is clear that a Goal 11 exception would be exceedingly difficult to justify under the administrative rules and statutes. *See e.g.*, OAR 660-011-0060(9).

## **X. Conclusion**

Based on all of the reasons presented above, 1000 Friends of Oregon and Columbia Riverkeeper strongly urge the Board of Commissioners to deny this application.

Respectfully,

s/ Meriel Darzen  
Meriel Darzen  
Circuit Rider 1000 Friends of Oregon

s/ Lauren Goldberg  
Lauren Goldberg  
Columbia Riverkeeper

**Table of Exhibits**  
**Columbia Riverkeeper and 1000 Friends of Oregon**  
**Testimony on Port of St. Helens Port Westward Rezone Application – Remand**

Exhibit No.	Description
<b>Appx.</b>	Final Opinion and Order in <i>Columbia Riverkeeper v. Columbia County</i> , __ Or LUBA __, (LUBA No. 2014-017/018, August 27, 2014).
<b>1</b>	Port of St. Helens, <i>Port Westward Industrial Park</i> , <a href="https://portsh.org/facility/port-westward-industrial-park/">https://portsh.org/facility/port-westward-industrial-park/</a> (last visited July 14, 2017).
<b>2</b>	Port of St. Helens, <i>Port Westward Industrial Park Facts</i> , <a href="https://portsh.org/wp-content/uploads/2016/09/PortWestward.pdf">https://portsh.org/wp-content/uploads/2016/09/PortWestward.pdf</a> (last visited July 14, 2017) (follow “Port Westward Industrial Park Facts” link from Exhibit No. 1).
<b>3</b>	PORT OF ST. HELENS, FINANCIAL STATEMENTS (June 30, 2016), <i>available at</i> <a href="https://portsh.org/wp-content/uploads/2016/09/Audit-Report-FY-16.pdf">https://portsh.org/wp-content/uploads/2016/09/Audit-Report-FY-16.pdf</a> .
<b>4</b>	Port of St. Helens, <i>NWTW Proposed Plant at Port Westward Update</i> , THE COMPASS, Spring 2016, at 2, <i>available at</i> <a href="https://portsh.org/wp-content/uploads/2016/09/Compass-Spring-2016.pdf">https://portsh.org/wp-content/uploads/2016/09/Compass-Spring-2016.pdf</a> .
<b>5</b>	Port of St. Helens, <i>Northwest Innovation Works Pursues Plan for Methanol Plant</i> , THE COMPASS, June 2014, at 1,3, <i>available at</i> <a href="https://portsh.org/wp-content/uploads/2016/09/The-Compass-June-2014.pdf">https://portsh.org/wp-content/uploads/2016/09/The-Compass-June-2014.pdf</a> .
