

November 15, 2019

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VIA EMAIL ONLY

Mayor Joe Benetti
City of Coos Bay City Council
Coos Bay City Hall
500 Central Avenue
Coos Bay, OR 97420

Re: City of Coos Bay Land Use Applications #187-18-000153 – Jordan Cove Energy Project - Navigation Reliability Improvements Applicant’s Final Written Argument

Dear Mayor Benetti and Members of City Council:

This office represents Jordan Cove Energy Project L.P. (“JCEP”) with regard to City of Coos Bay (“City”) Land Use Application #187-18-000153 – Jordan Cove Energy Project - Navigation Reliability Improvements (“Application”). The Application requests City authorization of a CBEMP zone map amendment from 52-NA to DDNC-DA for a 3.3-acre submerged area located immediately adjacent to the Federal Navigation Channel in Coos Bay, together with a related exception to Statewide Planning Goal 16 in support of such amendment. Subject to these authorizations, the Application also requests concurrent approval of an Estuarine Permit to allow new and maintenance dredging within the 3.3-acre area and a temporary dredge transport pipeline located in adjacent zone map designations. The purpose of these requested City authorizations is to allow dredging at this location adjacent to the existing Federal Navigation Channel, together with concurrent and similar improvements in Coos County at three channel locations to the southwest, to increase the transit window for all ships entering the channel during a broader range of weather and environmental conditions. Taken together, these four proposed channel improvements are described as the Navigational Reliability Improvements (“NRIs”).

This letter constitutes applicant’s final written argument in support of the Application following the close of the public record before the City Council. It does not include or attach any new “evidence” as that term is defined in ORS 197.763(9)(b).

I. Summary of Process

The Application has been the subject of an extensive public review process. Following the determination that the Application was complete, the Coos Bay Planning Commission held a noticed public hearing on March 21, 2019, followed by two open record periods (March 21 - April 25 and April 26 – May 16, 2019) during which over fifty separate written comments were submitted including thousands of pages of documents addressing a wide array of issues. LCOG submitted a Staff Report to the Planning Commission dated July 23, which included a comprehensive review of the comments received as applied to the applicable approval criteria. Following deliberation based upon the extensive written and oral testimony in the record and the applicable criteria, the Planning Commission recommended approval of the Application at its July 23, 2019 hearing.

The City Council held a noticed public hearing on August 27, 2019, during which the record before the Planning Commission (as well as additional public testimony) was received. The public hearing before the City Council was closed, and two open record periods for the submission of additional written testimony was established (August 27 through September 27 and September 28 through October 31, 2019). In all respects, the Application has been subjected to extensive public input and a thorough review process consistent with all City and statutory review requirements.

II. Limited Scope of the Application

A reference to the public comments received and the extensive record before the City Council may suggest the inaccurate perception that the Application encompasses the entire JCEP LNG Terminal Project, but that is not the case. Rather, many of the public comments and documents submitted are not directly relevant to the narrow decision before the City Council. From the outset, concerned commenters raised a far-ranging set of issues including objections to other components of the Project, which are under separate review, such as NRIs #1 through #3 located in Coos County, upland deposition of dredge spoils at APCO 1 and 2 sites, dredging of the terminal slip and access channel, LNG Terminal improvements, the Pacific Connector Gas Pipeline, and other aspects of the Project which, again, are subject to *other local, state or federal permits and proceedings* and are not within the City's jurisdiction or the subject of this Application.

Nonetheless, because of the wide-ranging and extensive public comments submitted, JCEP, as the applicant with the burden of proof in this matter, was compelled to provide thorough testimony in response, including necessary substantial evidence into the record to allow the City to fully evaluate the merits of such comments and to ensure that JCEP has provided substantial evidence demonstrating that the applicable CBMC approval criteria are met. At the close of the record before the Planning Commission, JCEP submitted a detailed final written argument to the Planning Commission on May 23, 2019, which (1) addressed the approval criteria, (2) cited to the supporting evidence in the record, and (3) responded to the main issues raised by public comments. For the City Council's reference, a copy of this earlier submittal to the Planning Commission addressing this extensive record is attached to this submittal.

In sum, and although the record to date is extensive, the scope of the decision before the City Council is expressly limited to the request for authorization to allow dredging a single 3.3-acre area of deep sub-tidal land immediately adjacent to the existing Federal Navigation Channel for the purpose of allowing vessel transit during a broader range of weather and environmental conditions than is feasible today. As noted above, additional aspects of the JCEP LNG Project located outside the City of Coos Bay are not relevant to this decision.

After considering all the evidence, public comments, and relevant criteria in the CBMC, the Planning Commission determined on July 23, 2019 that JCEP had *satisfied all criteria* and recommended approval of the Application. The Planning Commission has unique expertise and experience reviewing land use applications for compliance with applicable criteria. The Planning Commission's recommendation should, accordingly, guide the City Council's decision.

III. New Issues/Evidence before City Council

Following the Planning Commission recommendation of approval, the City Council held a public hearing and provided two additional open record periods for the purpose of further public input. Notably, there are no significant new issues of substance raised during the City Council's review proceedings that were not raised before, and therefore considered, by the Planning Commission, with the potential exception of testimony requesting a reduction of the existing in-water work window ("IWWW") established by Oregon Department of Fish and Wildlife ("ODFW"). For the reasons explained below,

the City Council should deny the requested reduction and maintain the standard IWWW.

A. The Evidence does not Support Shortening the IWWW.

The Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (“CTCLUSI”) provided an October 31, 2019 letter (City Council, Comment 17) expressing support for an earlier letter from the ODFW (submitted to the City Council on August 27, 2019), which generally asserted that the IWWW should be shortened from February 15 to February 1 to protect spawning Pacific herring (*Clupea pallasii*). This ODFW letter provided no studies, data, or support for the suggestion that the IWWW should be shortened. CTCLUSI also submitted recent correspondence between ODFW and JCEP including related studies provided by ODFW addressing the IWWW generally. ODFW did not, however, submit any new evidence in this proceeding that supports modification of the current IWWW at this location. For the reasons outlined below, JCEP believes that the testimony offered by CTCLUSI fails to provide an evidentiary basis for a condition reducing the current established IWWW for this project. Further, shortening the IWWW would be contrary to established ODFW guidance, and any required deviation from such state guidance by the City would need to be based solely upon established City review criteria, as well as be supported by substantial evidence in the record.

1. NRI #4 is not Eelgrass Habitat.

Eelgrass surveys from as recent as 2018 show that NRI #4 is not an area containing documented eelgrass.¹ The absence of eelgrass is to be expected at this sub-tidal location based on expert testimony in the record which confirms that NRI #4 is too deep for eelgrass habitat and, accordingly, is not a location where herring would choose to spawn.²

¹ See 2018 Eelgrass and Bathymetry Surveys Coos Bay, Oregon (Nov. 2018) (Planning Commission, Exhibit 39.AA).

² See Technical Memorandum, *Eelgrass Baseline Information, Potential Impacts and Mitigation: Navigation Reliability Improvements; Coos County File Nos. AM-18-011/RZ-18-007/HBCU-18-003*, (Planning Commission, Exhibit 39.N).

2. The Evidence does not Show that Herring Spawn at NRI #4 in February.

ODFW's broad statement in its August 27, 2019 letter that herring spawn "about mid-February in Coos Bay" is only accurate for the lower stretches of the Coos Bay Estuary based on ODFW's own seminal study on herring spawning in Coos Bay Estuary. Specifically, a comprehensive study by Miller and McRae (1978)³ found herring spawning only in the lower reaches of Coos Bay (between approximate mile 2 and 3) before February 16. At the location of proposed NRI#4, herring spawning was not documented until March 21. *Id.*

Further, the studies that CTCLUSI submitted to the City Council at the close of the second open record period address herring spawning in Yaquina Bay which, as specifically addressed in JCEP's October 31, 2019 *Technical Memorandum - Response to Comments - Land Use Application #187-18-000153 - ODFW Recommendation to Restrict In-water Work Window to February 1 (October, 2019)*,⁴ has an earlier herring spawning cycle than Coos Bay so data from Yaquina Bay is not transferrable or relevant.⁵ *Id.* The additional reports CTCLUSI submitted address potential in-water noise impacts on herring to justify shortening the IWWW. However, as also addressed in the above-referenced *Technical Memorandum*, the in-water noise studies conclude that herring quickly acclimate to in-water noise, and none of the studies demonstrate that JCEP's limited dredging activities will create any noise that will interrupt herring spawning, if herring were even present at or near NRI #4 between October 1 and February 15.⁶ Taken together, these evidentiary submittals and rebuttal analysis demonstrate there simply is no support for shortening the current applicable IWWW as requested by CTCLUSI.

3. ODFW's Comment Recommending Shortening the IWWW Conflicts with Formal ODFW Guidance.

³ See JCEP, Planning Commission, Exhibit 39.CC-7.

⁴ See JCEP, City Council, Comment 19.CBCC-8.

⁵ See JCEP, City Council, Comment 19.CBCC-8 at 4-6.

⁶ See JCEP, City Council, Comment 19.CBCC-8 at 6-9.

Shortening the IWWW is also in conflict with ODFW formal guidance titled “*Guidelines for Timing of In-Water Work to Protect Fish and Wildlife Resources (June 2008)*”⁷ (hereafter, “*ODFW Guidance*”). The *ODFW Guidance* sets the IWWW “based on ODFW fish biologists’ recommendations and any new/public information received.” For the Coos Bay Estuary, the *ODFW Guidance* IWWW is expressly set at October 1 through February 15.⁸ The *ODFW Guidance* is intended to be the agency’s “reference document” for comments on IWWWs during federal, state and local governmental regulatory and permitting processes. Simply stated, there is no cited analytical or evidentiary basis in this record for superseding the established ODFW guidance, and, accordingly, the published ODFW IWWW of October 1 - February 15 should remain in effect. Notably, for similar reasons, in its decision to approve JCEP’s parallel application for eelgrass mitigation, the Planning Commission declined CTCLUSI request to truncate the IWWW. We request City Council consideration of these specific proposed revisions, which are set forth in the attachment to my letter.

IV. Conditions of Approval

Finally, JCEP calls the City Council’s attention to the August 21, 2019 letter from the undersigned requesting specific modifications to a number of conditions of approval included in the Planning Commission recommendation. As noted earlier, the requested modifications are intended to improve clarity and provide a more objective understanding JCEP’s obligations to demonstrate compliance *prior* to commencement of the proposed NRI improvement, if authorized.

In addition, counsel for CTCLUSI submitted testimony on October 31, 2019 requesting modification to proposed condition of approval #3 recommended by the Planning Commission, which requires compliance with a MOA and related agreements entered into by JCEP and the CTCLUSI. JCEP concurs with the CTCLUSI request that this condition be modified to require such compliance both prior to and *during* the commencement of all authorized activities, which can be accomplished through additional revision to my recommended revised condition language referenced above.

⁷ See JCEP, City Council, Comment 19.CBCC-8 at 11 (*ODFW Guidance*).

⁸ See JCEP, City Council, Comment 19.CBCC-8 at 12.

CTCLUSI also requests revisions to recommended condition of approval #1 relating to required compliance with any conditions incorporated into various applicable state and federal permits issued for the proposed NRI improvements, and we support this requested revision with the exception of the addition of the “Memorandum of Agreement under the National Historic Preservation Act.” That document is not a permit nor the obligation of JCEP but is an internal compliance document prepared by and under the control of federal agencies, and any direct compliance obligations imposed on JCEP will, instead, be implemented through conditions imposed on the remaining permits.

