



AGENDA ITEM SUMMARY

Date: December 4, 2019

To: City of Coos Bay City Council

From: Lane Council Governments (LCOG) Contact:

Henry Hearley, Assistant Planner, 541-682-3089, hhearley@lcog.org

Jacob Callister, Principal Planner, 541-682-4114, jcallister@lcog.org

RE: Land Use Application #187-18-000153 – Jordan Cove Energy Project Navigation and Efficiency and Reliability of the Coos Bay Deep Draft Navigation Channel.

The City Council is scheduled to hold a meeting to deliberate and make a decision on Land Use Application #187-18-000153, Jordan Cove Energy Project Navigation and Efficiency and Reliability of the Coos Bay Deep Draft Navigation Channel, on January 7, 2019. At that meeting the Council will receive and consider a revised staff report from LCOG on the Jordan Cove application. The Council will also have the Coos Bay Planning Commission's recommendation before them. Appropriate notice for this meeting has been provided.

Following this Agenda Item Summary is an expanded and revised staff report prepared by LCOG staff. Although a substantial amount of content remains unchanged, LCOG staff incorporated additional evidence and discussion and have developed more conclusive responses to many of the approval criteria.

PROCESS TIMELINE

A detailed timeline is included in the LCOG staff report. Following is a summary key recent events related to the application:

- August 27, 2019 – Council received and considered LCOG's staff report on the Jordan Cove application, the Planning Commission's recommendation and public testimony.
- August 27 – October 31, 2019 – Open record periods during which additional testimony was received and rebutted, and the applicant had the opportunity to provide a final written argument.
- January 7, 2019 – City Council meeting where the Council will receive and consider a revised staff report from LCOG on the Jordan Cove application, deliberate and potentially make a decision on the application.

APPLICANT'S REQUEST

JCEP proposes dredging at four locations in the Channel. Three of the proposed NRIs are within Coos County and one (NRI - Dredge Area #4) is within the City of Coos Bay. The applicant is proposing the following applications to address NRI#4:

- (1) A map amendment to the Coos Bay Estuary Management Plan and zoning map 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.

KEY PARAMETERS

Analysis of the application is constrained by the following key parameters:

- The applications are entirely dependent on the applicant receiving approval of a Goal 16 exception. Without an exception to Estuarine Resources, the 3.3-acre dredge site cannot be changed in the comprehensive plan from a Natural Aquatic to a Development Aquatic unit. It is also noted that permits cannot be issued for dredge and temporary pipeline work if text changes to the comprehensive plan are not approved. In sum, without the approval of all four requests by the applicant, the applicant’s proposed dredging at NRI #4 cannot proceed.
- An “exception” to a Statewide Planning Goal (“exception”) is an allowance of a use otherwise prohibited by a goal. Criteria addressing exceptions “reasons” should be appropriately considered.
- The subject area of this application is the 3.3-acres of area currently designated NA-52 by the CBEMP. State law and local code confines the City Council’s consideration to the impacts from the use(s) proposed in this application, accordingly, most, if not all, evidence addressing full LNG elements are irrelevant to the applicable evaluation criteria. The decision maker is also required to make the decision based solely on the applicable criteria that are found in the local code and comprehensive plan. A further discussion of this can be found on Pages 8 and 9 of the LCOG staff report.

KEY CRITERIA

The City of Coos Bay contracted with the Lane Council of Governments (LCOG) to conduct a neutral analysis and prepare an accompanying staff report for the Estuary Management Plan and comprehensive plan text amendments and the Jordan Cove NRI permit applications. Decisions and conclusions on the application ultimately lie with the City Council. LCOG’s analysis/response and recommendation is intended to provide guidance in establishing findings and conclusions for the applications.

In previous memos, LCOG staff have identified key criteria of particular significance for the Council to consider in rendering a decision on these land use applications. Some of these criteria are subjective. LCOG staff look to the Council to draw actionable conclusions on these particular criteria.

On July 23rd, 2019, the Planning Commission were presented with these criteria. At that meeting the Planning Commission passed a motion to recommend an approval finding for each of the specific criteria.

Following is a summary of the key criteria identified by LCOG. All criteria must be met to approve the application and the attached staff report addresses all approval criteria (criteria outlined on Page 7). The staff report contains “staff responses” to all approval criteria. These “LCOG staff responses” can be directly referenced in the development of Council findings. All staff responses to criterion not included in the matrix, currently reflect a finding supporting approval of the applications.

LCOG STAFF RECCOMENDATION

As outlined on Page 50 of the staff report, LCOG staff recommends denial of the applications. Though the majority of criteria can be objectively met, there are several criteria which staff believe are not met. These criteria are highlighted in the updated matrix that follows.

CONDITIONS OF APPROVAL

Should Council determine to approve the project, LCOG recommended conditions of approval are outlined on Page 49-50.

ACTION BY THE CITY COUNCIL

The following are motion alternatives for the Coos Bay City Council related to deliberations and decision making:

- 1) A motion to approve all of the four requested actions based on findings of approval and conditions of approval (including any additional/new conditions of approval). *The LCOG staff report contains “staff responses” to all approval criteria. These “staff responses” can be directly referenced as council findings. Any criterion not included in the matrix has a finding supporting approval of the application.* The applicant has prepared complete approval findings that the Council can reference or adopt in full.
- 2) A motion to deny all of the four requested actions based on findings of inconsistency with one or more the approval criteria. LCOG staff has prepared a findings document that reflects their responses and denial recommendation.
- 3) A motion to hold off on deliberations and/or final action.

Although Council deliberations can be general to the four applications, there should be separate motions and votes on final decisions for each of the four requested applications.



Criteria	Report Page	Approval	Denial	LCOG Staff Response
<p><i>CBMC 17.360.060 (A)(2), THE PROPOSED AMENDMENT IS IN THE PUBLIC INTEREST</i></p>	<p>Page 14</p>	<p>Relies on a finding that: The proposal results in safer and more efficient navigation in the Bay and this affects the public interest in a net positive way. (may cite additional reasons)</p>	<p>Relies on a finding that: The proposal is not in the public’s interest because not all approval criteria can be met. (may cite additional reasons)</p>	<p>Criterion is <u>not</u> met. Decision makers will have to interpret what is meant by the “public interest” and make findings in support of their decision. If the Council agrees with LCOG staff, this criterion will be found to be unmet due to the failure of meeting all criteria.</p>
<p><i>Goal 6 – Air, Water and Land Resources Quality.</i></p>	<p>Page 17</p>	<p>Relies on a finding that: The applicant’s Water Quality Certification Permit has not been conclusively denied. There is currently an avenue for the applicant to show consistency with environmental quality standards, through a Condition of Approval (#1) requiring the applicant to secure an ODEQ Water Quality Certification Permit and evidence of an approved FERC certificate.</p>	<p>Relies on a finding that environmental quality standards cannot be met as proposed, based on the failings of the Draft EIS and ODEQ’s initial denial of a Water Quality Certification Permit which identifies turbidity from dredging as a cause for denial.</p>	<p>Criterion is met. LCOG Staff concluded that, although the City can leverage applicable state and federal regulations (i.e. DEQ’s turbidity requirements), this criterion can be met with a condition to assure the approved project meets those state and federal requirements as described in Condition of Approval #1.</p>

Criteria	Report Page	Approval	Denial	LCOG Staff Response
<p>OAR 660-004-0020 (d) <i>The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.</i></p>	<p>Page 28</p>	<p>Relies on a finding that: The CBEMP does not identify the marine organisms in area 52-NA as “uses.”</p>	<p>Relies on a finding that: The sensitive NA-52 zone with shellfish beds and crabbing areas are adjacent uses and measures designed to reduce adverse impacts to these adjacent uses are insufficient given ODEQ’s denial based on turbidity levels from dredging.</p>	<p>Criterion is met. LCOG staff apply the term “uses” as strictly applied and listed in the CBEMP and find that crabs and other marine organisms are not “uses” as such. “Compatible” is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses. LCOG staff have included a Condition of Approval (#1) describing that the applicant shall obtain a Section 401 Water Quality Certification Permit (addressing turbidity concerns).</p>
<p>OAR 660-004-0022 (1) (a) <i>There is a demonstrated need for the proposed use or activity based on one or more of the requirements of Goals 3 to 19.</i></p>	<p>Page 30</p>	<p>Relies on a finding that: The exception is necessary based on Goal 9 (Economic Development), Goal 12 (Transportation) and Goal 13 (Energy) in that the proposal will bring about economic benefits and development and the NRIs will decrease transit delays and increase navigational safety for all transiting vessels in the Bay.</p>	<p>Relies on a finding that: The applicant has not provided evidence sufficient to indicate that an exception is required in order to meet the City’s Goal 9, Goal 12 or Goal 13 obligations. Market demand or findings that the use would contribute to the local economy alone are insufficient. Demonstrated need for an exception must show that the City will fail or is at risk to provide adequate opportunities for a variety of economic activities without the exception.</p>	<p>Criterion is <u>not</u> met. The demonstrated need to justify an exception must be based on the City’s obligation under one or more statewide planning goals. Based on case law and the evidence in the record, LCOG staff conclude that an exception is not <i>required</i> in order to meet the City’s Goal 9, Goal 12 and Goal 13 obligations. Because this is a State rule, deference will not be given to a local interpretation.</p>

Criteria	Report Page	Approval	Denial	LCOG Staff Response
<p><i>OAR 660-004-002(8)(b)</i> <i>Dredging to maintain adequate depth to permit continuation of the present level of navigation in the area to be dredged.</i></p>	<p>Page 34</p>	<p>Relies on a finding that: The proposal permits the continuation of the present level of navigation, affording it more efficiency and safety. No additional consideration is necessary.</p>	<p>Relies on a finding that: The proposal supports more than the “continuation of the present level of navigation.” It proposes “enhancements” of the Channel. It enables larger ships at greater frequencies than at present levels.</p>	<p>Criterion is <u>not</u> met. LCOG Staff conclude that a common sense reading of OAR 660-004-0022(8)(b) is that it was most likely intended to preserve only the navigation rights that are in existence when the Exception application is filed. It reflects DLCD’s effort to balance the interests of protecting coastal resources and economic and navigation interests. Because this is a State rule, deference will not be given to a local interpretation.</p>
<p><i>In-Water Work Window</i> <i>Reducing window from “October 1 to February 15” to “October 1 to February 1”</i></p>	<p>Page 41</p>	<p>Relies on a finding that: ODFW and opponents have provided sufficient evidence that truncating the end of the IWWW from February 15 to February 1 is necessary to reduce the potential for dredge impacts and siltation to the herring spawn/egg masses which are typically deposited in Coos Bay.</p>	<p>Relies on a finding that: ODFW and opponents do not provide sufficient evidence that truncating the end of the IWWW from February 15 to February 1 is necessary to reduce the potential for dredge impacts and siltation to the herring spawn/egg masses which are typically deposited in Coos Bay.</p>	<p>Faced with competing expert testimony regarding the length of the IWWW, LCOG staff agree with the applicant that CTCLUSI and <u>ODFW</u> have not provided evidence sufficient to supersede the established IWWW of October 1 to February 15.</p>



CITY OF COOS BAY
Public Works/Community Development Department

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STAFF REPORT

Type III – Land Use Process
Jordan Cove Energy Project – Navigational Reliability Improvements

STAFF: Henry Hearley, Assistant Planner, Lane Council of Governments (LCOG)
Jacob Callister, Principal Planner, LCOG
Anne Davies, Principal Attorney, LCOG
Carolyn Johnson, Community Development Administrator, City of Coos Bay

REVIEW BODY: City Council

MEETING: Tuesday, January 7, 2020 at 7:00 p.m.

LOCATION: Coos Bay City Council Chambers, 500 Central Avenue, Coos Bay, Oregon

APPLICANT/OWNER: Jordan Cove Energy Project L.P. (JCEP)
Attention: Meagan Masten, 111 SW 5th Avenue, Suite 100, Portland, OR, 97204

APPLICANT'S REPRESENTATIVE: Perkins Coie LLP, 1120 NW Couch Street, Tenth Floor, Portland, OR 97209
Attention: Steven Pfeiffer

SUBJECT PROPERTY: T 25S R 13W Sections 8, 17, 19, 30; T 25R 14W Sections 25, 35, 36.

SUBJECT: LAND USE APPLICATION #187-18-000153 – Jordan Cove Energy Project
Navigation and Efficiency and Reliability of the Coos bay Deep Draft Navigation Channel

I. BACKGROUND/CONTEXT

Staff outline the process followed to date with respect to City of Coos Bay Land Use Application #187-18-000153.

Process Timeline:

- **November 21, 2018** - City received Land Use Application from Perkins Coie, the applicant's representative. Following submittal, City of Coos Bay staff contract with LCOG to help process the application. A 30-day completeness review of the application ensues.
- **December 20, 2018** – LCOG issued a "letter of incompleteness" requesting clarification and additional information with respect to their submittal.

- **February 4, 2019** – Applicant’s representative submitted the additional information and clarification on items requested. Staff reviewed the information.
- February 12, 2019 – LCOG issued a “letter of completeness” for Land Use Application #187-18-000153.
- **March 21, 2019** – First evidentiary public hearing held in front of City of Coos Bay Planning Commission. The public hearing was closed. A request for the record to be left open was requested and granted.
- **March 22 – April 25, 2019** - First open record period.
- **April 26 – May 16, 2019** – Second record period limited to issues raised during the first open record period.
- **May 23, 2019** – Applicant issued their final written arguments in support of the application.
- **July 23, 2019** – City of Coos Bay Planning Commission meeting to hear testimony received and deliberate on the matter. Planning Commission made motions to recommend approval of all four of the applicant’s requests with a vote of four in favor and two in opposition. The Planning Commission’s recommendation reflected affirmative findings for the “Key Criteria” identified by staff in the Agenda Item Summary, as well as the Conditions of Approval as proposed.
- **August 27, 2019**- City of Coos Bay City Council public hearing held. Hearing was open for receipt of all verbal testimony and written comments for parties in favor and opposition. Staff presented staff report accompanied with brief presentation. A motion was made and passed to close the public hearing but keep the record open for the following periods, as presented below.
 - **August 28-September 27, 2019** - First open record period for City Council.
 - **September 28, - October 31, 2019** – Second open record period for City Council.
 - **November 1 – November 15, 2019** – Time for applicant’s final written arguments.
- **October 1, 2019** – City Council held a hearing on the applicant’s request for a revised timeline to move up deliberations to an earlier date in January.
- **October 15, 2019** – City Council voted to revise the deliberations schedule and move deliberations up to January 7, 2020 from January 21, 2020.
- **January 7, 2020** – City Council deliberations and probable final action.

