



Oregon

Theodore R. Kubongoski, Governor

Department of Land Conservation and Development

635 Capitol Street, Suite 150

Salem, OR 97301-2540

(503) 373-0050

Fax (503) 378-5518

www.lcd.state.or.us



NOTICE OF ADOPTED AMENDMENT

10/13/2009

TO: Subscribers to Notice of Adopted Plan
or Land Use Regulation Amendments

FROM: Plan Amendment Program Specialist

SUBJECT: Clatsop County Plan Amendment
DLCD File Number 001-07R (REMAND)

The Department of Land Conservation and Development (DLCD) received the attached notice of adoption. Due to the size of amended material submitted, a complete copy has not been attached. A Copy of the adopted plan amendment is available for review at the DLCD office in Salem and the local government office.

Appeal Procedures*

DLCD ACKNOWLEDGMENT or DEADLINE TO APPEAL: Monday, October 26, 2009

This amendment was submitted to DLCD for review prior to adoption. Pursuant to ORS 197.830(2)(b) only persons who participated in the local government proceedings leading to adoption of the amendment are eligible to appeal this decision to the Land Use Board of Appeals (LUBA).

If you wish to appeal, you must file a notice of intent to appeal with the Land Use Board of Appeals (LUBA) no later than 21 days from the date the decision was mailed to you by the local government. If you have questions, check with the local government to determine the appeal deadline. Copies of the notice of intent to appeal must be served upon the local government and others who received written notice of the final decision from the local government. The notice of intent to appeal must be served and filed in the form and manner prescribed by LUBA, (OAR Chapter 661, Division 10). Please call LUBA at 503-373-1265, if you have questions about appeal procedures.

***NOTE:** THE APPEAL DEADLINE IS BASED UPON THE DATE THE DECISION WAS MAILED BY LOCAL GOVERNMENT. A DECISION MAY HAVE BEEN MAILED TO YOU ON A DIFFERENT DATE THAT IT WAS MAILED TO DLCD. AS A RESULT, YOUR APPEAL DEADLINE MAY BE EARLIER THAN THE ABOVE DATE SPECIFIED.

Cc: Ed Wegner, Clatsop County (Will Caplinger, Clatsop County)
Gloria Gardiner, DLCD Urban Planning Specialist
DLCD: Jon Jinings, Matt Spangler, Paul Klarin, Dale Blanton

<paa> YA/

FORM 2

DLCD

Notice of Adoption

THIS FORM MUST BE MAILED TO DLCD
WITHIN 5 WORKING DAYS AFTER THE FINAL DECISION
PER ORS 197.610, OAR CHAPTER 660 - DIVISION 18

<input type="checkbox"/> In person	<input type="checkbox"/> electronic	<input type="checkbox"/> mailed
DEPT OF		
OCT 06 2009		
LAND CONSERVATION AND DEVELOPMENT		

Jurisdiction: **Clatsop County**

Local file number: Ordinance #09-04

Date of Adoption: **August 12, 2009**

Date Mailed: **October 5, 2009**

Was a Notice of Proposed Amendment (Form 1) mailed to DLCD? **No** Date:

Comprehensive Plan Text Amendment

Comprehensive Plan Map Amendment

Land Use Regulation Amendment

Zoning Map Amendment

New Land Use Regulation

Other:

Summarize the adopted amendment. Do not use technical terms. Do not write "See Attached".

Ordinance No. 09-04, dated August 12, 2009, was described in a Notice of Final Decision, provided to the DLCD Regional Office in Newport within 5 working days of the decision, as "an Ordinance Supplementing the Findings in Support of Ordinance 08-05 and Readopting Certain Provisions of Ordinance 08-05; LUBA Case No. 2008-052." As a response to a LUBA remand, the County did not provide a Notice of Proposed Amendment (Form 1). However, the county provided Notice of Proposed Amendment prior to the first evidentiary hearing on Ordinance 08-05.

The Board action was in response to two issues remanded by LUBA in their review of the case referenced above: 1) scale of development; i.e., consistency with the "small-to-moderate" language in the Comprehensive Plan; and 2) meaning of the word "protect" in relation to mitigation of impacts to traditional fishing areas.

Does the Adoption differ from proposal? **Yes**, Please explain below:

The Adoption concerned the LUBA remand issues. The proposal involving amendments to the Comprehensive Plan Text and Map and Zoning Map were previously listed and/or described under submittals related to Ordinance 08-05.

Plan Map Changed from:

to:

Zone Map Changed from:

to:

Location:

Acres Involved:

Specify Density: Previous:

New:

Applicable statewide planning goals:

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Was an Exception Adopted? YES NO

Did DLCD receive a Notice of Proposed Amendment...

45-days prior to first evidentiary hearing?

Yes No

If no, do the statewide planning goals apply?

Yes No

If no, did Emergency Circumstances require immediate adoption?

Yes No

DLCD file No. _____

Please list all affected State or Federal Agencies, Local Governments or Special Districts:

OR Dept. of Environmental Quality; OR Water Resources Dept.; OR Dept. of State Lands; OR Dept. of Fish & Wildlife; OR Dept. of Transportation; OR Dept. of Energy; OR Dept. of Land Conservation & Development; Federal Energy Regulatory Commission; National Marine Fisheries Service

Local Contact: **Will Caplinger**

Phone: (503) 325-8611 Extension: 1705

Address: **800 Exchange Street, Ste 100**

Fax Number: 503-338-3666

City: **Astoria**

Zip: **97103**

E-mail Address: **wcaplinger@co.clatsop.or.us**

ADOPTION SUBMITTAL REQUIREMENTS

This form **must be mailed** to DLCD **within 5 working days after the final decision**
per ORS 197.610, OAR Chapter 660 - Division 18.

1. Send this Form and TWO Complete Copies (documents and maps) of the Adopted Amendment to:

**ATTENTION: PLAN AMENDMENT SPECIALIST
DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
635 CAPITOL STREET NE, SUITE 150
SALEM, OREGON 97301-2540**

2. Electronic Submittals: At least **one** hard copy must be sent by mail or in person, or by emailing **larry.french@state.or.us**.
3. Please Note: Adopted materials must be sent to DLCD not later than **FIVE (5) working days** following the date of the final decision on the amendment.
4. Submittal of this Notice of Adoption must include the text of the amendment plus adopted findings and supplementary information.
5. The deadline to appeal will not be extended if you submit this notice of adoption within five working days of the final decision. Appeals to LUBA may be filed within **twenty-one (21) days** of the date, the Notice of Adoption is sent to DLCD.
6. In addition to sending the Notice of Adoption to DLCD, you must notify persons who participated in the local hearing and requested notice of the final decision.
7. **Need More Copies?** You can now access these forms online at **<http://www.lcd.state.or.us/>**. Please print on **8-1/2x11 green paper only**. You may also call the DLCD Office at (503) 373-0050; or Fax your request to: (503) 378-5518; or Email your request to **larry.french@state.or.us** - **Attention: Plan Amendment Specialist**.

RECORDED

AUG 13 2009

**BEFORE THE BOARD OF COMMISSIONERS
FOR CLATSOP COUNTY, OREGON**

Doc # 2009080002

AN ORDINANCE SUPPLEMENTING THE
FINDINGS IN SUPPORT OF ORD 08-05 AND
READOPTING CERTAIN PROVISIONS OF
ORD 08-05

ORDINANCE NO. 09-04

WHEREAS, on December 12, 2006, Bradwood Landing LLC filed permit applications to develop a liquefied natural gas terminal and associated facilities, at the property described in Attachment 3 to Exhibit A of Ordinance 08-05 and the related Resolution and Order; and

WHEREAS, NorthernStar Energy LLC and Bradwood Landing LLC later submitted applications to permit a natural gas pipeline and terminal construction worker park and ride facility; and

WHEREAS, the applications were consolidated for the purpose of County review (Bradwood and NorthernStar applications together referred to herein as the "Applications"); and

WHEREAS, the Planning Commission held public hearings on the Applications on July 10 and July 17, 2007 and following public deliberations on August 29, 2007 recommended approval of the Applications subject to conditions of approval and adopted findings in support of the recommendation on September 28, 2007; and

WHEREAS, the Board of Commissioners held public hearings on the Applications on October 22, 2007 and November 19, 2007, publicly deliberated on December 13, 2007 and made tentative decisions to approve the applications subject to adoption of findings. Such Findings

were adopted and the Board of Commissioners decision of approval was final on March 20, 2008; and

WHEREAS, the approval was appealed to the Land Use Board of Appeals (LUBA) in the matter of *Columbia Riverkeeper, et al v. Clatsop County* (LUBA No. 2008-052); and

WHEREAS, on January 27, 2008, LUBA issued its decision in LUBA No. 2008-052. LUBA remanding the decision approving the Applications to the County to address two Comprehensive Plan (“Plan or CCP”) policies, as they related to two assignments of error, and more particularly stating:

- (1) “The county does not explain why it is permissible under the explicit terms of LWDUO 1.035 to apply the law dictionary definition instead of or in addition to the definition from the statewide planning goals. Not only is the statewide planning goal definition obviously more germane to the meaning of CCP Policy 20.2(1) and CCP Policy 20.8, but LWDUO explicitly requires the county to apply that definition before turning to a law dictionary definition. We conclude that remand is necessary for the county to apply the statewide planning goal definition of ‘protect’.” LUBA 2008-052 at 34.
- (2) “Given that the county erred in its primary conclusion that the scale restriction is a mere restatement of the fill limitation, and because the county erred in limiting the scope of ‘development activities’ to the upland acres covered by the LNG facility itself, we conclude that remand is necessary for the county (sic) re-evaluate whether the proposed development activities, considered as a whole, comply with the ‘small or moderate’ scale limitation.” LUBA 2008-052 Record at 48;

(the “Remand Issues”)

WHEREAS, Columbia Riverkeepers (CRK) and Columbia Intertribal Fish Commission (CRITFC) (the “Appellants”) appealed the LUBA decision to the Court of Appeals but the

appeal was summarily dismissed. The Appellants sought reconsideration of the summary dismissal of the appeal, which was denied and the Appellants did not seek review by the Oregon Supreme Court. A final appellate judgment and LUBA Order were issued with the Applications being remanded back to the County to address the Remand Issues as set forth above; and

WHEREAS, following issuance of LUBA's Final Order, the Applicants submitted written requests to the County asking that it act upon the remand; and

WHEREAS, on June 24, 2009, the Board agreed to consider the Applications on the remand limited to consideration of the evidence in the record and only as to the Remand Issues; and

WHEREAS, a hearing was held on July 8, 2009 to hear argument on the Remand Issues and consider supplemental findings and the Board reached a tentative decision on July 16, 2009, subject to review and approval of revised findings on July 22, 2009; and

WHEREAS, all notices to interested property owners and interested parties have been provided pursuant to law; now therefore,

THE BOARD OF COMMISSIONERS OF CLATSOP COUNTY ORDAINS AS FOLLOWS:

SECTION 1. The Board of Commissioners hereby adopts the supplemental findings set forth in Attachment 1 to this ordinance, attached hereto and incorporated herein, to modify and supplement the findings in support of Ord. 08-05.


SECTION 2. The Board of Commissioners readopts sections 1, 2, 3, 4 and 7 of Ord. 08-05. The portion of the property described above and shown in Attachment 4 of Exhibit A of Ord 08-05 as Area 1 (.79 acres) Area 2 (.39 acres) and Area 3 (4.17 acres) is hereby rezoned from AN (Aquatic Natural) to MI (Marine Industrial) and the Comprehensive Plan designation is changed

from Natural to Development. The portion of the property described above and shown in Attachment 4 of Exhibit A to Ord. 08-05 as Area 5 (46.4 acres) is hereby rezoned from AC2 (Aquatic Conservation 2) to AD (Aquatic Development). The Comprehensive Plan designation is changed from Conservation- Other Resources to Development and the request for a conditional use permit to allow the proposed dredging in the ADC2 zone is denied. The amendment to the Comprehensive Plan provided in Attachment 6 to Exhibit A of Ord 08-05 is adopted and the Board concludes that goal exceptions requested are not required. Language related to scale of development as small to medium is not deleted from the Comprehensive Plan.

SECTION 3. In support of this ordinance, the Board readopts the March 5, 2008 Findings of Fact and Conclusions of Law as indicated in Exhibit A of Ord 08-05 and as supplemented and modified by the findings in Attachment 1, hereto.

Approved this 12TH day of August, 2009.

THE BOARD OF COUNTY COMMISSIONERS
FOR CLATSOP COUNTY, OREGON

By  _____, Chair
JEFF HAZEN

By  _____
Recording Secretary

RECORDED

AUG 13 2009

BEFORE THE BOARD OF COUNTY COMMISSIONERS

Doc # 2009080001

FOR CLATSOP COUNTY, OREGON

In the matter of the Bradwood Landing LLC
and NorthernStar Energy LLC request for
Action on the Remand of LUBA No. 2008-
052

RESOLUTION AND ORDER

A. On December 12, 2006, Bradwood Landing LLC filed permit applications to develop a liquefied natural gas terminal and associated facilities, at the property described in Attachment 3 to Exhibit A of Ordinance 08-05 and the related Resolution and Order.

B. NorthernStar Energy LLC and Bradwood Landing LLC later submitted applications to permit a natural gas pipeline and terminal construction worker park and ride facility. (Bradwood and NorthernStar applications together referred to herein as the "Applications")

C. These Applications were consolidated for the purpose of County review. The Planning Commission held public hearings on the Applications on July 10 and July 17, 2007 and following public deliberations on August 29, 2007, recommended approval of the Applications subject to conditions of approval, and adopted findings in support of the recommendations on September 28, 2007.

D. The Board of Commissioners held public hearings on the Applications on October 22, 2007 and November 19, 2007, publicly deliberated on December 13, 2007 and made tentative decisions to approve the Applications, subject to adoption of findings. Such findings were adopted and the Board of Commissioners' decision of approval was final on March 20, 2008.

E. The approval was appealed to the Land Use Board of Appeals (LUBA) in the matter of *Columbia Riverkeepers, et al v. Clatsop County* (LUBA 2008-052).

F. On January 27, 2008, LUBA issued its decision in LUBA No. 2008-052. remanding the decision approving the Applications to the County to address two Comprehensive Plan ("Plan or CCP") policies, as they related to two assignments of error, stating:

- (1) "The county does not explain why it is permissible under the explicit terms of LWDUO 1.035 to apply the law dictionary definition instead of or in addition to the definition from the statewide planning goals. Not only is the statewide planning goal definition obviously more germane to the meaning of CCP Policy 20.2(1) and CCP Policy 20.8, but LWDUO explicitly requires the county to apply that definition before turning to a law dictionary definition. We conclude that remand is necessary for the county to apply the statewide planning goal definition of 'protect'." LUBA 2008-052 at 34.
- (2) "Given that the county erred in its primary conclusion that the scale restriction is a mere restatement of the fill limitation, and because the county erred in limiting the scope of 'development activities' to the upland acres covered by the LNG facility itself, we conclude that remand is necessary for the county (sic) re-evaluate whether the proposed development activities, considered as a whole, comply with the 'small or moderate' scale limitation." LUBA 2008-052 Record at 48.

(the "Remand Issues")

G. Columbia Riverkeepers (CRK) and Columbia Intertribal Fish Commission (CRITFC) (the "Appellants") appealed the LUBA decision to the Court of Appeals but failed to comply with state law concerning the timely filing of appeals and therefore the appeal was summarily dismissed. The Appellants sought reconsideration of the summary dismissal of the appeal, which was denied. A final appellate judgment and LUBA Order were issued with the Applications being remanded back to the County to address the Remand Issues as set forth above.

H. Following issuance of LUBA's Final Order, applicants Bradwood Landing LLC and NorthernStar submitted written requests to the County asking that it act upon the remand.

I. On June 24, 2009, the Board agreed to consider the Applications on the remand limited to consideration of the evidence in the record and only as to the Remand Issues

J. A hearing was held on July 8, 2008, to hear argument on the Remand Issues and consider supplemental findings; the Board reached a tentative decision on July 16, 2009, subject to review and approval of revised findings on July 22, 2009.

NOW THEREFORE, the Board of Commissioners hereby reaffirms its adoption of Ordinance 08-52 and related Resolution and Order

IT IS HEREBY ORDERED:

1. The County supplements its findings in support of Ord 08-05 and related Resolution and Order by adoption of the Supplemental Findings set forth in Exhibit 1 ("Supplemental Findings") to this resolution attached hereto and incorporated herein.

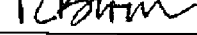
2. The County reaffirms the approvals described in Exhibit A of Ord 08-05 and related Resolution and Order, subject to conditions of approval described therein for the following activities:

- a. Hunt Creek Bridge Replacement
- b. Concrete Batch Plants
- c. Dredging
- d. Dredged Material Disposal
- e. Electrical Power Line
- f. Construction Worker Park and Ride Lot
- g. In Water Structures

- h. Lay Down (Storage and Staging) Areas
 - i. Two LNG Storage Tanks and the Gasification Plant
 - j. Railroad Relocation
 - k. Road Improvements to Clifton and Bradwood Roads
 - l. Pipeline Segment in MI Zone
 - m. Pipeline Segment in F80 Zone
 - n. Pipeline Segment in HI Zone
 - o. Pipeline Segment in LW Zone
 - p. Pipeline Segment in AD Zone
 - q. Pipeline Segment in EFU Zone
 - r. Land Use Compatibility Statements
3. The effective date of this Resolution and Order is July 22, 2009.