V. Conclusion.

Based upon the above, the City should approve JCEP’s requests: (1) to amend the CBEMP map to change the zoning designation of the NRI Site from 52-NA to DDNC-DA; (2) to amend the CBCP to take a reasons exception to Goal 16 to change the zoning designation of the NRI Site to DDNC-DA; (3) for Estuarine and Coastal Shoreline Uses and Activities Permit For “New And Maintenance Dredging” in the DDNC-DA estuarine zone; and (4) Estuarine and Coastal Shoreline Uses and Activities Permit to allow an accessory temporary dredge transport pipeline in the 52-NA, 53-CA, 54-DA, and 55-CA estuarine zones and an accessory buoy in the 52-NA estuarine zone. As found by the Planning Commission, the relevant criteria have been met and JCEP requests the City Council vote to approve the Application.

Thank you for your consideration of these closing comments and we look forward to the City Council’s final decision on the Application.

Very truly yours,



Steven L. Pfeiffer
Enclosure

cc: Carolyn Johnson, City of Coos Bay (via email) (w/encl.)
Henry Hearley, LCOG (via email) (w/encl.)
Jake Callister, LCOG (via email) (w/encl.)
Client (via email) (w/encl.)

May 23, 2019

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Re: City of Coos Bay Land Use Applications #187-18-000153 – Jordan Cove Energy Project - Navigation Reliability Improvements Applicant’s Final Written Argument

Dear Henry:

As you are aware, this office represents Jordan Cove Energy Project L.P. (“JCEP” or “Applicant”), the Applicant requesting approval of land use applications, referenced below, that will allow dredging of a 3.3 acre narrow sub-tidal area as a “Navigation Reliability Improvement” or “NRI” adjacent to the existing federally designated Coos Bay Deep-Draft Navigation Channel (“Channel”) between river mile 6 and 7. This 3.3 acre NRI (“NRI #4”) is one of four NRI’s JCEP seeks to dredge to increase the efficiency of navigation and transportation in Coos Bay. NRI #4 is located within the jurisdictional boundary of the City of Coos Bay and three other NRI areas are located within Coos County (and subject to separate land use application package).

The Applicant seeks approval of the following applications from the City of Coos Bay: (1) a map amendment to the Coos Bay Estuary Management Plan to change the designation of approximately 3.3 acres from 52-NA to DDNC-DA; (2) a text amendment to the City of Coos Bay Comprehensive Plan to take a reasons exception to Statewide Planning Goal 16 Estuarine Resources to authorize the map amendment; (3) an estuarine and coastal shoreline uses and activities permit for “New and Maintenance Dredging” in the DDNC-DA Estuarine Zone; and (4) an estuarine and coastal shoreline uses and activities permit to allow an accessory temporary dredge transport pipeline in the 52-NA, 53-CA, 54-DA, and 55-CA Estuarine Zones (collectively, “Applications”).

This letter constitutes Applicant's written argument, timely submitted by the deadline established by the Planning Commission of May 23, 2019. The purpose and structure of this letter is to identify the applicable approval criteria, summarize issues relevant to the approval criteria, and provide references to information in the record that supports approval of the *Applications*.

Please place a copy of this letter into the record for this matter, and please place a copy before the Planning Commission before deliberating in this matter.

I. Executive Summary

The essential purpose of the *Applications* is to improve navigability for vessels transiting Coos Bay by dredging a "turning area" of the Channel that has historically limited vessel transit during various weather conditions. This will improve the efficiency of the level of vessel transit for all current and future vessels using the Channel and the Oregon International Port of Coos Bay ("Port"). The proposed dredging and maintenance dredging (every three to five years) will occur in a narrow strip located immediately adjacent to the existing Channel, which the U.S. Army Corps of Engineers has been routinely dredging for the past 100 years. The area of the proposed activity is shown in *Applications*, Exhibit 1.

The limited scope of the *Applications*, and corresponding assessment of any potential impacts and mitigation, is an important threshold issue. While many public comments focused on other aspects of the Jordan Cove LNG Project ("Project"), the limited issue before the City involves compliance with the applicable approval criteria for rezoning and proposed dredging related to the NRI #4 area and related dredge lines. Accordingly, the assessment of information, potential impacts (specific or cumulative), and mitigation must similarly focus on activities only with regard to the NRI #4 area and related dredge lines. The scope of this proceeding *does not include*, e.g., NRI #1 through #3 (located in Coos County), upland deposition of dredge spoils at APCO 1 and 2 sites, dredging the Slip and Access Channel, Kentuck Eelgrass Mitigation Site, or any other aspects of the Project, all of which are subject to other local, state or federal permits and proceedings for which the public has, or will have, opportunity for participation and comment.

The Applicant has submitted the *Applications*, a supporting narrative, and over 65 different exhibits prepared or collected by the Jordan Cove Energy Project (“Project”) team in support of the *Applications*. The Exhibits include a number of “*Technical Memoranda*” prepared by consultants and subject matter experts that address public comments, decision criteria, and provide specific page references to where supporting information may be found in the record. While much of the opposition comments focus on aspects of the Project other than NRI #4, raise speculative issues without evidence, or fail to address applicable approval criteria, JCEP has made a good faith effort to address some of these issues in order to provide general information on NRI #4, even if not directly relevant to approval of the *Applications*.

The record of this proceeding, together with this written argument, demonstrate that the *Applications* comply with applicable approval criteria, including generally:

- The process for Planning Commission review of the *Applications* is consistent with the designated procedure for such proceedings as set forth in the City of Coos Bay Development Code (“CBDC”) and Coos Bay Comprehensive Plan (“CBCP”);
- The public need for, and benefits of, NRI #4 to support the continuation of existing navigation in the Channel are clearly demonstrated in the record. As evident from testimony from the Coos Bay Pilots Associates, NRI #4 will improve navigational efficiencies for all vessels that currently transit the Channel;
- The cumulative effects of the *Applications* will be to improve transportation and navigability adjacent to and within the existing federal navigation Channel, and any temporary impacts to the subtidal habitat (which has not been identified or inventoried as having significant fish, shellfish, eelgrass or other habitat) will be mitigated through operational and planning efforts;
- A Goal 16 exception is authorized because dredging to permit the continuation of navigation in the Channel is a demonstrated “reason” justifying such an exception, and potential impacts will be mitigated;
- No alternative areas for the NRI is available or appropriate because NRI #4 is a site-specific “turning areas” (identified by the Coos Bay Pilots Association,

“Pilots”) that currently limits efficient navigation. No alternative areas will achieve the required navigational efficiency result;

- Long-term environmental, economic, social and energy consequences are not significantly more adverse than if NRI #4 was constructed in another area, and will be appropriately mitigated where impacted;
- NRI #4 is compatible with other adjacent uses (which are primarily navigation in the Channel) or will be rendered so through measures designed to reduce impacts including mitigation, best management practices or “BMPs,” spill prevention planning and other measures as identified in the record;

The record demonstrates that the Planning Commission can and should reasonably conclude that the approval criteria for the *Applications* are met and the *Applications* should be recommended for approval by the City Council. While this narrative does not attempt to re-state every issue raised in public comments, the following discussion addresses the applicable approval criteria and key issues that were raised during the public comment period.

II. Approval Criteria

A. Post-Acknowledgement Plan Amendment: Rezone

1. Comprehensive Plan Amendment under CBDC.

JCEP is seeking a Post-Acknowledgement Plan Amendment (“PAPA”) to amend the City of Coos Bay Comprehensive Plan (“CBCP”) and zone map for NRI #4 from current 52-NA zoning to DDNC-DA. The CBDC, Chapter 17, establishes the process and approval criteria for reviewing and approving map and text amendments to the Coos Bay Estuary Management Plan (“CBEMP”). The Applications comply with all applicable approval criteria, as follows.

A. Comprehensive Plan Map Amendment

1. CBDC - 17.360.010¹ Comprehensive plan amendment.

(1) The boundaries of the comprehensive plan map designations and the comprehensive plan text may be amended as provided in CBDC 17.360.020.

(2) The city may amend its comprehensive plan and/or plan map. The approval body shall consider the cumulative effects of the proposed comprehensive plan and/or map amendments on other zoning districts and uses within the general area. Cumulative effects include sufficiency of capital facilities services, transportation, zone and location compatibility, and other issues related to public health and safety and welfare the decision-making body determines to be relevant to the proposed amendment.

1. Cumulative Effects have been Addressed Pursuant to CBDC 17.360.010(2).

The record provides substantial evidence that allows the City to “consider” cumulative effects of the *Applications* on other “zoning districts and uses within the general area” and to find that such effects are compatible as discussed below:

- ***Cumulative Effect of Improved Navigation and Transportation*** - The primary use in the general area of NRI #4 is navigation and transportation. NRI #4 is adjacent to the existing federal navigation Channel which has been used primarily for vessel navigation in Coos Bay for over 100 years. See **Comment 39, Exhibit W** (*US Army Corps of Engineers Environmental Assessment*, confirming historic use of Channel for navigation and historic annual maintenance dredging). The criteria specifically calls out the cumulative effect on “transportation” and evidence shows that the average size of vessels transiting Coos Bay has increased over the past 20 years to present, e.g., from 193.8 ft. (length) and 45,422 lbs. (dead weight) to 200.6 ft. (length) and 52,894 lbs. (dead weight), with the largest vessel call at 229 feet (length) and 62,800

¹ CBDC Chapter 17.215 (as cited in the *Applications*) was re-codified by Ordinance of the City Council to Chapter 17.360.

lbs. (dead weight). See **Comment 32** (*Letter from Capt. George Wales, Coos Bay Pilots Association*). As explained, approval of the map amendment will facilitate NRI #4, which will increase transportation safely and efficiently for existing navigation, and particularly as the average size of vessels increases as anticipated.

- **Cumulative Effect on Habitat or Species** - Despite the 52-NA zoning designation, and many comments expressing concern about impacts on various species and eelgrass, the 3.3 acre area of NRI #4 is currently deep sub-tidal habitat which has not been identified as having any significant fish, crustacean, shellfish, or eelgrass habitat. See **Comment 39**, **Exhibit AA** (*2018 Eelgrass and Bathymetry Surveys Coos Bay*); **Exhibit EE** (*Technical Memorandum, Crustacean and Shellfish Baseline Information, Potential Impacts and Mitigation*); **Exhibit FF** (*Technical Memorandum, Fish Baseline Information, Potential Impacts and Mitigation*); **Exhibit GG** (*Technical Memorandum, Eelgrass Baseline Information, Potential Impacts and Mitigation*); **Exhibit PP** (*Response to Removal-Fill Comments*). The record further demonstrates that no significant impacts on marine mammals or birds are anticipated based on the temporary duration of dredging, the limited area involved, and lack of proximity of NRI #4 to significant marine mammal or bird nesting or critical feeding areas. See **Comment 39**, **Exhibit II** (*Technical Memorandum, Marine Mammals Baseline Information, Potential Impacts and Mitigation*); **Exhibit JJ** (*Technical Memorandum, Birds (e.g., Snowy Plover, Blue Heron, Marbled Murrelet, Diving Waterfowl) Baseline Information, Potential Impacts and Mitigation*). Further, the entire western side of NRI #4 has been annually dredged for decades by the US Army Corps of Engineers, and so the proposed dredging at NRI #4 is compatible with the historic use of the area for navigation dredging. See **Comment 39**, **Exhibit W**. Nonetheless, the City may also consider the mitigation which will be implemented to minimize the temporary and localized cumulative effects of dredging at NRI #4 and the ability of this habitat to naturally recover between dredging events. See **Comment 39**, **Exhibit AA** (*Technical Memorandum, Dredging Locations, Methods, Equipment, Frequency, Volumes, Dredge Spoil Deposition, Potential Impacts and Mitigation*); **Exhibit EE** (*Technical Memorandum, Crustacean and Shellfish Baseline Information, Potential Impacts and Mitigation*); **Exhibit PP** (*Response to Removal-Fill Comments*).