The Coos Bay Deep Draft Navigation Channel (Channel) serves a vital purpose in providing the only safe vessel access to and from Coos Bay and the Pacific Ocean for marine terminals located along the Bayfront. The Channel was initially authorized in 1899 and since then has undergone ten modifications. Most recently, the Channel was deepened 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. Over the last 20 years the dimensions and tonnage of ships serving terminals in Coos Bay has increased. The size of vessels typically calling on Coos Bay terminals has increased from an average of 45,422 Metric Tonnes to an average of 52,894 Metric Tonnes with a projected near-term vessel size of 70,400 Metric Tonnes. Currently, environmental conditions, including wind, fog, and currents, coupled with the increasing ship size explained above, have caused the Coos Bay Pilots Association (“Pilots”) to impose more limiting restrictions on when vessels may safely

transit the Channel. These restrictions, in turn, cause significant delays and increased pressure on the Pilots to navigate ships through the Channel. Delays are measured in the total transit time, from the time the vessel arrives off the coast of Coos Bay until it returns offshore after calling at its local Coos Bay destination. These delays generally decrease the efficiency and competitiveness of maritime commerce on a global scale, thereby jeopardizing continued success for maritime commerce in Coos Bay. Minimizing delay is a pressing need because companies that utilize the port of Coos Bay have identified potential new customers in Asia that desire to export cargo using bulk carriers that are slightly larger than the ships typically calling today. Various marine terminal businesses within Coos Bay require assurances that terminals can efficiently accommodate larger dimension bulk carriers in the future.

The Coos Bay Estuary Management Plan (CBEMP)

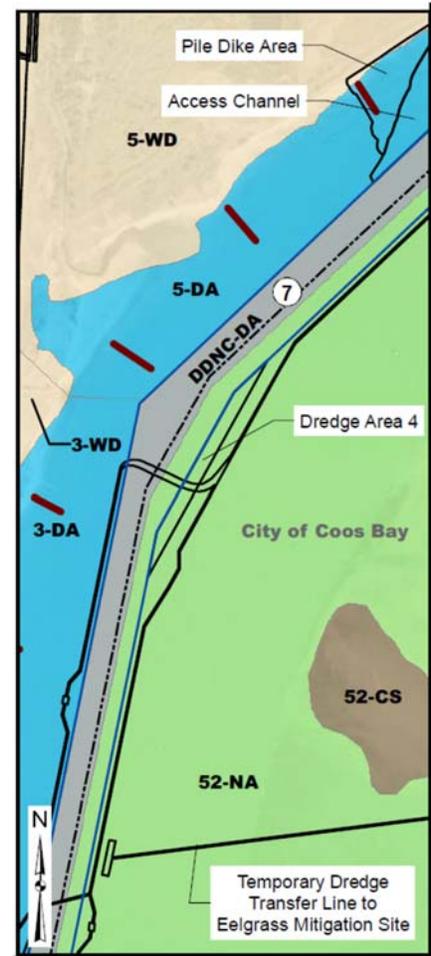
To comply with Statewide Planning Goal 16 Estuarine Resources, Coos County, City of Coos Bay and City of North Bend developed the CBEMP. It was adopted and acknowledged in 1984. Goal 16 requires that all areas within an estuary be classified into management units in the estuary management plan. There are three “aquatic” management units in the CBEMP: Natural Aquatic (NA), Conservation Aquatic (CA) and Development Aquatic (DA). This application proposes an amendment to change an area of the Coos Bay Estuary from Natural Aquatic (NA) to Development Aquatic (DA).

According to the CBEMP, Natural Aquatic areas are managed for resource protection preservation and restoration. They place severe restrictions on the intensity and types of uses and activities allowed within them. Natural Aquatic areas include tidal marshes, mud-sand flats, seagrass and algae beds that, because of a combination of factors such as size, biological productivity and habitat value, play a major role in the functioning of the estuarine ecosystem. Natural Aquatic areas also include ecologically important subtidal areas.

Development Aquatic areas are managed for navigation and other water-dependent uses, consistent with the need to minimize damage to the estuarine system. Some water-related and other uses may be allowed, as specified in each respective unit. Development Aquatic areas include areas suitable for deep or shallow-draft navigation (including shipping and access channels or turning basins), sites and mining or mineral extraction areas, and areas adjacent to developed or developable shorelines which may need to be altered to provide navigational access or create new land areas for water-dependent uses.

Dredging

Dredging, or “Navigational Reliability Improvements” (NRIs), could increase the operational window to safely transit any vessel through the Channel. The applicant notes that NRIs, which are described in more detail below, are designed to increase the environmental operating windows for all ships entering Coos Bay by softening critical turns, relocating aids to navigation



and reducing the required Channel directional changes. The NRIs are designed to reduce entry and departure delays and allow for more efficient vessel transits through the Channel for the size of vessels entering the Port today.

All work associated with the NRIs is proposed to take place during the approved in-water work period for Coos Bay (October 1 to February 15). The applicant notes that JCEP will place initial and future dredged material derived from the NRI Sites at the APCO 1 and 2 sites near the southern terminus of the U.S. Highway 101 McCullough Bridge. These sites are located in the City of North Bend; JCEP has filed a separate application with that City to authorize disposal of these dredge spoils in these locations. If dredging by hydraulic methods, JCEP will utilize a 24- to 36-inch temporary dredge pipeline to transport the dredged material to the disposal sites on the bottom or horizontal extent of the Channel to reduce potential conflicts with vessel navigation. The maximum distance from the NRIs to the APCO sites is approximately 8.3-miles. The dredge line is illustrated in Attachment A, Exhibit 6. Booster pumps would be required to move the material to the disposal sites through the pipeline.

The applicant believes that NRIs will facilitate economic opportunities, including access to emerging opportunities to export products with today's larger vessels, including bulk carriers. Although log export vessels serving the upper bay are smaller, the proposed enhancements also benefit these vessels by broadening the tidal and environmental windows for transiting the Channel, providing an enhanced margin of safety and improved efficiency in the loaded vessel departure schedule. Both Roseburg Forest Products and the Pilots have submitted letters of support for the NRIs. See Attachment A, Exhibit 3. For JCEP and its LNG terminal, the NRIs will allow for transit of LNG vessels of similar overall dimensions to those listed in the July 1, 2008 United States Coast Guard ("USCG") Waterway Suitability Report, the USCG Letter of Recommendation dated May 10, 2018 and USCG letter confirmation dated November 7, 2018 see Attachment A, Exhibit 4, but under a broader range of weather conditions, specifically higher wind speeds. As a result, JCEP estimates that, upon completion of the NRIs, JCEP will be able to export the full capacity of the optimized design production of the LNG Terminal on a consistent annual basis.

First Evidentiary Hearing in front of Planning Commission

The Planning Commission held a public hearing on the application on March 21, 2019. During the hearing the public had an opportunity to submit oral and/or written testimony in favor or opposition of the proposal. At the public hearing two parties provided oral testimony in favor of the proposal and 17 in opposition, and one neutral. Including the testimony presented during the public hearing, Staff also received written testimony from interested parties during the first open record period. At the close of the first open record period at 5PM on April 25, 2019, Staff had received 38 comments with six in favor and 31 in opposition and one neutral. The applicant also submitted response to comments.

First Evidentiary Hearing in Front of City Council

At their August 27, 2019 evidentiary hearing, the City Council accepted oral and written testimony from the applicant and the applicant's representative. The City Council made and passed a motion to close the public hearing, but kept the record open, and determined a date certain of January 21, 2020 to reconvene to deliberate and take possible action on the applicant's request. In the weeks following the first evidentiary hearing, the applicant reached out to the City and contracted Staff about a possible revision to the current timeline in hopes to

move up the date of deliberation to December or earlier in January to better align with the applicant's submittal requirements for state agencies.

Revised Timeline

On October 21, 2019, the City Council held a public hearing on whether to allow a revised timeline as requested by the applicant. (See attachment C) Public testimony was received from the applicant, proponents, and opponents. The City Council requested the applicant supply a letter from Oregon Department of State Lands (ODSL) outlining their timeline submittal requirements. On October 15, City Council reconvened and decided to allow the revised timeline for the application and to move the date of deliberations from January 21, 2020 to January 7, 2020.

The Record

With regards to entering the public testimony and the applicant's submission into "the record", CBMC is silent on this matter. The Oregon Land Use Board of Appeals (LUBA) dictates that the record consists of everything that is "placed before, but not rejected by the decision maker." "Placed before" used to mean hard copies; however this now means something different. The entire record has been posted online available for the decision makers and public to freely view. For individuals that do not have internet access or a computer, a hard copy of the record can be provided at the cost of printing.

Staff have reviewed the public comments and provided a summary of points raised consistently below. To see all comments submitted, including open records periods and applicant submittals, for this application please refer to the City's website at <http://coosbay.org/departments/community-development-department>. Analysis of these issues are presented in the evaluation of the related approval criteria where such criteria exists.

II. APPLICANT'S REQUEST

JCEP proposes dredging at four locations in the Channel. Three of the proposed NRIs are within Coos County and one (NRI - Dredge Area #4) is within the City of Coos Bay. The applicant is requesting a goal 16 exception because it's required in order to execute the proposed Post Acknowledged Plan Amendments (PAPAs) specifically, the rezone of 3.3 acres of an aquatic unit currently zone NA-52 to DDNC. The applicant is proposing the following application to that end:

- (1) A map amendment (Comprehensive Plan and Zoning maps) 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.

III. NOTICES AND REFERRALS

Notice:

On June 28, 2019 notice of the City Council public hearing was mailed in the same manner as all previous notices (see below). Notice was also published in *"The World"* on July 6 and August 10, 2019.

On December 3, 2019, notice of the January 7, 2020 City Council deliberations was sent to all interested parties in a manner consistent with how all previous notices have been sent for this application. Notice was also published in *"The World"* on December 14 and December 28, 2019.

On May 23 and June 13, 2019 notice for the July 23 Planning Commission meeting was mailed to surrounding property owners along the shoreline adjacent to the proposed NRI sites. The Coos Bay Municipal Code (CBMC) doesn't outline specific noticing requirements for a subject property located in a body of water. City staff mirrored the notice approach used by Coos County for the three associated NRI dredge sites being concurrently evaluated. The County mailed notice to bayfront properties adjacent to the proposed NRIs. The City mailed notice to bayfront properties within the City Limits.

Notice was also sent to concerned parties that contacted city staff indicating they would like to receive notice. Notice for the meeting was also published in *"The World"* on May 25 and June 29, 2019. Notice for the City Council Public Hearing on August 27, 2019 was sent in the same manner on June 28, 2019, was published July 6, 2019 and was published again August 10, 2019.

Staff provided required notice to Department of Land Conservation and Development (DLCD) for a post acknowledgement plan amendment on February 12, 2019. Staff have also been in touch with DLCD's Goal 16 specialist, Matt Spangler, (now retired) and Heather Wade.

Referrals:

On March 1, 2019, referral notice was sent to the following governmental/utility/tribal agencies for a request for comment on the application: DLCD, ODSL, Coos Bay North Bend Water Board, NW Natural, Pacific Corp, Coos County, City of Coos Bay, Oregon International Port of Coos Bay, and Confederated Tribes of Coos, Lower, Umpqua and Siuslaw Indians and Coquille Tribe (CTCLUSI).

City of Coos Bay Public Works issued a comment indicating that the proposed dredging appears to be at or near Station 280+00 (Figure 1 of 9). The City has an existing utility line at or near this station installed under the Bay. Staff recommends the proposed dredging shall not impact this existing utility line; this requirement is noted as a condition of approval in Section VIII of this staff report.

City of Coos Bay Public Works also requested that it be the responsibility of the applicant to ensure that all applicable resource agency permits, and approvals are obtained prior to commencement of any work. Staff recommends the condition to obtain appropriate permits prior to any proposed dredging activities. This and all conditions of approval can be found in Section VIII of this staff report.

Staff received referral comment from Oregon Department of Fish and Wildlife (ODFW) recommending truncation of the In-Water Work Window (IWWW) to end on February 1 would

reduce the potential for dredge impacts and siltation to the herring spawn/eggs masses which are typically deposited about mid-February in Coos Bay. The applicant has submitted testimony and evidence in rebuttal of ODFW's recommended truncation. A further discussion of the IWWW will be presented in this staff report.

IV. APPROVAL CRITERIA

Coos Bay Municipal Code (CBDC)

17.360.010-Comprehensive Plan Amendment
17.360.020-Initiation of Amendment
17.360.060-Appeal Criteria
17.352.010-Estuarine/Coastal Shore Activities

Coos Bay Comprehensive Plan (CBCP)

Section 7.1 Natural Resources and Hazards Strategies NRH.8 and NRH.9
Section 8.3 Land Use and Community Development Planning Strategies LU.4, LU.5 and LU.7
Section 7.5 Economic Development

Coos Bay Estuary Management Plan (CBEMP) Policies

DDNC-DA Zone – General Conditions for Approval of “New and Maintenance Dredging”
DDNC-DA Zone – Special Conditions for Approval of “New and Maintenance Dredging”
CBEMP Policy #17 – Protection of “Major Marshes” and “Significant Wildlife Habitat” in Coastal Shorelines
CBEMP Policy #18 – Protection of Historical and Archaeological Sites within Coastal Shorelands
CBEMP Policy #5 – Estuarine Fill and Removal

Statewide Planning Goals

Goal 1: Citizen Involvement
Goal 2: Land Use Planning
Goal 6: Air, Water and Land Resources Quality
Goal 9: Economic Development
Goal 12: Transportation
Goal 13: Energy Conservation
Goal 16: Estuarine Resources

Reasons Exceptions (Oregon Revised Statute and Oregon Administrative Rules)

ORS 197.732 – Goal Exceptions
OAR 660-004-0020- Criteria for Goal 16 exceptions OAR 660-004-0022- Criteria for Goal 2 exceptions

V. EVALUATION OF APPROVAL CRITERIA FOR COMPREHENSIVE PLAN AMENDMENT

COOS BAY MUNICIPAL CODE (CBMC)

CBMC 17.360.010 Comprehensive Plan Amendment

A. The boundaries of the Comprehensive Plan map designations and the Comprehensive Plan text may be amended as provided in CBMC 17.360.020 of this title.

Discussion/Staff Response: The subject property lies within the Coos Bay Estuary, and falls under the ownership of the ODSL, the applicant has requested and received permission to file this land use application with the City of Coos Bay. The ODSL letter is included in the

record. The application includes a request for an exception to Goal 16, requiring a comprehensive plan text amendment. This criterion has been met.