THE BOARD OF COUNTY COMMISSIONERS
FOR CLATSOP COUNTY, OREGON

By  _____, Chair

By  _____
Recording Secretary

**Clatsop County Supplemental Findings
for LUBA No. 2008-052**

August 2009

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I. SUMMARY

A. Identification of Issues

On January 27, 2008, the Land Use Board of Appeals issued its decision in LUBA No. 2008-052, *Columbia Riverkeeper, et al. v. Clatsop County*. As stated in the decision at page 3, petitioners appealed a county decision to allow a liquefied natural gas terminal, natural gas pipeline and related facilities. LUBA remanded the decision to the County to address two Comprehensive Plan (“Plan or CCP”) policies, as they related to two assignments of error, stating:

- (1) “The county does not explain why it is permissible under the explicit terms of LWDUO 1.035 to apply the law dictionary definition instead of or in addition to the definition from the statewide planning goals. Not only is the statewide planning goal definition obviously more germane to the meaning of CCP Policy 20.2(1) and CCP Policy 20.8, but LWDUO explicitly requires the county to apply that definition before turning to a law dictionary definition. We conclude that remand is necessary for the county to apply the statewide planning goal definition of ‘protect’.” LUBA 2008-052 at 34.
- (2) “Given that the county erred in its primary conclusion that the scale restriction is a mere restatement of the fill limitation, and because the county erred in limiting the scope of ‘development activities’ to the upland acres covered by the LNG facility itself, we conclude that remand is necessary for the county (sic) re-evaluate whether the proposed development activities, considered as a whole, comply with the ‘small or moderate’ scale limitation.” LUBA 2008-052 Record at 48.

B. Identification of Actions Taken

In order to respond to the remand, the County supplements its findings in Ord 08-05 as follows based on evidence contained in the record:

- (1) Explaining how the project complies with policies requiring the protection of traditional fishing areas when disruptive inwater activities occur given the Land Conservation and Development Commission (LCDC) definition of “protect”;
- (2) Explaining how the project complies with the Comprehensive Plan policy requiring that threatened and endangered species habitat be protected from incompatible development given the LCDC definition of “protect”;

- (3) Explaining how the scale of the project is “small to medium/moderate” considering, along with the upland area occupied by the terminal, the construction of power lines, gas pipelines and pilings and other structures within the County and necessary to offload LNG ships as well as the development activities as a whole; and
- (4) Directing staff to execute Land Use Compatibility Statements for the terminal and associated facilities stating that the Project is consistent with the Clatsop County land use regulations as reflected in the effective provisions of Ord 08-05 as supported by the original and these supplemental findings.

C. County Process on Remand

1. Testimony Received

We determined at our June 24, 2009 meeting that legal argument would be heard from those who participated in the proceedings below and those with standing under the applicable land use regulations. Over 20,000 pages populate the existing record generated over nine months of hearings and the record will not be reopened for submission of new evidence. Documents submitted as evidence after the December 3, 2007 closure of the record were rejected.

Everyone who appeared at the July 8 hearing either participated below or described their standing to the Board and was allowed to testify at the July 8 hearing. People established standing in a variety of ways, including residence in the county and recreational use of the Columbia River.

We heard assertions at the July 8, 2009 hearing that the record should be reopened based largely on assertions that facts have changed.¹ We previously found that state and federal mitigation requirements meet or exceed those of the County and that it is likely and reasonably certain that compliance is feasible. LUBA 2008-52 Record at 160. We find that the federal and state approval process as well as the mitigation, erosion control and shoreline monitoring plans are the mechanism through which details of screening, buffering, etc. will be refined. As we stated in the original findings

“During the County process, Bradwood Landing submitted to the County copies of mitigation plans marked ‘draft’ that Bradwood Landing had submitted to federal regulators. We understand that the August 2007 mitigation plan submitted to the County is in the process of being reviewed by the following governmental agencies: NMFS, USFWS, Corps, EPA, DLCD, ODFW, DEQ,

¹ We also note that CRK did not object during the June 24, 2009 hearing when procedures, including the evidence to be considered, were determined. Thus, the Board also finds the objection untimely.

DSL, ODOE with potential review also by OWRD, ODF and in WA: Cowlitz County, Ecology, WDFW and WDNR.”

LUBA 2008-52 Record at 160.

Goal 16 OAR 661-015-0010(1) Implementation(3) states:

“State and federal agencies shall review, revise and implement their plans, actions and management authorities to maintain water quality and minimize man-induced sedimentation in estuaries. Local governments shall recognize these authorities rather than developing new or duplicatory management techniques or controls.”

Existing programs to be utilized include the Forest Practices Act, Non-Point Source Discharge Water Quality Program of DEQ, DSL Fill and Removal Program. *Id.*

We specifically found that the future mitigation plan “may incorporate the feedback Bradwood Landing received from federal regulators since August 2007.” LUBA 2008-52 Record at 160. We note that the conditions of approval require submission of all required state and federal permits and County approval of a mitigation plan, shoreline monitoring plan and erosion control plan, and that if in fact changes are proposed in the details of these activities, they are properly addressed in these future public hearings. LUBA 2008-52 Record at 29-30. We also note that shoreline monitoring plan must include a mechanism to annually report conditions of the Clifton Channel shoreline with respect to new hydraulic conditions created by the dredging project. LUBA 2008-52 Record at 000029. Mitigation plans include monitoring requirements as well. S.4.208(7).

Columbia Riverkeeper (CRK) has asserted a right to respond to the final form of the findings. We have reviewed the material submitted and responded. Allowing further responses would create a never ending cycle of revisions. No new evidence has been considered and further submittals will not be considered.

2. Material Considered

As noted above, we determined that our action on the remand would be based on the existing record. The record in this case closed to new evidence on December 3, 2007. We stated in our decision on June 24, 2009 that written legal argument would be accepted until noon on July 6, 2009, and that the only written materials that would be considered on July 8, 2009 were written submittals received by noon on July 6, 2009.

In cases where part of the testimony was admissible and part was not, staff has endeavored to redact the material. We accept these legal arguments with proper redactions. CRK and Mr. Auerbach have submitted letter responses to the supplemental findings. The submittals state that where they reference newer versions of documents than are in the record, the references “shall be understood to refer to the same or similar facts in the accepted version.” They also assert that additional information and references submitted into the record are provided only to respond to the County’s new information, evidence or theories presented in the

proposed Supplemental Findings. Pg. 591 of July 6, 2009 Submittals (hereinafter "July 09 Documents"). As stated in our determination on June 24, 2009, we will not consider evidence not in the record. Further, CRK and Mr. Auerbach have identified no new evidence in the proposed supplemental findings to which they would be entitled to respond.

We also recognize that during the public hearing reference was made to material outside the record and visuals outside the record were displayed. We do not consider any of this information in making our decision as it falls outside the rules this Board established for the remand process. We recognize that the initial hearing in this matter was extensive and that the conditions of approval specifically provide for applicants to submit additional materials for approval by the Board through a public process. If there are objections to the mitigation plan, erosion control plan, shoreline monitoring plan, or other required plans or their adequacy, those issues are properly raised at the time those plans are considered. Development permits will only be issued after the applicant submits to the Planning Department copies of all state and federal permits required for this development. Timely received material is accepted as argument only and evidence contained therein is rejected. Oral testimony, to the extent it contained new evidence, will not be considered in making the decisions. To the extent objections have been made that are inconsistent with this decision, those objections are denied.

3. Disclosure of Ex Parte Contacts

Ex parte contacts were revealed and discussed as set forth in LWDUO 2.160. Board members affirmed that they are not biased and have not prejudged this matter.

4. Staff Report

Oral and written staff reports were made by Planning Director Ed Wegner and Jeff Bennett, County Counsel. The staff report includes the statement that no independent determination had been made that the proposed findings are legally correct. Legal staff advised that the supplemental findings are reasonable and the findings support the determination made.

II. LEGAL ANALYSIS

A. Background

1. Goals 16 and 17 and Application of the Traditional Fishing Areas Policy.

Goal 16 of the Statewide Planning Goals is:

“to recognize and protect the unique environmental, economic, and social values of each estuary and associated wetlands; and to protect, maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic, and social values, diversity and benefits of Oregon’s estuaries.”
OAR 660-010-0000.

Goal 17 of the Statewide Planning Goals is:

“to conserve, protect, where appropriate, develop and where appropriate restore the resources and benefits of all coastal shorelands, recognizing their value for protection and maintenance of water quality, fish and wildlife habitat, water-dependent uses, economic resources and recreation and aesthetics. The management of these shoreland areas shall be compatible with the characteristics of the adjacent coastal waters; and

“to reduce the hazard to human life and property, and the adverse effects upon water quality and fish and wildlife habitat, resulting from the use and enjoyment of Oregon’s coastal shorelands.”
OAR 660-010-0000.

The Goal 16/17 element of the Comprehensive Plan implements Statewide Goals 16 and 17 at the local level through its stated policies. The Comprehensive Plan Goals 16/17 Element includes Policy 20.2 Agriculture and Fisheries, Policy No. 1, which provides:

“Traditional fishing areas shall be protected when dredging, filling, pile driving or other potentially disruptive inwater activities occur.”

“Protect” is not defined in the Plan or other County regulations. Clatsop County’s Land Water and Development and Use Ordinance (LWDUO) Section 1.035 does, however, address review of unlisted words and phrases. LWDUO 1.035 states in part:

“The definition of any word or phrase not listed in this chapter which is in question when administering this Ordinance shall be defined from one of the following sources. The sources shall be consulted in the order listed.

- “(1) Clatsop County Comprehensive Plan.
- “(2) Any other Clatsop County resolution, Ordinance, codes or regulation.
- “(3) Any statute or regulation of the State of Oregon (including the Uniform Building Code and LCDC Goals and Guidelines).
- “(4) Legal definition from case law or law dictionary.”

In its decision in LUBA Case No. 2008-052, LUBA held that when interpreting policies in the comprehensive plan the County improperly considered a law dictionary definition of “protect” in addition to the Land Conservation and Development Commission (LCDC) definition, and must rely on the LCDC Goals and Guidelines Definitions in the absence of a definition of “protect” in the LWDUO. “Protect” is defined in the Statewide Planning Goals and Guidelines as “save or shield from loss, destruction or injury or for future intended use.”
OAR 660-010-0000.

“Conserve” is defined in the LCDC Goals and Guidelines as “to manage in a manner which avoids wasteful or destructive uses and provides for future availability.” OAR 660-010-0000. Because “conserve” is defined as to avoid destructive uses and Goal 17 calls for both protection and conservation of shorelands, we find that the terms “conserve” and “protect” have different meanings. Conserve means to avoid destructive uses, and protect is broader and encompasses shielding from destructive uses. Protect, as defined by LCDC, does not require complete avoidance of all loss.

2. Application of the LCDC Definition of “Protect” in the Clatsop County Planning Regulations.

a. Role of Acknowledged Code Provisions in Providing Protections.

The acknowledged Clatsop County Comprehensive Plan and land use regulations implement the Statewide Planning Goals, including Goals 16 and 17. LUBA 2008-052 Record at 015091. Because LCDC acknowledged the Clatsop County Comprehensive Plan and zoning ordinance and standards document and found them to be consistent with Goals 16 and 17, we interpret the use of these terms so that the use of the word “protect” in these documents is consistent with the LCDC definition.

As explained below, we conclude that the acknowledged Comprehensive Plan uses the term “protect” in a manner that, consistent with the state definition, includes shielding mechanisms without requiring proof that no loss, destruction or injury will occur.

Commissioner Rohne was the lone commissioner dissenting from this approval. He expressed concern that the definition of protect as used in these findings might disregard the fact that the definition also refers to saving from loss, destruction or injury or for future intended use. We recognize, however, that the definition says to save or shield, not save and shield. Further, actions which save resources are discussed in these findings as well as actions which shield resources. The Comprehensive Plan states that the timing of dredging and dredged material disposal will be coordinated with state and federal resource agencies, local governments and private interests **to protect** aquatic and shoreland resources. Comp Plan Goal 16 Policy 24, N3. The plan states that coordination of timing provides protection. Policy 20.19 of the Goal 16/17 element of the Plan identifies policies that **protect** and enhance water quality to include control of non-point source water pollutants by state water quality programs; the Forest Practices Act; administrative rules; no untreated waste discharges into tributary streams, enclosed bays or sloughs; containment and clean up equipment; and appropriate waste disposal receptacles. Again, protection is provided through shielding mechanisms, whether in the form of infrastructure or regulation.

The acknowledged zoning ordinance also uses “protect” in a manner consistent with the state definition of protect. “The purpose of the MI zone is to manage Columbia River Estuary shore lands in urban and urbanizable areas and shore lands in rural areas especially suited for water dependent development and to reserve these shore lands for water-dependent industrial, commercial, and high-intensity recreational use.” LWDUO Section 3.622; LWDUO Section 3.634(10). Development standards governing development in the Marine Industrial (MI) Zone provide fencing will be allowed where necessary to protect property. Similarly, the

County's Beach and Dune Overlay zone protects identified recreational, wildlife habitat and other resources and provides that fencing is permitted to protect vegetation. LWDUO 4.056(4)(C)(5). Fence is not defined in the code or the LCDC definitions and a state law definition was not located but fence is defined in *Ballentine's Law Dictionary*, 3d ed., p. 465, as:

“an enclosure about a field or other space, or about any object, especially enclosing a structure of wood, iron, or other material, intended to prevent intrusion from without or straying from within; a visible or tangible obstruction which may be a hedge, ditch, wall, obstacle interposed between two portions of land so as to part off and shut in land and set it off as private property or for the purpose of using it separately from adjacent land of the same owner.”
(Emphasis added.)

Actions which prevent intrusion provide protection.

Finally, the acknowledged County Standards Document establishes, in general terms, how development will occur in the County and is consistent with defining “protect” as including shielding from loss or destruction or injury. Similar to the Comprehensive Plan and the LWDUO, the Standards Document calls for design and construction to be such that fish and wildlife and associated environmental values are protected. The Erosion Control standards are intended to protect the water quality of surface water and improve fish habitat. Storm sewer inlets are protected by sediment traps and filter barriers. S2.504(b)(5). Fish and wildlife resources are protected by performing instream work during the Oregon Department of Fish and Wildlife (“ODFW”) inwater work window. S2.504(b)(5)(b).

The use of “protect” in the section of the Columbia River Estuary Shoreland and Aquatic Use and Activity Standards that includes policies applicable to dredging and dredging material disposal is consistent with the state definition of “protect.” The timing of dredging and dredged material disposal operations shall be coordinated with state and federal resource agencies, local governments and private interests to protect estuarine aquatic and shoreland resources. S4.232(4). Dredging operations shall be consistent with state and federal resource agency conditions, the requirements of local governments and concerns of private interests, to ensure that project timing and dredging conditions protect estuarine resources. S4.232(F). Surface runoff from disposal sites is controlled to protect water quality. S4.232(20). Thus, we conclude that the LCDC definition of protect is met by compliance with acknowledged county zoning and standard regulations stating that implementation of particular measures accomplishes protection and by construction of the development and imposition of conditions that will either save or shield the protected resource from the potential harm identified in the policy.

b. Role of Mitigation in Providing Protection

In its findings, LUBA stated that “the county apparently understands [protect] to mean using measures that are intended to ‘minimize’ impacts, even if those measures fail to shield the resource from loss and significant adverse impacts still occur. That view may be consistent with the law dictionary definition the County relies upon, but it is not at all clear to us that it is consistent with the statewide planning goal definition.” LUBA No. 2008-052 Record at 33-34.

Commissioner Rohne expressed concern that dredging in the estuary, even if it was outside the intertidal area, did not meet the Goal 16 requirement for protection of the estuary.

Goal 16 states the objective is in part to protect the values of each estuary and associated wetlands. Goal 17 is, in part, to protect coastal shorelands. We conclude that this means that the values of each estuary and associated wetlands and coastal shorelands must be protected, not that estuaries and associated wetlands and coastal shorelands may never be disturbed.

Bradwood Landing has designed the dredge footprint area in consultation with numerous agencies to maximize the efficient use of the current basin, minimize the amount of dredging and reduce impacts to fisheries, thereby reducing the area impacted and protecting the habitat as a whole. LUBA 2008-052 Record at 020896.

“Protect” as defined by LCDC and as used by the County and acknowledged by LCDC in the County planning documents does not require that absolutely no disturbance occurs. Protection is provided by avoiding those areas to the extent possible and making development sensitive to the environment where it does in fact occur, so that estuarine and coastal shoreland values are maintained.

A land use exception is a decision by the regulating authority to exclude certain property from the requirements of one or more applicable statewide planning goals in accordance with a state established review process. OAR 660-004-0000(2). Thus, if Clatsop County wished to authorize action contrary to Goals 16 or 17, the county would have to adopt an exception.

The Department of Land Conservation and Development (DLCD) formally commented on this Project yet did not advise us that, in its opinion, the project violated Goal 16/17. In fact, DLCD advised us in its opinion that unless the County determined that the integrity of the estuary would be compromised, the zoning of the turning basin could be changed from AC2 to AD to allow dredging without an exception to Goal 16 or 17. LUBA Record at 008753-55. Dale Blanton, State-Federal Relations Coordinator for DLCD, wrote:

“An exception is not required unless a specific goal requirement prohibits a use or activity or otherwise requires the application of a different designation or zone. **Application of a Development management unit and an AD zone to an estuarine area that findings demonstrate is required to support water dependent development on the adjacent shoreland area implements requirements of Statewide Planning Goal 16 (Estuarine Resources) and Goal 17 (Coastal Shorelands). An exception is not required to apply a development management unit for a required navigational improvement, unless the proposed dredging will adversely affect the integrity of the estuarine ecosystem, requiring the application of a natural or conservation management unit.**” LUBA 2008-052 Record at 8754. (Emphasis added).