- ***Cumulative Effect on Recreation.*** Many commenters raised concerns about effects from dredging NRI #4 on recreation including fishing, clamming, boating, paddling and other recreational activities. The record confirms that any interference with recreation will be minimal based on the small area of NRI #4 (compared to the 20 square miles of Coos Bay available for recreating), the limited duration of the proposed dredging, and evidence that NRI #4 area is not used as a significant clamming, crabbing or fishing area. See **Comment 39**, **Exhibit HH** (*Technical Memorandum, Recreation, Baseline Information, Potential Impacts and Mitigation*); and **Exhibit AA**, **Exhibit EE**, **Exhibit FF**, **Exhibit GG**, **Exhibit II**, and **Exhibit JJ** (cited above).
- ***Cumulative Effects on Capital Facilities Services.*** There is no evidence in the record that the *Applications* will interfere with the City's budgeting, funding or planning for capital facilities services.

Accordingly, the proposed plan amendments and dredging activities under the *Applications* are compatible with the adjacent uses (navigation/transportation/dredging) and will not have a significant effect on the stated goals of the 52-NA zone (i.e., "This aquatic unit contains extensive eelgrass beds with associated fish and waterfowl habitat...") based on the lack of such habitat in the deep subtidal area of NRI #4.

CBDC - 17.360.020 Initiation of Amendment

Amendments of the comprehensive plan text or map, zoning map, or this title may be initiated by the following:

- (1) A Type III application, CBDC 17.130.100, Type III procedure, by one or more owners of the property proposed to be changed or reclassified consistent with the adopted comprehensive plan; or**
 - (2) A Type IV legislative process, CBDC 17.130.110, Type IV procedure, by motion of the planning commission and adoption by the city council.**
- 2. Applicant has Followed the Type III Procedure pursuant to CBDC 17.130.100.**

The underlying landowner of the NRI #4 property, the Department of State Lands (“DSL”), authorized submittal of the *Applications*. See *Applications*, Exhibit 8. CBDC 17.130.100 (“Type III procedure”) provides that a Type III application “will be considered at one or more public hearings before the city’s planning commission.” A Type III application does not as a matter of course go before the City Council. See CBDC 17.130.130(5)(c) (providing for City Council consideration of a Type III application but only in event of appeal). However, state law requires the local governing body to take final action to approve any post-acknowledgment comprehensive plan amendment before it can become final. *Housing Land Advocates v. City of Happy Valley*, __ Or LUBA __ (LUBA No. 2016-031, May 23, 2016). The *Applications* include a request for an exception to Goal 16, which is a request for a plan text amendment. Therefore, pursuant to *Housing Land Advocates*, the City will schedule the *Applications* for final action by the City Council after the Planning Commission’s initial decision. As of the date of this submittal, the *Applications* have correctly followed the Type III procedure.

CBDC - 17.360.060 Approval Criteria

- 1) For a Type III or Type IV review, the city council shall approve the proposal upon findings that:**
 - (a) The proposed amendment is consistent with the applicable policies of the comprehensive plan or that a significant change in circumstances requires an amendment to the plan or map;**

3. The Applications are Consistent with the Approval Criteria in 17.360.060(1)(a).

As provided in CBDC 17.360.060(1)(a), approval criteria includes a finding that the *Applications* are consistent with applicable policies of the CBCP. Each of the applicable policies are addressed below, including citations to relevant portions of the record demonstrating consistency.

CBCP Policies

- NRH.8 Coos Bay shall encourage the preservation and protection of riparian vegetation as an important fish and wildlife habitat and**

as a viable means of flood control by enactment of appropriate property development ordinances providing protection by establishing buffer strips along waterways, along designated HUD floodways, with the exception of navigable waterways. This strategy recognizes that such land use practices are necessary (1) to preserve the area’s natural resources, and (2) to eliminate unnecessary drainage and erosion problems often accompanying development.

A. The Applications Comply with Policy NRH.8.

This policy concerns preservation and protection of “riparian vegetation” including during development. The location where the NRI #4 temporary dredge line will come in proximity to any shoreline habitat and riparian vegetation will be at the locations where the dredge lines to offload dredged material for processing at two upland sites located in the City of North Bend (referred to as APCO 1 and APCO 2). However, because the APCO 1 and 2 sites are located in a different jurisdiction, any such impacts are not subject to review under the *Applications*. Further, even if applicable, NRH.8 does not affirmatively obligate JCEP to take any action, but rather obligates the City to “encourage” preservation of riparian vegetation “by placing buffer strips along waterways, along designated HUD floodways, with the exception of navigable waterways.” JCEP will comply with any such applicable regulations the City has implemented in accordance with its obligation to so “encourage” preservation of riparian vegetation and will fully implement mitigation controls and BMPs required under any state or federal dredge and fill permit. Therefore, the City can find that the *Applications* comply with NRH.8.

NRH.9 Coos Bay shall cooperation with local, state, and federal agencies in conserving and protecting fish and wildlife habitat, open spaces, and aesthetic and scenic values encompassed by areas enclosed by the Coos Bay-North Bend Water Board, Empire Lakes, and Mingus Park. This strategy is not intended to prohibit development in these areas, but rather to ensure that if development occurs it takes into consideration the ability of the

land to support such development, i.e., soils, topography, habitat, natural processes, etc. This strategy recognizes that these areas are particularly sensitive and valuable resources.

B. Policy NRH.9 does not Apply to the Applications.

The above policy addresses City cooperation with other local, state and federal agencies and creates no affirmative obligations for an applicant and, therefore, does not apply to the *Applications*.

7.5 ECONOMIC DEVELOPMENT

Goal 1, Policy 1.5 Support and cooperate with community and regional partners to encourage economic growth.

C. The Applications Comply with Goal 1, Policy 1.5.

The *Applications* request authorizations to create a navigation reliability improvement for the Channel, which will primarily benefit all vessels that are navigating to and from the Port. Vessel size and weight have both increased over the past 20 years, and navigation of the Channel is limited during certain weather windows based on the narrow Channel at the proposed NRI #4 location. Although the Port is located outside the City limits, is an important regional entity that facilitates mass export and import of goods and commodities overseas and thus serves as a key driver of economic development throughout Coos Bay and southwest Oregon. As a result, approving the *Applications* and facilitating NRI #4 will support community businesses and regional partners and encourage economic growth. See **Comment 32** - Captain George Wales, Coos Bay Pilots Association; **Comment 35** - Jon Barton; **Comment 36** - Randy Hoffine, Pacific Properties; and **Comments 37 and 38** - Dale Sause and Cory Sause, Sause Bros. Inc.; *Applications*, **Exhibit 3** (letters of support from Roseburg Forest Products and Coos Bay Pilots Association); **Comment 39**, **Exhibit CC.9(b)** (*Public/Economic Benefit*); and **Exhibits G.1, G.2 and G.3** (*EcoNorthwest Economic Analysis Reports*); **Exhibit OO** (*Public Need and Social, Economic, and Other Public Benefits*).

Goal 6, Policy 6.1, 6.2 **Maximize the potential uses and benefits the waterfront and deep-water port offers to the city and region as a whole; Support the Port of Coos Bay in its development efforts for transportation linkage and to develop a deep-draft channel to accommodate large cargo vessels and increase shipping activities and water-dependent uses.**

D. *The Applications Comply with Goal 6, Policy 6.1 and 6.2.*

The above Policies go to the core purposes of the *Applications*. NRI #4 will “maximize” the potential uses and benefits of the Port and associated Channel navigation by improving existing navigation of the Channel during a wider weather-window, and particularly as vessels at the current frequency increase in size. Further, the *Applications* will help accommodate large cargo vessels and increase shipping activities in Coos Bay. Therefore, the *Applications* squarely comply with these policies. See **Comment 32** - Captain George Wales, Coos Bay Pilots Association; **Comment 35** - Jon Barton; **Comment 36** - Randy Hoffine, Pacific Properties; and **Comments 37 and 38** - Dale Sause and Cory Sause, Sause Bros. Inc.; *Applications*, **Exhibit 3** (letters of support from Roseburg Forest Products and Coos Bay Pilots Association).

LU.4 **Coos Bay shall not make major revisions to this Comprehensive Plan more frequently than every two years, if at all possible. “Major revisions” are those that have widespread and immediate impact beyond the subject area under consideration. The city recognizes that wholesale approval of frequent major revisions could ruin the integrity of this Plan.**

E. *The Applications Comply with the Policies in CBCP, LU.4.*

The *Applications* do not request “major revisions” to the CBCP under LU.4 as there will be no widespread or immediate impact beyond the area of NRI #4. The text amendment only directly affects the NRI #4 site, which is approximately 3.3 acres in size and is located at an isolated, undeveloped strip of submerged land adjacent to the

Channel. Approval of the *Applications* (and related dredging and dredge lines) will not, from a land development or conservation perspective, have a widespread and immediate impact beyond the NRI dredging site and temporary dredge line area. The current area of NRI #4 is deep subtidal habitat (with no identified significant eelgrass, crustacean or shellfish populations) and will remain deep subtidal habitat after the dredging activity. See **Comment 39**, Exhibit AA (*2018 Eelgrass and Bathymetry Surveys Coos Bay*); Exhibit EE (*Technical Memorandum, Crustacean and Shellfish Baseline Information, Potential Impacts and Mitigation*); Exhibit FF (*Technical Memorandum, Fish Baseline Information, Potential Impacts and Mitigation*); Exhibit GG (*Technical Memorandum, Eelgrass Baseline Information, Potential Impacts and Mitigation*). As confirmed by these Exhibits, the effect of dredging under the *Applications* will be limited in duration and limited in impact to the immediate NRI #4 area. Further, this area is already acclimated to navigation and dredging based on the location adjacent to the Channel (and exposure to annual adjacent maintenance dredging). See **Comment 39**, Exhibit W (*Environmental Assessment - Coos Bay Maintenance Dredging*). The City should find that the *Applications* comply with this policy.

LU.5 **Coos Bay may make minor changes to this Comprehensive Plan on an infrequent basis as need and justification arises. “Minor changes” are those which do not have significant impact beyond the immediate area of the property under consideration. The city recognizes that wholesale approval of frequent minor changes could ruin the integrity of this Plan.**

F. The Applications Comply with the Policies in CBCP, LU.5.

As noted above for LU.4, the *Applications* request approval to make navigational improvements to an isolated, undeveloped strip of submerged land that is approximately 3.3 acres in size. The need and justification for the *Applications* have been demonstrated in the record including improving navigation of the Channel and improving economic opportunities for enhanced vessel traffic in Coos Bay. See **Comment 32** - *Captain George Wales, Coos Bay Pilots Association*; **Comment 35** - *Jon Barton*; **Comment 36** - *Randy Hoffine, Pacific Properties*; and **Comments 37 and 38** - *Dale Sause and Cory Sause, Sause Bros. Inc. Applications, Exhibit 3* (letters of support

from *Roseburg Forest Products and Coos Bay Pilots Association*); **Comment 39**, Exhibit CC.9(b) (*Public/Economic Benefit*); and Exhibits G.1, G.2 and G.3 (*EcoNorthwest Economic Analysis Reports*). From a land development perspective, approval of the *Applications* will not have a widespread or significant impact beyond the NRI #4 area as the character of the deep subtidal habitat (with no identified significant eelgrass, crustacean or shellfish populations) will remain deep subtidal habitat after the dredging activity is conducted. See **Comment 39**, Exhibit AA (*2018 Eelgrass and Bathymetry Surveys Coos Bay*); Exhibit EE (*Technical Memorandum, Crustacean and Shellfish Baseline Information, Potential Impacts and Mitigation*); Exhibit FF (*Technical Memorandum, Fish Baseline Information, Potential Impacts and Mitigation*); Exhibit GG (*Technical Memorandum, Eelgrass Baseline Information, Potential Impacts and Mitigation*). Impacts from dredging will be localized and temporary. See **Comment 39**, Exhibit BB (*Dredging Pollution Control Plan*); Exhibit D (*Dredge Materials Management Plan @ 3391 through 3625*). Therefore, the City should find that the *Applications* request “minor changes” to the CBCP under LU.5.