B. 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.

Discussion: Neither the CBMC, nor the CBCP provide a definition of “cumulative effects.” The definition provided by the National Environmental Policy Act (NEPA) is as follows and is adopted by City Council:

Cumulative impacts result when the effects of an action are added to or interact with other effects in a particular place and within a particular time. It is the combination of these effects, and any resulting environmental degradation, that should be the focus of cumulative impact analysis. While impacts can be differentiated by direct, indirect, and cumulative, the concept of cumulative impacts takes into account all disturbances since cumulative impacts result in the compounding of the effects of all actions over time. Thus the cumulative impacts of an action can be viewed as the total effects on a resource, ecosystem, or human community of that action and all other activities affecting that resource no matter what entity (federal, non-federal, or private) is taking the actions ...Effects and impacts are used synonymously.

The applicant advances a number of positive cumulative effects of such an amendment, including facilitating an increase in safety and efficiency of navigation in the Channel. The Applicant also asserts that a cumulative effect of the proposal is to augment transportation in the bay. The applicant’s assertion is that the proposal is not expected to have cumulative effects on the sufficiency of capital facilities services, or health and welfare.

A number of public comments were received which counter the applicant’s assertion. In a comment received by the Oregon Shores Conservation Coalition (OSCC), they point out that the applicant has not provided evidence sufficient to evaluate its claim that the proposed activities “would facilitate an increase in safety and efficiency of Navigation in the Channel.” Additional comment from concerned individuals assert the applicant has not considered the cumulative effects of such an amendment on the entire Estuary.

The applicant re-affirms in their final written arguments, that the issue before the City is limited and involves compliance with the applicable criteria for a comprehensive plan and zoning map amendments and rezoning of the proposed area as well as the proposed Estuarine permits for dredging related to NRI #4. The scope of this application does not include NRI #1 through #3, upland deposition of dredge spoils at APCO 1 and 2 sites, dredging of the slip and access channel, Kentuck Eelgrass Mitigation Site, or any other aspect of the project, all of which are subject to other local, state or federal permits.

Staff Response: Public comments have advanced numerous potential cumulative (and direct) impacts of the proposed dredging. Some of these may not appear to be specifically

addressed by the applicant. With respect to cumulative effects, Staff have found the City's jurisdiction only involves the identified 3.3 acres zoned NA-52. In rendering a decision on this application, the City Council may only address impacts resulting from the activities proposed by this City application alone. The City Council is not allowed to consider impacts based on other applications for other activities that are not presented as part of this application. The City Council is also required to make the decision based solely on the applicable criteria that are found in the local code and comprehensive plan. Those criteria only require that the approval body "consider" the cumulative effects of the proposal under review; i.e., the proposed dredging at NRI #4. By conducting the hearing and issuing a recommendation, the City's decision-making bodies have necessarily considered the cumulative effects and adopted NEPA's definition of cumulative effects. This criterion has been met.

CBMC 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:

A. A Type III application, CBMC 17.130.100, Procedures, by one or more owners of the property proposed to be changed or reclassified consistent with the adopted Comprehensive Plan; or

B. A Type IV legislative process, CBMC 17.130.110, Procedures, by motion of the Planning Commission and adoption by the City Council.

Discussion: The underlying landowner of the subject property is ODSL, which has given the applicant permission to file this application as seen in the record. Comment was submitted related to the ownership dynamic of the estuary. The underlying landowner of the estuary is ODSL. Jordan Cove does not contend it owns the estuary. Jordan Cove obtained and verified permission from DSL to submit the land use application in question.

Staff has looked at the public comments raised regarding "ownership" and the initiation of the application as submitted by JCEP. CBMC 17.360.020(1) provides that, for Type III applications, initiation of a plan amendment (such as approval of an exception) by one or more of the property owners. Opponents allege the property owner is ODSL, and not the applicant, and that ODSL must sign the application. The applicant argues JCEP has obtained permission from ODSL, and that is enough.

Staff Response: Staff finds this issue to be a matter of local code interpretation. The City may interpret what is meant in the code by "initiation". Staff points to a case out of Coos County related to the JCEP pipeline in which, county code clearly required that applications be submitted by the property owner and that they "shall include the signature of all owners of the property." The CBMC code has a similar, yet less clearly stated, requirement for permit applications as shown in CBMC 17.130.050(2)(f), which calls out a proof of ownership document as sufficient for "technical completeness". The CBMC does not specifically require that the property owner sign the application; it merely requires that the application include proof of ownership.

The City could interpret CBMC 17.360.020(1) regarding “initiation” to allow a property owner to merely authorize the application without actually signing the application form. Staff notes that the goal of the code provision is to simply make sure the property owner is aware of the request. Staff finds that applicant has done that.

The proposal will still need to be signed off by DSL before any dredging activities can occur. The applicant has a separate application submitted with DSL that is currently under review.

The application is quasi-judicial in nature because it involves a single landowner, a limited geographic area, is not City-initiated, and concerns the application of existing policies to a specific set of facts. State law requires local governing bodies to take final action to approve post-acknowledgment (text) plan amendments (*Housing Land Advocates v. City of Happy Valley, Or LUBA (LUBA No. 2016-031, May 23, 2016)*), and the final decision on the application must be rendered by the Coos Bay City Council. This criterion has been met.

CBMC 17.360.060 Approval Criteria

A. For a Type III or Type IV review, the City Council shall approve the proposal upon findings that:

1. 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,

Discussion/Staff Response: The application to change the CBCP designation of the NRI Site from NA-52 to DDNC-DA is consistent with the applicable policies of the CBCP. Consistency with specific applicable policies is discussed below:

Section 7.1, Natural Resources and Hazards, Strategy 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.

Discussion: The applicant asserts that the proposal does not include any impacts to City of Coos Bay shoreline habitat or riparian areas. The applicant anticipates possible temporary, but not permanent, impacts to shoreline habitat, including to riparian vegetation in the areas where the applicant plans to offload dredged material for processing, but they are not located within the Coos Bay city limits.

OSCC testimony points out the applicant provides no meaningful data to evaluate a claim of no shoreline or riparian habitat and suggests the opposite may be true. Other comments submitted assert that the applicant’s proposal will increase turbidity, water temperatures, and noise pollution, all of which have the potential to impose serious harm on estuarine organisms. Comments received suggest these are the types of cumulative effects the City must consider.

The applicant states that NRH.8 concerns the preservation and protection of “riparian vegetation.” The location where the temporary dredge line related to NRI #4 will come in proximity of any shoreland habitat and riparian vegetation is not located within the City of Coos Bay’s jurisdiction and therefore not subject to review under this application.

The applicant notes that they will comply with any regulations the City has implemented in accordance with its obligation to “encourage” preservation of riparian vegetation. The OSCC disputes this claim of the applicant that its only obligation is to “encourage” preservation of riparian vegetation, but rather the Section 7 of the CBCP includes “problem statements” that are “written to cite the reasons and justification of the policies and how they will be put into effect.” The OSCC contends, the applicant should demonstrate that its proposals are consistent with the City’s implementation of Policy NRH.8.

Staff Response: As discussed above, Staff concurs with the applicant because, although NRH.8 compels the City to “encourage” preservation and protection of riparian vegetation, it does not affirmatively obligate the applicant to take any action in pursuit of the City’s strategies, goals, and issues. This criterion has been met.

Section 7.1, Natural Resources and Hazards, Strategy NRH.9

Coos Bay shall cooperate 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.

Discussion/Staff Response: The policy creates no affirmative obligations for the applicant. In their submitted testimony, the OSCC asserts that the decision makers should take into consideration the potential adverse and irreparable harm the proposal has on the natural resources contained in NA-52, and the estuary as a whole, prior to any recommendation of approval (consistent with CBMC 17.360.010). Staff conclude that Policy NRH.9 requires no affirmative action by the applicant. This criterion has been met.

Section 7.5 Economic Development

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

Discussion: The applicant notes approval of the proposed NRIs will primarily benefit large vessels that are navigating to and from the International Port of Coos Bay (Port). The Port itself is located outside of city limits but 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 for Coos Bay and regions beyond. The applicant asserts that the NRIs support community and regional partners and economic growth as the goal describes.

The applicant has submitted an Economic Development Analysis for Operations prepared by ECONorthwest that provides an economic analysis for the broader project and is not necessarily specific to NRI #4. In sum, the Economic Development Analysis outlines the total construction costs of the fully realized facility at approximately \$9.7 billion, with \$2.8 billion

of that figure being spent directly at Oregon businesses. The analysis further asserts that the project will directly pay Oregon resident workers about \$1.5 billion in compensation, in addition JCEP has agreed to a Community Enhancement Plan (CEP) under which property tax benefits available at the site would result in JCEP's payment of over \$40 million dollars per year during operations, to be used for capital projects, including schools. The Economic Impact Analysis for Operations report is included in this staff report as Exhibit G.2. Further the applicant points to several comments received during the open record period from local businesses and business owners that show support for the proposed NRIs.

In their submitted testimonies, the OSCC, and several concerned individuals challenge that the proposed NRIs will only benefit LNG tanker transit, and that the applicant fails to provide evidence sufficient to support claims that the proposed NRIs would encourage economic growth in the City of Coos Bay in accordance with the vision of Section 7.5.

Staff Response: As discussed above, Staff agrees with the applicant's analysis of the economic analysis the project will have on Coos Bay and regions beyond. A further explanation of the economic development aspect of the applicant's proposal as it relates to Goal 16 exception criteria and showing a need based on Goal 9 as noted later in this staff report. This criterion has been met.

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.

Discussion: Goal 6 of the CBCP is intended to maximize the potential for water dependent uses that utilize the Port's deep-water navigation Channel. The uses should offer a benefit for the City and region as a whole. Further, the Goal should support efforts to accommodate large cargo vessels and increased shipping activities for water dependent uses. Comments were received refuting the applicant's assertion that the purpose of the application is to facilitate increased navigational safety and efficiency in the Channel. Additionally, the OSCC contends the applicant's proposal is not consistent with Goal 6 because they have failed to provide sufficient evidence to evaluate their claim that the proposed uses and activities will *"facilitate increased navigational safety and efficiency for large vessels."*

In written arguments, dated May 23, the applicant re-asserts project consistency with Goal 6, Policy 6.1 and 6.2, noting that the proposed NRI #4 will "maximize" the potential uses and benefits of the Port and 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.

Staff Response: The applicant asserts the intent of the Goal is to "maximize" the potential uses and benefits that will be provided to the City and region as a whole, and further, the intent of the proposal is to *facilitate increased navigational safety and efficiency for large vessels*, which is contemplated in the language of Goal 6 *"to develop a deep-draft channel to accommodate large cargo vessels and increase shipping activities and water-dependent uses."* Staff find the applicant's proposal meets the intent of the goal because as similarly noted above in response to CBCP Goal 1, Policy 1.5, the proposed NRIs will primarily benefit

large vessels, and facilitate mass export and import of goods and commodities overseers and thus benefit the waterfront and deep-water port that will benefit the City and region, as contemplated by Goal 6. Further, Staff references Captain George Wales' letter of support (Attachment A, Exhibit 3 "Letters of Support") in which he states that over the last 20 years the dimensions and tonnage of vessels transiting the Bay have increased, and points out the inefficiencies created at NRI #4 and the proposal to deepen and widen the turn will improve today's larger ships to make this turn safely and on a consistent basis. Lastly, in response to comments stating a lack of evidence provided on behalf of the applicant that the proposal will provide for "efficiencies" in the Channel, the applicant has submitted Exhibit MM which outlines a quantifiable reduction in energy consumption and increase in efficiency. This criterion has been met.

Section 8.3 Land Use and Community Planning Strategy 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 the Plan.

Section 8.3 Land Use and Community Planning Strategy 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.

Discussion/Staff Response: This policy uses language with elements of subjectivity. The potential for widespread and immediate impacts from dredging may be a possibility. Regardless, the policy does not establish an outright prohibition on "major revisions," but rather limits such changes to no more than one every two years, "if at all possible," a qualifier which introduces additional subjectivity to that criteria. And in the case of "minor revision," the policy does not establish an outright prohibition on "minor changes," but rather limits such changes to an "infrequent basis."

City of Coos Bay staff confirm there have been no major revisions to the Coos Bay Comprehensive Plan within the two years previous to the submission of the application. Staff concludes that, regardless of the interpretation of "major revisions" the CBCP does not prohibit major revisions to the Comprehensive Plan if another "major revision" has not occurred within the previous two years, and as such is not limited to the two-year time frame. This criterion has been met.

Section 8.3 Land Use and Community Planning Strategy LU.7

Coos Bay shall anticipate that conflicts may arise between the various plan implementation strategies contained in the 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.

Discussion: The OSCC state the applicant has not provided sufficient evidence to support its claim that approval of the application will not cause any conflicts between various CBCEP implementation strategies and further, broadly suggests that the application is inconsistent with all applicable policies of the CBCP and Goal 16 exception criteria.

In written arguments dated May 23, the applicant reiterates that the proposal will not cause any conflicts between various CBCP implementation strategies, and points to evidence currently in the record which addresses and finds consistent with all applicable policies of the CBCP, and the Goal 16 exception.

Staff Response: Staff are not aware of any specific conflicts between implementation strategies. Staff agrees with the intent of LU.7 that if conflicts are shown and discernable, the City should consider the long term environmental, economic, social, and energy consequences, most likely in the form of an ESEE analysis, and the result should favor the strategy with results that have the maximum (highest) benefit. As a result, Staff agrees with the applicant that the proposal will not cause any conflicts between various CBCP implementation strategies. Opponents have not identified in their arguments which conflicts are created as a result of the proposal. Staff are not aware of any indication that the proposal will have conflicts between various CBCP implementation strategies.

2. The proposed amendment is in the public interest; and

Discussion: The applicant asserts that the proposed amendment to the CBCP serves a public interest by creating safer and more efficient navigation in the Channel, thereby promoting economic activity in the City of Coos Bay consistent with Comprehensive Plan Goal 1 Policy 1.5 and Goal 6, Policies 6.1 and 6.2. Promoting navigational safety and efficiency has support beyond the applicant, as indicated through letters of support submitted with the application materials (Attachment A, Exhibit 3).

The applicant has provided a response addressing environmental concerns negatively affecting public interests, which were raised in public testimony (Attachment A, Exhibit 5).

Several comments received by the public disagree that the proposal is in the public interest. Comments received point to the applicant's failure to explain that the proposal will result in "increased navigational safety and efficiency for large vessels in the Channel." In addition, they point to the failure to describe how the proposal will result in an "economic boon" to the City and region. The comments suggest the proposal will erode the land base in the Estuary that supports on-going ecological processes that sustain major sectors of the regional economy, including commercial and recreational fishing and crabbing, as well as potential harm imposed on commercial crabbing vessels. Comments contend, for these reasons, that the proposal is not in the public interest.

Staff Response: What's considered to be in "the public interest" is subjective. To approve the proposal, the City Council would need to adopt a finding explaining what is relevant to that determination, and present evidence in the record that is being considered in making the ultimate "public interest" determination. While a finding as to what's in the "public interest" is a City Council matter, Staff believes to deny the proposal City Council could make a finding that the proposal is not in the public interest because the proposal fails to satisfy all applicable criteria, as explained later in this staff report on pages 30-35.