The analysis provided by DLCD supports the County conclusion that Goal 16/17 requirement for protection relates to the integrity of the estuarine ecosystem. In its letter to Clatsop County making recommendations as to this very application, DLCD wrote:

... Goal 16 requires plans to protect unique environmental, economic and social values of each estuary. The goal also requires plans to “protect, maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic, and social values, diversify and benefits of Oregon’s estuaries.” (emphasis added). Goal 16 prioritizes uses and management of estuaries. The first priority is uses which maintain the integrity of the estuarine ecosystem. The second priority is water-dependent uses requiring estuarine location, as consistent with the overall Oregon Estuary Classification. **We read these provisions to require the designation of appropriate Development management units that support water dependent shoreland uses unless the development authorized in the Development management unit does not maintain the estuarine ecosystem.** The application of these provisions does not require a goal exception unless the Development management unit will not maintain the integrity of the estuarine ecosystem.

Based on Goal 16 priorities, we believe the county should link shoreland uses with required estuarine navigational requirements by applying designations that support water dependent development at appropriate locations. Where findings demonstrate the need for a substantial navigational improvement, such as a turning basin or access area, the plan should apply a Development management unit and require a specific project to demonstrate compliance with the dredge/fill test after completing an impact assessment. Unless there is information that indicates the uses and activities authorities within a Development management unit would adversely affect the integrity of the estuarine ecosystem, an exception is not required to apply a Development management unit. LUBA Record at 8756-8757. (Emphasis added).

The Project is consistent with the goals because the integrity of the ecosystem is maintained. The water dependent industrial use of the Bradwood site is appropriate given its unique characteristics, including

- Location at River Mile 39;
- Within 1,000 feet of the Columbia River channel;
- Self scouring water depths of 30 to 40 feet close to shore;
- Direct rail access;
- Approx. 50 acres of backup lands;
- Single ownership;

- Dredged material disposal and mitigation areas on site;
- Relatively isolated location;
- Existing dock structure;
- Rock source on site for development needs that also has commercial development; and.
- An existing exception for fill of the mill pond and designating a development area close to shore.

That appropriate water dependant uses are allowed within the estuary and coastal shorelands is further supported by the reduced priority given to water related uses which do not degrade or reduce the natural estuarine resources and values. OAR 660-015-0010(1). Avoidance of reduction or degradation is not required for water dependent uses. Since the requested action may be taken consistent with the goals, the protection objectives of Goal 16 and 17 are necessarily met.

Mitigation is defined as any action that to some degree softens the impact of development on wetlands and adequate areas. LWDUO 1.030 provides the mitigation:

“may include all or any of the following actions: (1) avoiding the impact altogether by not taking a certain action or parts of an action; (2) minimizing impacts by limiting the degree or magnitude of an action and its implementation; (3) rectifying the impact by repairing, rehabilitating or restoring the affected environment; (4) reducing or eliminating the impact over time by preservation and maintenance operations and (5) compensating for the impact by creation, restoration, or enhancement of wetlands and aquatic areas to maintain their functional processes, such as natural biological productivity, habitat and species diversity unique features and water quality.”

To the extent mitigation measures prevent substantial adverse impacts to the estuary and shorelands, they are consistent with and provide protection to the estuary as a whole.

The LWDUO states “[u]ses in the MI zone shall maintain the integrity of the estuary and coastal waters.” LWDUO 3.622. This provision supports the conclusion, if the provisions are read in a manner to be consistent, that protection provision occurs by maintaining the integrity of the area as a whole.

The code also recognizes that there are levels of protection and that protection is not an all or nothing proposition. “The purpose of the Mitigation Site Overlay District is to protect an identified mitigation site in the Columbia River Estuary from incompatible and preemptive development uses and activities and implement mitigation and restoration actions in designated areas of the zone.” LWDUO 4.182. There are multiple priority categories and protection levels for mitigation sites in the mitigation site overlay district. LWDUO 4.186.

Uses allowed on sites getting priority 1, levels 1, 2 and 3 protection include uses allowed in the underlying zone that do not preempt the use of the site for mitigation purposes, subject to the underlying zone’s development standards. LWDUO 4.186. Uses allowed on sites getting

priority 1 level 4 protection allow all uses in the underlying zone subject to the underlying zone's development standards.

As we found in our previous findings and discuss below, the integrity of the estuary ecosystem is maintained and the balancing required by Goals 16 and 17 is completed. Mitigation of impacts so as to avoid significant adverse impacts protects the integrity of the estuary as a whole.

B. Protection of Traditional Fishing Areas When Disruptive Inwater Activity Occurs

1. The Project Protects Traditional Fishing Areas When Disruptive Inwater Activities Occur.

The Clifton Channel has been identified as a traditional fishing area. About 125 LNG carriers will call at the terminal each year. LUBA 2008-052 Record at 020717. This area will be protected, that is, saved or shielded from loss, destruction or injury or for future intended use, by maintenance of water quality and limiting industrial activities so that they allow for the continued operation of the traditional fishing area when disruptive inwater activities occur.

The provisions in S4.200, *et seq.* apply to development within the Columbia River Estuary, and its standards "are intended to protect the unique economic, social and environmental values of the Columbia River Estuary." S4.203(2) provides that "[a]ppropriate landscaping, fencing and/or other buffering techniques shall be used to protect the character of adjacent uses." The measures proposed by the applicant (described herein and in Chapter 11 of the Ord 08-05 Findings) and required by the state and federal permitting process provide the requisite protection of traditional fishing areas when disruptive inwater activities occur.

Compliance with the Dredging and Dredged Material Disposal policies, for example, shields the traditional fishing areas from injury when disruptive inwater activities occur. Dredging will be performed to create a safe and sufficient turning basin for ships while minimizing ecological impacts and avoiding significant adverse impacts. The County's acknowledged standards implementing Goals 16 and 17 establish that minimization of the impacts provides requisite protection. S2.504(5)(b) provides that instream work protects fish and wildlife resources when it is conducted during the inwater work window defined by the regulating government agencies. S4.232(4) similarly provides that proper timing of dredging operations protects estuarine resources.

To minimize impacts and protect habitat:

- Dredging will be allowed only during an approved inwater work window (November 1 through February 28 time period) established by the ODFW, the National Marine Fisheries Service and the U.S. Army Corps of Engineers, designed to minimize impacts to aquatic life by allowing dredging only during times when low fish populations are present in the river.

LUBA 2008-052 Record at 020896.

Traditional fishing areas are also protected when disruptive inwater work occurs since they are shielded by the Project's incorporation of additional measures to protect traditional fishing areas, including:

- Minimization of turning basin size;
- Siting of turning basin outside the intertidal area;
- Screening of intakes; and
- Upland disposal of materials.²

LUBA 2008-052 Record at 020863, 005508.

Avoidance of fish entrapment is provided and traditional fishing areas are protected when disruptive inwater activity occurs through the use of fewer, larger vertical piles to minimize the number of piles and allow pile driving within a caisson filled with bubbles to shield fish from impacts. LUBA 2008-052 Record at 20863. This will protect traditional fishing areas when disruptive inwater activity occurs.

Large vertical piles will be used for inwater structures to minimize the number of piles that must be used and to allow vertical pile driving within a caisson filled with bubbles to avoid or minimize acoustic effects on fish and thus on traditional fishing areas. LUBA 2008-052 Record at 0020863. Safety zones will be established around pile driving and other construction activities to protect marine mammals. LUBA 2008-052 Record at 020896. Vibratory drivers, which tend to produce lower noise and vibration levels, will be used to the extent possible. LUBA 2008-052 Record at 019970. Lastly, pile driving may occur between the hours of 7 a.m. and 10 p.m. and dredging may occur 24 hours per day. These hours allow the work to be completed under a compressed schedule, reducing the number of construction days needed for pile driving and dredging. LUBA 2008-052 Record at 017663. These actions will protect traditional fishing areas when disruptive in water activity occurs.

Filling is also conducted so as to protect traditional fishing areas. S4.232(20) provides that water quality is protected by controlling surface runoff from dredge material disposal with disposal runoff water entering the receiving waterway through a controlled outfall at a location with adequate circulation and flushing characteristics. Surface runoff is controlled by the Project to protect water quality when disruptive inwater activity occurs. LUBA 2008-052 Record at 20869. The detailed erosion control plan required as a condition of approval must "contain adequate provisions to ensure that undesirable erosion, sedimentation, increased flood hazard and other changes in circulation will be avoided at the disposal site and in adjacent areas." LUBA 2008-052 Record at 00029. Erosion control is a means of protection recognized in the Code. S.2501. The Project, as a condition of approval, must obtain all required state and federal permits and obtain approval of its mitigation plan and erosion plan. 2008 LUBA Record at 00030, 00032. The Erosion Control Development Standards expressly state that the purpose of the section is "to protect the water quality of surface water, improve fish habitat and preserve

² See discussion in prior findings of Policy 20.8 as well for a relevant discussion of the use of avoidance and minimization and the mitigation to achieve protection.

topsoil by developing and implementing standards to help reduce soil erosion related to land disturbing activities.” S2.501. Water quality is protected and fish habitat enhanced through the use of measures that reduce erosion. The use of a sediment fence stops sediment and shields the lower elevations from excessive sediment exposure, protecting the resource. The Erosion Sediment Control standards set out in S2.504 provide that development will “[p]rotect storm sewer inlets and culverts by sediment traps or filter barriers.” Project utilization of these mechanisms will protect traditional fishing areas when disruptive inwater work occurs.

The avoidance of fill activity in a substantial amount of wetlands and mitigation for areas filled promotes the health of the estuary as a whole and protects traditional fishing areas by promoting system-wide aquatic health. The filling of the millpond has been acknowledged in a previous Comprehensive Plan Amendment as appropriate to create a unified industrial site. Dredge material will be disposed of on the site with the implementation of erosion control plans as provided in the conditions of approval. The extensive erosion control program will protect surrounding water quality and thus the traditional fishing areas when filling occurs. Traditional fishing areas are protected when disruptive inwater activity occurs.

The southeast entrance to the Clifton Channel is the one usually taken by the boats coming from Westport or Cathlamet. Closure of that entrance would result in boats having to travel around the north end of Tenasillahe Island, increasing the number of miles needed to reach Clifton Channel. Staff concluded that dredging, construction of inwater structures and subsequent security measures may block water access at least some of the time and that some fish entrapment may occur. We conclude that the “traditional fishing area” in Clifton Channel is protected: fish, fish habitat, and both commercial and sport fishing will continue in the area. Other deep draft vessels similar in size to the LNG carriers traverse the Columbia River. While the LNG Carrier (LNGC) is in transit in the navigation channel, its impact on fishers will be like the impact of those other deep draft vessels navigating the river and therefore no different from the routine part of the use of traditional fishing areas. The Clifton Channel access will further be protected through imposition of a condition of approval limiting its closure. Clifton Channel will remain open and available to users during all periods of construction and operation with entrance and egress into the southeast entrance to Clifton Channel being limited for only the 30 to 45 minutes when a ship is maneuvering at berth, protecting areas identified by Staff as traditional fishing areas.³ This corresponds to closure only approximately 2% of the year. As proposed and conditioned, the Project protects the traditional fishing areas when disruptive inwater activity occurs because traditional fishing areas are saved *or* shielded from loss, destruction *or* injury *or* for future intended use when disruptive inwater activity occurs.

Some opponents have alleged that traditional fishing areas will not receive the required protection because in their view no disturbance is allowed under the protection provision. As explained above, some disturbance is allowed so long as the disturbance does not have a substantial adverse effect on the resource. Commissioner Rohne felt that closure 2 percent of the

3

$$\frac{100 * (45 \text{ minutes maneuvering}) * (1 \text{ arrival} + 1 \text{ departure}) * (125 \text{ ships/year})}{\frac{365 \text{ days}}{1 \text{ year}} * \frac{24 \text{ hours}}{1 \text{ day}} * \frac{60 \text{ minutes}}{1 \text{ hour}}} = 2\% \text{ of the year an LNG carrier will be maneuvering at the site}$$

year was unacceptable. Columbia Riverkeeper (CRK), for example, argues that LUBA's decision requires that we conclude that all disturbance of identified traditional fishing areas will be prevented, no matter how insubstantial. This is not the standard. The LCDC definitions distinguish between conservation and protection. Traditional fishing areas such as Clifton Channel will generally remain open and accessible to fishermen when the Liquefied Natural Gas Carrier (LNGC) is berthed. Closure during berth maneuvers is minor and consistent with the protection of traditional fishing areas.

Commercial fisheries have in recent years had a short season. Dredging during the ODFW approved in water work window (November to February) and the major commercial fishing season for salmon (August through October) do not overlap. LUBA No. 2008-52 Record at 018513, 020896. During periods of extensive fishery use during short seasons, LNGC ship passage may impact commercial fishing. Given the expected frequency of one LNG Carrier round-trip every three days, commercial fishermen could reasonably expect to experience a LNG Carrier passage once every 1.5 days. LUBA 2008-52 Record at 018513. This passage may disrupt activity for a short time; however, ship traffic has always been present in the fishing grounds, commercial fishermen have experience with minimizing the impact of ship passage and our condition of approval requires that Clifton Channel be kept open at times other than when a ship is maneuvering at the berth. Further, the number of ship trips on the Columbia River has decreased roughly a quarter in the last twenty years as changes in ships have increased the volume of material one ship may carry. *Id.* at 18501. The additional trips associated with Bradwood Landing will not result in trips as high as historic levels. LUBA Record 2008-52 Record at 18501. "[T]here are about 1,600 to 2,000 ships per year that travel from the Pacific Ocean to terminals in or near Portland, which is upriver of the proposed Bradwood Landing facility. Each of these ships pass by Bradwood Landing twice (one journey upstream and then again on the return to the Pacific Ocean). This means that 8 to 11 ships currently pass the Bradwood location per day in one direction." LUBA No. 2008-52 Record at 018502. The dimensions and speed of LNG carriers are well within the range of traffic along this portion of the river. LUBA No. 2008-52 Record at 018503. Further, three cargo shippers accounting for roughly three round trips per week have discontinued their use of the Columbia, relocating to the Port of Tacoma. "The additional traffic attributable to the LNG plant plus new container ship customers will approximately offset this loss in traffic." *Id.* at 18502, 18513. Since there is no compelling evidence that historic traffic levels were problematic for traditional fishing areas, we conclude that the LNGC traffic will not be problematic and that traditional fishing areas will be protected. LUBA 2008-52 Record at 00069, 004043, 008288, 018502. CRK argues that the County has failed to analyze the cumulative impacts of the project when addressing the scale of the development despite the fact that LUBA rejected CRK's argument that our findings below did not provide the required cumulative impacts analysis. LUBA 2008-52 at p. 42. The adequacy of cumulative impact analyses is a settled issue. In our cumulative impact analyses, accepted by LUBA, we conclude that "the Comprehensive Plan Amendment and the envisioned alternatives and development activities as envisioned will not have adverse cumulative impacts on the estuary "and that the amendment is consistent with Goal 16." LUBA 2008-52 Record at 000354.

CRK argues that the County errs by assuming that the development will occur and that measures designed to provide protection are sufficient given the development. CRK misunderstands our approach. DLCD has advised the County that under Goals 16/17, water

dependent shorelands should be zoned for development and adjacent areas needed for navigation zoned to allow actions such as dredging so long as the integrity of the estuary as a whole is not compromised. CRK does not address the fact that DLCD has acknowledged the protection measures relied upon by the County in its Plan. The code itself states that habitat is protected through compliance with these regulations. Evidence in the record supports the conclusion that access to Clifton Channel will not be materially impeded, that the morphology of Clifton Channel will not be adversely affected, that salmon will be protected against wake stranding, and so on. CRK simply disagrees with the County's conclusions.

CRK repeats arguments previously rejected, arguing that unvetted state comments that were leaked, that the state said should not be relied upon and that did not reflect review of submissions and conditions under consideration at the local level, were and are properly given little weight. Our position concerning these documents is unchanged.

Mr. Huhtula states:

“[i]t's reasonable to expect [the protect policy sections] in the Plan were meant to implement Statewide Planning Goal 16 and 17, and to protect (to save or shield from loss, destruction, or injury or to save for future intended use) Columbia River resources and the fishing-dependent portions of our economy.”

As noted previously, we have the benefit of input to the State Department of Land Conservation and Development on the objective of Goals 16 and 17 as they relate to this case. Although Mr. Huhtula and others suggest no disturbance is allowed, DLCD has advised the County that the objective of the Goal is protection of the integrity of the estuary as a whole. LUBA affirmed our previous findings regarding the need for dredging and fill associated with this project. LUBA 2008-52 p. 17, 36. DLCD has also recognized that turning basins should be designated where needed to serve water dependent development.

The cumulative impact analysis supports our conclusion the area is protected. LUBA 2008-52 Record at 000333-000354. Potential cumulative impact is discussed in the Waterway Sustainability Report. The USCG declared that to make the Columbia River suitable for transit of LNG carriers, additional measures would be necessary and that Bradwood and others agree to provide those measures. Columbia River Bar pilots, the Columbia River pilots, Capt. James Townley of the Columbia River Steamship Operators and a member of the Area Maritime Security Committee and Mr. Paul Dombrowski of the Regional Maritime Security Committee for the Columbia River testified that LNG carriers can be moved safely on the river. *Id.* at 349.

There was much discussion about the safety and security zones that will be in place for the LNG Carrier's transit to Bradwood. We believe evidence in the record that:

- There is no “Exclusion Zone” – there are no vessels or activities that are summarily excluded because of the LNG Carrier's Safety/Security Zone;
- The Coast Guard fully anticipates, and so states in the Waterway Suitability Report, that all vessels will “routinely... transit the Safety Zone;” and

- Deep draft vessels are permitted to meet the LNG Carrier in routine transit under much the same terms and conditions as other deep draft vessels now meet on the River. LUBA 2008-52 LUBA Record at 00349.