<b>6</b>	Port of St. Helens, <a href="https://nwinnovationworks.com/projects/port-of-st-helens">https://nwinnovationworks.com/projects/port-of-st-helens</a> (last visited July 14, 2017) (explaining Northwest Innivation Works facility overview and FAQs).
<b>7</b>	Marissa Luck, <i>Economic Potential Still Untapped as Port Westward Chief Plans Retirement</i> , THE DAILY NEWS, Sept. 7 2016, <i>available at</i> <a href="http://tdn.com/news/local/economic-potential-still-untapped-as-port-westward-chief-plans-retirement/article_d996c480-0c22-5456-a0f4-7ef6b628f164.html">http://tdn.com/news/local/economic-potential-still-untapped-as-port-westward-chief-plans-retirement/article_d996c480-0c22-5456-a0f4-7ef6b628f164.html</a> .
<b>8</b>	Courtney Vaughn, <i>Port Authorizes More Money for Port Westward Rezone</i> , COLUMBIA COUNTY SPOTLIGHT, Oct. 14, 2016, <i>available at</i> <a href="http://pamplinmedia.com/scs/83-news/327308-206966-port-authorizes-more-money-for-port-westward-rezone">http://pamplinmedia.com/scs/83-news/327308-206966-port-authorizes-more-money-for-port-westward-rezone</a> .
<b>9</b>	BOARD OF COUNTY COMM’RS FOR COLUMBIA COUNTY, OR, ORDINANCE NO. 2001-06 THE “PORT WESTWARD URBAN RENEWAL PLAN ORDINANCE,” 1-72 (June 13, 2001) <i>available at</i> <a href="https://static1.squarespace.com/static/558c4ad1e4b00dea8bcb2b46/t/5665e742a12f4485d10c251e/1449518914764/Original_Plan.pdf">https://static1.squarespace.com/static/558c4ad1e4b00dea8bcb2b46/t/5665e742a12f4485d10c251e/1449518914764/Original_Plan.pdf</a> (adopts the urban renewal plan and the document includes the “Port Westward Urban Renewal Plan Report”).
<b>10</b>	COLUMBIA DEV. AGENCY, REPORT ACCOMPANYING PORT WESTWARD URBAN RENEWAL PLAN 1-23 (April 30, 2001), <i>available at</i> <a href="https://static1.squarespace.com/static/558c4ad1e4b00dea8bcb2b46/t/5665e75ba12f4485d10c26a6/1449518939940/Amended_Report.pdf">https://static1.squarespace.com/static/558c4ad1e4b00dea8bcb2b46/t/5665e75ba12f4485d10c26a6/1449518939940/Amended_Report.pdf</a> .
<b>11</b>	Paulette Lichatowich, <i>Preserving the Future at Port Westward</i> , COLUMBIA