3. 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).

Discussion: The applicant asserts the proposal will not result in a decrease in the level-of-service for any identified capital facilities and/or services identified in the Coos Bay capital improvement plan. The OSCC contends the applicant has not provided evidence sufficient to evaluate that the proposal “will not result in a decrease in the level-of-service for any identified capital facilities and/or services identified in the Coos Bay capital improvement plan.”

Staff Response: There is no evidence in the record that the proposal will result in a decrease in the level-of-service for any identified capital facilities and/or services. Thus, staff conclude the applicant’s assertion is valid. This criterion has been met.

Statewide Planning Goals

Statewide Planning Goals noted below are pertinent to the subject application.

Goal 1: Citizen Involvement – to develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.

Discussion/Staff Response: Goal 1 directs local governments to develop a citizen involvement program that ensures the opportunity for citizens to be involved in all phases of the planning process. The City of Coos Bay’s citizen involvement program takes the form of Planning Commission, and as such, the City has adequately satisfied Goal 1. Additionally, The City of Coos Bay has adopted, within its Development Code, a program for post-acknowledgment plan amendments. The CBMC has been acknowledged by DLCD. This staff report affirms that required notice has been issued. That program also includes the hearings that will take place to address the application. The process and level of citizen involvement with respect to this application is consistent with Goal 1. This criterion has been met.

Goal 2: Land Use Planning – to establish a land use planning process and policy framework as basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions and actions.

Discussion: Goal 2 requires establishing a land use planning process and policy framework as a basis for all land use decisions and requires an adequate factual base for all land use decisions. In the present case, the provisions of the CBMC and the Oregon Revised Statute (ORS) establish the land use planning process and policy framework for considering the application. Further, the applicant has submitted materials, including narrative and supporting documentation, in the application with the intent to show consistency with applicable approval criteria. Goal 2 requires that the City coordinate its review and decision on the application with appropriate government agencies. In its review of the application, the City has provided referral notice to affected agencies with an opportunity to comment on the proposal. Referral comments received with respect to the proposal can be found under Section III of this staff report. Goal 2 also contains the rule and procedures for taking an exception to a statewide planning goal.

The OSCC states in their testimony that the applicant has failed to satisfy the applicable criteria and that the deficiencies shown in its application show that the proposal is therefore inconsistent with Goal 2. Individual comment was received relating to the deficiencies in the lack of coordination between the different jurisdictions involved in all four NRI sites. Comments suggest that it's a failure of Goal 2 that all four NRI sites are not considered in a coordinated manner by the respective jurisdictions.

In their submission comments, the OSCC holds that, because the concurrent application fails to demonstrate that the comprehensive plan amendment is permissible, the request for Estuarine and Coastal Shorelands Uses and Activates Permit are unjustified.

A comment was received regarding the Oregon Department of Environmental Quality's (ODEQ) decision to deny a Section 401 Water Quality Certification permit. The denial was based, in part, on the proposed project's failure to comply with City criteria and standards related to water quality. Comments also addressed the request of the applicant by ODSL to address the concern that its proposed project fails to conform with requisite criteria in local comprehensive plan and land use regulations, including those in Coos County and the City of Coos Bay. Opposing testimony contends the applicant failed to meaningfully address these concerns in its response.

Staff Response: Staff does not fully understand opponents' Goal 2 argument. Opponents seem to be relying on language in the ODEQ denial decision that suggests that the proposal fails to comply with applicable local approval criteria. Statewide Planning Goal 2 requires that all land use decisions have an "adequate factual base." An "adequate factual base" is synonymous with the requirement that a decision be supported by substantial evidence. To the extent opponents are simply arguing that the proposal does not satisfy the applicable approval criteria, the findings relevant to those specific arguments are found below in a discussion of those approval criteria. This criterion has been met.

Goal 3: Agricultural Lands – to maintain and preserve agricultural lands.

Staff Response: The NRI site does not include any agricultural lands. Goal 3 is not applicable to this application.

Goal 4: Forest Lands

Staff Response: The NRI site does not include any forest lands. Goal 4 is not applicable to this application.

Goal 5: Natural Resources, Scenic and Historic Areas, and Open Spaces

Discussion: Based on the information available to staff, the NRIs do not include any inventoried Goal 5 resources. In their submitted comments, the OSCC disputes the applicant's claim that there are no inventoried Goal 5 resources at the NRI site. The OSCC contends there are known Goal 5 inventoried resources, including the Henderson Marsh (a Goal 5 Major Marsh) and the Coos Head (an outstanding scenic resources) in the vicinity of the Coos Bay estuary which could be impacted by the applicant's proposal. OSCC calls upon the applicant to address consistency with Goal 5. The OSCC also asserts that staff's proposed condition of approval #5 is insufficient to address compliance with Goal 5.

Staff Response. Staff notes that Henderson Marsh (a Goal 5 Major Marsh) and the Coos Head (an outstanding scenic resource) are “in the vicinity of the Coos Bay Estuary”. As pointed out earlier in this staff report, the decision-making body by law, shall only consider the proposal as it relates to what’s within the City’s jurisdiction. NRI #4 is the only proposed dredging location under the City’s jurisdiction. Absent comment showing a Goal 5 resource located within the 3.3-acre NRI #4, the applicant’s response to Goal 5 is sufficient. This criterion has been met.

Goal 6: Air, Water and Land Resources Quality – To maintain and improve the quality of the air, water and land resources of the state.

Discussion: There are no administrative rules governing Goal 6; it relies entirely on state and federal regulations for direction and implementation. Goal 6 provides: “All waste and process discharges from future development, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards.”

The applicant’s narrative indicates that JCEP has applied for state and federal approval of dredging activities at the NRI site. The applicant also notes that the proposed map amendments do not alter existing City protections provided by the CBEMP restricting dredging activities, which protections have been previously deemed consistent with Goal 6.

The applicant has submitted a biological assessment completed by the consultant David Evans and Associates (DEA). In its report (Attachment A, Exhibit 5), DEA indicates Best Management Practices (BMPs) will be employed. The applicant identifies BMPs that will be utilized with the proposed dredging as a way to minimize impacts, a discussion of the BMPs can be found in Attachment A, Exhibit 5 (Page 7).

In their submission comments, the OSCC contends the applicant concludes without providing evidence that “*these effects will be temporary, insignificant, or both, and JCEP will complete the NRI using methods to protect these resources.*” They note that the applicant’s assertion is somewhat in conflict with the Draft Environmental Impact Statement (DEIS) in which the Federal Energy Regulatory Committee (FERC) concludes that “*constructing and operating the Project would result in temporary, long-term, and permanent impacts on the environment.*” The OSCC also states proposed condition of approval #3 recommended by the Planning Commission is insufficient to address compliance with Goal 6. Additionally, comment was received during the second open record period submission relating to Goal 6 that indicates the applicant fails to demonstrate the proposal will not harm water quality in the state of Oregon as evidentiary in ODEQ’s decision to deny a 401-water quality permit.

Staff Response: When a property’s comprehensive plan and zoning map designations are changed to allow a particular use of that property, Goal 6 requires the local government to adopt findings explaining why *it is reasonable to expect that applicable state and federal environmental quality standards can be met by the proposed use.* The function of Goal 6 is not to anticipate and precisely duplicate state and federal environmental permitting requirements. Rather, an applicant need only demonstrate that there is a reasonable expectation that the proposed use will be able to comply with applicable state and federal standards.

Given the evidence in the record, there is a reasonable expectation that the proposed use will be able to comply with state and federal standards. The ODEQ denial of a Section 401 Water Quality Certification was in part due to the absence of a Dredge Pollution Control Plan. Therefore, ODEQ did not have the Dredge Pollution Control Plan to rely on. ODEQ's denial is a denial "without prejudice" meaning JCEP can re-apply and address concerns outlined in ODEQ's report. A resubmittal for a Section 401 Water Quality Certification would include the now completed Dredge Pollution Control Plan. Further, Condition of Approval #1 requires the applicant to obtain the state 401 water quality permit. With this condition, Goal 6 would be satisfied.

In their first open record submittal, the applicant proposed a revision of Condition of Approval #1. In their remarks, the applicant points out it's not feasible to "comply" with a Final Environmental Impact Statement (FEIS), and the language "*all other state and federal requirements*" is unclear and highly subjective. A FEIS represents the documentation of the potential impacts associated with a project subject to federal compliance. This information is considered by the federal agency in its issuance of the associated federal permit, which must be the subject of full compliance over time. The applicant proposed for the requirement to provide a FEIS be removed from Condition of Approval #1, as it's already addressed in Condition of Approval #13, and proposed adding a requirement to provide evidence of an approved FERC certificate. Condition of Approval #4 as proposed by Staff and recommended for approval by Planning Commission will remain as is. As such, Staff have revised Condition of Approval #1 to reflect the deletion of "all other state and federal requirements" due to its ambiguous and subjective nature, and the addition for a requirement to obtain and provide evidence of an approved FERC certificate. With Condition of Approval #1 as listed below, the proposal is consistent Goal 6. The criterion has been met as conditioned.

Condition of Approval #1: Prior to the commencement of any dredging activities, JCEP shall provide the City of Coos Bay evidence of an approved Section 401 Water Quality Certification permit and evidence of an approved Federal Energy Regulatory Commission (FERC) certificate, and shall comply with any conditions imposed by FERC.

Goal 7: Areas Subject to Natural Hazards. – To protect people and property from natural hazards.

Discussion: Goal 7 requires local governments to identify and plan for natural hazard areas and coordinate their natural hazard plans and programs with state agencies.

Comments received assert that during initial construction, anchored dredges and associated dredging materials, including temporary pipelines, present in the Bay, would potentially be a hazard for life and property in the Bay in the form of drifting debris. It is also noted that there may be impairment to rescue operations in the event of an earthquake and/or tsunami, and that the expanded channel width and depth will enable tsunami waves to propagate more freely in the Estuary.

The applicant asserts compliance with Goal 7 "*because it will not increase the likelihood of damage to people or property within the City from natural hazards.*" Comments received, affirm that it is insufficient for the applicant to make this claim without any meaningful

discussion of the inventoried hazards or the applicable CBMC provisions. Comments were received relating to the earthquake and tsunami risk that lies just off the coast in the form of the Cascadia Subduction Zone.

Staff Response: There are no Oregon Administrative Rules (OAR) implementing Goal 7. The language of the goal itself is to *“protect people and property from natural hazards”* (reducing risks to life and property that are caused by natural hazards), Accordingly, it is aimed primarily at limiting “development” in areas subject to natural hazards. As defined by Goal 7 “Development” means the *“act, process or result of developing.”* Even if the proposed activity is considered “development”, the proposed use does not substantially increase risks of damage to persons or property from any possible hazardous event. Staff conclude that the proposal is consistent with Goal 7. This criterion has been met.

Goal 8: Recreational Needs – To satisfy the recreational needs of the citizens of the state and visitors, and where appropriate, to provide for the siting of necessary recreational facilities including destination resorts.

Discussion: The applicant asserts that the proposed NRI site #4 itself does not involve recreation or inventoried recreational areas, facilities or opportunities. Staff note that Coos Bay supports recreational activities. As indicated in the applicant’s response to Removal-Fill comments Version 2.0, dredging operations are expected to temporarily impact recreational craft transit or limit fishing where work is actively occurring and in the associated safety area around work areas. The applicant provided a summary of the recreational activities that take place in the Coos Bay Estuary, and indicated that all three boat ramps that provide access to the estuary will remain open during the proposed dredging activities, as well as an announcement to the boating community via a local notice to mariners provided through notification to the United States Coast Guard. The report in its entirety can be found in this staff report as Attachment A, Exhibit 5 (Page 10).

In their submitted comments the OSCC calls out the importance of the Estuary where the NRI is proposed as being of critical importance to the recreational needs of the citizens and visitors to Coos Bay. The OSCC contends recreational boating and other outdoor activities would likely suffer significant impacts as a result of the construction and ongoing operations.

The applicant has addressed, in its DEA report, their method to minimize impacts on recreational uses in the Estuary. In their final written arguments, the applicant also submitted Exhibit HH which cites multiple documents and studies in the record where JCEP has considered and addressed potential recreational impacts. The applicant asserts and has provided evidence in the form of a technical memo Exhibit EE and FF, potential impacts and proposed mitigation with regards to crustaceans and shellfish. While studies within the Channel are limited, the March 2019 DEIS found the four NRI improvement sites are not located in known clamming or crabbing areas, or shrimp or oyster habitat. Furthermore, as specifically related to the proposed dredging, FERC in its Draft EIS issued in March, 2019, has determined that there would be an initial loss of benthic resources from dredging in the Channel, that would recover over time, and overall habitat structure of the Bay would remain essentially unchanged from the widening of the Channel in these areas. Additionally, FERC states, the effects would be minimized by the current IWWW of October 1 to February 15, and by maintaining the cutterhead near the bottom (if a hydraulic dredge is used).

The applicant also addressed Dr. Yamada's study "*Potential Impact of Jordan Cove LNG Terminal Construction on the Nursery Habitat of Dungeness Crab*," (Attachment E) noting that the NRIs are not eelgrass habitat and so dredging these areas would not cause the impacts asserted by Dr. Yamada. The Chang and Levings (1978) paper as evidenced that dredging causes mortality in Dungeness crab is not relevant to the proposal as the paper cited by Dr. Yamada examines potential effects of burial from open water dredge disposal; JCEP plans to dispose of dredged materials from the NRIs upland at the APCO sites.

Staff Response: The applicant has adequately addressed Goal 8 and Staff adopts the applicant's analysis. The proposal is consistent with Goal 8. This criterion has been met.

Goal 9: Economic Development – To provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare and prosperity of Oregon's citizens.

Discussion: The applicant is proposing NRIs to one site within the City's jurisdiction that the applicant asserts will facilitate a broader operational window, and increase safety and efficient of water transit, in the Channel. The navigational reliability improvements at NRI #4 have the ability to contribute to economic prospects to the City and region as a whole.

A number of submitted comments, contend that the proposed NRIs will enable transiting LNG tankers to operate in windier conditions, but the applicant fails to demonstrate that dredging associated with the NRI site will improve navigation conditions for commercial vessels other than those JCEP is proposing to operate. Additionally, the OSCC states there is no evidence that the current Channel is limiting the economic opportunities for the City as a whole, rather than for the applicant's own self-interest, and that the applicant will only realize the entire economic benefits if all four proposed NRIs are approved; one NRI location will not result in the economic benefits or increased navigation the applicant is claiming.

Staff Response: The applicant has submitted several economic impact studies completed by ECONorthwest (Exhibit G.2). Economic development is a key criterion related to a Goal 16 exception proposed by the applicant. Economic development is, therefore, addressed later in this staff report under criteria required for a Goal 16 exception. To see the link between Goal 9 and the Goal 16 exception please refer to pages 30-35 of this staff report.