The safety/security zone is described as an area within a 500 yard radius around the LNG carrier, including the water surface and below and ending at the shoreline. In addition, the safety/security zone does not extend vertically – such a restriction, if there were one, would be defined in a Temporary Flight Restriction under Title 14 Part 91. There is no Temporary Flight Restriction associated with the Bradwood Landing operations or LNG Carrier movements on the Columbia River. *Id.*

As explained in the DEIS:

“The Coast Guard exercises regulatory authority over LNG facilities that affect the safety and security of port areas and navigable waterways under Executive Order 10173; the Magnuson Act (50 United States Code (USC) § 191; the Ports and Waterways Safety Act of 1972, as amended (33 USC § 1221 et seq); and the Maritime Transportation Security Act of 2002 (46 USC § 701). The Coast Guard is responsible for matters related to navigation safety, vessel engineering and safety standards, and all matters pertaining to the safety of the facilities or equipment located in or adjacent to navigable waters up to the last valve immediately before the receiving tanks. The Coast Guard also has authority for LNG facility security plan review, approval, and compliance verification as provided in 33 CFR 105, and siting as it pertains to the management of vessel traffic in and around the LNG facility. As required by its regulations, the Coast Guard is responsible for issuing an LOR as to the suitability of the waterway for LNG marine traffic. Issuance of the LOR would be based on the following items:

- density and character of marine traffic;
- locks, bridges and other manmade obstruction in the waterway;
- environmental effects of LNG ships during transit from open water to the facility;
- maritime security (MARSEC)/port security considerations; and
- the following factors adjacent to the facility:
 - depth of water;
 - tidal range;
 - protection from the high seas;
 - natural hazards, including reefs, rocks, and sandbars;
 - underwater pipes and cables; and

- distance of berthed vessels from the channel and the width of the channel.

In accordance with 33 CFR 127.007, each applicant must submit a Letter of Intent (LOI) to the local Captain of the Port (COTP) to begin the LOR process. NorthernStar submitted an LOI to the Coast Guard for the project on January 18, 2005.

On June 14, 2005, the Coast Guard issued a *Navigation and Vessel Inspection Circular – Guidance on Assessing the Suitability of a Waterway for Liquefied Natural Gas (LNG) Marine Traffic* (NVIC 05-05). The purpose of this NVIC is to provide guidance to applicants seeking to construct and operate shore-side LNG import terminals regarding the timing and scope of the Coast Guard process necessary for the consideration of safety and security issues, including LNG marine traffic. NVIC 05-05 itemizes data to be included in a Waterway Suitability Assessment (WSA) to be produced by an applicant, and outlines the roles of the COTP and Federal Maritime Security Coordinators (FMSC) in the review and validation of the WSA by the Coast Guard.

NorthernStar submitted its Preliminary WSA to the Coast Guard on December 29, 2005, and in response to Coast Guard comments, a Follow-on WSA was produced in May 2006. The Coast Guard provided the FERC with its Waterway Suitability Report (WSR) on February 28, 2007. LUBA No. 2008-52 Record at 4707-4708.

In the Waterway Suitability Report (“WSR”), the U.S. Coast Guard recommends key improvements to Columbia River navigation and safety:

- These improvements will benefit all Columbia River traffic.
- The public will benefit indirectly from increased public safety resources. *Id. at 00349.*

The river traffic is under the jurisdiction of the Coast Guard and will be managed by it. The Clatsop County zoning ordinance also requires that all required state and federal permits be submitted to the County. See for example LWDUO 3.636. The County finds that the permitting requirements identified above, coupled with this development ordinance requirement will ensure that there are not significant cumulative impacts as a result of this amendment and associated development. *Id.*

The transit management plan for LNG carriers (which must be approved by the Coast Guard) will be designed to avoid impacting fishing vessels. In addition, NorthernStar Natural Gas (NSNG) has an agreement with the drift fishermen with rights in the Columbia adjacent to Bradwood. Bradwood Landing is avoiding the Buoy 10 fishery and development will have no

more impact on recreational fishing than any other deep-draft vessel. LUBA No. 2008-52 Record at 000353.

Quoting in full from the report prepared by West Consultants:⁴

“A review of historic aerial photographs from 1939 to 2001 shows no significant changes have occurred to the morphology of the Clifton Channel near the project site over this 62 year period, despite significant changes in hydraulics and sediment load caused by flow regulation and dredging activities. The Clifton Channel has not changed significantly because the shoreline of the channel is comprised of material that is resistive to bank erosion. Based on field reconnaissance observations, the shoreline of the Clifton Channel consists of: (1) sand and gravel beach; (2) heavily vegetated banks of silt, sand, and gravel material; (3) tidal flats, which consist of flat sand beach that is vegetated with grasses and shrubs and occasionally has large woody debris; (4) gravel and cobble beach (boulders were observed at some of the locations); or (5) riprap.

The Proposed Project will cause a reduction in the flow through the Clifton Channel, resulting in a reduction of the water surface profile, shear stresses, and flow velocities through the channel. The changes in hydraulic conditions will occur over a short period of time, 1.5 hour period at the peak of flood and ebb tides, for low to average flows and over the entire tidal cycle for high flows. A review of the SED2D-WES results shown in Appendix E indicates that minor deposition may occur for the 50 percent exceedance flow along the Clifton Channel. However, the results do not show significant changes to the overall bed conditions in the Clifton Channel for the range of flows modeled. The small changes in the hydraulic characteristics associated with the Proposed Project are not expected to alter the form of the Clifton Channel.” LUBA 2008-52 Record at 000345.

We agree with these conclusions.

Dredging impacts on estuarine resources at Bradwood were evaluated in the October 16, 2007 memo from Willis E. McConnaha of Jones & Stokes,⁵ which explained that while

⁴ The WEST report was an expert report submitted by Bradwood Landing. LUBA No. 2008-52 Record at p. 011551 *et seq.*

⁵ The McConnaha analysis was prepared at the request of and submitted by Bradwood Landing. LUBA No. 2008-52 Record at p. 6009. Dr. McConnaha *curricula vitae* is in the record at 006010-006016.

Bradwood Landing's analysis has focused on juvenile Chinook salmon, including subyearling and yearling varieties, the results should extend to other salmonids. Dr. McConnaha noted:

"Yearling migrants (most spring Chinook, steelhead and many coho) use the estuary primarily as a migrational corridor linking upriver production areas and the ocean. These fish move rapidly through the lower Columbia River and are most frequently found in the upper water column in the deeper, main channel areas. Subyearling migrants (most fall Chinook and some coho) rear and grow in the estuary prior to moving into marine waters. These fish are usually found in shallow water areas; we demarcate shallow and deep water areas at around 20 feet in depth.

"Dredging of the turning basin at Bradwood Landing is projected to encompass about 57 acres off-shore of Bradwood Landing. The action will take the present depth of about 35 feet to a minimum of 43 feet in depth. In other words, the action will deepen areas that are already classed as "deep" habitats. Dredging will not affect the shallow water areas used by subyearling salmon, while the further deepening of deep-water areas is unlikely to be discernable for yearling salmon using the upper water column.

"I would anticipate that other ecological effects of the dredging to be minimal as well. Certainly the dredging itself will have a direct effect on the benthic community. However, the estuarine river-bed is constantly shifting due to currents and sediment transport and communities are well adapted to this. I would expect the benthic community to rapidly recover following dredging." LUBA 2008-52 Record at 0008341-342.

We agree with these conclusions.

Based upon the above and, to the extent they are consistent, our previous findings we conclude that the Project and related land use actions are consistent with Policy 20.2 and protect traditional fishing areas when disruptive inwater activities occur.

C. Protection of Threatened and Endangered Species Habitat from Incompatible Development

1. Identification of Threatened and Endangered Species Policy.

The Goal 16/17 Element of Clatsop County's Comprehensive Plan includes Policy 20.8; Policy 20.8(2) provides:

"Endangered or threatened species habitat shall be protected from incompatible development."

On remand, the County must evaluate this policy using the LCDC definition of “protect.” As discussed above, “protect” is defined by LCDC as to “save or shield from loss, destruction or injury or for future intended use.” OAR 660-010-0000. We evaluate the compliance of the Project with the policy below.

2. The Project Protects Threatened and Endangered Species Habitat From Incompatible Development.

Federally and state listed threatened and endangered species of salmonids were identified as potentially occurring in the area of the project. LUBA 2008-052 Record at 005022.⁶ Columbia white tailed deer are included on the federal list of endangered species. *Id.* at 005025. The stellar sea lion is federally listed as threatened. The marbled murrelet and northern spotted owl are listed by both the state and federal governments as threatened. LUBA 2008-052 Record at 005024-25.

The Standards Document generally describes how development will occur in the County. S4.218 requires that permitted fill or dredging activities in intertidal and shallow to medium depth estuarine subtidal areas be mitigated through project design and/or compensatory mitigation (creation, restoration or enhancement of another area) to ensure that the integrity of the estuary ecosystem is maintained. (This is consistent with the input received from DLCD stating that the purpose of the Goal is to protect the integrity of the estuary as a whole.) Thus, habitat is protected through the maintenance of the integrity of the ecosystem as a whole. Here, the dredging is designed to protect threatened and endangered species from incompatible development through its location. The more sensitive shallow habitat is avoided and thus saved from loss.

County standards include requiring avoidance of impacts where possible, S4.218(2)(A). This protects traditional fishing areas when disruptive in water activities occur by avoiding sensitive areas, saving them for future use. Endangered and threatened species habitat is protected from incompatible development by the decision to dredge in a deep portion of the Columbia River, rather than in the intertidal and shallow to medium depth estuarine subtidal areas in which S4.218 requires dredging to be mitigated. LUBA 2008-52 Record at 00061-62, 64, 005055, 008288, 012062, 012066, 020727, 020933. This requirement for mitigation only in dredge areas that, unlike the turning basin here, are shallow or intertidal, is also found in Goal 16 guidelines. OAR 660-015-0011, Implementation(5). S4.218 provides for mitigation for “dredging in intertidal and shallow to medium depth estuarine subtidal area” to ensure that the integrity of the estuary ecosystem is maintained. Again, protection is provided in this way by avoiding an area that is critical habitat for juvenile salmonids specifically in less than 20 feet of water, thereby saving it from loss. Threatened and endangered species habitat will be protected from incompatible development.

The area proposed for dredging for the turning basin at Bradwood Landing is already deeper than 20 feet. Bradwood Landing has intentionally designed the dredge footprint in

⁶ Potential impacts on threatened and endangered species are discussed extensively in the LUBA 2008-052 Record at 005022-50117 and expressly incorporated herein.

habitat that is deeper than 20 feet (a depth considered to be deep water habitat) because it has a greatly reduced use by juvenile salmonids. The proposed dredge area is deep water habitat now and would continue to be deep water habitat after construction. Use of this type of habitat by juvenile salmon will be virtually unchanged because they predominantly use the top 10–15 feet of the water column regardless of total depth. We believe testimony on behalf of applicant to the effect that benthic invertebrates (small “bugs” that salmon and other fishes eat) that live in the deeper habitat substrate (surface) have been shown to quickly recover from dredging disturbance. LUBA No. 2008-54 Record at 003265. This is because they are present in high numbers in the area surrounding the disturbed area and they quickly re-colonize (move into) the dredged area. The young fish that would consume these invertebrates do not actually forage on the river bottom in the deep water habitat; they eat those materials and organisms that get suspended and float around closer to the surface of the water, and are constantly in motion from river currents and tidal currents. Bradwood Landing also protects habitat from incompatible development by using suction dredging, a technique that reduces turbidity. A minor increase in turbidity (suspended sediments) that contains these invertebrate food items actually has been shown to stimulate juvenile and adult salmon and other fishes to feed. LUBA 2008-052 Record at 000064-65, 003265-66, 020728, 002755. While the analysis was focused on juvenile Chinook salmonid including subyearling and yearling varieties, we received expert testimony that the analysis should extend to other salmonids. LUBA No. 2008-52 Record at 6009.⁷ Threatened and endangered species habitat will be protected from incompatible development.

The policy providing that endangered or threatened species habitat shall be protected from incompatible development is designed to protect the habitat from “incompatible development.” The policy is not designed to protect habitat from any and all development or disturbance. The Bradwood site has long been recognized as appropriate for industrial port development. *See, e.g.*, LUBA 2008-052 Record at 003115, Lower Columbia River Ports Region Study of Ports of Astoria, St. Helens and Portland; ODOT, 1975, LUBA 2208-052 Record at 003134, 003140-41. Habitat is protected from incompatible development through selection of a terminal site that has undergone industrial development since the 1840s rather than a more pristine site. LUBA 2008-52 Record at 005499, 005506. Threatened and endangered species habitat will be protected from incompatible development.

Further, the Project footprint has been reevaluated and redesigned during the design stage to maximize avoidance of wetland and shoreline areas on the site. LUBA 2008-052 Record at 005499. For example, the facility was designed without a slip, significantly reducing the Project footprint and thus avoiding some impacts. LUBA 2008-052 Record at 005500. This design provides future protection to habitat by avoiding certain areas, saving them for habitat use.

Docked LNG ships recirculating ballast water through the engines for cooling after the shore-based water supply is turned off and until the ship is ready to leave will avoid additional water intake and discharging heated water within the LNG berth and maneuvering area. LUBA 2008-052 Record at 005054. Horizontal directional drilling will be the method for crossing

⁷ Assertions by opponents that protection is not provided are generally not referenced to evidence in the record and citations identified above relate to expert testimony that protection will be provided.

streams known to contain listed salmonids to avoid impacts on listed species. LUBA 2008-052 Record at 005058.

General development standards within the Columbia River estuary require adequate landscaping, fencing and/or other buffering techniques to protect the shore land and aquatic areas. S.4.203. Protection from incompatible development is also provided because required buffer zones will be maintained between construction activities and significant wildlife resources. LUBA 2008-052 Record at 005501. Buffering shields a protected resource from an incompatible use and provides protection as discussed in the findings. Threatened and endangered species habitat will be protected from incompatible development.

The Project will be compatible with endangered and threatened species habitat (and therefore the habitat protected from incompatible development) because it will mitigate for reduced habitat quality through restoration of several times as much high quality habitat, promoting and protecting habitat in the estuary as a whole. LUBA 2008-052 Record at 004979.

Given the knowledge that nearshore areas provide important migration habitat for juvenile salmonids and other species, only minor changes are proposed in this area in the form of support piles under the proposed Project, allowing the area's habitat functions to be maintained during terminal operations. LUBA 2008-052 Record at 005502. This saves the area for future use, ensuring protection from incompatible development.

Aquatic and shore land resources were identified in the review process, and these resources will be protected, that is to say shielded from loss, through the use of shielding mechanisms imposed by different state agencies, including statutory and regulatory requirements concerning non-point source water pollutants as well as containment, clean up and adoption of mitigation and erosion plans subject to County review and approval. LUBA 2008-052 Record at 000030, 000032, 017890-91, 020733, 020866-67. Control of non-point source water pollutants is a means of protection recognized in the County Code. (See Section A of these findings.) LWDUO 4.056(4)(C)(5) provides that fencing may be provided on a temporary basis to protect vegetation. LWDUO 3.634(10) provides that in the Marine Industrial Zone fencing will be allowed where it is necessary to protect property of the use concerned or to protect the public from a dangerous condition. Similarly, shielding mechanisms will be used here. Threatened and endangered species habitat will be protected from incompatible development.

Impacts on Columbia white tailed deer and their habitat have been avoided by selection of a former industrial site as the terminal location as opposed to a more pristine site. LUBA 2008-052 Record at 005060. The terminal site has also been minimized, reducing potential for encroachment into habitat area. LUBA 2008-052 Record at 005059. Vegetative clearing during construction will be scheduled outside the fawning season. LUBA 2008-052 Record at 005062. Following construction, temporarily impacted forest habitats will be replanted in kind with native trees. LUBA 2008-052 Record at 005094. Replacement habitat will also be secured. LUBA 2008-052 Record at 005094. Threatened and endangered species habitat will be protected from incompatible development.

Nesting, roosting, feeding and resting areas used by resident and migrating birds are protected. Some concern was raised regarding bald eagles. LUBA 2008-052 Record at 001384,

009195. There are no bald eagle nests within 0.5 miles of the terminal site. LUBA 2008-052 Record at 005100, 013307. Bradwood Landing will minimize construction, operation and maintenance activities within 0.5 miles of any nest (or 0.25 miles if any nest is within line-of-sight of the Project). Bradwood Landing will also avoid removal of potentially suitable bald eagle nest or roost trees (e.g., mature deciduous or coniferous trees that offer an unobstructed view of the surrounding area). LUBA 2008-052 Record at 005099. Other birds' nesting, roosting, feeding and resting areas are similarly protected as set forth in LUBA 2008-052 Record at 005022-050117. Threatened and endangered species habitat will be protected from incompatible development.

We conclude that the proposed activities will protect endangered or threatened species habitat from incompatible development. Bradwood Landing submitted a revised mitigation plan detailing Bradwood Landing's environmental and mitigation process approach. The mitigation plan outlines how Bradwood Landing has worked its way through the mitigation process to date by first describing the footprint and facility changes that took place to avoid and minimize impacts wherever possible during the design process. Protection through avoidance and minimization did not stop with conceptual design; it has continued (and will into the future) as Bradwood Landing responds to agency and public feedback on the proposal. Avoidance and minimization includes preservation of the most sensitive and highly functional natural resources at the Bradwood site, as well as preservation of existing high quality habitat adjacent to the Svensen Island mitigation area and use of horizontal directional drilling in identified sensitive areas to avoid surface disturbance. LUBA 2008-052 Record at 005502. Threatened and endangered species habitat will be protected from incompatible development.

Upon review of the record, we conclude that as both mitigated and regulated, significant adverse impacts will not occur and policy identified resources are protected.