LU.7 **Coos Bay shall anticipate that conflicts may arise between the various plan implementation strategies contained in this plan when applying the policies to specific situations. To resolve these conflicts, if and when such may occur, Coos Bay shall consider the long term environmental, economic, social, and energy consequences expected to result from applying one strategy in place of others, then to select and apply the strategy that results in maximum public benefit as supported by findings of fact. This strategy is based on the recognition that a viable conflict resolution process is essential to the success of any comprehensive plan.**

G. *The Applications Comply with the Policies in CBCP, LU.7.*

Approval of the *Applications* will not cause any conflicts between the various CBCP implementation strategies. As explained in this narrative, and supported by evidence, the *Applications* are consistent with all applicable policies of the CBCP and (as discussed below) with the Goal exception criteria of OAR 660--004-0022(8)(c) (which addresses

the long-term environmental, economic, social and energy consequences of the *Applications*) as well as the public benefit justification under OAR 660-004-0022(8)(b)(B) (as discussed below), based on the facts and evidence in the record. Accordingly, the City should find that there is no need to resolve any conflicts in order to approve the *Applications*. For these reasons, the City can find that the *Applications* comply with the policies of the CBCP in LU.7.

(b) The proposed amendment is in the public interest; and

4. The Applications Meet the Approval Criteria in 17.360.060(1)(b).

The CBCP amendment that these *Applications* seek is in the public interest because it will result in increased navigational safety and efficiency for large vessels transiting the Channel today, which will further allow increased economic input and output to flow through the Channel and Port, and which, in turn, will be an economic benefit to the City and the region. Although opponents have asserted that the benefits of the NRIs accrue only to JCEP, the record demonstrates to the contrary the benefits of improved navigation at NRI #4 for all vessels currently navigating the Channel. As well as the benefits of accommodating larger vessels at the current frequency, all without regard to the future development of the JCEP project. See **Comment 32** - Captain George Wales, Coos Bay Pilots Association; **Comment 35** - Jon Barton; **Comment 36** - Randy Hoffine, Pacific Properties; and **Comments 37 and 38** - Dale Sause and Cory Sause, Sause Bros. Inc. *Applications*, **Exhibit 3** (letters of support from Roseburg Forest Products and Coos Bay Pilots Association); **Comment 39**, **Exhibit CC.9(b)** (*Public/Economic Benefit*); and **Exhibits G.1, G.2 and G.3** (*EcoNorthwest Economic Analysis Reports*). The *Applications* comply with this approval criterion.

(c) Approval of the amendment will not result in a decrease in the level-of-service for capital facilities and services identified in the Coos Bay capital improvement plan(s).

5. The Applications Meet the Approval Criteria in 17.360.060(1)(c).

There is no evidence in the record indicating that approving the *Applications* will result in a decrease in the level-of-service for any identified capital facilities and/or services in

the Coos Bay capital improvement plan. Therefore, the City can find that the *Applications* comply with this criterion.

2. Statewide Planning Goals

Post-acknowledgment plan amendments must be in compliance with the Statewide Planning Goals (“Goals”). ORS 197.175(2)(a); *1000 Friends of Oregon v. LCDC*, 301 Or 447, 724 P2d 268 (1986). The rezoning is a post-acknowledgment plan amendment. Therefore, the City’s decision must explain why the rezoning is in compliance with the Goals. Alternatively, if a Goal is not applicable, the City must adopt findings explaining why that Goal is not applicable. *Davenport v. City of Tigard*, 22 Or LUBA 577, 586 (1992). The narrative included with the *Applications* provides a detailed response to the Applicability of each Goal, which will not be repeated in this letter. However, JECF does wish to address the key arguments supporting the requested exception to Goal 16 (Estuarine Resources) to allow the proposed zone change and related activities to complete NRI #4.

A. Goal 16 Exception.

Goal 16 (Estuarine Resources) divides areas into “Natural,” “Conservation” and “Development” management units and provides permissible uses within each area. While all three units allow some form of dredging (i.e., “Natural” allows “*Dredging necessary for on-site maintenance of existing functional tide gates and associated drainage channels and bridge crossing support structures*”; “Conservation” allows “*new dredging for boat ramps and marinas*,” “*minor navigational improvements*,” “*dredging necessary for mineral extraction*,” and “*Aquaculture requiring dredge or fill or other alteration of the estuary*”; and “Development allows “*Dredge or fill, as allowed elsewhere in the goal*,” “*Water transport channels where dredging may be necessary*”), JCEP interprets the degree and type of dredging allowed in the 52-NA (“Natural”) management unit to require an exception to Goal 16 to complete NRI #4.

Pursuant to ORS 197.732, a local government may adopt an exception to a goal if the following standards are met:

ORS 197.732(2)(c):

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

The above criteria are incorporated into OAR 660, Division 4 (administrative rules implementing ORS 197.732), which provide the following approval criteria for the standards in ORS 197.732(2)(c)(A) through (D), as follows:

(i). Reasons Exception (ORS 197.732(2)(c)(A); OAR 660-004-0020(2)(a)).

- (a) "Reasons justify why the state policy embodied in the applicable goals should not apply." The exception shall set forth the facts and assumptions used as the basis for determining that a state policy**

embodied in a goal should not apply to specific properties or situations, including the amount of land for the use being planned and why the use requires a location on resource land;

Based on the above general “reasons exception” language, JCEP’s detailed description and discussion of the purpose, need, and location of the proposed NRIs in the *Applications*, related record (as discussed further, below), and based on approval criteria under the CBDC (discussed above) satisfies the requirement to set forth the facts and assumptions in a manner that allows the Planning Commission to determine that Goal 16 exception is justified.

The dredging limitations in Goal 16 has a specific “reasons” exception under OAR 660-004-0022(8)(b), “Other Alterations and Uses,” applicable to dredging in Natural or Conservation areas for navigation:

(b) Dredging to maintain adequate depth to permit continuation of the present level of navigation in the area to be dredged.

The *Applications* propose dredging to maintain adequate depth to permit continuation of the present level of navigation at NRI #4. As background, the Channel was initially authorized in 1899 and since then has undergone ten modifications. Most recently, the Channel was expanded from -35 feet to -37 feet in 1997 to allow for the safe navigation and transit of Coos Bay for the size of ships prevalent during that time period. See **Comment 39**, Exhibit W (*US Army Corps of Engineers Environmental Assessment*); **Comment 32** (*Letter from Capt. George Wales, Coos Bay Pilots Association*,). Over the past 20 years, the size and weight of vessels transiting Coos Bay has increased that the average size of vessels transiting Coos Bay has increased, e.g., from 193.8 ft. (length) and 45,422 lbs. (dead weight) to 200.6 ft. (length) and 52,894 lbs. (dead weight), with the largest vessel call at 229 feet (length) and 62,800 lbs. (dead weight). See **Comment 32** (*Letter from Capt. George Wales, Coos Bay Pilots Association*).

Coos Bay is currently suitable for navigation, including large vessels, as confirmed in the July 1, 2008 US Coast Guard (USCG) Waterway Suitability Report, the USCG Letter of Recommendation dated May 10, 2018 and USCG letter confirmation dated November 7, 2018 (see *Applications*, Exhibit 4). However, periodic environmental and weather

conditions, including wind, fog, and currents have caused the Pilots to impose ever more limiting restrictions on when vessels may safely transit the Channel during such weather/environmental conditions. See **Comment 32**. One of the areas that must be restricted to transit during such conditions (due to depth) is the NRI #4 “turning area” of the Channel. While the NRI #4 area does not pose a substantial impediment to vessel transit during typical “good” weather, that same area restricts vessel transit during poor weather conditions.

The reasons exception for dredging in OAR 660-004-0022(8)(b) applies to dredging to “*permit continuation of the present level*” of navigation. The terms “continuation,” “present” and “level” are not defined in OAR 660-004-0022(8)(b), and so they may be given their plain/dictionary meaning. See *Potter v. Schlessor Company, Inc.*, 335 Or 209 (2003). Merriam Webster (online Dictionary, 2019) defines these terms as follows;

“continuation” : 1 : the act or fact of *continuing* in or the prolongation of a state or activity. 2 : resumption after an interruption. 3 : something that continues, increases, or adds.

“present”: 1 : now existing or in progress. 2a : being in view or at hand. b : existing in something mentioned or under consideration. 3 : constituting the one actually involved, at hand, or being considered. 4 : of, relating to, or constituting a verb tense that is expressive of present time or the time of speaking.

“level”: : the magnitude of a quantity considered in relation to an arbitrary reference value broadly : magnitude, intensity.

Applying these definitions to OAR 660-004-0022(8)(b), the terms mean “continuation” (*continuing, resuming or something that increases or adds*) of the “present” (*now existing or in progress*) “level” (*magnitude, intensity*) of navigation. Thus, Dredging NRI #4 will ensure that the *quantity or frequency* of navigation *now existing* will be *continued* during a wider range of weather conditions in the dredged NRI #4 area. Further, the need for and benefits from transit efficiency will be greater over time. As transiting vessels at the current frequency, i.e. “...present level...” become larger in size, as the record indicates. For these reasons, this standard is met.

- (f) In each of the situations set forth in subsections (7)²(a) to (e) of this rule, the exception must demonstrate that the proposed use and alteration (including, where applicable, disposal of dredged materials) will be carried out in a manner that minimizes adverse impacts upon the affected aquatic and shoreland areas and habitats.**

The Goal 16 exception must also demonstrate that the activity will be carried out in a manner that minimizes certain impacts as outlined in OAR 660-004-0022(8)(f), above. For a Goal 16 “reasons exception” involving navigation improvement dredging, the primary criterion is to minimize adverse impacts on aquatic and shoreland areas and habitats. JCEP’s efforts to minimize such impacts are fully addressed in the record and are further discussed in Section III of this letter. Accordingly, the “reasons exception” criteria in OAR 660-004-0022(8) are met.

In the alternative, if the catchall “reasons exception” in OAR 660-004-0022(1)(a) is evaluated, the following approval criteria applies for a “use not specifically provided in this division.”

- (a) “Reasons justify why the state policy embodied in the applicable goals should not apply.” The exception shall set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations, including the amount of land for the use being planned and why the use requires a location on resource land;**
- (1) For uses not specifically provided for in this division, or in OAR 660-011-0060, 660-012-0070, 660-014-0030 or 660-014-0040, the reasons shall justify why the state policy embodied in the applicable goals should not apply. Such reasons include but are not limited to the following:**

² JCEP reads the reference in the Secretary of State Administrative Rules to “(7)” as a potential typographical error that was intended to reference section “(8),” so JCEP is responding to the extent applicable.

- (a) **There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Goals 3 to 19; and either**

* * *

- (B) **The proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site.**

Applying the above criteria, the “demonstrated need” for the NRI under the Goals is found in Goal 9 (Economic Development) to provide “*opportunities ...for a variety of economic activities vital to the health, welfare, and prosperity of Oregon’s citizens,*”³ Goal 12 (Transportation) “[t]o provide and encourage a safe, convenient and economic transportation system” in Coos Bay⁴, and Goal 13 (Energy Conservation) “to conserve energy” through avoiding ship transit delay, and thus more efficient transit opportunities.⁵ NRI #4 has “special features” because the location is based on physical restrictions at a fixed vessel turning area in the Channel (identified by the Coos Bay Pilots Association) which currently restricts navigation during various weather conditions. See **Comment 32**. Accordingly, the “exception” (and related dredging) can only occur at the specific NRI location identified in the *Applications*. JCEP has designed the extent of dredging at NRI #4 at the minimum possible area to achieve the needed increase in navigational efficiency. Thus, the Applications and record also satisfy the “reasons exception” criteria in OAR 660-004-0022(1)(a), if applicable.