Goal 10: Housing – To provide for the housing needs of the citizens of the state.

Staff Response: Goal 10 is not applicable to this application.

Goal 11: Public Facilities and Services –

Staff Response: The applicant's proposal does not involve or affect public facilities and service as framework for development. Goal 11 is not applicable to this application.

Goal 12: Transportation – To provide and encourage a safe, convenient and economic transportation system.

Discussion: Under Goal 12 local governments are required to consider all modes of transportation, including water, that facilitate the flow of goods and services so as to

strengthen the local and regional economy, and that avoid principle reliance on one more of transportation. The applicant contends the proposal is consistent with Goal 12 because the proposal advances these objectives of Goal 12 by supporting a safer and more efficient use of the Channel for water transportation.

As pointed out earlier in this staff report, public testimony calls out the applicant's failure to adequately provide evidence that the proposal will benefit the local and regional economy. While the applicant affirms that the NRIs help the flow of goods and services by reducing transit time of goods to the market, the decrease of time vessels waiting off-shore for Port conditions to improve, the reduction of fuel, and overall safety and efficiency, opposing testimony refutes this claim and advances the argument that based on the current record, the proposal does not include sufficient evidence that the proposed NRI itself will increase efficiency and reduce delays for vessels other than LNG tankers nor offer evidence as to how much energy is currently wasted when vessels wait outside the Channel.

Staff Response: The applicant contends compliance with Goal 12 because the proposal because it advances the objectives of Goal 12 by supporting a safer and more efficient use of the Channel for water transportation. Opponents allege, the applicant has not provided adequate evidence that the proposal will benefit the local and regional economy nor will it increase efficient or reduce delays. Staff rejects the oppositions argument because the applicant has submitted an abundance of evidence that show the proposal's benefit to the local and regional economy (Exhibit G.2), albeit only realized for the entire LNG project, and not specifically NRI #4. Secondly, as shown in Exhibit MM and Captain George Wales' letter of support, the proposal (and specific to the NRIs), will have a quantifiable increase in efficiency and reduction in delays. Staff finds the proposal is consistent with Goal 12, because the current record contains adequate evidence to support the applicant's argument advances the Goal 12 objective of facilitating the flow of goods and services in an effort to strengthen the local and regional economy, as supported by Exhibit G.2, and Exhibit MM, and Captain George Wales' letter of support . The applicant Goal 16 exception request uses transportation as a key approval criterion which will be addressed later in this staff report under criteria required for a Goal 16 exception. To see the link between Goal 12 and the Goal 16 exception please refer to Pages 30-35 of this staff report. This criterion has been met.

Goal 13: Energy Conservation – To conserve energy.

Discussion: Goal 13 directs local governments to manage land use so as to maximize the conservation of all forms of energy. The applicant contends the proposal complies with Goal 13 because the proposal will facilitate maximal energy conservation by increasing the safety and efficiency of vessel transit of the Channel, and by increasing the Channel's operational window. Further, the NRIs will reduce the amount of time vessels spend waiting to enter and navigate the Channel. To illustrate the approximate amount of energy saved as a result of the NRIs, the applicant has submitted Exhibit MM. Without the NRIs in place average total delay hours per port call is 23 hours, with the NRIs in place that's reduced to 16 hours, resulting in a seven-hour reduction in transiting time. The average energy savings per LNG carrier port call is 50,750 kW-Hours. At an average of 115 LNG port calls per year this equates to an average energy consumption savings of 5,836 megawatt-hours (mWh) per year; this is equivalent to enough energy to supply power to 6,484 US homes for a month.

Staff points out in this memo the energy savings calculations only apply to LNG carriers and are assuming all four NRI sites are approved and in place.

The OSCC contends the applicant fails to demonstrate compliance with Goal 13 because the applicant has not provided evidence sufficient to claim the proposed NRI will *“facilitate maximal energy conservation by increasing the safety and efficiency of vessel transit of the Channel, and by increasing the Channel’s operational window.”*

Staff Response: Goal 13 is essentially a planning goal and includes few, if any, substantive requirements that could preclude the proposed PAPAs. The opponents contend the applicant has not provided evidence sufficient to claim the proposed NRI will *“facilitate maximal energy conservation by increasing the safety and efficiency of vessel transit of the Channel, and by increasing the Channel’s operational window.”* Staff finds Goal 13 simply does not require that. Furthermore, staff finds Exhibit MM does lay out, in a rather detailed fashion, the amount of energy that can be conserved as a result of the proposal. The application is consistent with this goal. This criterion has been met.

Goal 14: Urbanization – To provide for an orderly and efficient transition from rural to urban land use.

Staff Response: Goal 14 is not applicable to this application.

Goal 15: Willamette River Greenway

Staff Response: Goal 15 is not applicable to this application.

Goal 16: Estuarine Resources - To recognize and protect the unique environmental, economic, and social values of each estuary and associated wetlands; and to protect, maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic, and social values, diversity and benefits of Oregon's estuaries.

Discussion/Staff Response: The Coos Bay Estuary Management Plan (CBEMP) is a refinement plan to the Coos Bay Comprehensive Plan and implements Goal 16 for the City of Coos Bay. The CBEMP divides all estuaries into three aquatic management units: Natural, Conservation, and Development. The proposed NRI site is currently zoned 52-NA, which is a natural aquatic unit. In the 52-NA natural aquatic zone, dredging is not a permitted use. The applicant seeks to amend the CBEMP to apply the DDNC-DA (a development aquatic unit) designation to the proposed NRI site in order to allow the dredging necessary to complete the NRIs. A Goal 16 exception is required to rezone the NRI site to a DDNC-DA development site. The requested goal exception is specifically addressed on Page 25 of this report.

Staff received numerous public comments urging the City to uphold the integrity of Goal 16. The OSCC submitted comments reasoning that the applicant has failed to satisfy the applicable criteria required for a goal exception. A further discussion of the applicable criteria with respect to a Goal 16 exception will be addressed in this staff report on beginning on Page 25.

Goal 17: Coastal Shorelands - To conserve, protect, where appropriate, develop and where appropriate restore the resources and benefits of all coastal shorelands, recognizing their value for protection and maintenance of water quality, fish and wildlife habitat, water-dependent uses, economic resources and recreation and aesthetics. The management of these shoreland areas shall be compatible with the characteristics of the adjacent coastal waters; and to reduce the hazard to human life and property, and the adverse effects upon water quality and fish and wildlife habitat, resulting from the use and enjoyment of Oregon's coastal shorelands.

Staff Response: The proposed NRI #4 site does not include any designated coastal shorelands. The proposed dredge transport pipeline will not impact shorelands within the jurisdictional limits of the City of Coos Bay. Goal 17 is not applicable to this application.

Goal 18: Beaches and Dunes – To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas; and to reduce hazard to human life and property from natural or man-induced actions associated with these areas.

Staff Response: The proposed NRI site does not include any designated beaches or dunes. Goal 18 is not applicable to this application.

Goal 19: Ocean Resources – To conserve marine resources and ecological functions for the purpose of providing long-term ecological, economic, and social value and benefits to future generations.

Staff Response: The proposed NRI site does not include or abut any ocean resources. Goal 19 is not applicable to this application.

Specific Proposed Amendments to the CBEMP

The following are the exact text amendments the applicant is proposing to the CBEMP.

CITY OF COOS BAY TEXT AMENDMENTS ASSOCIATED WITH JORDAN COVE ENERGY PROJECT L.P. APPLICATIONS FOR NAVIGATION RELIABILITY IMPROVEMENTS

(1) AMENDMENT TO COOS BAY ESTUARY MANAGEMENT PLAN

“5. DESIGNATION OF SITE-SPECIFIC MANAGEMENT SEGMENTS, USES AND ACTIVITIES

“AUTHORIZED NAVIGATION CHANNELS

“LOWER BAY/UPPER BAY AQUATIC UNIT 01

“DEEP-DRAFT NAVIGATION CHANNEL (35' authorized draft) MANAGEMENT CLASSIFICATION – DA

“PROJECT DESCRIPTION:

“The entrance and lower bay section includes a federally-authorized project extending from the Entrance Bar at the outer (western) extremity of the jetties to the railroad bridge at Bay Mile 9.0 north of Pony Slough. The project specifies a 45-foot deep channel with ‘suitable’ width across the Entrance Bar, a 35-foot deep by 300-foot wide channel to the railroad bridge, an Anchorage Basin at Bay Mile 3.5 (southwest of Sitka Dock), a Buoy Storage Area between Sitka Dock and Pigeon Point (not part of federal project), a Turning Basin north of Empire at Bay mile 6.0, a widened turn area from Lower Jarvis Range to Jarvis Turn Range channels southwest of Bay mile 7.0 to a 41-foot deep MLLW elevation (including 37-foot deep channel, two-foot over-dredge allowance, and two-foot advanced maintenance allowance) (see EXCEPTION #), and the Anchorage Basin southwest of Roseburg Lumber Co. at Bay mile 7.5. In-bay disposal sites are located off of Coos Head (‘G’) and North Bend Airport (‘D’). Two other in-bay disposal sites at Bay Miles 4 and 5 are included in this segment.

“The upper bay section includes a federally-authorized project from the railroad bridge (Mile 9.0) to Isthmus Slough at Bunker Hill (Mile 15.0). The federal project involves a navigation channel 35 feet deep by 300 to 400 feet wide, and Turning Basins at North Bend (Mile 12.0) and Coalbank Slough (Mile 14.5).

As a result of the applicant’s request a small amendment will be required in the Coos Bay Comprehensive Plan that references the approved site-specific exception:

(2) AMENDMENT TO COOS BAY COMPREHENSIVE PLAN 2000, VOLUME III, PART 3, TO ADD EXCEPTION #__ - AQUATIC UNIT 52-NA/DEVELOPMENT UNIT DDNC-DA - NAVIGATION RELIABILITY IMPROVEMENTS

Chapter 3.2, Site-Specific Exceptions, is hereby amended by adding Exception #__ as follows:

[INSERT FINDINGS UPON ADOPTION]

VII. CRITERIA FOR GOAL 16 REASONS EXCEPTION

OAR 660-004-0020

(1) If a jurisdiction determines there are reasons consistent with OAR 660- 004-0022 to use resource lands for uses not allowed by the applicable Goal or to allow public facilities or services not allowed by the applicable Goal, the justification shall be set forth in the comprehensive plan as an exception. As provided in OAR 660-004-0000(1), rules in other divisions may also apply.

Staff Response/Discussion: Subsection (1) mainly provides that the rationale be adopted as part of the plan. If the proposal is approved, the rationale for the exception will be adopted as a part of this plan amendment. This criterion has been met.

(2) The four standards in Goal 2 Part II(c) required to be addressed when taking an exception to a goal are described in subsections (a) through (d) of this section, including general requirements applicable to each of the factors:

(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;

Discussion: The applicant has advanced specific “reasons” that “*justify why the state policy embodied in the applicable goals should not apply.*”

The applicant asserts that the proposed 3.3 acre NRI site located in the Channel is in need of improvement in order to facilitate safer and more efficient navigation. The applicant indicates that the proposed use must be located where mapped because this is where the navigational reliability improvements are most needed.

Opponent comments point out an exception should be “exceptional,” and the applicant’s proposal warrants careful consideration to assess its consistency with this “exceptional” standard.

Staff Response: Staff discussion of exception reasons is included in detail on Page 30 of this report, in the response to OAR 660-004-0022. This criterion has been met.

(b) “Areas that do not require a new exception cannot reasonably accommodate the use.” The exception must meet the following requirements:

Discussion: The applicant identifies the proposed NRI #4 site as location specific. The proposed location of the NRI site is the only site JCEP has determined that it’s feasible to make the proposed necessary improvements to increase safety and efficient vessel navigation in the Channel. The applicant asserts that the identified site is at a location in the Channel where there is an extremely restrictive, unavoidable turn in the Channel; this turn is responsible for significant delays in vessel transit in the Channel. The applicant states, in

their narrative, that JCEP could widen other areas of the Channel to improve navigational efficiency, but the proposed NRI site, is the location most in need of improvement to achieve the results in improved efficiency and safety of navigation required within the Channel.

A number of public comments received assert the applicant has not identified a need for the proposed NRI because the Channel currently functions for navigation. They affirm that the existing Channel can reasonably accommodate the use and that the proposal is not consistent with the requirements of subsection (2)(b).

Staff Response: To Staff's knowledge, no comment has been submitted indicating a more or similarly suitable area exists to be dredged that can provide the same improvements the applicant is seeking with NRI #4. Staff finds that addressing the purpose of the NRIs is site dependent. This criterion has been met.

(A) The exception shall indicate on a map or otherwise describe the location of possible alternative areas considered for the use that do not require a new exception. The area for which the exception is taken shall be identified;

Discussion: As explained above, the proposed NRI #4 area is location specific and the applicant indicates it would not be possible to locate it anywhere that does not require a new exception. Project opponent comments received with respect to a lack of alternative analysis referred to alternate sites along the western coast of the United States (and Alaska) that could accommodate the full LNG project.

Staff Response: A map of the proposed NRI is included as "Dredge Area 4" in Attachment A, Exhibit 1, Page 1 of 4. This criterion has been met.

(B) To show why the particular site is justified, it is necessary to discuss why other areas that do not require a new exception cannot reasonably accommodate the proposed use. Economic factors may be considered along with other relevant factors in determining that the use cannot reasonably be accommodated in other areas. Under this test the following questions shall be addressed:

(i) Can the proposed use be reasonably accommodated on resource land that would require an exception, including the destiny of uses on non-resource land? If not, why not?

(ii) Can the proposed use be reasonably accommodated on resource land that is already irrevocably committed to non-resource uses not allowed by the applicable goal, including resource land in existing unincorporated communities, or by increasing the density of uses on committed lands? If not, why not?

(iii) Can the proposed use be reasonably accommodated inside an urban growth boundary? If not, why not?

(iv) Can the proposed use be reasonably accommodated without the provisions of a proposed public facility or service? If not, why not?

Discussion: The applicant affirms that these are the specific geographic locations where the channel is constrained. The applicant notes that in any case, it is not possible for JCEP to locate them anywhere that does not require a new exception.

Staff Response: The proposed use does not relate to a public facility in the Channel and will not require any additional public facilities or services to construct. This criterion is met.

(C) The “alternative areas” standard in paragraph B may be met by a broad review of similar types of areas rather than a review of specific alternative sites. Initially, a local government adopting an exception need assess only whether those similar types of areas in the vicinity could not reasonably accommodate the proposed use. Site specific comparisons are not required of a local government taking an exception unless another party to the local proceeding describes specific sites that can more reasonably accommodate the proposed use. A detailed evaluation of specific alternative sites is thus not required unless such sites are specifically described, with facts to support the assertion that the sites are more reasonable, by another party during the local exceptions proceeding.