The County's conditional use process is designed to protect areas from incompatible development. The conditional use permit portion of the code "provides a system of review of such uses so that the community is assured that the uses are compatible with their locations and with surrounding land uses, and will further the purpose of this ordinance and the objectives of the comprehensive plan." LWDUO 5.005. LWDUO 5.025 provides that in permitting a conditional use, conditions may be imposed. These conditions include:

- (1) limiting the manner in which a use is conducted, "including restricting the time an activity may take place and restraints to minimize such environmental effects as noise, vibration, air pollution and odor,"
- (2) requiring diking, screening, landscaping or other facility to protect adjacent property, and
- (3) requiring the protection of existing trees, vegetation, water resources, wildlife habitat or other significant natural resources.

Conditions are recognized in the code as a means by which neighboring uses may be rendered compatible. Some material was submitted into the record to support the position that

dredging operations would block and destroy traditional fishing areas and listed habitat. *See, e.g.,* LUBA 2008-052 Record at 013509-36. Federal and state agencies conduct an independent review of impacts on endangered species and habitat under distinct authority and standards. *See, e.g.,* LUBA 2008-052 Record at 013509. We recognize that separate permitting and review activity exists and our approval is conditioned upon the applicant obtaining the requisite state and federal permits. We also find that documents generated by a state or federal agency and submitted into the local record or the opposition of individuals or groups do not necessarily reflect review of responsive materials submitted at the local level, such as expert analysis submitted concluding that the deepening of the dredge area will not increase water velocity downstream in Clifton Channel or the requirement for approval of a shoreline monitoring plan. LUBA 2008-052 Record at 009192. Thus, while we recognize that the record contains material taking a position counter to our conclusions, we conclude that as conditioned, the Project and remanded land use actions proposed meet the applicable criteria.

Bradwood Landing has redesigned the Project to protect threatened and endangered species habitat from incompatible development. Specific protection measures described include:

- Avoiding some areas by reducing the facility footprint and reconfiguring the terminal to lessen fill impacts and restore temporary work areas to highest habitat value;
- Maintaining required buffer zones between construction activities and significant wildlife resources;
- Reducing the number of pier pilings needed by using fewer larger diameter pilings, thus reducing inwater construction time and completing work when the fewest fish are present;
- Locating the turning basin and berth so as to eliminate the need to dredge an access channel;
- Selecting a site that has been historically an industrial development and that has naturally occurring deep water to eliminate the need to dredge in shallow water habitat;
- Using bubble filled caissons to reduce noise and minimize fish impacts during construction of pilings;
- Changing Project design to provide screened water to ships at dock for cooling engines and filling ballast tanks, to shield fish (including listed salmonids) from entrainment;
- Preserving existing shoreline bathymetry in shallow water and near shore areas to maintain migration corridor for juvenile fishes;
- Creating, improving and protecting hundreds of acres of wetlands while only impacting approximately 13 acres of wetlands to construct the LNG terminal;

- Providing compensatory mitigation for wetland and shallow-water fish habitat wetlands;
- Restoring estuarine influence to up to 65 acres of isolated, degraded and diked wetlands;
- Providing functions of pocket estuaries – protected from high flows, gives animals/fish sheltered refuge;
- Restoring habitat complexity and microhabitats that have been lost over time due to filling for dikes, riprap, seawalls, railroad and road building;
- Limiting through use of the tethered tugs the speed of LNG ships on the river to speeds below which most wake stranding occurs; and
- Requiring submittal of a shoreline monitoring plan.

LUBA 2008-052 Record at 005501, 005502, 020727, 020729, 005499, 005500, 005508, 0020897, 009214, 005054.

The Project to develop a liquefied natural gas facility in the lower Columbia River includes an environmental commitment that Bradwood Landing has stated ensures a significant net benefit to salmon productivity and the lower Columbia ecosystem. In addition to avoidance and minimization of impacts and robust compensatory mitigation, Bradwood Landing has committed \$46-\$59 million (depending on the life of the Project) to a Salmon Enhancement Initiative (“SEI”) to ensure the Project significantly improves and helps to sustain ecosystem function and salmon productivity in the lower Columbia estuary. These monies will be spent on advancing high priority recovery plan actions for benefiting terrestrial and aquatic species and protecting and restoring their habitats. Restoration protects by providing an area for future use.

The final details of protection will be established through the conditions of approval requiring submittal and approval of a mitigation plan, shoreline monitoring plan and erosion control plan through the public hearing process, as well as submittal of copies of all state and federal permits required for this development.

During the County process, Bradwood Landing submitted to the County copies of mitigation plans marked “draft” that Bradwood Landing had submitted to federal regulators. We understand that the August 2007 mitigation plan submitted to the County is in the process of being reviewed by the following governmental agencies: NMFS, USFWS, Corps, EPA, DLCD, ODFW, DEQ, DSL, ODOE, with potential review also by OWRD, ODF, and in WA: Cowlitz County, Ecology, WDFW, and WDNR.

The County agrees with the analysis provided by Bradwood Landing establishing that federal and state mitigation standards meet or exceed County standards. We recognize that Bradwood Landing’s mitigation program has been and continues to be reviewed as part of the federal government’s review of the project and the County agrees with the conclusion in the draft

Environmental Impact Statement that it is possible to construct the project with adequate mitigation.

The County, in approving the Project, finds that solutions consistent with the County regulations addressing protection and mitigation are possible, likely and reasonably certain to succeed and that it is therefore feasible for the mitigation plan to be developed in a manner consistent with the Clatsop County regulations.

We find that the requisite protection is provided, utilizing the LCDC definition of “protect” as applied through CCP 16/17 Policies 20.2 and 20.8.

Further, we note that LUBA has previously recognized that where appropriate, a county may balance policies that could be viewed as contradictory. On page 7-169, under “Navigational Structures,” the standards document states that:

“Federal and state resource agencies have established policies and guidelines for application of their authorities for review of estuarine aquatic area and shoreline development proposals. These review criteria are broad in scope and, generally, emphasize that navigational structures be designed and constructed, based on all feasible development alternatives, to protect fish and wildlife and associated environmental values.”

Although we find no conflict, if a conflict were found here, Clatsop County similarly seeks to balance development with protection. LUBA has held, “[w]hen an applicable comprehensive plan policy has overlapping or conflicting policies, it is permissible for a local government to interpret and apply them in a manner that balances those policies. *See Waker Assoc., Inc. v. Clackamas County*, 111 Or App 189, 194-95, 826 P2d 20 (1992) (‘a balancing process that takes account of relative impacts of particular uses on particular goals and the logical relevancy of particular goals to particular uses is a decisional necessity.’)” The County Plan expresses a preference for development of existing port sites such as at Bradwood. CP P20.3. Shorelands with adjacent deep water access, adequate rail or road access shall be reserved for water dependant recreational, commercial and industrial port development. CP P20.3. Bradwood is such a site.

Fishing is a traditional industry and lifestyle of the Northeast County. The fishing industry shall be preserved and promoted:

- a. through strict enforcement of the Forest Practice Act;
- b. through encouragement of alternatives to water storage of logs;
- c. through discouragement of oil tanker traffic on the Columbia River;
- d. through the allowance of boat houses, net floats and associated fisheries related facilities in appropriate waterways;
- e. through production of fish by both hatchery and natural means; and
- f. **through close evaluation of industrial development and other activities to ensure compatibility and maintenance of water quality.**

Page 14 of Northeast Community Plan Revision December 18, 1979 (emphasis added). Close evaluation of industrial development and other activities to ensure compatibility and maintenance of water quality have been a hallmark of our review as discussed herein.

P20.15 addresses residential, commercial and industrial development in the estuary. “Shoreland developments shall be designed and constructed to minimize adverse environmental and aesthetic impacts. Where appropriate and feasible, development shall be clustered to provide open space.” Clustering occurs here with a compact terminal design.

Columbia River Estuary Shoreland and Aquatic Regional Policies, policy 20.5(2), provides in relevant part that:

“[d]redging and dredge material disposal shall not disturb more than the minimum area necessary for the project and shall be conducted so as to minimize impacts on wetlands and other estuarine resources. Loss or disruption of fish and wildlife habitat and damage to essential properties of the estuarine resource shall be minimize through careful location, design, and construction of:

- (a) Facilities requiring dredging,
- (b) Sites designated to receive dredged material, and
- (c) Dredging operation staging area, and equipment marshalling yards.

Dredged materials shall not be placed in intertidal or tidal marsh habitats or in other areas that local, state or federal regulatory agencies determine to be unsuitable for dredge material disposal.”

Dredged materials are not proposed for placement in areas deemed unsuitable for placement. Bradwood is a County-designated dredge material disposal site. LUBA No. 2008-52 Record at 020740. Dredging is minimized through the location in a naturally deep area of the river and in a location contiguous to the main navigation channel, eliminating the need to dredge a channel from the berth to the navigation channel. LUBA No. 2008-52 Record at 020727.

The Clatsop County Goal 16 and 17 policies call for the protection of threatened and endangered species habitat from incompatible development. Traditional fishing areas will be protected when disruptive inwater activities occur. Comprehensive Plan policies also call for preservation of the fishing industry by “the close evaluation of industrial development and other activities to ensure compatibility and maintenance of water quality.” Northwest Community Plan General Policy 2. The policy that traditional fishing areas will be protected when disruptive inwater activities occur presumes that disruptive in-water activities may in fact occur. The policy that threatened and endangered species will be protected from incompatible development presumes that development may occur. These policies considered together and balanced are consistent with the LCDC definition of “protect,” and the Plan does not require a showing that threatened and endangered species habitat or that traditional fishing areas will not be affected in

any way or incur any loss, but rather promotes sensitive development that results in compatible development.

Characteristics that contribute to suitability for water-dependent development include:

1. Deep water close to shore with supporting land transportation facilities suitable for ship and barge facility;
2. Potential for aquaculture;
3. Protected areas subject to scour which would require little dredging for use as a marina; and
4. Potential for recreational utilization of coastal waters or riparian resources.

Bradwood has long been recognized as having deep water close to shore with supporting land transportation facilities such as the railroad. Bradwood Site Area Plan, Goal 9 Industrial Lands Inventory. The plan and zoning designations of Bradwood have anticipated marine industrial use at this site.

Uses of the MI zone shall maintain the integrity of the estuary and coastal waters. Notably “uses which are not water dependent or water related are provided for, only if they do not foreclose options for future higher priority uses and do not limit the potential for more intensive use of the area.” LWDUO 3.622. This indicates that when the County zoned the property MI, it determined that passive use was not appropriate for the site and, in fact, uses that could preclude industrial activity were inappropriate. It also indicates that substantial dredging is not required because the water is already deep in this location.

For all the foregoing reasons, we find that the proposed activity and related land use actions as conditioned do comply with Policy P20.8(2) as well as P20.2.

D. *Limitation of Development Activities at Bradwood to Small to Moderate Scale*

1. *Background.*

In the findings in support of Ord 08-05, the County discussed compliance with a Northeast Community Plan policy stating: “Development activities at Bradwood shall be of small or moderate scale, not involving extensive filling to create new land areas.”

In the section “Using the Plan” the Comprehensive Plan states that:

“The Clatsop County Plan is a statement of public goals, objectives, standards and maps that are intended to be used in making specific decisions about present and future land use. In addition, the County-wide Element and Community Plans contain information, explanations and findings in narrative form. These statements have significance in clarifying the bases for the County’s position on each subject in the Plan. Goals, policies,

objectives and standards are implemented when the County reviews individual land use actions. To determine whether a specific land use proposal is appropriate a decision must be made on whether the proposal conforms to each applicable goal, policy and standard.”

While statements in the Comprehensive Plan narrative are not independent approval criteria, they are intended to inform the plan. The 1990 Bradwood Subarea Plan states that:

“The Bradwood industrial site offers limited potential for small to medium sized water-dependent industrial development. There is deep water close to shore, some available vacant land, and railroad access. There are constraints to development, however, including poor highway access and the proximity of the wildlife refuge.”

The 1996 Industrial Lands Inventory states that:

“Bradwood is suitable for industry that needs marine access combined with railroad siding [sic] but limited highway access and limited or self-contained public facilities.”

Considering both the 1990 Comprehensive Plan text and the 1996 Comprehensive Plan text in Goal 9 and the Industrial Lands Inventory as they inform goals, policies and standards, and the Northeast Community Area Plan, the Bradwood Landing project is of a scale appropriate to the site and is properly deemed moderate or medium in scale. Uses allowed outright in the MI zone include port facilities and/or shipping facilities, fuel storage and dispensing facilities, vessel construction, maintenance and repair facilities, seafood receiving and processing and integrated manufacturing and shipping facility where a significant portion of the operation is water dependent. LWDUO 3.624.

The applicants, Bradwood Landing LLC and NorthernStar Energy (referred to hereafter collectively as “Bradwood Landing”), propose to develop a liquefied natural gas (“LNG”) marine terminal, natural gas pipeline, and related facilities at Bradwood. The Project will receive LNG from ocean-going vessels, temporarily store it, and then regassify it before sending it out by pipeline. The pipeline will transport the gas from the terminal to industries, electric power generating plants, and natural gas distribution companies.

The narrative section of the 1990 Bradwood Subarea Plan describes Bradwood as offering limited potential for industrial development. The 1996 Industrial Lands Inventory states Bradwood is suitable for “industry that needs marine access combined with railroad siding [sic] but limited highway access and limited or self contained facilities.” The Bradwood Landing project is such an industry. The proposed use needs marine access in order to accept tanker delivery of LNG and will use the railway to deliver construction materials to the site. Bradwood Landing will improve Clifton Road as anticipated in the Inventory and use limited or self-contained public facilities. Product will be transported from the site via pipeline as opposed to roads.

In its decision, LUBA concluded that the County may conclude that small to moderate scale development is that occupying fewer than 100 acres. LUBA concluded, however, that while it was not clear dredging would properly be considered a part of the acreage, the County should include inwater structures, the power line and the pipeline when evaluating the scale of development against the 100-acre standard. LUBA stated that the focus of the scale limitation is development activities. On remand, the County must address the appropriate components of scale and analyze the Project's compliance with the scale policy. The County previously addressed elements of scale other than acreage under Goal 9 and summarizes and expands on those findings in Section 5 of these Findings.

2. The Development Activities at Bradwood Do Not Involve Extensive Filling to Create New Land Areas.

As discussed in our previous findings in support of Ord 08-05 and incorporated herein by reference to the extent consistent with these supplemental findings, the development activities do not involve extensive fill to create new land areas. A Bradwood Subarea Policy provides that large scale fills in along the Columbia River shoreline and impacting fill areas in excess of 20 acres is not appropriate. Comp Plan Goal 16/17 P30.21. An existing exception for the Bradwood site authorizes fill of the mill pond to create a unified development site. *Id.* Thirteen acres of fill are proposed here and we find that there is not excessive fill to create new land areas. LUBA 2008-52 Record at 020800. We also note that the reference in the policy to creation of new land areas is consistent with our conclusion below that the focus for establishing scale in this context is land-based activities.

3. Development Activities at Bradwood are Limited in Scale Considering Permanently Occupied Land.

We conclude that land-based development activity is small to moderate in scale if it permanently occupies fewer than 100 acres. The Goal 9 inventory is of industrial *lands* and describes the size of Bradwood in the context of its land area. Clatsop County Goal 9 at p. 78, 91.⁸ The Goal 9 element of the Comprehensive Plan states that “[t]he need for industrially zoned *land* is as much a result of local economic policies and economic development strategies as it is market demand. The purpose in providing a supply of manufacturing *land* is to guarantee the economic well-being of a community.” Policy 78 (emphasis added). The plan discusses the activity of the Clatsop County Economic Development Committee (“EDC”) and goes on to state that:

“Nowhere is the lack of a coordinated comprehensive economic planning strategy more apparent than in the area of manufacturing zoned land. Until the EDC took it upon itself to categorize

⁸ “The need for industrially zoned land is as much a result of local economic policies and economic development strategies as it is market demand. The purpose in providing a supply of manufacturing land is to guarantee the economic well being of a community.” http://clatsopcounty.us/Assets/Dept_12/PDF/Comp%20Plan%20Goal%209.pdf, p. 78.

existing vacant land, no single agency had ready access to industrially available vacant land.

“The EDC, with the cooperation of the county and several municipalities, has completed and is currently updating its inventory of county-wide industrially zoned land. A copy of their map follows this section.

* * * * *

“Given the community’s expressed desire to vitalize its riverfront area, this allocation of industrial land seems appropriate, particularly with the favorable per dollar impact that marine oriented activity has on the County’s economy and labor force.

“Unfortunately, the larger industrial tracts due primarily to ownership patterns tend to be available on an all-or-nothing basis. The only client currently capable of utilizing such a large parcel would be a heavy large industrial activity. Due to this restriction, all of the larger parcels are vacant and will, in all likelihood, remain so in the future as they have in the past.”

Id. (emphasis added).

The Industrial Lands Inventory then goes on to state:

“By opening one of the large two hundred plus acre sites for small, industrial usage it may be possible to meet projected demand more efficiently and also ease the task of attracting smaller firms to the area.” *Id.* at 80.

Elsewhere in the Plan it states:

“The EDC has completed an inventory of County-wide industrial zoned land. As the inventory portrays, Clatsop County has a number of vacant industrial sites throughout the County, several being large tracts of 100-660 acres.

* * * * *

“A problem exists in that the larger industrial tracts tend to be available on an all-or-nothing basis due primarily to ownership patterns. The only client currently capable of utilizing such a large parcel would be heavy large industrial activity. By opening one or more of the large hundred plus acre sites for small industrial usage, it may be possible to meet demands for industrial land more efficiently and also make it easier to attract smaller firms to the area.”

Id. at 12.

The record includes a comparison of the amount of land available at other local marine industrial zoned sites in the County ranging in size from 25 acres to 288 acres. LUBA 2008-52 Record at 003261. The County includes large industrial sites where large scale development may occur. Those land sites are over 100 acres in size.