³ See **Comment 32** - Captain George Wales, Coos Bay Pilots Association; **Comment 35** - Jon Barton; **Comment 36** - Randy Hoffine, Pacific Properties; and **Comments 37 and 38** - Dale Sause and Cory Sause, Sause Bros. Inc.; *JCEP Applications*, Exhibit 3 (letters of support from Roseburg Forest Products and Coos Bay Pilots Association); **Comment 39**, **Exhibit CC.9(b)** (*Public/Economic Benefit*); and **Exhibits G.1, G.2 and G.3** (*EcoNorthwest Economic Analysis Reports*).

⁴ See **Comment 32** - Captain George Wales, Coos Bay Pilots Association; **Comments 37 and 38** - Dale Sause and Cory Sause, Sause Bros. Inc.

⁵ See **Comment 39**, **Exhibit MM** (*Technical Memorandum, LNG Carrier Transit Energy Conservation with NRIs in Place*).

- (ii). “Areas that do not require a new exception cannot reasonably accommodate the use” (ORS 197.732(2)(c)(B); OAR 660-004-0020(2)(b)).

As discussed above, NRI #4 is location-specific. Its purpose is to improve navigational efficiency at a specific turning area in the Channel. There are, accordingly, no other areas that could accommodate the use (nor have any alternative areas in Coos Bay been identified in any opposition comments). This analysis does not change under the evaluation criteria in OAR 660-004-0020(2)(b)(A) which asks about “possible alternative areas” that do not require an exception and OAR 660-004-0020(2)(b)(B) which asks about other possible areas that do not require an exception or accommodating the use on non-resource lands. These criteria do not apply because NRI #4 is entirely site-specific and no alternative location could achieve the “reason” for the exception (i.e., maintaining navigation at a problematic turning area). Accordingly, “areas that do not require a new exception cannot reasonably accommodate the use” and the criterion is satisfied.

- (iii). “The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site”; (ORS 197.732(2)(c)(C); OAR 660-004-0020(2)(c)).

For this approval criteria, OAR 660-004-0020(2)(c) provides some additional guidance:

(c) * * * The exception shall describe: the characteristics of each alternative area considered by the jurisdiction in which an exception might be taken, the typical advantages and disadvantages of using the area for a use not allowed by the Goal, and the typical positive and negative consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts. A detailed evaluation of specific alternative sites is not required unless such sites are specifically described with facts to support the assertion that the sites have significantly fewer adverse impacts during the local exceptions proceeding. The

exception shall include the reasons why the consequences of the use at the chosen site are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site. Such reasons shall include but are not limited to a description of: the facts used to determine which resource land is least productive, the ability to sustain resource uses near the proposed use, and the long-term economic impact on the general area caused by irreversible removal of the land from the resource base. Other possible impacts to be addressed include the effects of the proposed use on the water table, on the costs of improving roads and on the costs to special service districts.

The NRI #4 location is the only site at which JCEP can make the improvements necessary to maintain the efficiency of vessel navigation in the Channel, including, for larger vessels in the future at the same frequency, as documented by the testimony of Pilot Captain George Wales. See **Comment** 32. The NRI site is a restrictive, but unavoidable, turn in the Channel. This turn is responsible for significant delays in vessel transit in certain weather conditions. Although JCEP could widen another area of the Channel, the specific NRI #4 area is the critical area which poses existing constraints to the present level of navigation, and, accordingly, at which navigation efficiencies can be achieved. There are no alternative sites requiring a Goal exception or otherwise where transit efficiencies can be achieved.

(iv). *“The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts”*; (ORS 197.732(2)(c)(D); OAR 660-004-0020(2)(d)).

For this criterion, 660-004-0020(2)(d), provides the following additional guidance:

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

The NRI #4 site is located immediately adjacent to the existing Channel. Accordingly, compatibility with existing navigation is the dominant use on adjacent parcels, and the primary purpose of the NRI (improving navigation efficiency) is fully compatible with navigation/transportation. The general area is deep subtidal habitat which is consistent with the current/pre-dredging and post-dredging condition of NRI #4. Adverse impacts on the adjacent use is not anticipated due to the evidence in the record that NRI #4 has not been identified as having any significant fish, crustacean, shellfish, or eelgrass habitat, and the area has experienced periodic dredging for decades. See **Comment 39**, Exhibit AA (*2018 Eelgrass and Bathymetry Surveys Coos Bay*); Exhibit EE (*Technical Memorandum, Crustacean and Shellfish Baseline Information, Potential Impacts and Mitigation*); Exhibit FF (*Technical Memorandum, Fish Baseline Information, Potential Impacts and Mitigation*); Exhibit GG (*Technical Memorandum, Eelgrass Baseline Information, Potential Impacts and Mitigation*). The record further demonstrates that no significant impacts on marine mammals or birds are anticipated based on the temporary duration of dredging, the limited area involved, and lack of proximity of NRI #4 to significant marine mammal or bird nesting or critical feeding areas. See **Comment 39**, Exhibit II (*Technical Memorandum, Marine Mammals Baseline Information, Potential Impacts and Mitigation*); Exhibit JJ (*Technical Memorandum, Birds (e.g., Snowy Plover, Blue Heron, Marbled Murrelet, Diving Waterfowl) Baseline Information, Potential Impacts and Mitigation*). To the extent, however, that there are any potential impacts on potential adjacent natural resources, the record confirms that impacts to species and habitat are expected to be temporary, non-significant and JCEP will implement appropriate measures to mitigate such impacts. See **Comment 39**, Exhibit BB (*Dredging Pollution Control Plan*); Exhibit D (*Dredge Materials Management Plan @ 3391 through 3625*); Exhibit PP (*Response to Removal-Fill Comments*); Exhibit W (*US Army Corps of Engineers Environmental Assessment*) (and as further discussed in Section III, below).

- (3) If the exception involves more than one area for which the reasons and circumstances are the same, the areas may be considered as a group. Each of the areas shall be identified on a map, or their location otherwise described, and keyed to the appropriate findings.**

The *Applications* seek a Goal 16 exception for one NRI site in the City. The remaining NRI Sites are located outside of the City's jurisdiction, and therefore not subject to the *Applications* or this criterion.

- (4) For the expansion of an unincorporated community described under OAR 660-022-0010, including an urban unincorporated community pursuant to OAR 660-022-0040(2), the reasons exception requirements necessary to address standards 2 through 4 of Goal 2, Part II(c), as described in of subsections (2)(b), (c) and (d) of this rule, are modified to also include the following:**
- (a) Prioritize land for expansion: First priority goes to exceptions lands in proximity to an unincorporated community boundary. Second priority goes to land designated as marginal land. Third priority goes to land designated in an acknowledged comprehensive plan for agriculture or forestry, or both. Higher priority is given to land of lower capability site class for agricultural land, or lower cubic foot site class for forest land; and**
 - (b) Land of lower priority described in subsection (a) of this section may be included if land of higher priority is inadequate to accommodate the use for any of the following reasons:**
 - (A) Specific types of identified land needs cannot be reasonably accommodated on higher priority land;**
 - (B) Public facilities and services cannot reasonably be provided to the higher priority area due to topographic or other physical constraints; or**
 - (C) Maximum efficiency of land uses with the unincorporated community requires inclusion of lower priority land in order to provide public facilities and services to higher priority land.**

The *Applications* do not seek to expand an unincorporated community. Therefore, these approval criteria do not apply to the *Applications*.

B. Approval for Estuarine and Coastal Shoreland Uses and Activities Permit

1. CBDC

CBDC - 17.370.010 General

Uses and activities permitted by the Coos Bay estuary management plan are subject to general and special conditions and policies to comply with statewide planning goals and the Coos Bay Estuary Plan as adopted by the city of Coos Bay. Compliance with these conditions and policies must be verified; therefore, all uses and activities under jurisdiction of the Coos Bay estuary management plan must be reviewed.

CBDC 17.370.010 makes the general and special conditions of the CBEMP approval criteria for the *Applications*. The DDNC-DA CBEMP zone allows new and maintenance dredging, which the *Applications* seek approval for, subject to general conditions (CBEMP Policies #17 and #18) and a special condition (mitigation of adverse impacts - CBEMP Policy #5). As explained below, CBEMP Policy #5, in turn, triggers consideration of CBEMP Policies #4 and #4a. Therefore, these policies are addressed below.

JCEP also requests approval of an accessory temporary dredge line in the 52-NA, 53-CA, 54-DA, and 55-CA CBEMP management units. The dredge line is described in the DEA memo included in *Applications* at Exhibit 5 and it is depicted in the figures included in Exhibit 6. Finally, JCEP requests approval of an accessory buoy in the 52-NA management unit. The buoy is located south of the Channel and is depicted in *Applications*, Exhibit 7.

DDNC-DA Zone - General Conditions For Approval of “New and Maintenance Dredging”

CBEMP Policy #17 - Protection of “Major Marshes” and “Significant Wildlife Habitat” in Coastal Shorelands

Local government shall protect major marshes, significant wildlife habitat, coastal headlands, and exceptional aesthetic resources located within the Coos Bay Coastal Shorelands Boundary and included in the Plan inventory, except where exceptions allow otherwise. Local government shall consider:

- A. “major marshes” to include areas identified in the Goal #17 “Linkage Matrix” and the Shoreland Values Inventory map;**
- B. “significant wildlife habitats,” coastal headlands and exceptional aesthetic resources to include those areas identified on the map “Shoreland Values.”**

This strategy shall be implemented through:

- A. plan designations and use and activity matrices set forth elsewhere in this Plan that limit uses in these special areas to those that are consistent with protection of natural values; and**
- B. through use of the “Shoreland Values” map that identifies such special areas and restricts uses and activities therein to uses that are consistent with the protection of natural values. Such uses may include propagation and selective harvesting of forest products consistent with the Oregon Forest Practices Act, grazing, harvesting wild crops, and low-intensity water-dependent recreation.**

This strategy recognizes that special protective consideration must be given to key resources in coastal shorelands over and above the protection afforded such resources elsewhere in this Plan.

1. CBEMP Policy #17 does not Apply to the Applications.

According to the Shoreland Values map, there are no inventoried resources at the NRI #4 site for which Policy #17 requires protection. Therefore, CBEMP Policy #17 does not apply to the *Applications*.

CBEMP Policy #18 - Protection of Historical and Archaeological Sites Within Coastal Shorelands

Local government shall provide special protection to historic and archaeological sites located within the Coos Bay Coastal Shorelands Boundary, except where Exceptions allow otherwise. These sites are identified in the section entitled: “Coastal Shoreland Values Requiring Mandatory Protection” and on the “Special Considerations Map.” Further, local government shall continue to refrain from widespread dissemination of site-specific information about identified archaeological sites.

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

The development proposal, when submitted, shall include a site development plan showing, at a minimum, all areas proposed for excavation, clearing and construction. Within three (3) working days of receipt of the development proposal, the local government shall notify the Coos, Siuslaw, Lower Umpqua Tribal Council in writing, together with a copy of the site development plan. The Tribal Council shall have the right to submit a written statement to the local government within ten (10) days of receipt of such notification, stating whether the project as proposed would protect the historical and archaeological values of the site, or if not, whether the project could be modified by appropriate measures to protect those values.

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

- A. Retaining the historic structure in situ or moving it intact to another site; or**
- B. Paving over the site without disturbance of any human remains or cultural objects upon the written consent of the Tribal Council; or**
- C. Clustering development so as to avoid disturbing the site; or**

- D. Setting the site aside for non-impacting activities, such as storage; or**
- E. If permitted pursuant to the substantive and procedural requirements of ORS 97.750, contracting with a qualified archaeologist to excavate the site and remove any cultural objects and human remains, reintering the human remains at the developer's expense; or**
- F. Using civil means to ensure adequate protection of the resources, such as acquisition of easements, public dedications, or transfer of title.**

If a previously unknown or unrecorded archaeological site is encountered in the development process, the above measures shall still apply. Land development activities which violate the intent of this strategy shall be subject to penalties prescribed in ORS 97.990(8) and (9). Upon receipt of the statement by the Tribal Council, or upon expiration of the Tribal Council's ten-day response period, the local government shall conduct an administrative review of the development proposal and shall:

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

modifications deemed necessary by the governing body to protect the historical and archaeological values of the site.