Discussion/Staff Response: Given the discussion above, staff find this criterion is irrelevant.

(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.” 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;

Discussion: Public comments noted that, absent more detailed information regarding the proposed methods of dredging, blasting, or other removal within the proposed NRI, a complete analysis of the comparative adverse impacts cannot be done. In response, the

applicant submitted additional information describing proposed methods of dredging in which they plan to utilize a hydraulic cutter suction that loosens material from its in-situ state and lifted through a pipe system connected to a centrifugal pump. The sediment-water slurry is pumped from the Channel bottom through a transport pipeline to a barge or upland disposal site. A proposed alternative method is mechanical dredging which excavates in-situ sediments with a grab or bucket from land or water-based structures such as a barge. The most common type of mechanical dredge is the clamshell dredge (see the Dredging Pollution Control Plan, Exhibit BB, Pages, 9-11).

Staff is not aware of any plans that involve blasting as they relate to NRI #4 but the applicant did address comments regarding blasting in their second open record period submittal as seen in Exhibit PP (Page 46) in which the applicant explains: *“ODFW states that the applicant should only submit in-water blasting permit applications after obtaining access to site locations and collecting site-specific information to complete applications. No in-water blasting will occur within the coastal zone.”*

Staff Response: There is no compelling evidence of non-compliance with this criterion. There is no indication that the long-term economic, environmental, social and energy costs of widening other areas of the Channel are materially different from the same consequences of making the improvements at the proposed location of NRI #4. This criterion has been met.

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

Discussion: The proposed NRI site is located immediately adjacent to the existing Channel. The adjacent uses to the Channel are transit of large vessels that currently call on the Port. The adjacent land use designation is Deep Draft –Development Aquatic (DA) unit. According to the CBEMP, DA units *“include areas suitable for deep or shallow-draft navigation (including shipping and access channels or turning basins), sites and mining or mineral extraction areas, and areas adjacent to developed or developable shorelines which may need to be altered to provide navigational access or create new land areas for water-dependent uses.”* Additionally, the applicant’s consultant (DEA) has submitted an environmental impacts report (Attachment A, Exhibit 5) which outlines plans to reduce adverse environmental impacts upon the waters of the Bay and Channel. This includes performing capital and maintenance dredging during the ODFW-approved IWWW (October 1 to February 15) to reduce impacts to sensitive life stages of fish in the bay, using various dredging methods to minimize the effects on water turbidity within the bay, and applying best management practices associated with dredging (including cutter head suction, clamshell, and hopper dredging) to reduce turbidity effects. Some of the BMPs that will be utilized to reduce NRI dredging impacts to shellfish and crustaceans, include turbidity monitoring (100 feet upstream and downstream from the dredging activity with no more than 10 percent increase above background levels), emergency dredge pump shut off and clean up procedures, and upland erosion and sediment control practices (to minimize

upland dredge spoils return to the Bay), among others, as described in the Dredge Pollution Control Plan. As a result of those methods, JCEP expects any increased water turbidity resulting from the NRI to be temporary and limited to the immediate vicinity of dredging operations.

This assertion by the applicant in some part was disputed by ODEQ in their finding that dredging at the NRIs would cause turbidity levels to increase above allowable numeric limits. It's unclear, but ODEQ's denial may have been in part due to the absence of a Dredge Pollution Control Plan, which may have been completed after the record was closed for JCEP's Section 401 Water Quality Certification permit. (See Attachment D, 6.9.3 DEQ Findings: Turbidity, and 1.4 WQC Decision).

Numerous public comments challenge the applicant limiting their consideration of adjacent uses to the channel alone, noting that adjacent to the NRI #4 site are shellfish beds and crabbing areas.

In their written argument's dated May 23, 2019, the applicant identifies navigation, transportation and dredging as the compatible uses.

Staff Response: Staff note the following excerpt from the criteria: *"The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts"*. Opponents argue that the applicant fails to specifically address adjacent uses to the Channel. If authorized, the proposal would be occurring adjacent to the existing NA-52 designation. If the term "uses" is strictly applied as listed in the CBEMP, under NA-52 no marine organisms are listed as "uses." Opponent comments note that adjacent to NRI #4 are shellfish beds and crabbing areas and are "uses." Staff apply the term "uses" as strictly applied and listed in the CBEMP and find that crabs and other marine organisms are not uses.

The exception shall demonstrate that the proposed use (in this case dredging) is situated in such a manner as to be compatible. "Compatible" is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses. JCEP does state increased water turbidity will be a result of the dredging at NRI #4, but the adverse impacts as a result of the dredging are expected to be temporary and limited to the immediate vicinity of dredging operations. ODEQ denied a 401-water quality permit because, in part, the applicant's proposed measures designed to reduce adverse impacts were not sufficient; specifically measures, or best practices employed to keep water turbidity levels reaching in excess of numeric limits. A further discussion of the ODEQ 401 Water Quality Certification permit denial will be presented under Policy 5 on page 43 of this staff report.

The applicant submitted a Dredge Pollution Control Plan, but the adequacy of the plan is unclear, given ODEQ's denial of the 401 Water Quality Certification permit. The applicant has not elaborated in their written arguments on how the measures contained in the plan mitigate adverse impacts with respect to turbidity. Opponents have not made any arguments, or arguments clear to Staff as to how the plan is insufficient. Staff will refer to ODEQ for concurrence of the plan. To that end, Staff have imposed a condition of approval describing that the applicant shall obtain a Section 401 Water Quality Certification Permit, and in order for the applicant to obtain a Section 401 Permit, ODEQ must concur with their Dredge Pollution Control Plan. As to the question of whether or not turbidity standards are

local approval criteria, Staff can implicate the ODEQ denial to applicable approval criterion, which will be addressed later in this staff report on page 43. Criterion met.

(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.

Staff Response: The applicant's proposal seeks an exception to Goal 16 for one NRI site within the City's jurisdiction. The remaining three sites fall outside of City jurisdiction. By law the City can only consider the NRI contained within the City of Coos Bay's jurisdiction. To see a map of the proposed navigational reliability areas, see Attachment A, Exhibit 1, Page 1 of 4, included in this staff report. This criterion does not apply.

ANALYSIS OF OAR 660-004-0022

OAR 660-004-0022 addresses, in greater detail, the “*types of reasons that may or may not be used to justify certain types of uses not allowed on resource lands.*” Consistency with any one of the ten alternatives outlined in OAR 660-004-0022 provides sufficient justification for a “reasons” exception. In seeking an approval of a Goal 16 exception as requested in this application, the applicant's representative advances two avenues for obtaining a Goal 16 exception. The applicant asserts that the application meets the criteria for a goal exception under the general exceptions as indicated in OAR 660-004-0020(1); The applicant affirms that the application also meets the criteria for a goal exception through a second avenue under OAR 660-004-0022(8)(b).

Following is the staff response to criteria for both of these avenues.

OAR 660-004-0022

Reasons Necessary to Justify an Exception Under Goal 2, Part II(c)

An exception under Goal 2, Part II(c) may be taken for any use not allowed by the applicable goal(s) or for a use authorized by a statewide planning goal that cannot comply with the approval standards for that type of use. The types of reasons that may or may not be used to justify certain types of uses not allowed on resource lands are set forth in the following sections of this rule. Reasons that may allow an exception to Goal 11 to provide sewer service to rural lands are described in OAR 660-011-0060. Reasons that may allow transportation facilities and improvements that do not meet the requirements of OAR 660-012-0065 are provided in OAR 660-012-0070. Reasons that rural lands are irrevocably committed to urban levels of development are provided in OAR 660-014-0030. Reasons that may justify the establishment of new urban development on undeveloped rural land are provided in OAR 660-014-0040.

(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:

(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

(A) A resource upon which the proposed use or activity is dependent can be reasonably obtained only at the proposed exception site and the use or

activity requires a location near the resource. An exception based on this paragraph must include an analysis of the market area to be served by the proposed use or activity. That analysis must demonstrate that the proposed exception site is the only one within that market area at which the resource depended upon can reasonably be obtained; or

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

Discussion: Under OAR 660-004-0022(1) the applicant must demonstrate a need for the proposed use/activity based on requirements of one or more Statewide Planning Goals 3 to 19. Applicant's asserted the "demonstrated need" for the proposed NRI #4 is based primarily on Goal 9 (Economic Development) and 12 (Transportation). In the applicant's written arguments dated May 23, 2019, the applicant added a third goal (Goal 13 Energy Conservation) that it asserts justifies the exception.

Goal 12 – Transportation

As explained in the applicant's narrative addressing the Goal 12 justification, structural restrictions on the Channel cause significant transit delays and unduly increase directional changes during transit through the Channel. Delays are measured in the total transit time; from the time the vessel arrives off the coast of Coos Bay until it returns offshore. Minimizing delay is framed as a pressing need because companies that utilize the Port have identified new customers in Asia that desire to export cargo using bulk carriers that are slightly larger than the ships typically calling on the Port today. The applicant points out there are various marine terminal businesses within Coos Bay that require assurances that terminals can efficiently accommodate larger dimension bulk carriers in the future.

Comments submitted suggest that the proposal is only benefiting JCEP and not all users of the Port. The proposed NRIs will allow companies to secure emerging opportunities to export products using today's larger vessels, including bulk carriers of up to 299.9 meters (983.3 feet) in length, 49 meters (160.8 feet) in beam, and 11.9 meters (39 feet) in draft. The applicant has included in its application a letter from the US Coast Guard to JCEP, indicating Coos Bay Pilots can safely and successfully maneuver carriers of up to 299.9 X 49m X 11.9 dimensionally while transiting the Channel. The letter is included in this staff report as Attachment A, Exhibit 4 (Page 15). The OSCC argues that it is unclear from the evidence provided by the applicant that the proposed NRI will reduce delays for the average vessel currently navigating the Channel. Further, the OSCC points out that the applicant has submitted no evidence that suggests the conclusion that continuing existing shipping and commercial activities in the Bay would be unduly constrained absent the proposed NRI.

In their narrative, the applicant asserts that JCEP and the Coos Bay Pilots believe the proposed navigational reliability improvement site is essential to achieve the required number of LNG vessel transits needed to lift the JCEP design annual LNG production volume. Excessive delays in LNG carrier transit in the Channel, to and from the LNG terminal, could result in a shore storage tank topping situation, requiring JCEP to curtail LNG production.

Comments submitted question whether allowing larger vessels to transit in and out of the Bay actually creates a safer environment. Public testimony suggests the applicant has failed

to demonstrate that enabling LNG vessels to transit under windier conditions would actually result in safer navigation in the Lower Bay.

Goal 9 – Economic Development

The applicant has submitted an Economic Development Analysis for Operations prepared by ECONorthwest that provides an economic analysis for the broader project, however the report is not specific to NRI #4. In sum, the Economic Development Analysis outlines the total construction costs of the fully realized facility at approximately 9.7 Billion, with 2.8 Billion of that being spent directly at Oregon businesses. The analysis further asserts that the project will directly pay Oregon resident workers about \$1.5 billion in compensation. In addition, JCEP has agreed to a Community Enhancement Plan (CEP) under which property tax benefits available at the site would result in JCEP's payment of over 40 million dollars per year during operations, to be used for capital projects, including schools. Further, the applicant states in Exhibit PP, page 19 of 63, that unemployment in Coos County for 2016 was 6.5%, which was higher than the average unemployment rates in both the U.S. and Oregon. The project will provide 6,000 jobs during peak construction, and 215 permanent family-wage jobs during operations. The Economic Impact Analysis for Operations report is included in this staff report as Exhibit G.2. Further the applicant points to several comments received during the open record period from local businesses and business owners that show support for the proposed NRIs, specifically Roseburg Forest Products in which Roseburg states minimizing delays in the Channel is a pressing need because Roseburg has identified potential new woodchip customers in Asia which will require vessels which are slightly larger than the ones transiting the Channel today. Moreover, Roseburg states, without the NRIs, the potential for growth in shipping commerce is jeopardized. The proposed NRIs are needed to ensure the current and future viability of maritime commerce in Coos Bay. Please refer to Attachment A, Exhibit 3 for JCEP's letters of support.

Opposition comments assert that the applicant has failed to show that the proposal will be an "economic boon" and that a general desire to "boost the local economy" or general statements about reducing traffic delays are not sufficient to establish a "demonstrated need" sufficient to warrant a "reasons" exception to Goal 16.

Goal 13 – Energy Conservation

The applicant's reliance on Goal 13 to satisfy the "demonstrated need" criterion was not explicitly called out in the applicant's initial application submittal as evidence to support a Goal 16 exception based on OAR 660-004-0022(1). The memo addressing energy consumption (Exhibit MM) was submitted prior to the close of the first open record period on April 25, 2109 when new evidence is permitted into the record. Specifically, as related to Goal 13, the applicant contends the proposal shows a demonstrated need in that, if constructed, the NRIs will result in a net energy efficiency of 5,836 mWh per year

The applicant's evidence in support of a "reasons exception" is similar to the arguments outlined under Goal 12, as both deal with efficiency of transportation.

For the foregoing reasons, the OSCC contends that the applicant has failed to show that the NRI will fulfill a "demonstrated need for enhanced shipping within the Bay" and that there is insufficient evidence in the record to assess compliance with the policy objectives of Goals

9, 12, and 13. As a result, the OSCC argues that the proposal fails to meet the criteria to satisfy a Goal 16 exception.

Staff Response: LUBA has held that market demand is not, in and of itself, sufficient to satisfy the “demonstrated need” standard. However, market demand, along with other factors, might be evidence that weighs into the “demonstrated need” determination. That determination requires the applicant to show that the city cannot satisfy the obligations of a particular goal without the proposed use. In a 1996 case, Josephine County approved an exception to Goal 4 to place a racetrack on forest land. *Middleton v. Josephine County, 31 Or LUBA 423 (1996)*. The applicant presented evidence that there was market demand for the use, the use would provide an economic benefit to the county, the County had a desire to diversify its economy by providing tourist attractions, and the area had been designated as a federal enterprise zone. Despite all of that evidence, LUBA determined it was not sufficient to justify a reasons exception because the applicant did not show that the County was unable to satisfy its obligations under one of the Statewide Planning Goals, specifically Goal 9 without the proposed use. A local government is required to establish that it failed, or is at risk of failing, to provide adequate opportunities for a variety of economic activities, and that taking an exception to a resource goal to allow the proposed use is a necessary step toward satisfying that goal requirement. See *Drouhin v. Perse, Or LUBA (LUBA No. 2006-157, December 21, 2007)*.