The repeated references to land, parcels and tracts in the Goal 9 discussion further indicates that the County's focus is on land area and not water area. It is worth noting that dredging water depth is not a constraint to development in the Bradwood Subarea, Northeast Community Area Plan or Industrial Lands Inventory plans. Rather it, and the proximity to the navigation channel are considered nearby features and described as such throughout the Comprehensive Plan.

We conclude large scale industrial development is that where the developed industrial site occupies more than 100 acres of land.

In providing that development at Bradwood will be small to moderate in scale, the context of the Comprehensive Plan establishes the Board of Commissioners' intent was to limit "development" to that occurring on land and not aquatic areas. In the section on using the Comprehensive Plan, the Plan states that it contains information, explanation and findings in narrative form and that these statements have significance in clarifying the County's position on each subject in the Plan. (LUBA 2007-052 Record at 000127.) The Goal 16 section of the Comprehensive Plan addressing Bradwood states that "[t]his area includes the industrial area at Bradwood, a stretch of steep forested shoreline to the east and portions of the Columbia River. This subarea is in Clatsop County." The plan goes on to state that the Bradwood industrial site is currently proposed for use as a rock quarry. "It is designated as a dredged material disposal site. Bradwood is privately owned." (Clatsop County Goal 16, Policy 30.21.) Bradwood is in the subarea and identified here as the industrial site in private ownership. This description of the Bradwood site does not include the river.

The Goal 16 section goes on to state that:

"The Bradwood industrial site offers limited potential for small to medium sized water-dependent industrial development. There is deep water close to shore, some available vacant land, and railroad access. There are constraints to development, however, including poor highway access and the proximity of the wildlife refuge. Future development which would require extensive filling (impacting aquatic areas in excess of 20 acres) along the Columbia River for the purpose of creating additional industrial land is not appropriate. In order to fully utilize the marine industrial shore lands, it would be appropriate to fill the old Bradwood mill pond. This pond covers an area of less than 10 acres." (Clatsop County Comprehensive Plan Goal 16/17, Policy 30.21.)

This supports our conclusion that land is the concern in the scale of development provision and not the water area or river bottom since it is the industrial site which is identified as offering limited potential for small to medium sized industrial development. Scale is considered in context. The Comprehensive Plan suggests that scale is associated with size.

It is the industrial area that is properly considered when evaluating development activity “at Bradwood.”⁹ The chart in Goal 9 indicates that it is land area at issue when evaluating company site size. Goal 9 Industrial Lands Inventory, p. D6.

Some opponents have suggested that size is not reasonably related to scale. Considered in context the Comprehensive Plan suggests that scale is associated with size. The narrative in the Comprehensive Plan refers in multiple places to the size of development at Bradwood. The Bradwood Subarea Plan states:

“The Bradwood site offers limited potential for small to medium sized water dependent industrial development. There is deep water close to shore, some available vacant land and railroad access. There are constraints to development, however, including poor highway access and proximity of the wildlife refuge.”

The 1990 exception for the Bradwood area states that “[t]he exception will allow for water dependent industrial development of the Bradwood Marine Industrial tract. This industrial tract includes 40 to 50 acres of developable shore lands with 3,000 feet of Columbia River Estuary frontage.” (See Clatsop County 12/90 “Exception to Goal 16 Placing An Aquatic Area Adjoining The Marine Industrial Shorelands At Bradwood Into The Aquatic Development Designation.”). The AD expansions would allow for a more “complete utilization of this water dependent industrial tract by allowing for the following range of uses or activities: (1) filling of the old mill pond (2) lateral expansion of the existing dock or the construction of new docks along the Columbia River shoreline; (3) dredging to provide navigational access along the face of the existing dock and future new docks within the AD zone.” *Id.* at 1. “The mill pond in its existing configuration effectively splits Bradwood into two separate developable parcels” with both parcels about 20 acres in size. *Id.* at 2. “Filling the mill pond will significantly enhance the development potential of the Bradwood Marine Industrial tract.” *Id.* The exception notes that filling the mill pond results in the creation of a 50 acre development tract. *Id.* Dredging is to

⁹ We also note that in the verbal and written statements concerning the scale of development, opponents have not addressed what “at Bradwood” means. We conclude, based upon the statements in the subarea plans, concerning limitations related to development at Bradwood, the area at issue is the M1 zoned industrial site, along with the mill pond and attached inwater structure area. Bradwood was the location of the first commercial sawmill in Oregon and relied upon a dock. We conclude that the turning basin, park and ride, Hunt Creek bridge, etc., are not at Bradwood, as that term is used in the Comprehensive Plan policy.

Further, to the extent these project components (turning basin, park and ride, bridge, etc.) are properly held to occur “at Bradwood,” we conclude that they are not part of the 100-acre threshold we have identified in the Goal 9 Industrial Lands Inventory as characteristic of industrial sites. Areas occupied during construction of a facility such as temporary construction easements for pipelines are not permanently occupied and are not part of the 100 acres.

provide access and is not part of the site. The Industrial Lands Inventory describes the deep draft accessibility of the site as a feature of its location rather than as a component of its size. Clatsop County Goal 9 p. 91.¹⁰ Bradwood is clearly identified here as the industrial tract suggesting that the dredging activities would be excluded from the 100 acres.

The area to be dredged is also properly excluded for the following reasons. As noted above, LWDUO 1.030 defines “development” as:

“Any man made change to improved or unimproved real estate, including but not limited to: construction, reconstruction, conversion, relocation or enlargement of any structure; any mining, excavation, landfill or land disturbance, any use or extension of the use of land.”

As established above, the dredging is not “at Bradwood” for purposes of the industrial site size or 100 acres.

The proposed dredging is not a man made change to improved or unimproved real estate. Real estate is not defined in the LWDUO or other local regulations so we refer to secondary sources and conclude it refers to land.¹¹ Our view of real estate is supported by those LWDUO identified activities that qualify as changes to real estate. The activity of dredging does not include the “construction, reconstruction, conversion, relocation or enlargement of a structure”

¹⁰ We also note that, as discussed below, the river is already deep adjacent to the Bradwood MI site, and the Project does not propose a large increase in the depth of the river in this location. LUBA 2008-052 Record at 003265-003266.

¹¹ When words are not defined, LWDUO 1.035 requires that the County look to other statute or regulation in the State of Oregon. As such we look to an Appraiser Certification and Licensing Board regulation OAR 161-002-0000(31) where “real estate” is defined as:

“an identified parcel or tract of land, together with any improvements, that includes easements, rights-of-way, undivided or future interests or similar rights in a tract of land, but does not include mineral rights, timber rights, growing crops, water rights or similar interests severable from the land when the transaction does not involve the associated parcel or tract of land.”

ORS 696.010(16) defines real estate to include:

“leaseholds and licenses to use including, but not limited to, timeshare estates and timeshare licenses as defined in ORS 94.803, as well as any and every interest or estate in real property, whether corporeal or incorporeal, whether freehold or nonfreehold.”

Both of these definitions suggest that “real estate” does not include activities or man made changes occurring under water. Commissioner Rohne stated his believe that the reference to a water right in OAR 161-002-000(31) would add the dredge area to real estate as water involved in a land use transaction/zoning request. A water right is a right designated as the water supply for a designated use. ORS 540.505. It is not a zoning action or transaction.

and thus is not an improvement in the use of land. Similarly, the dredging is not “landfill” or “land disturbance” because it occurs in water as opposed to on land. The dredging is not “mining” because it occurs in the water.¹² The only possible remaining development activity that could include dredging is “excavation.” “Excavation” is “the removal by man of sand, sediment, or other material from an area of land or water for other than commercial or industrial use.” LWDUO 1.030. The proposed dredging does not qualify as “excavation” because the dredge material will be used to raise the facility site. The proposed removal of material is for industrial use because it will allow for industrial access.

CRK argues that the dredged area should be considered submersible lands and this area included. The definition of “aquatic” in the section of the Comprehensive Plan (relied upon by CRK for a definition of “use” and “activity”) states, however, that land under the river is aquatic area suggesting that the river bottom is not treated as land in this context.¹³ We reject CRK’s interpretation.

Based upon the above discussions, we conclude that even if the dredge area were properly considered part of the development activity at Bradwood, it would not be properly considered part of the 100 acres and discuss the scale of the dredging in Section 5.

4. Calculation of Permanently Occupied Land at Bradwood.

The terminal will have attached to the facility 6.2 miles of pipeline within Clatsop County and a 1.6 mile power distribution line. LUBA 2008-052 Record at 020725. Development activity outside Clatsop County is not part of its land use jurisdiction. The terminal will also have a single berth for mooring and unloading one LNG carrier at a time. Structures associated with the berth will include a wharf and four breasting and six mooring dolphins. “The wharf will extend from the shore to the berth and will be constructed of reinforced concrete beams and slabs. It will consist of an unloading platform at the end where LNG carriers will dock and a combined roadway and pipeway trestle that will connect the unloading platform to the shore. The unloading platform will be approximately 105 feet wide, and the combined roadway and pipeway trestle will be approximately 45 feet wide.... Altogether, the inwater structures will occupy less than one acre of the river.” LUBA 2008-052 Record at 020717-020718.

¹² “Landfill” is not defined. LWDUO 1.030 defines mining as “premises from which any rock, sand, gravel, stone, topsoil, clay, mud, peat or mineral is removed or excavated for sale, or other reasons, and exclusive of excavating and grading for streets and roads and the process of grading a lot preparatory to the construction of a building for which a permit has been issued by a public agency.”

¹³ “Aquatic areas include the tidal waters, including subtidal areas and wetlands of the estuaries, and non-tidal sloughs, streams and wetlands within the shorelands area boundary. The lands underlying these waters are also included. The upper limit of aquatic areas is the upper limit of aquatic vegetation, or where such line cannot be accurately determined Mean Higher High Water (MHHW) in tidal areas or Ordinary High Water (OHW) in nontidal areas.” Comp. Plan Goal 16/17 (12/90), p. 3.

Manmade changes to the MI site for the construction of the terminal were previously considered in the scale of development and, in fact, the acreage of 40.1 includes the inwater structures in the AD zone.

The industrial site in this case is the Marine Industrial Zoned site, identified in the Industrial Lands Inventory and as modified by subsequent County action, including applicant's applications considered in Ord 08-05. As LUBA noted in its decision, "development" is "any man made change to improved or unimproved real estate, including but not limited to construction, reconstruction, conversion, relocation or enlargement of any structure; any mining, excavation, landfill or land disturbance, or any use or extension of the use of land." LWDUO 1.030.¹⁴ Manmade changes to the MI industrial site include construction of the LNG terminal facility. A "structure" is anything constructed, erected, portable or located on the ground or water or attached to the ground or to an existing structure, including but not limited to residences, apartments, barns, stores, offices, factories, sheds, cabins, mobile and floating homes and other buildings. *Id.* A "building" is a "structure built for the support, shelter or enclosure of persons, animals, chattels or property of any kind." *Id.* Because development, by definition, includes structures attached to the MI land or the ground or facility, the powerline, pipeline and inwater structures within the Bradwood Landing controlled area and within the County (and thus subject to the County's jurisdiction) are included in the acreage calculation. Access improvements, such as improvements to the state owned Hwy 30, the County owned Clifton Road, required Hunt Creek Bridge work or the turning basin are not development activities at the site as intended by the scale limitation or the 100 acres identified in the Industrial Lands Inventory and are not included.¹⁵

The operational size of the facility considering the terminal and inwater structures is:

MI	30.5 acres	
F/AN	9.1 acres	(rezoned to MI)
AD	<u>.5 acres</u>	(inwater structures)
	40.1 acres	

LUBA 2008-052 Record at 005128.

¹⁴ An extension of the use of land relates to an expansion of the permitted timeline for a development (*see, e.g.,* LWDUO 5.030, discussing extensions to conditional use approvals). No extension of use is proposed here.

¹⁵ Also, roads are properly distinguished from structures in this case. A county road is an improved travel surface placed within a dedicated right-of-way that has been formally accepted by the county for access purposes and that is maintained by the county. This is distinguishable from a structure that is anything constructed, erected, portable or located on the ground or water or attached to the ground or to an existing structure, including but not limited to residences, apartments, barns, stores, offices, factories, sheds, cabins, mobile and floating homes and other buildings. LWDUO 1.030. In S4.210, the county sets forth standards applicable to the maintenance and construction of roads, bridges and railroads in the Columbia River Estuary and shoreland and aquatic areas and notes that these land transportations should be designed and sited to enhance areas in the Marine Industrial Shorelands. The roads and bridge are not identified as part of the industrial use.

Operational Area

Terminal and inwater structures	40.1 acres
Conservatively using 100' right of ways, 8 acres for pipeline and powerline on Bradwood Landing Controlled property	<u>8</u> ~50 acres

See LUBA 2008-052 Record at 020954,020955, 000331, 005128.

Fifty permanently occupied acres is less than the 100 acres identified in the Industrial Lands Inventory. Being more aggressive and including the temporary construction area for the terminal and waterway, as well as the powerline and pipeline, results in the use of 69.4 acres, still less than the 100 acres identified as describing industrial sites in the Industrial Lands Inventory.

Being even more conservative and taking the permanent right-of-way for the powerline beyond the Bradwood Landing ownership to its full length in Clatsop County results in 17.8 acres. LUBA 2008-052 Record at 000220.

The length of the pipeline in Clatsop County is 6.2 miles (reference DEIS Table 2.1.4-1, pp. 2-25, LUBA 2008-052 Record at 004751).¹⁶ As the maps in the record show, much of this segment of pipe is installed without surface disturbance using horizontal directional drill technology. LUBA No. 2008-52 Record at 00331-332. Based on 30' wide maintained pipeline corridor, there are 22.55 acres in pipeline development.¹⁷

This reflects a total of 40.1 plus 17.8 plus 22.55 acres or 80.4 acres, fewer than 100 acres (conservative since it includes pipeline and powerline areas some distance from the Bradwood industrial site)¹⁸, and small to medium/moderate in scale.¹⁹

¹⁶ Pipelines not permitted as part of this application, such as the proposed Palomar pipeline, are not properly considered part of this development. The application to store soil on nearby properties zoned F-80 during construction has been withdrawn and we do not consider the request as part of the size or scale related to the LNG use.

¹⁷ (reference DEIS pp. 4-115, LUBA 2008-052 Record at 004690): (6.2 miles*5280sq ft/mile)*30ft/43560sq ft per acre=22.55 acres.

¹⁸ LUBA 2008-052 Record at 015856, 015857, 020954.

¹⁹ **Construction Area**

Terminal and inwater structures: 61.4 acres

Pipeline: (1000' on Bradwood Landing) • (100' construction) • (1 acre) = 2.3 acres
(Controlled property) (easement) (43560 ft²)

(continued...)

Since the maximum permanent developed area at Bradwood contains fewer than the 100 acres described in the Industrial Lands Inventory, the development is consistent with and meets the applicable scale policy related to development at the Bradwood site being small to moderate in size. As discussed above, we also find that more liberal considerations of activities to be considered impact less than 100 acres.

Opponents have argued that a size of 100 acres does not necessarily result in small to moderate development when the project is considered as a whole. We find that if this is correct, exceeding 100 acres would not, in and of itself, result in a project that is no longer small to moderate. We previously made findings concerning other characteristics leading us to conclude that the scale of development activities meet the applicable policy. We revisit this topic below.

5. Further, Impacts Associated with Development Activities at Bradwood are Small to Moderate in Scale.

Our previous findings included a substantial discussion concerning the range of issues we considered and suggested that the scale of development activities at Bradwood was moderate and consistent with the Northeast Community Area Policy. At the hearing on remand there appeared to be confusion and the perception that we were considering only acreage. We were not and do not consider only acreage and continue to incorporate those previous findings to the extent they are consistent with the findings made herein. For purposes of clarity and to respond to new arguments, we also expand the discussion of scale in these supplemental findings. LUBA 2008-52 Record at 111127-142. The Comprehensive Plan narrative, as noted above, discusses constraints to development at Bradwood. We conclude that the scale policy as intended to ensure that development does not exceed the carrying capacity of the site and adjoining areas is met.

The suggestion has been made that scale is distinct from size and that we err if we consider 100 acres as relevant to whether the proposal is consistent with the Northeast Community Plan policy. Mr. Auerbach²⁰ suggests that we have not considered the whole development and argues that activities such as dredging and construction must be considered. Contrary to Mr. Auerbach's assertion, they have been considered. Mr. Auerbach suggests that we have unduly focused on size and that scale requires a consideration of the relative nature of the activity. Contrary to Mr. Auerbach's assertion, we have looked at the relative nature of the proposed activity.

(... continued)

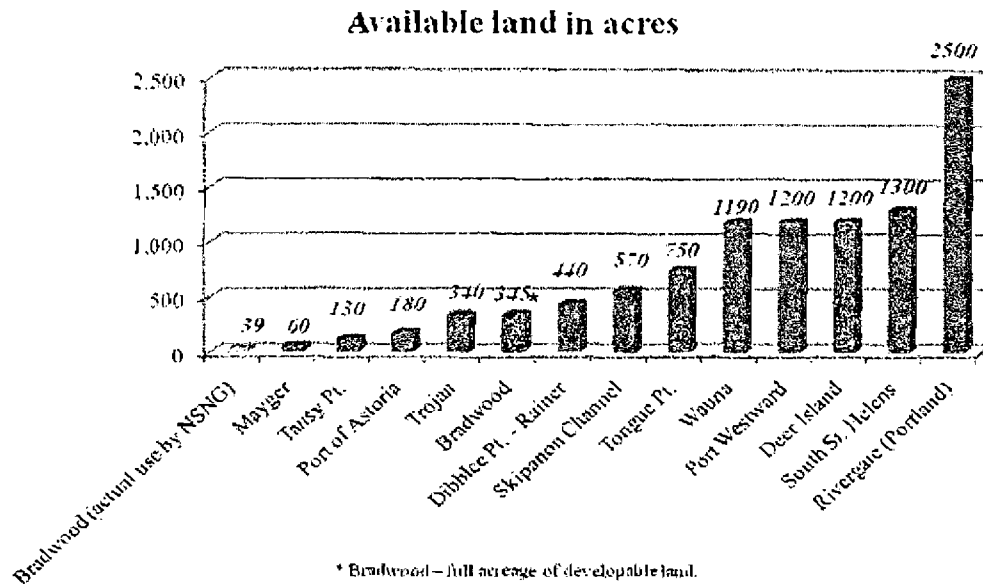
Powerline: (2500' Bradwood Landing) + (100' construction) + (1 acre) = 5.7 acres
 (Controlled property) (easement) (43560 ft²)

TOTAL: 69.4 acres

The concrete batch plants are sited in the permanent terminal area and thus included in the acreage calculation.