This strategy recognizes that protection of historical and archaeological sites is not only a community's social responsibility, but is also legally required by Goal #17 and ORS 97.745. It also recognizes that historical and archaeological sites are non-renewable cultural resources.

2. CBEMP Policy #18 does not Apply to the Applications, but Measures will be Implemented to Address Cultural Resources.

The City has not inventoried any historical, cultural, and archaeological resources in the area of proposed development. Therefore, there are no known inventoried resources in this location to consider under this policy. *See also, Comment 39, Exhibit A.6, Exhibit CC.9(a), and Exhibit D.*

Notwithstanding this fact, JCEP recognizes that in the course of development consistent with the *Applications* there may be unanticipated discovery of cultural resources, remains, and/or objects. To address this possibility, JCEP has coordinated with the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians ("Tribes") to enter a memorandum of agreement ("MOA") addressing these circumstances, and more broadly, CBEMP Policy #18.

A copy of the signed MOA is included in *Applications*, Exhibit 9. The MOA incorporates a Cultural Resources Protection Agreement entered between JCEP and the Tribes ("CRPA"). The CRPA provides a process for the exchange of project-related information, confidentiality requirements, commitments to mitigation, monitoring agreements, agreements for the treatment of unanticipated discovery of cultural resources, site access agreements, and cost recovery agreements. The CRPA, in turn, incorporates an Unanticipated Discovery Plan ("UDP"), which provides procedures in the event of an unanticipated discovery of historic properties, archaeological objects, archaeological sites or human remains, funerary objects, sacred items, and items of cultural patrimony, during the construction and operation of the Pipeline. The CRPA and UDP are attached as exhibits to the MOA in *Applications*, Exhibit 9. In the MOA, JCEP and the Tribes expressly agreed that the CRPA and the UDP constitute appropriate measures under

CBEMP Policy #18 that would protect the cultural, historical, and archaeological values of this development site, Exhibit 12. JCEP is willing to accept a condition of City approval of the *Applications* requiring compliance with the MOA and its attachments.

Subject to the proposed voluntary condition, the City should find that the *Applications* are consistent with CBEMP Policy #18.

DDNC-DA Zone - Special Condition For Approval of “New and Maintenance Dredging”

CBEMP Policy #5 - Estuarine Fill and Removal

Dredging and/or filling shall be allowed only:

- A. If required for navigation or other water-dependent uses that requires an estuarine location or if specifically allowed by the applicable management unit requirements of this goal; and**
- B. If no feasible alternative upland location exists; and**
- C. If a public need (i.e., a substantial public benefit) is demonstrated and the use or alteration does not unreasonably interfere with public trust rights; and**
- D. If adverse impacts are minimized; and**
- E. The activity is consistent with the objectives of the Estuarine Resources Goal and with other requirements of state and federal law, specifically the conditions in ORS 541.615 and Section 404 of the Federal Water Pollution Control Act (P.L.92-500).**

Other uses and activities which could alter the estuary shall only be allowed if the requirements in B, C, and D are met. All portions of these requirements may be applied at the time of plan development for actions identified in the Plan. Otherwise, they shall be applied at the time of permit review.

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

"Significant" as used in "other significant reduction or degradation of natural estuarine values", shall be determined by:

- A. The U.S. Army Corps of Engineers through its Section 10 and 404 permit processes; or**
- B. The Department of Environmental Quality (DEQ) for approvals of new aquatic log storage areas only; or**
- C. The Department of Fish and Wildlife for new aquaculture proposals only.**

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

3. The Applications are Consistent with CBEMP Policy #5.

JCEP's new and maintenance dredging activities must be consistent with CBEMP Policy #5. The DDNC-DA zone allows new and maintenance dredging. Furthermore, because the *Applications* include a Goal 16 exception, Policy #5 requires only that the *Applications* comply with criteria D. and E., above, because, as expressly noted within the Policy, the findings for the Goal 16 exception suffice for the *Applications* to comply with criteria A. - C.

Policy #5 directs that an applicant demonstrate compliance with criterion D. of Policy #5 (identification and minimization of adverse impacts) pursuant to the procedure set forth in CBEMP Policy #4a. Furthermore, Special Conditions for approval of new and maintenance dredging in the DDNC-DA zone provide that such dredging is allowed only “subject to finding that adverse impacts have been minimized.” JCEP will minimize adverse impacts as summarized below, in response to CBEMP Policies #4 and #4a, and as further discussed in the record. *See Applications, Exhibit 5; **Comment 39**, Exhibit AA (2018 Eelgrass and Bathymetry Surveys Coos Bay); Exhibit EE (Technical Memorandum, Crustacean and Shellfish Baseline Information, Potential Impacts and Mitigation); Exhibit FF (Technical Memorandum, Fish Baseline Information, Potential Impacts and Mitigation); Exhibit GG (Technical Memorandum, Eelgrass Baseline Information, Potential Impacts and Mitigation); Exhibit II (Technical Memorandum, Marine Mammals Baseline Information, Potential Impacts and Mitigation); Exhibit JJ (Technical Memorandum, Birds (e.g., Snowy Plover, Blue Heron, Marbled Murrelet, Diving Waterfowl) Baseline Information, Potential Impacts and Mitigation); Exhibit BB (Dredging Pollution Control Plan); Exhibit D (Dredge Materials Management Plan @ 3391 through 3625); Exhibit PP (Response to Removal-Fill Comments)(and as further discussed in Section III, below, concerning “Effects” on Aquatic Community, Recreation, and of Dredging).*

As cited in the above exhibits, JCEP will use various dredging methods to minimize the effects of NRI #4 on turbidity within the bay. JCEP will use best management practices (including cutter head suction, clamshell, and hopper dredging) associated with dredging to reduce turbidity effects, and, as a result of those methods, JCEP expects any increased water turbidity to be temporary and limited to the immediate vicinity of dredging operations. Furthermore, JCEP does not anticipate oil spills or toxic discharges to occur when constructing the NRIs, and JCEP will use precautions to avoid either through appropriate spill prevention planning. Dredging and material transport vessels will carry small volumes of petroleum in comparison to large bulk carriers and Panamax vessels that regular traverse Coos Bay. JCEP will use best management practices to avoid and minimize spills or discharges during dredging operations and dredged material transport, including the implementation of spill prevention, control and countermeasure plans. JCEP plans to perform capital and maintenance dredging during the ODFW-approved in-water work window (October 1 to February 15) to reduce

impacts to sensitive life stages of fish in the bay. See, e.g., **Comment 39**, **Exhibit BB** (*Dredging Pollution Control Plan*); **Exhibit D** (*Dredge Materials Management Plan @ 3391 through 3625*).

Criterion E. of Policy #5 requires that the NRIs are “consistent with the objectives of the Estuarine Resources Goal and with other requirements of state and federal law, specifically the conditions in ORS 541.615 and Section 404 of the Federal Water Pollution Control Act (P.L.92-500).” The *Applications* are consistent with the objectives of Goal 16 (Estuarine Resources Goal) because they protect the economic values of the estuary while minimizing adverse impacts of the dredging activity. The *Applications* are consistent with other requirements of state and federal law including the conditions in Section 404 of the Federal Water Pollution Control Act and ORS 541.615 (which is now ORS 196.810). ORS 196.810 requires a permit from DSL to remove any material from the beds or banks of waters of the state. JCEP acknowledges such obligations, and all necessary DSL and Federal Section 404 authorizations will be obtained as a condition precedent to dredging.

For these reasons, the City should find that JCEP’s proposed new and maintenance dredging activities are consistent with CBEMP Policy #5.

Alternatively, the City should find that CBEMP Policy #5 is not applicable to the *Applications* pursuant to state law. LUBA has held, and the Court of Appeals has affirmed, that “[w]hen a goal exception is taken to facilitate proposed development, any comprehensive plan policies that implement the goal for which the exception is taken no longer govern that development.” *Friends of Marion County v. Marion County*, 59 Or LUBA 323, 350-351 (2009), *aff’d* 233 Or App 488, 227 P3d 198 (2010). The *Applications* request an exception to Goal 16 to facilitate dredging in a natural management unit. As the last sentence of CBEMP Policy #5 clearly states, the purpose of this policy is to implement Goal 16: “This strategy recognizes that Goal #16 limits dredging, fill, and other estuarine degradation in order to protect the integrity of the estuary.” Accordingly, pursuant to the appellate decisions in *Friends of Marion County*, CBEMP Policy #5 is not applicable to the *Applications*.

#4 Resource Capability Consistency and Impact Assessment

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

A. Natural Management Units

- Aquaculture
- Bridge crossings
- Log storage

B. Conservation Management Units

- Aquaculture
- Bulkheading
- Dike maintenance dredging
- High-intensity water-dependent recreation
- Log storage dredging
- Minor navigational improvements requiring dredging or fill
- New or expanded log storage
- Rip-rap
- Water intake or withdrawal and effluent discharge

C. Development Management Units

- Aquaculture
- Bulkheading (except for Aquatic Units #3-DA, 5DA, and 6DA)
- Dredging
- Fill
- Flow lane disposal of dredged material
- In-water structures
- Mining and mineral extraction
- New or expanded log storage
- Water-related and nondependent, nonrelated uses not requiring fill

D. Any other uses and activities which require the resource capability consistency test as a condition within a particular management unit or which could affect the estuary's physical processes or biological resources.

Unless fully addressed during the development and adoption of comprehensive plans, actions which would potentially alter the estuarine ecosystem shall be preceded by a clear presentation of the impacts of the proposed alteration.

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

- A. A description of resources identified in the plan inventory;**
- B. An evaluation of impacts on those resources by the proposed use (see impact assessment procedure, below); and**
- C. In a natural management unit, a use or activity is consistent with the resource capabilities of the area when either the impacts of the use on estuarine species, habitats, biological productivity and water quality are not significant or that the resources of the area are able to assimilate the use and activity and their effects and continue to function in a manner to protect significant wildlife habitats, natural biological productivity, and values for scientific research and education.**

D. In a conservation management unit, a use or activity is consistent with the resource capabilities of the area when either the impacts of the use on estuarine species, habitats, biological productivity, and water quality are not significant or that the resources of the area are able to assimilate the use and activity and their effects and continue to function in a manner which conserves long-term renewal resources, natural biologic productivity, recreational and aesthetic values, and aquaculture.

An impact assessment need not be lengthy or complex, but it should enable reviewers to gain a clear understanding of the impacts to be expected. It shall include information on:

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

This policy is based on the recognition that the need for and cumulative effects of estuarine developments were fully addressed during the preparation of this Plan and that, except as otherwise stated above, no additional findings are required to meet Implementation Requirement #1 of LCDC Goal 16.

4. The Applications are Consistent with CBEMP Policy #4.

As required by CBEMP Policy #5, “[i]dentification and minimization of impacts shall follow the procedure set forth in Policy #4. Although neither of the activities in Policy #4a (“aquiculture” and “log storage dredging”) clearly apply, the record confirms that JCEP intends to pursue myriad methods to minimize impacts. *See Applications, Exhibit 5; Comment 39, Exhibit AA (2018 Eelgrass and Bathymetry Surveys Coos Bay); Exhibit EE (Technical Memorandum, Crustacean and Shellfish Baseline Information, Potential Impacts and Mitigation); Exhibit FF (Technical Memorandum, Fish Baseline Information, Potential Impacts and Mitigation); Exhibit GG (Technical Memorandum, Eelgrass Baseline Information, Potential Impacts and Mitigation); Exhibit II (Technical Memorandum, Marine Mammals Baseline Information, Potential Impacts and Mitigation); Exhibit JJ (Technical Memorandum, Birds (e.g., Snowy Plover, Blue Heron, Marbled Murrelet, Diving Waterfowl) Baseline Information, Potential Impacts and Mitigation); Exhibit BB (Dredging Pollution Control Plan); Exhibit D (Dredge Materials Management Plan @ 3391 through 3625); Exhibit PP (Response to Removal-Fill Comments)*(and as further discussed in Section III, below, concerning “Effects” on Aquatic Community, Recreation, and of Dredging).