In a more recent case, the Oregon Court of Appeals overturned Jackson County’s approval of a Goal 3 exception for a solar power generation facility on high value farmland. *1000 Friends v. Jackson County, 292 Or App 173, 423 P3d 793 (2018)*. State statute allowed photovoltaic solar power generation facilities on high value farmland so long as the facility did not preclude more than 12 acres from use for commercial agriculture. The proposed facility exceeded that limit, so a Goal exception was required. The applicant and the County took the position that the County could not satisfy its obligations under Goal 13 (energy) because Goal 13 requires that lands and uses be managed and controlled so as to maximize conservation of all forms of energy. LUBA and the Court disagreed, holding that Goal 13 does not *require* local governments to develop or facilitate the development of energy facilities. Goal 13 regulates the manner by which property is developed. That is, the Goal requires that all development be managed and controlled to conserve energy; it does not require the County to develop, or facilitate the development of, any particular use, such as large solar power facilities.

The evidence in this record does not appear to satisfy the burden established by LUBA and the Court of Appeals with regard to “demonstrated need.” Staff believes that the record does not contain sufficient evidence supporting a conclusion that an exception to Goal 16 is necessary for the City to meet its Goal 9, Goal 12, or Goal 13 obligations. Therefore, Staff conclude that this criterion is not met.

(8) Goal 16 – Other Alterations or Uses: An exception to the requirement limiting dredge and fill or other reductions or degradations of natural values to water-dependent uses or to the

natural and conservation management unit requirements limiting alterations and uses is justified, where consistent with ORS chapter 196, in any of the circumstances specified in subsections (a) through (e) of this section:

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

Discussion: The applicant affirms that the proposed improvements are designed to increase the environmental operating window for all vessels entering the Bay by softening critical turns, relocating navigational aids, and reducing the required Channel directional changes. The applicant claims that, the proposed dredging will reduce entry and departure delays and allow for more efficient vessel transits through the Channel for the size of vessels calling on the Port today.

The applicant notes that, for JCEP, the proposed navigational reliability improvements will allow for transit of Liquid Natural Gas (LNG) vessels of similar overall dimensions to those listed 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, but under a broader range of weather conditions, specifically higher wind speeds. As a result, JCEP estimates that upon completion of the proposed navigational reliability improvement site, JCEP will be able to export the full capacity of the optimized design production of the LNG terminal on a consistent basis. For these reasons, the applicant advances that the dredging associated with the navigational reliability improvement will maintain adequate depth to permit continuation of the presently allowed level of navigation, and allow that navigation to occur more efficiently, safely and reliably. The aforementioned letters are included in this staff report as Attachment A, Exhibit 4.

In their submission comments, the OSCC note that the reason to permit dredging “to maintain adequate depth to permit continuation of the present level of navigation” is a provision that is only applicable to maintenance dredging, not to an expansion of a channel into new areas presently designated for natural aquatic management.

Additionally, the OSCC asserts the applicant has provided no evidence that the current Channel is inoperable without dredging in the adjacent natural management areas or that the proposed NRI is required for continued use of the existing Channel. The OSCC refutes the applicant’s claim that the proposed NRI will allow for navigation to occur more efficiently, safely and reliably. The OSCC advances an alternate conclusion that it’s not clear that dredging to widen the turns would increase safety margins for pilots: while the turns are wider, they will be taken at higher wind speeds.

Staff Response: Staff believes, based on the applicant’s statement, and materials provided in the record, that the NRI proposed supports more than the “continuation of the present level of navigation.” It proposes “enhancements” of the Channel, enabling larger ships at greater frequencies than at present levels. Keeping the general rule in mind, staff believe it to be common sense the proposal goes beyond the “continuation of the present level of navigation.” Staff note that OAR 660-004-0022(8)(b) appears to be DLCD’s attempt to balance the interests of protecting coastal resources and economic and navigation interests, and the rule was most likely intended to preserve only the navigation rights that are in existence when the exception application was filed. (i.e. The spirit of the provision is

enabling dredging and maintenance to keep in check natural processes (including sedimentation) which impede “present levels of navigation” not to enable enhanced navigation, as proposed. By looking at the context of the whole rule, it was the intent of the drafter to protect estuarine resources. Based on this conclusion staff assert that this criterion is not met and that an exception to Goal 16 cannot be justified through OAR 660-004-0022(8)(b).

(f) In each of the situations set forth in subsections (8) (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.

Discussion: The applicant indicates in their application that they will complete the proposed NRIs at the site in a manner that minimizes adverse impacts upon the affected aquatic and shoreland areas and habitats.

Numerous submissions of public testimony contest that more information regarding potential adverse impacts arising from the proposed NRI is needed, as well as a description of the methods to be used before any conclusion can be made regarding the criteria contained in subsection (f).

In their submission comments, the OSCC specifically points out that the DEA memo (Attachment A, Exhibit 5) makes reference to “best management practices”, but the applicant fails to specifically identify what those are. Also lacking in the DEA memo is an assessment of the potential risk of oil spills and any other toxic discharge related to dredging and accessory uses. The OSCC finds staff’s proposed Condition of Approval #1 insufficient absent evidence that these measures will be adequate to protect aquatic resources.

As noted earlier in this staff report, ODEQ found dredging for the NRIs, the Slip, and Access Channel would cause turbidity levels to increase above allowable numerical limits.

The applicant plans to perform the proposed dredging during the ODFW approved IWWW (October 1 to February 15) to reduce impacts to sensitive life stages of fish in the Bay. A further discussion of the proposed truncation of the IWWW by CTCLUSI and ODFW is offered later in this staff report. See discussion of Policy 5D on Page 40.

Additionally, related to dredging practices and methods, the applicant indicates in their application that JCEP will use various dredging methods (described in Attachment A, Exhibit 5) to minimize the effects of the NRIs on water 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 as a result of the NRIs to be temporary and limited to the immediate vicinity of dredging operations. The applicant also describes the various dredging practices in its Dredging Pollution Control Plan (see Exhibit BB on City’s website at <http://coosbay.org/government/codes-plans-standards#city-plans>).

The applicant notes that dredging and material transport vessels will carry small volumes of petroleum in comparison to large bulk carriers and Panamax vessels that regularly traverse

Coos Bay. JCEP will use best management practices to avoid and minimize spills or discharges during dredging operations and dredged material transport.

Dredging equipment and material transport vessels related to the proposed NRI site may generate temporary noise disturbances; however, evidence suggests that the noise will be localized to the immediate dredging area. The applicant states they do not anticipate that noise levels will have more than temporary effects on the behavior of aquatic species in the area of the proposed NRI site. The applicant's consultant, DEA, has evaluated the proposal and provided additional details on potential adverse impacts associated with the proposed dredging. The report is included in this staff report as Attachment A, Exhibit 5. Additionally, the applicant has submitted a memo (Exhibit II) further detailing possible adverse impacts to aquatic species with respect to operational noise and spills. The applicant's consultant indicates marine mammals may be potentially impacted by operational noise from the dredging activities and potential oil and lubrication spills. All marine mammals are protected under the Marine Mammal Protection Act (MMPA), which requires authorization from the National Marine Fisheries Service (NMFS) for incidental harassment of marine mammals. In its Draft EIS FERC opined that "*maintenance dredging would generate underwater sound pressure levels that could elicit responses in aquatic organisms*", but that generally "*response to changes in noise levels would be behavioral and perceptual, and not physiological. In nature, as fish and marine mammals would tend to avoid that area during periods of high noise output.*" The applicant's consultant concludes that operational noise would not have significant adverse effects on aquatic resources, and sound levels from dredging are not expected to exceed NMFS thresholds established as causing behavioral harassment to marine mammals in the Bay such that they alter their breeding, foraging, migrating or sheltering patterns. JCEP would be required to conduct all activities in accordance with the MMPA, as enforced by NMFS, and in accordance with all other regulatory agency requirements including the use of appropriate sound attenuation measures, as necessary. The report is included in this staff report as Exhibit II. The following Condition of Approval is appropriate related to potential adverse impacts to marine mammals as a result of operational noise associated with the proposed dredging activities.

Condition of Approval #2: Prior to the commencement of any dredging activities, JCEP shall receive written 404 authorization including ESA Section 7 compliance to perform the proposed dredging from the U.S. Army Corp of Engineers, in accordance with applicable agency requirements. Proof of such authorization shall be submitted to the City of Coos Bay prior to the commencement of dredging activities.

Staff Response: The applicant addresses inadvertent spills, or discharges in Attachment A, Exhibit 5, (Page 8) indicating that they will take preventative measures such as an implementation of a spill prevention plan. The applicant has completed a draft Spill Prevention, Control and Countermeasure Plan (SPCC Plans) that will be finalized prior to facility operation. See Exhibit A.4, due to length is not included in this staff report – refer to City's website at <http://coosbay.org/departments/community-development-department>) Staff note that, by and large, the SPCC pertains to the larger project. However, the Dredging Pollution Control Plan is specific to the NRIs, Kentuck and APCO sites and includes a section on spill response procedures. Staff find the plan reasonable to address spills related to the proposed dredging activities. Staff have not received any comments or expert testimony to refute the validity of the proposed spill response procedures. Lastly, as previously indicated in this staff report, it's unclear if ODEQ has

seen and reviewed the Dredging Pollution Control Plan due to the open and closure of record period(s), but without any comments related to its effectiveness and validity or expert testimony to the contrary, staff find it reasonable to believe the applicant can address spills should they occur. This criterion will be met with the following condition:

VIII. EVALUATION OF CRITERIA FOR ESTUARINE AND COASTAL SHORELAND USES ACTIVITIES PERMIT

CBMC – 17.352.010 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.

COOS BAY ESTUARY MANAGEMENT PLAN (CBEMP) POLICIES

Below are CBEMP Policies pertinent to the subject application.

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 “Shorelands Values.”**

This strategy shall be implemented through:

- A. Plan designations and use and activity matrices set forth elsewhere in the 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.

Staff Response/Discussion: According to the Shoreland Values map, there are no inventoried resources at the proposed navigational reliability improvement site for which CBEMP Policy #17 requires protection. Staff proposes CBEMP Policy #17 be included as a general condition of approval for dredging associated with the NRI. The criterion has been met as conditioned.

Condition of Approval #5: As a general condition, and in the event that additional analysis or circumstance reveals relevant and previously unknown or unmapped shoreland resources, all dredging activity must remain consistent with CBEMP Policy #17 - Protection of "Major Marshes" and "Significant Wildlife Habitat" in Coastal Shorelands.

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, reinterring the human remains at the developer's expense; or

- F. Using civil means to ensure adequate protection of the resources, such as acquisition of easements, public dedications, or transfer of title.

If a previously unknown or unrecorded archaeological site is encountered in the development process, the above measures shall still apply. Land development activities which violate the intent of this strategy shall be subject to penalties prescribed in ORS 97.990 (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 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 OBS 97.745. It also recognizes that historical and archaeological sites are non-renewable cultural resources.

Discussion: The applicant notes that the Shoreland Values Map does not indicate any known inventoried resources at this location to consider under this policy. Through correspondence with staff and members of the CTCLUSI, they asserted that the Shoreland Values inventory map is old (2002) and that there may be resources in the vicinity of the NRI Site. During the course of the proposed development there may be unanticipated discovery of cultural resources, remains, and/or objects. The applicant has included, in their submission, a copy of a Memorandum of Agreement (MOA) between JCEP and the CTCLUSI addressing these circumstances, and more broadly, Policy 18. A copy of the MOA is included in the record and can be found in the applicant's application. The MOA incorporates a Cultural Resources Protection Agreement (CRPA) entered between JCEP and the CTCLUSI in July of 2018. 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 includes an Unanticipated Discovery Plan (UDP), which provides procedures in the event of an unanticipated discovery of historic properties, archeological objects, archaeological sites or human remains, funerary objects, sacred items, and items of cultural patrimony, during the construction and operation of the proposed temporary dredge transport pipeline.

Staff Response: The following condition of approval would ensure compliance with respect to Policy #18. With the adoption of Condition of Approval #3, staff find the proposal complies with Policy #18. The criterion would be met as conditioned.

Condition of Approval #3: Prior to and during the commencement of any dredging associated with an Estuarine and Coastal Shoreline Uses and Activities permit, JCEP shall comply with the requirements of MOA, CRPA, and UDP as agreed upon and signed by JCEP and the Confederated Tribes of Coos, Lower, Umpqua, and Siuslaw Indians, as well as consistency with any other applicable provisions of Policy #18 of the CBEMP.

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 require 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 ORS541.615 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, which shall seek local government’s determination regarding the appropriateness of a permit to allow the proposed action.

Discussion: Policy #5 is relevant to the proposal because its referenced as a special condition for “new dredging” as listed under “activities” in the 52-NA zone in the CBEMP. The activity of “new dredging” is only to occur in the 52-NA zone subject to findings that adverse impacts have been minimized pursuant to Policy #5. As listed in Policy #5, when a goal exception is included in the proposal the application shall comply with only criterion D. and E. above, because as noted in Policy #5, the findings for a Goal 16 exception are

sufficient to comply with criteria A thru C. If the exception is approved, then Policy #5 A thru C are irrelevant. A Goal 16 exception to Estuarine Resources is required in order to proceed with the proposed rezoning of 3.3 acres of 52-NA to DDNC.

D. If adverse impacts are minimized; and

Discussion: One of the main ways the applicant proposes to minimize adverse impacts is to conduct work associated with the proposal during the ODFW approved IWWW which for the Coos Bay Estuary is October 1 to February 15. The issue of the ODFW IWWW was first introduced into the record (during the Planning Commission process) by CTCLUSI on March 21, 2019. The comment contends that in order to further the intent of Policy #5 of the CBEMP with respect to adverse impacts and “*reduce impacts to sensitive life stages of fish in the Bay*”, the IWWW should be modified to end on February 1. CTCLUSI cites evidence from their Natural Resource Department’s staff indicating that herring spawning (by a location know as Fossil Point) occurs in February. In their comment, CTCLUSI, urges the City and staff to consider a condition of approval that provides for the IWWW to end on February 1. Given the comment from CTCLUSI was received the day of the first evidentiary Planning Commission hearing, Staff didn’t have adequate time to incorporate it into its analysis. Staff reached out to ODFW for comment on the proposed truncation of the IWWW. Subsequently, on August 27, 2019, ODFW issued comment that “*truncating the end of the IWWW from February 15 to February 1 would reduce the potential for dredge impacts and siltation to the herring spawn/egg masses which are typically deposited about mid-February in Coos Bay.*”

At the close of the second open record period on October 31, 2019, CTCLUSI submitted comment and accompanying studies, related to the impacts of aquatic noise on herring, arguing in favor of a truncated IWWW period (please refer to the City’s website at <http://coosbay.org/departments/community-development-department> to see comments submitted on October 31, 2019, under “second open record period comments.”)