	COUNTY SPOTLIGHT, Nov. 11, 2016, <i>available at</i> <a href="http://pamplinmediagroup.com/scs/84-opinion/331869-211303-preserving-the-future-at-port-westward">http://pamplinmediagroup.com/scs/84-opinion/331869-211303-preserving-the-future-at-port-westward</a> .
<b>12</b>	Courtney Vaughn, <i>Flood Mitigation, Development Pose Challenges for Mint Farmers</i> , COLUMBIA COUNTY SPOTLIGHT, Mar. 3, 2017, <i>available at</i> <a href="http://pamplinmedia.com/scs/83-news/348068-227680-flood-mitigation-development-pose-challenges-for-mint-farmers">http://pamplinmedia.com/scs/83-news/348068-227680-flood-mitigation-development-pose-challenges-for-mint-farmers</a> .
<b>13</b>	CASCADE KELLY HOLDINGS, LLC & PORT OF ST. HELENS, <i>Third Amendment of Amended and Restated Sublease</i> , Mar. 17, 2016, at 1-411 <i>available at</i> <a href="http://edocs.puc.state.or.us/efdocs/HAQ/up349haq134537.pdf">http://edocs.puc.state.or.us/efdocs/HAQ/up349haq134537.pdf</a> (Excerpt)
<b>14</b>	E-mail from Murray V. Godley, III, President, Northwest Innovation Works, to Paula Miranda, Interim Executive Director, Port of St. Helens (January 20, 2017, 11:15 PST) (requesting an extension of Northwest Innovation Works lease)
<b>15</b>	Port of Portland, <i>Marine Facilities</i> , 1-24 (March 16, 2017), <a href="https://popcdn.azureedge.net/pdfs/Mar_Facility_Brochure.pdf">https://popcdn.azureedge.net/pdfs/Mar_Facility_Brochure.pdf</a>
<b>16</b>	Port of Portland, <i>Marine Terminal 6</i> (last modified Jul. 7, 2017), <a href="https://www2.portofportland.com/Marine/Terminal6">https://www2.portofportland.com/Marine/Terminal6</a> .
<b>17</b>	Port of Portland, <i>Terminal 6 Overview Map and FAQs</i> (last visited Jul. 14, 2017), <a href="https://popcdn.azureedge.net/pdfs/T6_OverviewMap_FAQs.pdf">https://popcdn.azureedge.net/pdfs/T6_OverviewMap_FAQs.pdf</a> (follow “Terminal 6 Overview Map and FAQs” hyperlink from exhibit 16).
<b>18</b>	Port of Astoria, <i>Tongue Point General Information</i> (last visited Jul. 14, 2017), <a href="http://www.portofastoria.com/Tongue_Point_General_Information.aspx">http://www.portofastoria.com/Tongue_Point_General_Information.aspx</a> .
<b>19</b>	STATE OF OR DEP’T. OF STATE LANDS, STATE OF OREGON DEPARTMENT OF STATE LANDS UPLAND LEASE AGREEMENT 26311-LE (Nov. 1, 2004) (agreement between Dep’t. of Public Lands as landlord and Port of Astoria as Tenant).
<b>20</b>	Letter from Nancy N. Pustis, Western Regional Manager, Land Mgmt. Div., OR Dep’t. of State Lands, to Jack Crider, Exec. Director, Port of Astoria (Jun. 3, 2010).
<b>21-a</b>	Port of Portland, <i>Marine Terminals Master Plan 2020: Overview</i> , <a href="http://www.portofportland.com/mtmp_overview.aspx">http://www.portofportland.com/mtmp_overview.aspx</a> (last modified Dec. 20, 2011) (last visited Jul. 14, 2017).
<b>21-b</b>	Port of Portland, <i>Marine Terminals Master Plan 2020: Background</i> , <a href="http://www.portofportland.com/mtmp_overview.aspx">http://www.portofportland.com/mtmp_overview.aspx</a> (last modified Dec. 20, 2011) (last visited Jul. 14, 2017) (follow “background” hyperlink/tab at top of page).
<b>21-c</b>	Port of Portland, <i>Marine Terminals Master Plan 2020: Cargo Forecast</i> , <a href="http://www.portofportland.com/mtmp_overview.aspx">http://www.portofportland.com/mtmp_overview.aspx</a> (last modified Dec. 20, 2011) (last visited Jul. 14, 2017) (follow “cargo forecast” hyperlink/tab at top of page).
<b>21-d</b>	Port of Portland, <i>Marine Terminals Master Plan 2020: Facility and Transportation Plans</i> , <a href="http://www.portofportland.com/mtmp_overview.aspx">http://www.portofportland.com/mtmp_overview.aspx</a> (last modified Dec. 20, 2011) (last visited Jul. 14, 2017) (follow “facility and transportation plans” hyperlink/tab at top of page).
<b>21-e</b>	Port of Portland, <i>Marine Terminals Master Plan 2020: Terminal 2 Preferred Alternative</i> , <a href="http://www.portofportland.com/MTMP_T2_Project.htm">http://www.portofportland.com/MTMP_T2_Project.htm</a> (last