For 1.f, the Goal 16 exception and related procedures will comply with the “Estuarine Resources Goal” and JCEP will ensure that the NRIs are consistent with other requirements of state and federal law, including (permits already applied for), e.g., Section 404 of the Federal Water Pollution Control Act, ORS 541.615, which is now ORS 196.810, requiring a permit from DSL to remove any material from the beds or banks of waters of the state. JCEP acknowledges this obligation, and all necessary state federal authorizations will be obtained as a condition of dredging commencement.

Policy #4a also references Policy #4 “assessment of impacts” which requires findings demonstrating the public’s need and gain that would warrant any modification or loss to the estuarine ecosystem, based upon a clear presentation of the impacts of the proposed alteration, as implemented in Policy #4a. None of the prerequisites to providing notice to state agencies under Policy #4a are triggered. Therefore, this policy requires the City to perform the impacts assessment consistent with CBEMP Policy #4 (which the City has already conducted through review of the NRIs, proposed impact, and proposed mitigation), with the conclusion that no significant impacts will accrue. See Staff Report, Attachment A, Exhibit 5. Furthermore, the substantial information in the record, including as cited in Section III below, support the staff assessment of no significant impacts. See also, *Applications*, Exhibit 5.

Most importantly, the City should find that CBEMP Policy #4 is not applicable to the *Applications* pursuant to state law. LUBA has held, and the Court of Appeals has affirmed, that “[w]hen a goal exception is taken to facilitate proposed development, any comprehensive plan policies that implement the goal for which the exception is taken no longer govern that development.” *Friends of Marion County*, 59 Or LUBA at 350-351, *aff’d* 233 Or App at 488. The *Applications* request an exception to Goal 16 to facilitate dredging in a natural management unit. As the last sentence of CBEMP Policy #4 clearly states, the purpose of this policy is to implement Goal 16: “This policy is based on the recognition that the need for and cumulative effects of estuarine developments were fully addressed during the preparation of this Plan and that, except as otherwise stated above, no additional findings are required to meet Implementation Requirement #1 of LCDC Goal 16.” Accordingly, pursuant to the appellate decisions in *Friends of Marion County*, CBEMP Policy #4 is not applicable to the *Applications*.

#4a Deferral of (A) Resource Capability Consistency Findings and (B) Resource Impact Assessments

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

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

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

A. Where aquaculture is proposed as a use, local government shall notify the Oregon Department of Fish & Wildlife (ODFW) in writing of the request, with a map of the proposed site;

B. Where log storage dredging is proposed as an activity, local government shall notify the Oregon Department of Environmental Quality (DEQ) in writing of the request, together with a map of the proposed site.

Within twenty (20) days of receipt of the notification, ODFW or DEQ, as appropriate, shall submit in writing to local government a statement as to whether the proposed use/activity will be consistent with the resource capabilities of the management segment, or if determined to be not consistent, whether the proposal can be made consistent through imposition of conditions on the permit. The appropriate state agency shall also perform the impact assessment required in Policy #4. If no statement is received from the affected state agency by the expiration of the twenty (20) day period, local government shall presume consistency of the proposal with the resource capabilities of the management segment, shall make findings appropriate to the presumption, and shall perform the assessment of impacts required by Policy #4.

For all other uses/activities specified above, local government shall determine appropriate findings whether the proposed use/activity is consistent with the resource capabilities of the management segment and shall perform the assessment of impacts required by Policy #4.

This strategy recognizes:

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

B. that the specified state agencies have expertise appropriate to assist local government in making the required finding and assessments.

This strategy is based upon the recognition that the need for and cumulative effects of estuarine developments were fully addressed during development of this Plan and that no additional findings are required to meet Implementation Requirement #1 of Goal #16.

5. The Applications are Consistent with CBEMP Policy #4a.

As noted above, CBEMP Policy #4 requires findings demonstrating the public's need and gain that would warrant any modification or loss to the estuarine ecosystem, based upon a clear presentation of the impacts of the proposed alteration, as implemented in Policy #4a. None of the prerequisites to providing notice to state agencies under Policy #4a are triggered. Therefore, this policy requires the City to perform the impacts assessment consistent with CBEMP Policy #4. The City has completed that assessment as discussed, above. See Staff Report, Attachment A, Exhibit 5.

For an additional reason, the City should find that CBEMP Policy #4a is not applicable to the *Applications*. LUBA has held, and the Court of Appeals has affirmed, that "[w]hen a goal exception is taken to facilitate proposed development, any comprehensive plan

policies that implement the goal for which the exception is taken no longer govern that development.” *Friends of Marion County*, 59 Or LUBA at 350-351, *aff’d* 233 Or App at 488. The *Applications* request an exception to Goal 16 to facilitate dredging in a natural management unit. As the last sentence of CBEMP Policy #4a clearly states, the purpose of this policy is to implement Goal 16: “This strategy is based upon the recognition that the need for and cumulative effects of estuarine developments were fully addressed during development of this Plan and that no additional findings are required to meet Implementation Requirement #1 of Goal #16.” Accordingly, pursuant to the appellate decisions in *Friends of Marion County*, CBEMP Policy #4a is not applicable to the *Applications*.

III. Focus Issues: City of Coos Bay NRI Applications.

The following section focuses on specific areas of public comments, some of which are relevant to the approval criteria for the *Applications* and some that are not relevant to limited decision before the Planning Commission but are included to guide members of the public to information that will help address their questions.

A. ISSUE: Need for NRI #4 and Public Benefit.

Coos Bay is a working port. The federally designated deep-draft Channel was authorized in 1899, and the U.S. Army Corps of Engineers has maintained and modified the Channel many times over the past 120 years. See **Comment 39**, **Exhibit W**. There are four terminals operating in the lower bay, and 10 terminals in the upper bay (3 of which currently handle deep draft vessels). The Channel has undergone at least 10 modifications including regular maintenance dredging. Most recently, the Channel was expanded in 1997 from -35 feet to -37 feet to allow for the safe navigation and transit of Coos Bay for the size of ships prevalent during that time period. However, over the last 20 years the dimensions and tonnage of ships serving terminals in Coos Bay has increased. Pilotage is mandatory in Oregon, and the Pilots have identified four “turning” areas in the Channel that, due to width and depth restrictions, restrict vessel transit during certain weather conditions. While the Channel remains “navigable” (even for large ships), the efficiency is reduced when vessels have to idle offshore waiting for suitable weather windows. As ship size increases, the utility of Coos Bay as a working port is limited by the current Channel configuration. See **Comment 32**.

The primary purpose of the *Applications* is to provide more efficient transit of vessels through the Channel during a wider weather window than the Pilots will currently allow. This is a benefit that will accrue to everyone who takes part in, or benefits from, the International Port of Coos Bay economy. NRI #4 is intended to help provide improvements that will keep Coos Bay competitive and will be open to use by all vessels transiting the bay. The public need and benefit has been well documented in the record. See **Comment 32** - Captain George Wales, Coos Bay Pilots Association; **Comment 35** - Jon Barton; **Comment 36** - Randy Hoffine, Pacific Properties; and **Comments 37 and 38** - Dale Sause and Cory Sause, Sause Bros. Inc.; *Applications*, **Exhibit 3** (letters of support from Roseburg Forest Products and Coos Bay Pilots Association); **Comment 39**, **Exhibit CC.9(b)** (*Public/Economic Benefit*); and **Exhibits G.1, G.2 and G.3** (*EcoNorthwest Economic Analysis Reports*); **Exhibit OO** (*Public Need and Social, Economic, and Other Public Benefits*).

B. ISSUE: Effects on Aquatic Community (e.g., Eelgrass, Crustaceans, Clams, Fish, Birds, Marine Mammals).

The potential impacts on aquatic species is limited to impacts that may occur in the area specifically subject to the *Applications*. These include the NRI #4 area and related temporary dredge lines (which will run along the deep draft channel). JCEP has retained numerous subject matter experts and consulting firms to assess the habitat in the areas of the proposed NRI, identified the presence, or lack of, aquatic species including eelgrass, crustaceans, shellfish, fish, marine mammals, birds and (where relevant) endangered species within these groups. JCEP's experts have provided focused *Technical Memoranda* which discuss baseline information, potential impacts, mitigation, and cite to studies and numerous documents in the record which uniformly demonstrate that the NRIs will not cause significant impacts for any of these species or related habitat.⁶ The *Technical Memoranda* provide analysis and detailed citations to the record, rationale, but some highlights include:

- ***Eelgrass*** - As cited *Technical Memorandum, Eelgrass Baseline Information, Potential Impacts and Mitigation: Navigation Reliability Improvements* (**Comment 39, Exhibit GG**), NRI #4 is not located in eelgrass habitat and the related

⁶ See **Comment 39**, **Exhibit L**, **Exhibit M**, **Exhibit N**, **Exhibit P**, **Exhibit Q** (and Exhibits, studies, reports cited therein).

temporary dredge line will not cross eelgrass habitat. While other aspects of the Project will involve potential impacts to eelgrass (and substantial mitigation), NRI #4 does not impact existing eelgrass or areas with conditions that would be conducive to becoming established eelgrass habitat.

- **Marine Mammals** - *Technical Memorandum, Marine Mammals Baseline Information, Potential Impacts and Mitigation (Comment 39, Exhibit II)*, confirms that any potential temporary noise from dredging equipment should not exceed ambient noise levels and can generally be avoided by marine mammals (further, marine mammal species in Coos Bay may be acclimated to dredging noise from regular U.S. Army Corps of Engineers dredging of the Channel). Potential noise from temporary piling installation can be mitigated (e.g., through vibratory installation methods) and will be regulated and restricted, if necessary, under the *Marine Mammals Protection Act* and through limiting work to periods to the ODFW in-water work window (Oct. 1 - Feb. 15). Any accidental spills will be addressed through an appropriate Spill Prevention Control and Countermeasure (SPCC) plan. *See also Comment 39, Exhibit DD; Exhibit J (Technical Memorandum - Water Quality Considerations – Implications for Clean Water Act Sections 401 and 404 Permitting)*.
- **Crustaceans and Shellfish** - *Technical Memorandum, Crustacean and Shellfish Baseline Information, Potential Impacts and Mitigation (Comment 39, Exhibit EE)*, confirms that the NRIs are not located in known clamming or crabbing areas, or shrimp or oyster habitat. While some impacts to the benthic community (e.g., worms, clams, benthic shrimp, starfish) may occur from dredging, studies have shown dredged areas to naturally recover with 1 to 12 months between dredging activity.
- **Fish** - As cited in *Technical Memorandum, Fish (e.g., Salmon, Sturgeon, Herring, Candlefish) Baseline Information, Potential Impacts and Mitigation (Comment 39, Exhibit FF)*, the NRI #4 dredging will not have significant impacts on fish species (including salmon, sturgeon, herring, candlefish, and others) due to limited duration of dredging (which can temporarily increase noise and turbidity); limiting impacts on anadromous fish by conducting work during the ODFW in-

water work period (Oct.1 - Feb. 15); location of the NRI #4 outside eelgrass habitat (and, correspondingly, outside crab and herring spawning areas); BMPs to reduce turbidity; and SPCC plans to prevent and address spills.