²⁰ Mr. Auerbach does not explain the relevancy of a non-Oregon statutory definition of heavy industry and we do not utilize it, finding the material we have relied upon more persuasive.

The facility is moderate in size compared to other industrial sites in the County, ranging from the 25-acre Tongue Point to the 288-acre Wauna Mill. WBA 2008-52 Record at 003261. As illustrated in the chart below, Bradwood is substantially smaller than many other industrial sites.



LUBA No. 2008-52 Record at p. 003260.

The proposed development is medium/moderate in scale considering historic development of the site. Bradwood has been an industrial site since the mid-1800s, and has been the location of much larger industrial developments in the past than is currently being proposed. At its height, the Bradwood mill employed 170 persons on site. Bradwood Landing will employ less than 50 people on site and is therefore significantly smaller than the lumber mill that previously occupied the site when considering employee numbers in determining scale.

The Comprehensive Plan describes industrial uses appropriate for rural sites as including those that do not have large numbers of employees traveling over county roads. During operations, Bradwood Landing employees traveling to the site on a given day will be under 50. This is not a large number of employees.

The suggestion was also made that the Project should be considered neither small to medium nor moderate in scale because of the size of the construction work force. We conclude that the size of the construction work force is not determinative of the size of the development as small to medium and, given the concerns raised about highway access, a park and ride facility is being developed offsite. The size of the permanent operational work force is a more appropriate measure of the scale of development, and at less than 70 total workers is small to medium or moderate, considering the site was previously a town with 170 employees.

In addition, the Project is small to medium in scale when compared to historical levels of ship traffic on the river. Ship traffic on the Columbia has dropped by roughly 25% in recent years. LUBA No. 2008-52 Record at p. 018501.

Opponents have asserted that the amount of dredging associated with the turning basin for the Project was not small to medium in scale because it involves the removal of 700,000 cubic yards over 46.2 acres. The river is naturally deep in this location, however, and breaking this number down, it is 0.35 cubic yards per square foot.²¹ Bradwood Landing submitted evidence to illustrate that in the context of Columbia River dredging projects, the Project is in fact medium or moderate in scale, with projects both larger and smaller along the Columbia. LUBA No. 2008-52 Record at 004124. Projects considered included the Port of Astoria's dredging of up to 150,000 cubic yards for up to five years (totaling 750,000), and the Army Corps of Engineers navigation channel project, with 19,000,000 cubic yards initially. LUBA No. 2008-52 Record at 003265-003266. During one of the Planning Commission meetings, the observation was made that there were dredging projects identified as larger than Bradwood Landing that were public projects. We do not believe, however, that the nature of the dredging sponsor as public or private relates to whether a project is medium in scale. It makes no difference to the environment whether the party removing material is public or private. Further, many publicly completed dredging projects are intended to further private industry.

The river is an average of approximately 35 feet deep in this location and this average depth will be increased to 43 feet. This 8-foot increase in depth is not large as evidenced by the discussion concerning the habitat distinction between shallow and deep water areas. LUBA 2008-52 Record No. 003266, 004042.

If the dredging is considered "development" at Bradwood, it is not large in scale and is therefore also consistent with the plan policy. The 1990 exception for the Bradwood subarea notes that the dredge volumes associated with this previous exception are less than those typically expected at other sites because the water is already deep and close to the navigation channel. Clatsop County 12/90 Exception at 5. Dredge volumes along the dock areas would be minimal due to existing deep water and close proximity to the navigational channel. The self-scouring river characteristics will also reduce the frequency and volume of future maintenance dredging at this site. *Id.* at 5. Similarly, the water to be dredged as part of this application is also already deep and close to the navigation channel, resulting in dredge activity that is not large in scale. The 1975 Lower Columbia River Port Study by ODOT and area ports found Bradwood to be an appropriate site for deep draft port development and the physical/cultural components map classified the area as having only minor limitations on development. LUBA No. 2008-52 Record at 002731. This is small to moderate and not large.

We conclude that the Bradwood Landing Project is consistent with Clatsop County Comprehensive Plan policies and zoning ordinance provisions designed to ensure the development of a site does not exceed its carrying capacity.

²¹ 700,000 cubic yards/46.2 acres*(43,560 sqft/acre)=0.35 cubic yards/square foot.

The Northwest Community Plan recognizes the excellent potential of the Bradwood site for small to medium sized development. The first paragraph in the “Issues” section of the Bradwood Subarea Plan discusses the site’s potential for certain forms of development. It declares that the site “offers limited potential for small to medium water-dependent industrial development.” It notes that the site has certain advantages—proximity to deep water, rail access, etc. It then notes that the site has some “constraints”—specifically, “poor highway access” and “proximity of the wildlife refuge.” “Issues” of “poor highway access” and “proximity to the wildlife refuge” are addressed through traffic and environmental mitigations proposed in this development application, which ensure that impacts are small to moderate in scale.

The 1996 Inventory observes that:

“Bradwood is at the end of a three mile long asphalt county road (sic) connects with U.S. Hwy. 30 due south. Improvement to this County road would be necessary to accommodate any significant industrial traffic loads. Since the railroad passes through the site and the Columbia borders it, barge and rail traffic may be the preferred method of transportation.”

Bradwood Landing will improve Clifton Road as anticipated in the Inventory. Bradwood Landing’s improvements to the road do not result in its exceeding the standards designated for Clifton Road in the Transportation System Plan and therefore do not result in an “out of scale” road. LUBA No. 2008-52 Record at 001140.

The Subarea Plan notes that the area has limited highway access. The staff has suggested that a small to medium use is one that will not create a burden on the transportation access. As conditioned, the Project does not exceed the capacity of the access available. It is the first three years, during plant construction, that are of most concern. During construction, activities will, at their peak, add less than 600 trips a day to Clifton Road. When the plant begins operating, the traffic it generates on Clifton Road will diminish. The traffic added to Clifton Road, both during construction and operation, is consistent with the capacity of Clifton Road. Further, the road will be substantially improved as part of the Project, addressing the concern related to “poor highway access.”

We find that the performance standard for Clifton Road is 750 average trips per day. During the peak of construction, traffic associated with the Project and background traffic result in fewer than 600 trips on Clifton Road per day. During operations, the number of trips along Clifton Road will be less than 140 trips per day. These levels are well within the limits identified and represent a level of development consistent with any site development constraints related to the “poor highway access” described in the Subarea Plan. The 1996 Industrial Lands Inventory observes that development at Bradwood that adds significant trips to Clifton Road will need to improve the road. Bradwood Landing proposes to make such appropriate improvements. The size of the construction workforce reflects construction timeframe and project component complexities and will not unduly burden the site for the short time it is ongoing because a park and ride facility is being developed to limit traffic on Clifton Road.

Further, Bradwood Landing has agreed to improvements to Clifton Road and has submitted a variance application for the S6.000 Table I provisions that cannot be met within the right-of-way. By maintaining traffic levels within the capacity of Clifton Road and improving its safety, Bradwood Landing has addressed the concerns related to highway access and is appropriate in scale.

The 1996 Industrial Lands Inventory states that the Bradwood site is appropriate for uses that are self contained or utilizing limited public facilities. The Bradwood Landing Project is such a facility. The powerline to serve the site is allowed in the MI and F 80 zone and will not adversely impact PacifiCorp's service area. Horizontal directional drilling will be used extensively to construct the pipeline, limiting the scale of any surface disruption to small or moderate.

The tanks at the site are tall and wide. The MI Zone, however, includes in its development standards an exemption for Bradwood from otherwise applicable limitations on building size, suggesting this does not make the facility inconsistent with the site. L3.634(16)(A).

Further, the request to rezone some land to MI does not support a conclusion that the scale of development is large. First, the Bradwood Subarea Plan anticipated rezoning of the mill pond to MI. Thus addition of that area to the amount of land zoned MI should not be considered an increase in the industrial footprint envisioned by the County. Moreover, the applicant studied a broader area than CREST had and submitted detailed information concerning wetlands on the site and a substantial amount of MI-zoned land on the western portion of the property contains sensitive wetlands and is outside the construction area. The addition of land zoned MI, as compared to the MI acreage that will not be used, is minimal and therefore negligible. The AN land to the south of the MI site also appears to be consistent with the County's original mapping since much of it is uplands and was part of the original mill site. The rezoning clusters the development and allows avoidance of the rarest wetland habitat located in the MI area to the northwest. The 1990 exception described the site as "a medium sized water-dependent industrial development tract."²² The minimal increase of the total MI land, will not transform the site into a large development tract. The shift in acreage utilized as MI is more to avoid impacts to the highest quality wetlands on the site, which happened to also be zoned MI, rather than to increase the total developed area. Further, by condition, the County may in the future rezone 4.7 acres currently zoned MI to AN without applicant opposition.

The Subarea Plan specifically discusses the amount of fill that would be appropriate at Bradwood, and states that development that would require fill of wetlands and waters of more than 20 acres is inappropriate. The Project proposes to fill only 13 acres of wetlands. LUBA 2008-52 Record at 020902. The facility also occupies essentially the same amount of land currently zoned MI and AD, the physical constraint the County placed on the site through adoption of its zoning map. Thus, the scale of industrial development proposed is within that contemplated by the County when it adopted the Comprehensive Plan.²³ The magnitude of fill

²² The 1990 exception also described a small industrial development site as 20+ acres.

²³ *Terminal Narrative*, page 190, LUBA 2008-52 Record at 20902.

remains at least one element of a small-to-medium development, and is supportive of the conclusion that the Project is appropriately scaled for the site.

The Project will support and be compatible with the wildlife refuge through extensive mitigation measures that will generally improve habitat in the area. Habitat of marginal use and value due to a history of active human use will be lost at the terminal, but the restored habitat will be of the highest potential value for the same species, because the replacement ratio will also be greater than 1:1. LUBA 2008-52 Record at 000154. The refuge is approximately 0.5 miles away. LUBA No. 2008-52 Record at 018052. Deer may utilize the area, but such use is small to moderate given the limited quantity of potentially suitable habitat. LUBA No. 2008-52 Record at 018052. Impacts will be small to moderate given the minimization of the terminal size, reducing encroachment into habitat areas. LUBA No. 2008-52 Record at 005059.

Bradwood Landing has argued that there will be a substantial net gain in habitat function. The reduced availability and function of upland wildlife habitat at the terminal and associated facilities, including habitat for Columbian white-tailed deer, will be mitigated through restoration of river bottom forest habitat, primarily at the Peterson Point site between Westport Slough and the Columbia River, about six miles southeast of Bradwood. The restoration will be consistent with the requirements of the Oregon Department of Fish and Wildlife's ("ODFW") fish and wildlife habitat mitigation policy, *see* OAR ch 635, div 415, and will include underplanting acreage that is currently hybrid poplars with native conifers and browse shrubs, and planting additional acreage that is currently bare ground and blackberries with native riparian trees and shrubs. As we noted in our initial findings, USFW and ODFW are reviewing the project and their recommendations will be incorporated into the project through the Biological Opinion and Incidental Take Study. LUBA 2008-52 Record at 00132. Impacts on deer or the refuge are also small to moderate, given the protection mechanisms for habitat discussed elsewhere in these Findings.

The Project is therefore appropriate in scale for the site given many factors. We agree with Mr. Auerbach's proposition that scale relates to relative relationships. The 100 acres related to the size of other industrial sites in the county. References to scale in the Standards Document includes submission of documents drawn to an appropriate scale (S2.503, S3.212, S3.212). We found and continue to find that relative to other industrial sites and Columbia River dredging and the remainder of the proposed activity conforms to the small to moderate in scale policy.

Mr. Auerbach suggests in his July 6, 2009 letter (pg. 6) that Goal 9 defines small scale industrial use. Mr. Auerbach states:

"The Goal 9 element of the Clatsop County Comprehensive Plan gives an extensive definition of small scale industrial use (p. 81 of 138).

"Cottage Industry Definition: Small scale industrial uses which do not alter the essence of the particular zone in which they wish to locate and do not detract from the livability of the surrounding land uses. As such, conditional use standards would vary depending upon the zone for which they are proposed. Uses anticipated under this category would include but not be limited to small boat

building, woodworking, electronic assembly crafts, furniture construction and similar activities.”

This is not a definition of small-scale development.

Cottage industries are an example of a small-scale activity provided in Goal 9 but not necessarily the only development activity that is small in scale. The definition does not say small-scale activities necessarily have small impacts. Goal 9’s definition of “cottage industry” does not state that small scale industrial uses do not alter the essence of the particular zone etc. Rather, the definition states that “cottage industry” is a small scale industry that does not have those impacts.

Mr. Auerbach misreads the code when he states small scale “is defined as” intended for the needs of the local community or for people traveling through the rural community and compatible with an enclosed building. (Auerbach 7/6/09 letter, p. 5). Mr. Auerbach references “3.060” and various other Clatsop County provisions. *Id.* at p. 5. Upon review of both the LWDUO and Standards document we note that small scale and light industrial are separated by a comma or used as an adjective and are distinct characteristics. No “3.060” was found in the standards document and 3.060 is only a heading with the LWDUO. LWDUO 3.062’s purpose section provides that zone may provide for nonresidential uses small in scale, intended for the needs of the local community or for people traveling through the rural community and are compatible with surrounding uses. The listing of the characteristics in this manner illustrate that (1) small in scale, (2) intended for the needs of the local community or people traveling through the area, and (3) compatible with surrounding uses may be considered separate and distinct characteristics. LWDUO 3.062.²⁴ Thus, contrary to Mr. Auerbach’s suggestion small in scale does not necessarily mean intended for local use. We reject Mr. Auerbach’s contention given other language in the plan and the LWDUO.

Scale is also discussed in the context of home occupations as appropriate for small scale businesses that could operate in a noncommercial or industrial zone (S3.461). The code does not state that small scale development is that able to operate in a non-commercial or non-industrial zone.

Mr. Auerbach states that:

“‘Small scale’ development is related more to the types of uses in context than by square footage of buildings and never by land area in the LWDUO. Building square footage associated with but not defined small scale is variously less than 3000, 4000 and 30,000

²⁴ Nevertheless, uses conditionally allowed in this zone include those of a “public utility nature, but not including equipment storage, repair yards, warehouses or related activities.” LWDUO 3.066(a). Public utility by definition includes “[a] private business or organization such as a public service corporation, performing some public service and subject to special governmental regulation” the service of which are paid for directly by the recipients thereof. LWDUO 1.030. “Such services include but are not limited to water supply, electric power, gas and transportation of persons or freight.” Gas is specifically identified as a public utility service and the proposed development is a public utility facility.

square feet. Thus square footage is clearly not the sole consideration.”

Auerbach 7/6/09 letter, p. 5. We conclude, given that Bradwood is expressly exempted by the acknowledged code from building size limitations, the height or width of storage tanks does not make the Project out of scale.

Mr. Auerbach asserts that heavy industrial uses should be used as a proxy for large scale or that anything “beyond” heavy industry is large in scale. *Id.* at p. 8. We reject that contention given the other language suggesting siting is appropriate. Mr. Auerbach asserts that large scale industrial uses should be considered as exceeding heavy industrial uses potentially incompatible with most other establishments and typically appropriate to areas with extensive shipping facilities. Mr. Auerbach claims that a primary difference among scales of development is ability to fit in an urban environment, impacts on the environment and claims that Bradwood Landing is incompatible. This ignores the Marine Industrial zoning of the terminal site. If dependence on rail or shipping facilities makes a proposed development inappropriate use, the very features of the site promoted by the County in its planning documents cannot be utilized. If the size of the tanks makes development at Bradwood large and therefore impossible, the MI zone’s express exclusion of Bradwood from the otherwise applicable building size limitation would be superfluous.

Small scale is not necessarily light industrial.²⁵ Considering the code and standard text cited small scale is one of a list that includes items such as compatible with the surrounding areas which suggests that small scale and compatibility are not necessarily one and the same. Nonetheless, we note that the Marine Industrial zoning applicable to Bradwood ensures that any development at the site must in fact be at a scale such that compatibility with surrounding land uses is achieved. As previously discussed in the findings, the proposal is compatible with the area. We conclude that even if we consider the wide range of issues opponents argue should be considered, they do not combine to make the Project other than small to moderate in scale.

As part of the Goal 16/17 resource in the County, properties suitable for water dependent development are identified. In Clatsop County, the prime development sites are zoned Marine Industrial based upon compatibility with adjoining uses (and therefore appropriateness of scale). We found, and continue to find, that the scale of development activities proposed at Bradwood are consistent with the site.