	modified Dec. 20, 2011) (last visited Jul. 14, 2017).
<b>21-f</b>	Port of Portland, <i>Marine Terminals Master Plan 2020: Terminal 4 Preferred Alternative</i> , <a href="http://www.portofportland.com/MTMP_T4_Project.htm">http://www.portofportland.com/MTMP_T4_Project.htm</a> (last modified Dec. 20, 2011) (last visited Jul. 17, 2017).
<b>21-g</b>	Port of Portland, <i>Marine Terminals Master Plan 2020: Terminal 5 Preferred Alternative</i> , <a href="http://www.portofportland.com/MTMP_T5_Project.htm">http://www.portofportland.com/MTMP_T5_Project.htm</a> (last modified Dec. 20, 2011) (last visited Jul. 17, 2017).
<b>21-h</b>	Port of Portland, <i>Marine Terminals Master Plan 2020: Terminal 6 Preferred Alternative</i> , <a href="http://www.portofportland.com/MTMP_T5_Project.htm">http://www.portofportland.com/MTMP_T5_Project.htm</a> (last modified Dec. 20, 2011) (last visited Jul. 17, 2017).
<b>22</b>	WA DEPT. OF ECOLOGY, COWLITZ PARTNERSHIP SHORELINE MASTER PROGRAM UPDATES, APPENDIX G (May 3, 2016), <i>available at</i> <a href="http://www.ecy.wa.gov/programs/sea/shorelines/smp/mycomments/CowlitzCounty/ApxGShorAnlRpt.pdf">http://www.ecy.wa.gov/programs/sea/shorelines/smp/mycomments/CowlitzCounty/ApxGShorAnlRpt.pdf</a> .
<b>23</b>	PARSONS BRINCKERHOFF, PORTS 2010 A NEW STRATEGIC BUSINESS PLAN FOR OREGON'S STATEWIDE PORT SYSTEM, April 2010, <a href="http://portoftoledo.org/wp-content/uploads/2014/06/2010PortPlan.pdf">http://portoftoledo.org/wp-content/uploads/2014/06/2010PortPlan.pdf</a> .
<b>24</b>	Port of Coos Bay, <i>Economic Development Tools</i> , <a href="http://www.portofcoosbay.com/econdevtools/">http://www.portofcoosbay.com/econdevtools/</a> (last visited Jul. 14, 2017).
<b>25</b>	Port of Coos Bay, <i>Port Owned Properties</i> , <a href="http://www.portofcoosbay.com/port-properties/">http://www.portofcoosbay.com/port-properties/</a> (last visited Jul. 14, 2017).
<b>26</b>	Tony Lystra, <i>NorthernStar Halts Work on Bradwood Landing LNG Port</i> , THE DAILY NEWS, May 4, 2010, <a href="http://tdn.com/news/local/northernstar-halts-work-on-bradwood-landing-lng-port/article_e185179a-57db-11df-ae29-001cc4c03286.html">http://tdn.com/news/local/northernstar-halts-work-on-bradwood-landing-lng-port/article_e185179a-57db-11df-ae29-001cc4c03286.html</a> .
<b>27</b>	OR DEP'T. OF STATE LANDS, AQUATIC RESOURCE MANAGEMENT PROGRAM REPORT: FISCAL YEARS 2015 AND 2016, <i>available at</i> <a href="http://www.oregon.gov/dsl/WW/Documents/2015_16Report.pdf">http://www.oregon.gov/dsl/WW/Documents/2015_16Report.pdf</a> .
<b>28</b>	U.S. Fish & Wildlife Serv., <i>Nat'l. Wetlands Inventory: Port Westward Wetlands</i> , <a href="https://www.fws.gov/wetlands/data/mapper.html">https://www.fws.gov/wetlands/data/mapper.html</a> (generated by the wetlands mapper after zooming in near Crims Island on the Columbia River and clicking the print icon and then clicking the green "print" icon and then clicking the label for the document under the "print jobs" heading)
<b>29</b>	U.S. Fish & Wildlife Serv., <i>Nat'l. Wetlands Inventory: Port Westward Wetlands</i> , <a href="https://www.fws.gov/wetlands/data/mapper.html">https://www.fws.gov/wetlands/data/mapper.html</a> (generated by the wetlands mapper after zooming in near Crims Island on the Columbia River and clicking the print icon and then clicking the green "print" icon and then clicking the label for the document under the "print jobs" heading) (zoomed in further than Exhibit 28)
<b>30</b>	PORT OF PORTLAND, MITIGATION MANAGEMENT PROGRAM: SITE STATUS REPORT 2013-2014, 1-119 (October 2015), <i>available at</i> <a href="https://www.portofportland.com/PDFPOP/Miti_Mngt_StatusReport_2014.pdf">https://www.portofportland.com/PDFPOP/Miti_Mngt_StatusReport_2014.pdf</a> .
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