- **Birds** - As cited in *Technical Memorandum, Birds (e.g., Snowy Plover, Blue Heron, Marbled Murrelet, Diving Waterfowl) Baseline Information, Potential Impacts and Mitigation (Comment 39, Exhibit JJ)*, the NRI dredging will not have significant noise impacts on bird species by conducting work during the ODFW in-water work period (Oct.1 - Feb. 15) to avoid nesting season; habitat and nesting areas are not located in the area of NRI #4; any reduced foraging in the NRI area will be temporary (as benthic areas recover); and there are adequate alternative foraging opportunities throughout the bay.

The sub-tidal habitat in the NRI areas has not been designated as critical habitat for any species, but JCEP is prepared to implement BMPs, conditions, and mitigation (including requirements or conditions in permits or land use approvals) to conduct NRI #4 dredging in a manner that prevents significant impacts on aquatic species including any listed threatened or endangered species that might be affected. See Comment 39, Exhibit S, Exhibit BB, Exhibit DD, Exhibit PP. JCEP is also encouraged that the Coos Bay Estuary has remained highly productive as many commenters noted, (e.g., for crabbing, clamming, fishing), in areas alongside the federal navigation Channel notwithstanding the annual dredging that has occurred over the past 100+ years. The NRI #4 area, located immediately adjacent to the Channel, is similarly expected to recover and remain sub-tidal habitat and have minimal effects on adjacent areas.

C. ISSUE: Effects on Recreation.

Recreation in Coos Bay is a significant and vitally important economic and public value. JCEP has retained experts to evaluate baseline information on recreational activities in Coos Bay including issues raised in public comments expressing concern about potential impacts from the NRIs on recreation, including crabbing, clamming, fishing, boating, and paddling. The baseline, potential impacts, and mitigation to recreation is address in *Technical Memorandum, Recreation Baseline Information, Potential Impacts and Mitigation (Comment 39, Exhibit HH)* which cites to multiple documents and studies in

the record confirming that JCEP has adequately considered and addressed potential recreational impacts. No significant impacts on recreational crabbing, clamming or fishing are anticipated from NRI #4 as this area is not identified as containing significant clamming or crabbing opportunities. However, mitigation and BMPs will still be put in place to mitigate potential impacts to such species. Similarly, interference to recreational boaters or paddlers (during active dredging) will be both temporary and minimal and JCEP will provide appropriate notices to the public when dredging occurs to minimize such inconvenience.

D. ISSUE: Effects of Dredging.

The primary activity to be authorized under the *Applications* is dredging. The activity includes initial dredging of one narrow strip of sub-tidal habitat and periodic maintenance dredging of this areas (every 3 to 5 years thereafter). Many public comments raised general questions about the locations, methods, volume, frequency, methods, dredge spoil locations, potential contaminated sediments, concerns about turbidity and water quality, adjacent areas to the NRI, and specific plans to implement dredging BMPs. While the *Applications* provide the detail necessary to evaluate the potential impacts and render a decision on the *Applications*, JCEP has included *Technical Memorandum, Dredging Locations, Methods, Equipment, Frequency, Volumes, Dredge Spoil Deposition, Potential Impacts and Mitigation* (Comment 39, Exhibit LL) which provides references to multiple documents and pages in the record addressing these issues, including an NRI-specific *Dredge Pollution Control Plan (Navigation Reliability Improvements, Kentuck, APCO) (April 2019)* (**Comment 39**, Exhibit BB); *Technical Memorandum - Water Quality Considerations – Implications for Clean Water Act Sections 401 and 404 Permitting (Feb. 2018)* (**Comment 39**, Exhibit J); *Attachment G: 401 Water Quality Certification (October 2017)* (**Comment 39**, Exhibit V).

As discussed herein, and as provided in the record, potential impacts of dredging (and periodic maintenance dredging every 3 to 5 years) have been thoroughly evaluated, including, e.g., impacts to habitat, species, recreation, water quality and, with appropriate mitigation, are anticipated to be short-term and not significant. See **Comment 39**, Exhibit A.1, Exhibit A.2, Exhibit A.3, Exhibit A.4, Exhibit A.5, Exhibit A.7, Exhibit A.10, Exhibit A.11, Exhibit A.13, Exhibit B, Exhibit C, Exhibit D, Exhibit E, Exhibit F,

Exhibit G, Exhibit H, Exhibit I, Exhibit U, Exhibit V, Exhibit X, Exhibit Y, Exhibit Z, Exhibit BB, Exhibit DD, Exhibit EE, Exhibit FF, Exhibit GG, Exhibit HH, Exhibit II, Exhibit JJ, Exhibit LL, Exhibit PP. These documents, and others, confirm the details of the proposed dredging activity, (locations, methods, equipment, frequency, volume, dredge spoil locations - although outside of the scope of these *Applications*), sampling to confirm the NRIs do not contain contaminants of concern, and mitigation that will be implemented during dredging. Robust BMPs will be mandated under state and federal permits, and JCEP has already developed plans and specific BMPs that will be applicable to the NRI dredging activities. See **Comment 39**, Exhibit J; Exhibit BB. Additional restrictions are anticipated to avoid impacts to specific species as discussed above, which may fall under separate plans or permits. While dredging in any aquatic location has potential for impacts, JCEP is taking great care to implement appropriate methods and a robust set of BMPs that will be required under these state and federal permits before any dredging can occur.

E. ISSUE: Turbidity.

To the extent minimizing turbidity is appropriate to mitigate the effects of dredging NRI #4, the record provides both analysis of potential turbidity and plans to reduce impacts. See **Comment 39**, Exhibit A.4 (*Resource Report No. 2 - Water Use and Quality*); Exhibit D (*Dredge Materials Management Plan @ 3391*); Exhibit H (*Turbidity Analysis Memo*); Exhibit J (*Technical Memorandum, Water Quality Considerations*); Exhibit BB (*Dredging Pollution Control Plan*).

If comments are received regarding the potential effect or significance of the May 6, 2019 Oregon Department of Environmental Quality (“DEQ”) Clean Water Act (“CWA”) Section 401 “*Water Quality Certification Decision Letter*” (“*DEQ Decision*”) sent to Jordan Cove LNG, LLC and Pacific Connector Gas Pipeline, LP, please consider the following. The *DEQ Decision* concerns DEQ’s review of JCEP’s demonstration of compliance with state water quality standards related to a pending federal U.S. Army Corps of Engineers (“USCOE”) permit to dredge and fill under Section 404 of the CWA.

The *DEQ Decision* not certify compliance at this time, however, is not relevant to the *Applications* because, first, it applies to the statewide turbidity standard in OAR 340-

041-0036 which has not been adopted by the City and is not an approval criterion for any of the pending *Applications* under the CBDC or CBCP.

Second, the *DEQ Decision* was made under certain statutory time constraints and does not in any way preclude JCEP from re-submitting a complete application to DEQ in the future as expressly stated at page 3 of DEQ's cover letter:

"As noted above, this decision is being made without prejudice. Jordan Cove may resubmit an application for 401 WQC with DEQ. If Jordan Cove does so, DEQ strongly recommends that Jordan Cove, the Corps and DEQ hold a pre-application conference to ensure a shared understanding of the information and actions required to complete subsequent review of an application in a timely manner..."

Accordingly, JCEP is free to seek a future 401 certification from DEQ (and we note, with the benefit of a substantially narrowed list of items to supplement). Therefore, the *DEQ Decision* does not indicate that a 401 certification for the project is not available.

Third, even if the *DEQ decision* was somehow relevant as evidence of lack of a turbidity control plan, JCEP has included a document in the *Applications* record that directly responds to the substantive issue in the *DEQ Decision*. The *DEQ Decision, Evaluation and Findings Report* at page 76 states as follows with regard to DEQ's reason for not certifying the NRI's:

"JCEP has not submitted a Dredging Pollution Prevention Plan. DEQ finds JCEP's proposed activities would cause turbidity to increase in excess of numeric limits, and absent any Dredging Pollution Prevention Plan, JCEP has failed to demonstrate its methods include sufficient controls to prevent exceedance of turbidity standard in OAR 340-041-0036."

Thus, the *DEQ Decision* (regarding NRIs) was based on the lack of a "*Dredge Pollution Control Plan*" to demonstrate compliance. However, JCEP recently completed the required *Dredge Pollution Control Plan* and submitted it into the record for the *Applications* on April 25, 2019. See [Comment 39](#), [Exhibit BB](#). Accordingly, if there is a question about whether JCEP has a plan to achieve "compliance with state turbidity standards" such evidence is in the record.

Accordingly, as a matter of law, the *DEQ Decision* has no effect on the City's review and decision to approve the *Applications*.

F. ISSUE: Energy Conservation.

Several opponents filed comments stating that there would be no energy efficiency benefits from NRI #4, however, JCEP has provided *Technical Memorandum, LNG Carrier Transit Energy Conservation with NRIs in Place: Navigation Reliability Improvements; Coos County File Nos. AM-18-011/RZ-18-007/HBCU-18-003* in the record to demonstrate that the NRIs will have net positive effects on energy conservation through more efficient transportation. See Comment 39, Exhibit T.

G. ISSUE: Cultural Resources.

JCEP has welcomed the opportunity to work with Tribal governments and communities with regard to the Jordan Cove Project. These efforts include JCEP's research on potential cultural resource sites, planning for inadvertent discovery, evaluation of potential impacts on tribal populations, and entering into an MOA with the Tribes to ensure cultural resources are protected, and evaluating potential impacts on tribal communities, which JCEP requests to be included as a binding condition of approval. See *Applications*, Exhibit 9; Comment 39, Exhibit A.6, Exhibit CC.9(a), Exhibit D; see also, Comment 39, Exhibit A.1; Exhibit A.2, Exhibit A.3, Exhibit A.5, Exhibit A.6, Exhibit A.7. JCEP has also welcomed interested Tribal government comments on the *Applications*. After studying the affected areas, JCEP has determined that there are no inventoried cultural or archaeological resources in the submerged area of NRI #4 s or related temporary dredge lines, so no impacts to such resources are anticipated. JCEP nonetheless has plans and procedures in place in the event cultural or archeological resources are discovered.

H. ISSUE: Natural Hazards.

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While potential impacts from natural hazards (or related emergency preparedness) are not directly applicable as decision criteria for the *Applications*. JCEP considers natural hazards to be an important issue of public safety, and (based on a number of public comments) has included *Technical Memorandum, Natural Hazards (Tsunami, Earthquake, Flooding, Storm Surge) Baseline Information, Potential Impacts and Mitigation* into the record for public review, which addresses where in the record JCEP has evaluated potential natural hazards. See **Comment 39**, **Exhibit R**. Furthermore, several comments raising questions about the potential hydrodynamic effects of dredging NRI #4 and related sediment transport. JCEP has, accordingly, included hydrodynamic studies in the record for reference. See **Comment 39**, **Exhibit X** and **Exhibit Y**.

IV. Conclusion.

Based upon the above, the City should approve JCEP's requests: (1) to amend the CBEMP map to change the zoning designation of the NRI Site from 52-NA to DDNC-DA; (2) to amend the CBCP to take a reasons exception to Goal 16 to change the zoning designation of the NRI Site to DDNC-DA; (3) for Estuarine and Coastal Shoreline Uses and Activities Permit For "New And Maintenance Dredging" in the DDNC-DA estuarine zone; and (4) Estuarine and Coastal Shoreline Uses and Activities Permit to allow an accessory temporary dredge transport pipeline in the 52-NA, 53-CA, 54-DA, and 55-CA estuarine zones and an accessory buoy in the 52-NA estuarine zone. As cited herein, substantial evidence in the record supports approval of the Applications.

Thank you for your consideration of the points in this letter.

Very truly yours,



Steven L. Pfeiffer

cc: Carolyn Johnson, City of Coos Bay (via email) (w/encls.)
Jake Callister, LCOG (via email) (w/encls.)
Client (via email) (w/encls.)