²⁵ If it were properly determined that the scale element dictates “light industrial” development, under our code’s light industrial development provisions we allow storage buildings or warehouses, such as the tanks and treating products such as the conversion of liquefied natural gas to gaseous form and related accessory uses. LWDUO 3.446. S3.518 discusses dwellings in conjunction with farm use where a proposed dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the land, such as planting, harvesting, marketing or caring for livestock, at a commercial scale.” An argument that scale is related to providing commercial service is not sufficiently developed for us to respond to Mr. Auerbach’s claim. There is not a clear relationship between revenue or taxes generated and scale of development activities. The alleged relationship between small to moderate scale development at Bradwood and commercial scale is not sufficiently explained.

The County Comprehensive Plan states in Goal 9 that the characteristics that make siting an industrial use outside the UGB appropriate include unique site specific resources located outside the UGB.

“-cannot budget the costs of unneeded urban services and maintain the comparative advantage necessary to market their product

“-are compatible with the accepted farm or timber management practices of adjacent activities

“-have necessary facilities already in place

“-existed prior to adoption of Comprehensive Plan or LCDC goals

“-are not labor intensive and do not require a large number of employees to travel from urban areas over rural roads.”

(Emphasis added.) Clatsop County Comp Plan Goal 9, page 21.

As discussed previously, the use is not labor-intensive requiring large numbers of people to travel on rural roads. The use is compatible with surroundings as discussed below.

The purpose of the marine industrial zone is “to manage Columbia River Estuary shorelands in urban and urbanizable areas and shorelands in rural areas especially suited for water dependent development and to reserve these shorelands for water dependent industrial, commercial and high intensity recreational use.” LWDUO 3.622.

The MI zone is sensitive to surroundings in that a permit for construction of any structure requires consideration of the compatibility of the structure and use with surrounding uses given:

“[t]ransportation, access, signs, lighting, building placement and design, noise, air quality, vibration, storage, landscaping, adjoining uses and location of public utilities including water and sewer facilities.” LWDUO 3.634.

Mr. Auerbach argues that small scale industries have limited impact on surrounding uses and are compatible therewith. Assuming this to be correct, we conclude the impact of the development activities at Bradwood are at most moderate in scale. In our previous findings, we addressed the compatibility of the proposed structures with surrounding uses considering numerous factors. (LUBA 2008-52 Record at p. 000278.)

The Project is of a scale compatible with surrounding uses and thus small to moderate because

- The Project is compatible with surrounding uses with respect to transportation. Regarding marine transportation on the Columbia River, the Project is compatible with commercial and recreational vessel traffic on the river and consistent with U.S. Coast Guard requirements for vessel safety. See Bradwood Landing Terminal,

Resource Report 11, Reliability and Safety § 11.3.3 (June 2006). We have imposed a condition of approval limiting any interference with the eastern entrance of Clifton Channel adjacent to the terminal such that it is no more than 2% of the year.

Regarding vehicle traffic over Bradwood Road, Clifton Road and U.S. Hwy. 30, the Project, with the improvements and measures described in the findings, will be compatible with the capacity of the road system and nearby land uses. The Project includes a slight rerouting of the existing railroad through the property to ensure that the terminal and railroad do not interfere with each other. Currently, there is no freight or passenger traffic on the railroad at Bradwood because of lack of business and the poor state of the tracks adjacent to and west of Bradwood, and no traffic is expected prior to construction of the terminal. Therefore, the rerouting of the tracks and construction of the terminal will not interfere with rail traffic. Further, a shuttle system is used during construction to ensure that traffic levels on Clifton road will be consistent with that authorized in the County's Transportation Supplement Plan. The small to moderate impact on traditional fishing areas is addressed in our "protect" findings.

- The Project is compatible with surrounding uses with respect to access. The Bradwood site may be accessed via water, rail, and road. Water access to surrounding lands and uses is not diminished or harmed as a result of the proposal as discussed above. The Project will also have no effect on rail access to surrounding properties. The railway will be slightly relocated and upgraded. The terminal would not interfere with rail traffic through the site and would not interfere with existing or future rail access to nearby properties. Road access to the terminal is via Clifton Road, Bradwood Road, and U.S. Hwy. 30. Clifton Road provides surface access to surrounding lands immediately adjacent to the site, and Hwy. 30 provides road access to other surrounding lands. Proposed marine terminal facilities are compatible with road access because road traffic associated with the proposed use will not restrict or degrade road access to surrounding lands below target level-of-service standards, as discussed in the Updated Traffic Impact Analysis. Further, product will be transported from the site via pipeline rather than trucked over roads.
- The Project will be compatible with surrounding land uses with respect to signs. The Project will not block or otherwise harm any signs on surrounding lands. Moreover, because the public will not have access to the facility, the facility's signage requirements will be minimal and will comply with applicable signage standards in the County's development standards document at section S2.300.
- The Project will be compatible with surrounding lands and land uses with respect to exterior lighting. Lighting is required for the safety of employees, navigation safety, and security. Lighting will comply with the applicable Marine Industrial zone standards in § 3.634(11) by using down-cast lighting fixtures, lighting shields, and landscaped buffer areas. Proposed onshore terminal facilities will be compatible with surrounding land uses with respect to building placement and design. The Bradwood Landing site is not visible from nearby residential property in the Clifton area, to the west. Another waterfront industrial use, the pulp and paper mill at Wauna, is located three miles upstream from the Bradwood Landing site. The Wauna mill operates

around the clock and is fully illuminated. The mill is much larger than the proposed terminal facilities at Bradwood Landing. The terminal facilities will be designed and configured in a manner that maximizes operational safety, while at the same time avoids or minimizes conflicts with adjoining and nearby land uses. This can be accomplished within the parameters of the MI setback (zone section 3.634(13)) and MI building height (zone section 3.634(15)) requirements.

- The Project will be compatible with surrounding uses with respect to noise. Bradwood Landing Terminal, Resource Report 9, Air and Noise Quality (June 2006) provides a detailed description of noise associated with the construction and operation of the terminal. Ambient noise sources in the vicinity include ships, barges, motor vehicles, quarry operations, industrial operations at Wauna, and agricultural activities on Puget Island. Pile driving, earthwork, and other construction activities will generate noise over a 36-month construction period. Bradwood Landing proposes to develop a construction noise control program in cooperation with construction contractors. The goal of this program will be to address specific noise control measures required to reduce or eliminate excessive noise from specific equipment and/or processes. This plan will include a proposed target of 10 dBA of overall noise source attenuation for selected construction equipment. Such attenuation might be accomplished through the use of sufficient engine exhaust mufflers, acoustically absorptive engine enclosures, the application of temporary noise barriers, and other proven noise reduction methods. Bradwood Landing will work with the construction contractor(s) and a qualified professional noise control engineer to develop an effective construction noise control program that will identify and achieve the required level of noise reduction required to address most noise impacts. An example of this noise control approach, reducing the reference noise level of selected construction equipment by 10 dBA in the model would result in lower aggregate sound levels. While noise from dredging activities could be reduced with targeted noise control, noise impacts would persist for the approximately 30-day dredging period. During non-dredging periods, noise impacts would still occasionally exist even with selected noise control (primarily during pile driving activity), but the average noise levels would generally remain below 55 dBA Ldn. Activities that could generate noise at the terminal during typical operations would include ship mooring and unloading, and the operation of a number of pumps, compressors, submerged combustion vaporizers, fans, and blowers. Equipment performance criteria were collected from equipment manufacturers, and the FERC Resource Reports for similar facilities. Some associated noise source levels were estimated using industry-standard sound power level estimation equations. With the estimated noise levels from typical LNG facilities, equipment noise data, manufacturer data, and calculated equipment noise levels, a noise impact analysis was performed by URS to estimate the contribution of the proposed facilities to sound levels. The results of the analysis are presented in a detailed noise impact analysis report, included in Appendix 9-C of Resource Report 9. Table 9.2-9 in Appendix 9-C shows the future predicted noise levels at five measurement locations along with the operating facility's contribution to those levels. The modeled noise levels do not exceed FERC's 55 dBA Ldn guideline or the Washington or Oregon regulatory

thresholds. Therefore, no noise mitigation is needed during the operation of the terminal and noise impacts are not large.

- The Project will be compatible with surrounding uses with respect to air quality. Resource Report 9 provides a detailed description and analysis of air emissions associated with the proposed facility. Sources of air emissions in the vicinity of Bradwood include passing ships and tug boats; motor vehicles on nearby roads and highways; the pulp and paper mill at Wauna, about three miles upstream from the site; and railroad locomotives. Bradwood Landing has applied for an air contaminant discharge permit (“ACDP”) from DEQ. The conditions of the ACDP will ensure that the proposed facility will comply with applicable air emission standards and requirements. See Section 6.2.1 of the CZMA Certification. The Project will also be compatible with surrounding land uses with respect to vibration. The operation of the facility would not cause vibrations detectable beyond the site boundaries.
- The Project will be compatible with surrounding lands and land uses with respect to storage. Proposed on-site storage facilities include two outdoor LNG storage tanks, each with a capacity of 160,000 cubic meters. Similar tanks are not found on surrounding lands, but they would not be incompatible with surrounding land uses because they do not require that uses or activities be curtailed or significantly modified. Although the terminal and storage tanks will be visible from the river and the Portland & Western Railroad, they will not be visible from U.S. Hwy. 30, the residences in Clifton, or other neighboring properties in Oregon. The nearby pulp and paper mill at Wauna is visible from U.S. Hwy. 30, the Columbia River, and Bradley State Scenic Wayside. Vegetation along the shore will help maintain compatibility with respect to views of the terminal from the river and points in Washington including Puget Island. Further, the storage tanks will be painted to blend with the background hills when viewed from the river.
- The Project will be compatible with surrounding land uses. Most adjoining lands are managed for forest uses. Activities associated with the management of commercial forest lands will not be negatively affected by onshore terminal facility operations. A railroad passes through the site, and can be considered an adjoining land use. Proposed terminal facilities do not conflict with the railroad. The Columbia River adjoins the proposed Bradwood site. As explained in section 11.3.3 of Resource Report 11, LNG tanker docking and unloading will not have any substantial effect on navigation via the main navigation channel or Clifton Channel.
- The Project is compatible with surrounding lands with respect to public utilities. There are no public sewers or water lines on the site or in the immediate vicinity, and Bradwood Landing will supply its own water, sanitary sewer, and electric power needs.
- The use of on-site batch plants will eliminate some heavy truck traffic from Clifton Road and U.S. Hwy. 30 during construction. Batch plants will be located near the center of the terminal, away from adjoining non-industrial areas. The MI zone has no performance standards for power poles or lines. The proposed power line route has

no impact on transportation facilities because it does not cross any transportation facilities. The poles are not lighted. No managed landscaping is proposed or required in the right-of-way beneath the power line. This corridor will be kept clear of large trees, but herbs and shrubs will grow in the corridor beneath the power lines. Water and sewer services are not needed for the power lines. The proposed power lines and poles do not generate noise or vibrations, nor do they result in air or water discharges.

- Amount of warehousing is consistent with site given decision of County to place no limits on building size for permitted uses.
- Impacts associated with the pipeline are small to moderate given the extensive amount of directional drilling to limit surface disturbance.
- The cumulative impact of the development will not have an adverse impact on flooding. Bradwood Landing stated that the 500-year flood elevation is 10.6 NGVD or 13.83 NAVD per the FIS ("flood insurance study") Report Table 3. Final grade elevation at the site varies from 20 to 25 NAVD. Since final elevation following deposit of the dredge material is at least 20 NAVD, it is above the 500-year flood plain level of 13.83 NAVD. Flood plain storage is protected. Applicant plans to deposit at least 350,000 cubic yards of dredge material on the site. This will elevate the site to 20 feet. The 100-year flood level is 13.3 feet. Assuming conservatively that 350,000 cubic yards of flood water will be displaced, with a river flow of 540,000 cubic yards per second at 100-year flood levels, the 340,000 cubic yards would be filled by river flow in less than 18 seconds. Considering this, as well as the tidal nature of the river, the Project will not affect flood plain storage capacity in any appreciable amount. Further, as shown in the memorandum provided in [Attachment 1 *included in the applicant's FHO findings*], the proposed mitigation at Svensen Island provides about seven times more water storage capacity than the volume being filled by the dredge material placement.
- Hunt Creek Bridge work has small impact as described in LUBA-2008-52 Record at 004987.
- Public sewers and water lines are not needed as the site can be developed to be self sustaining. Power will be provided by PGE over distribution lines located on MI land at the terminal site and F80 land on the portion of the line located above Bradwood. Other utility service is not required. Access is provided to the MI zoned terminal site via railroad, Clifton Road and the river. The S6.005(3) criteria for the design, construction and maintenance of the access road are met by the proposed improvements. Clifton Road will be designed for two way traffic. The developer will bear the full burden of the improvements proposed to Clifton Road. Improved vehicle access will be provided. The developer will shift a drainage ditch outbound a few feet as required in some cases. No new utilities will be needed, nor existing utilities affected, by the road improvements. The improvements to the road will benefit the adjoining land uses, and residents of the area will have priority access during construction. No new roads are proposed. Further, by minimizing the expansion of the road to that needed for safety purposes, interference with forest

management or harvesting practices will be minimized. The proposed improvements minimize incursion onto forest land by focusing work within the existing right-of-way and avoiding adjacent sensitive lands. Pedestrian and bicycle trips are not the type of trips taken or needed in this area.

- Consistency with navigation is also established in the work done by the Coast Guard on waterway suitability.
- The helipad is provided simply as a condition of approval landing spot should emergency service be required and does not involve routine use.²⁶
- The property's rural location and large size greatly limit the scale of compatibility issues: there are not many neighboring uses with which the proposed development might be incompatible. There are some, most notably the dwellings on Puget Island, about a half-mile away, and the dwellings in Clifton, about three-fourths of a mile away. The Puget Island residences will have a direct view of the LNG terminal and may experience some noise, vibration, unsightliness, or bright lights from the terminal. The dwellings at Clifton will not have direct views but may experience some impacts from the terminal, such as additional traffic on Clifton Road. We conclude that whatever noise, smells, or unsightliness residents of the area may experience from an LNG marine terminal at Bradwood, those side effects from the development do not render it "incompatible" in terms of size or scale with nearby dwellings. It must be recalled that Bradwood long was used as a mill site and still is planned and zoned for industrial uses. Industrial uses often are noisy, smelly, and unsightly: **Any** industrial use at Bradwood thus might cause some disturbance or inconvenience to dwellings in the area. We assume that County policy makers took that into account when they zoned Bradwood for industrial use. And we conclude that a policy that development activities at Bradwood shall be small to moderate in scale, should not be used to say "no industrial uses may be allowed at Bradwood" when the Comprehensive Plan and relevant zoning district already specify that such uses **are** allowed there.

The extensive analysis set forth above includes both construction and temporary as well as permanent impacts and establishes additional basis for our determination that given a broad and inclusive reading of the policy, development activities at Bradwood are small to moderate in scale, not involving extensive filling to create new land areas.

CRK suggests that the scope of activities considered by the County in evaluating scale was inadequate.

In its LUBA brief, CRK mentioned definitions in the Goal 16/17 (12/90) element of Comprehensive Plan as follows:

²⁶ LUBA 2008-52 Rec at 000032.

“Development or Use

“Use: Use is the end to which a land or water area is ultimately employed. A use often involves the placement of structures or facilities for industry, commerce, habitation, or recreation. An accessory use is the use incidental and subordinate to the main use of the property and located in the same lot or parcel as the main use.

“Activity: Activity is any action taken either in conjunction with a use or to make a use possible. Activities do not in and of themselves result in a specific use. Several activities—dredging, piling, fill—may be undertaken for a single use—a port facility. Most activities may take place in conjunction with a variety of uses.”

LUBA did not address the CRK identified definitions in its findings but rather looked to LWDUO 1.030. The supplemental findings prepared followed LUBA’s lead and used the LWDUO definition of development. CRK failed to preserve its right to appeal the LUBA decision but argues now that the definition of development used should be the definition of use above. This is a settled issue.²⁷

Further, LWDUO 1.050 incorporates the Plan into the zoning ordinance and makes use of the definitions in the LWDUO appropriate. There is not conflict between the code and Plan because development is not defined in the Comprehensive Plan.

Development is not defined in the section of the Comprehensive Plan cited by CRK.

LWDUO 1.030 contains the following definitions:

“Development – Any man made change to improved or unimproved real estate, including but not limited to: construction, reconstruction, conversion, relocation or enlargement of any structure, any mining, excavation, landfill or land disturbance, any use or extension of the use of land.

“Activity – development”

Use is not defined in the LWDUO.

²⁷ We observe that it is not clear from the language cited by CRK that County intended development to have same definition as use in the CRK cited plan definitions. The County could have intended to (1) include a definition of development and use and activity and simply failed to do so, (2) intended for development and use to mean the same thing or (3) intended development and activity to mean the same thing. The County may reasonably conclude development is not defined in the Plan and look to the code for the appropriate definition.

CRK argued to include construction activity and, based upon the Comprehensive Plan definition of activity, any action that facilitates development at Bradwood.

In fact, the definition of "development" in the LWDUO includes construction activity and the LWDUO, as its definition of "activity," refers to development. These activities do not, however, all occur at Bradwood. Further, using the CRK preferred definition of activity does not lead us to conclude that the Project is inconsistent with the identified policy. We find otherwise. CRK essentially asserts that construction activities make the proposed action large in scale. We conclude, on balancing the evidence and as discussed in these findings, that it does not.

III. CONCLUSION

For the foregoing reasons, we reaffirm our decision and findings in Ord 08-05 as modified and supplemented by these findings.



CLATSOP COUNTY

**Transportation and Development Services
Land Use Planning**

800 Exchange Street, Suite 100
Astoria, Oregon 97103
(503) 325-8611 • Fax (503) 338-3666

Attn: Plan Amendment Specialist
Dept. of Land Conservation & Development
635 Capitol Street NE, Suite 150
Salem, OR 97301-2540

FIRST CLASS MAIL