The applicant, at the close of the second open record period, on October 31, 2019, submitted a technical memo arguing against any truncation of the IWWW (see note above for accessing comments submitted on October 31, 2019.) Included in the technical memo were responses to ODFW’s recommendation to restrict the IWWW. In their response, the applicant’s technical staff point out that ODFW erred in applying Yaquina Bay herring spawn data to Coos Bay. The data for Coos Bay indicates that early spawning occurs on large spawning flats at Fossil Point and lower North Spit, which are a minimum of 1.9 miles from NRI #4. Later spawning, farther upstream and closer to NRI #4 occurs after mid-March, which is after the IWWW closes and asserts the technical memo also refutes ODFW’s cited studies regarding the impact of aquatic noise on herring, which ODFW erroneously relies upon for the proposition that dredging of NRI #4 will impact herring in Coos Bay. The memo sets forth a finding contrary to that of ODFW, in which the studies confirm that herring will quickly acclimate to repetitive aquatic noise (including natural and anthropogenic noise) and therefore, the studies do not justify a truncation of the current IWWW, even if herring were present in Coos Bay. The current IWWW has been in place for over 10 years, for a wide range of projects in Coos Bay. ODFW has not conducted additional studies in Coos Bay or provided for a public input process to justify a truncation of the current IWWW. The applicant asserts that if ODFW desires to adjust the IWWW, they would need to provide direct scientific evidence from Coos Bay that a shortened window will be more protective of spawning and

staging fish in Coos Bay in the same manner in which such evidence was relied upon to establish the current IWWW.

Included in the applicant's final written arguments, dated November 15, 2019, the applicant lays out four arguments in why City Council should reject any truncation of the IWWW. Staff summarize the applicant's following four arguments:

1) The evidence does not support shortening the IWWW.

The letter from ODFW received on August 27, 2019 generally asserts that the IWWW should be truncated from February 15 to February 1 to protect spawning Pacific herring. However, this ODFW letter provides no studies, data or support for the suggestion that the IWWW should be truncated. 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 that supports modification of the current IWWW at NRI #4.

2) NRI# 4 is not eelgrass habitat.

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

3) 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 lower stretches of Coos Bay based on ODFW's own seminal study. At the location of NRI #4, herring spawn was not documented until March 21.

Further, the studies submitted by CTCLUSI on October 31, 2019, address herring spawn in Yaquina Bay, which has an earlier spawning cycle than that of Coos Bay and are therefore not transferrable. Additionally, the studies submitted by CTCLUSI regarding the potential in-water impacts show the herring quickly acclimatize 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 there were even present or near NRI #4 between October 1 and February 15. The applicant asserts there is simply no support for truncating the current IWWW as requested by CTCLUSI.

4) ODFW's comment recommending shortening of the IWWW conflicts with formal ODFW guidance.

The applicant contends the recommended truncation of the IWWW by ODFW conflicts with its own guidance on timing for in-water work to protect fish and wildlife resources. Per the guidance, the IWWW for Coos Bay is expressly set at October 1 through February 15. The guidance is intended to be the agency's "reference document" for comments on IWWWs during federal, state, and local governmental regulatory and permitting processes. The applicant states there is simply no cited analytical or evidentiary basis in the record for superseding the established ODFW guidance and the published IWWW of October 1 to

February 15. The applicant also suggests, Planning Commission declined CTCLUSI's request for a truncation of the IWWW for similar reasons.

Staff Response: As discussed above, staff have competing expert testimony with respect to the IWWW. Staff agrees with the applicant that because CTCLUSI and ODFW have not provided evidence sufficient to supersede the established IWWW of October 1 to February 15, and the applicant intends to perform the proposed work within the established ODFW as a way to minimize adverse impacts, as contemplated by Policy #5 D.

Compliance with criterion Policy #5D directs the applicant to demonstrate how adverse impacts will be minimized, pursuant to CBEMP Policy #4a. Strategies, and best practices proposed by the applicant to minimize adverse impacts are mentioned earlier in this staff report and submitted into the record and can also be found in the DEA Memo included at Attachment A, Exhibit 5. Concerns exist as to how the applicant will minimize adverse impacts with respect to turbidity as raised by ODEQ in their denial of the applicant's Section 401 Water Quality Certification permit. As mentioned earlier in this staff report, for the turbidity standard to be considered, the City must tie it to a local applicable approval criterion. Staff have identified an applicable local approval criterion. A review of the nexus between ODEQ's denial of a Section 401 Water Quality Certification permit and the local applicable criteria is discussed in the proceeding section below. This criterion has been met.

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

Discussion: Comment was received regarding the ODEQ's decision to deny a Section 401 Water Quality Certification permit. The denial was based, in part, on the proposed project's failure to comply with City criteria and standards related to water quality. Comments also addressed the request of the applicant by ODSL to address the concern that its proposed project fails to conform with requisite criteria in local comprehensive plan and land use regulations, including those in Coos County and the City of Coos Bay. Opposing testimony contends the applicant failed to meaningfully address these concerns in its response. In their final written arguments, the applicant addresses the ODEQ's decision to deny the Section 401 Water Quality Certification permit and how it's not relevant to the application at hand. Provided is an analysis of each point made by the applicant in their final arguments that requests the City to consider the following three points:

- 1) *The decision by ODEQ to not certify compliance at this time is not relevant to the applications because it applies to the statewide turbidity standard as outlined in OAR 340-041-0036 which has not been adopted by the City and is not an approval criterion specific to any of the pending applications under the CBMC or CBCP.*

Staff Response: Staff concur with the applicant that the OAR turbidity standard is not incorporated into the CBMC. As such, the opponent need not demonstrate that the OAR itself is an approval criterion. The Council could determine that the turbidity standard is the floor beneath which the application cannot fall in order to satisfy the applicable approval criteria – i.e., an adverse effect that must be weighed in the ESEE analysis. This would be an interpretation of the code and should be entitled to local deference. Also, CBEMP Policy #5E provides “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.” Staff find the provision in Policy 5 (E) of other requirements of state is where the turbidity standards are incorporated into the CBMC.

ODEQ’s decision concluded that, without the Dredge Pollution Control Plan, it was impossible to determine whether the state turbidity requirements were satisfied. The applicant submitted a Dredge Pollution Control Plan in its first open record submittal. The Dredge Pollution Control Plan is dated April 8, 2019 and was completed by David Edwards and Associates. While staff are not privy to entire timeline of the ODEQ decision, ODEQ likely did not have had the Dredge Pollution Control plan to rely on when it rendered its decision because the record was not open to new submittal of evidence. While ODEQ may not have had the Dredge Pollution Control Plan to rely on when it rendered its decision, the applicant’s experts on the subject matter say the Dredge Pollution Control Plan is sufficient.

The Dredge Pollution Control Plan was submitted as (Exhibit BB, refer to City’s website at <http://coosbay.org/government/codes-plans-standards#city-plans>) part of the applicant’s open record period submittal on April 25, 2019.

- 2) *The decision by ODEQ was under certain statutory time constraints and does not in any way preclude JCEP from re-submitting a complete application to DEQ in the future.*

Staff Response: The contention here seems to be that, because the ODEQ found the applicant could re-apply, the denial cannot be used as a basis for denying the application. The applicant is correct in this assertion, the mere denial of the ODEQ permit does not necessarily dictate a denial of this application. The City Council must determine whether the ODEQ permit denial somehow implicates an applicable approval criterion. As discussed above, Staff have identified the local criterion in which the denial can be tied to.

- 3) *JCEP has included in the record a Dredge Pollution Control Plan as part of its April 25 first open record period submittal. The ODEQ decision to deny the permit was based on the lack of such plan to demonstrate compliance. However, the plan is now submitted into the record and if there is a question about whether JCEP has a plan to achieve “compliance with state turbidity standards” such evidence is in the record.*

Staff Response: The applicant explains that the denial of the ODEQ permit was, in part, based on the absence of a Dredge Pollution Control Plan, which was necessary to determine compliance with the OAR turbidity standard. The applicant then states “JCEP recently completed the required Dredge Pollution Control Plan and submitted it into the record for the application on April 25, 2019” (11 days before the DEQ permit was denied). The applicant asserts that the record now include a plan to achieve compliance with the OAR turbidity standards. As indicated above, the Dredge Pollution Control Plan may have been completed after the record had been closed, and therefore, the applicant could not submit it to ODEQ for consideration. Without evidence to refute the findings and analysis contained in the Dredge Pollution Control Plan, Staff accepts its validity. Staff note that the Dredge Pollution Control Plan will have to be inevitably submitted, reviewed, and concurred with by ODEQ staff should JCEP reapply for Section 401 Water Quality Certification permit. Additionally, any recommendation for approval should be based on conditions of approval

that require both a final EIS and an approved Section 401 Water Quality Certification permit, both of which have been included as conditions of approval.

In the applicant's response to Removal-Fill Comments Version 2.0 to ODSL, the applicant states their working closely with ODEQ on a new 401 application submittal schedule, and at least three technical meetings have been held between JCEP and ODEQ during which some of the issues and outstanding questions have been resolved. These meetings, and subsequent future meetings, are intended to design a process going forward, and to have all issues addressed prior to re-submittal. In summary, Staff rejects the applicant's assertion that ODEQ's denial of a Section 401 Water Quality Certification permit should not be considered by the City because the turbidity standards are not locally adopted, but Staff does not feel denial of the application should be based on this fact because there is presently no evidence confirming that the applicant cannot obtain a Section 401 Water Quality Certification permit upon resubmittal. As such, the issue can be resolved with the adoption of Condition of Approval #4. This criterion is met as conditioned.

Condition of Approval #4: Prior to the commencement of any dredging associated with an Estuarine and Coastal Shoreline Uses and Activities permit, JCEP shall obtain, and provide evidence of, all necessary ODEQ, DSL and Federal Section 404 authorizations. JCEP shall provide the City with copies of these approved authorizations for the record, and comply with all conditions of approval contained in the referenced permits.

CBEMP Policy #4 – Resource Capability Consistency and Impact Assessment

Local government concludes that all proposed actions (approved in this Plan) which would alter or 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
- Rip-rap
- Water intake or withdrawal and effluent discharge

C. Development Management Units

- Aquaculture
- Bulkheading (except for Aquatic Units #3DA, 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.

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 renewable resources, natural biologic productivity, recreational and aesthetic values and aquaculture.

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

- A. The type and extent of alterations expected;
- B. The type of resource(s) affected;
- C. The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and

aesthetic use, navigation and other existing and potential uses of the estuary;
and

D. The methods which could be employed to avoid or minimize adverse impacts.

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.

Discussion/Staff Response: 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, to the extent that it is applicable, requires the City to perform the impacts assessment consistent with CBEMP Policy #4.

The applicant asserts that CBEMP Policy #4 is not applicable to the application pursuant to state law. The applicant notes that 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 applicant requests an exception to Goal 16 rezone a 3.3-acre zone from 52-NA to DDNC to facilitate dredging in an aquatic unit where it would not be permitted absent a zone change. As the last sentence of CBEMP Policy #4 clearly states, the purpose of this policy is to implement Goal 16. Staff agrees with this assertion by the applicant. If the goal 16 exception is denied, Policy #4 is irrelevant as the applicant will not be able to proceed with the plan and map change required to change an aquatic unit from natural to development, and as such dredging is not a permitted use in the natural aquatic designation.

Staff notes this project will require state and federal permits and an assessment of environmental impacts will be completed. Conditions of approval #1, #2, #4, and #13 address these requirements. This criterion has been met.

CBEMP Policy #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 and Wildlife (ODFW) in writing of the request, together 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 (2) day period, local government shall presume consistency of the proposal with the resources 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.

Discussion/Staff Response: As noted above, because neither aquaculture nor log storage dredging are proposed, 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, including the content of the memo included as Attachment A, Exhibit 5, and the record to date.

As with Policy #4, the applicant asserts that CBEMP Policy #4a is not applicable to the application pursuant to state law. The applicant notes that 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 applicant requests 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. Staff agrees with this finding by the applicant. This criterion has been met.

VIII. Conditions of Approval

Staff has identified and recommends the following conditions for City Council consideration and Council action if authorization of the project proceeds:

Condition of Approval #1: Prior to the commencement of any dredging activities, JCEP shall provide the City of Coos Bay evidence of an approved Section 401 Water Quality Certification permit and evidence of an approved Federal Energy Regulatory Commission (FERC) certificate, and shall comply with any conditions imposed by FERC.

Condition of Approval #2: Prior to the commencement of any dredging activities, JCEP shall receive written 404 authorization including ESA Section 7 compliance to perform the proposed dredging from the U.S. Army Corp of Engineers, in accordance with applicable agency requirements. Proof of such authorization shall be submitted to the City of Coos Bay prior to the commencement of dredging activities.

Condition of Approval #3: Prior to and during the commencement of any dredging associated with an Estuarine and Coastal Shoreline Uses and Activities permit, JCEP shall comply with the requirements of MOA, CRPA, and UDP as agreed upon and signed by JCEP and the Confederated Tribes of Coos, Lower, Umpqua, and Siuslaw Indians, as well as consistency with any other applicable provisions of Policy #18 of the CBEMP.

Condition of Approval #4: Prior to the commencement of any dredging associated with an Estuarine and Coastal Shoreline Uses and Activities permit, JCEP shall obtain, and provide evidence of, all necessary ODEQ, DSL and Federal Section 404 authorizations. JCEP shall provide the City with copies of these approved authorizations for the record, and comply with all conditions of approval contained in the referenced permits.

Condition of Approval #5: As a general condition, all dredging activity must remain consistent with CBEMP Policy #17 - Protection of "Major Marshes" and "Significant Wildlife Habitat" in Coastal Shorelands.

Condition of Approval #6: As a general condition, dredging associated with an Estuarine and Coastal Shoreline Uses and Activities permit shall only occur during the ODFW approved in-water work window (IWWW) which occurs between October 1 and February 15, This condition shall remain in effect for all dredging periods that may span multiple years and multiple IWWWs.

Condition of Approval #7: During the conduct of all activities authorized under the Estuarine and Coastal Shoreline Uses and Activities Permit, JCEP shall comply with all Best Management Practices, as referenced in the Dredge Pollution Control Plan and Dredge Materials Management Plan.

Condition of Approval #8: During the conduct of all activities authorized under the Estuarine and Coastal Shoreline Uses and Activities Permit, JCEP shall comply with all applicable Best

Management Practices included in the Dredging Pollution Control Plan (Navigation Reliability Improvements, Kentuck, APCO) (April 8, 2019), and particularly such BMPs related to turbidity, and with BMPs set forth in the Technical Memoranda submitted by the applicant.

Condition of Approval #9: As a general condition, JCEP shall ensure all floating and submerged dredging equipment operating in the Bay shall be clearly marked with day signals and light signals at night in accordance with the US Inland Rules of the Road.

Condition of Approval #10: As a general condition, JCEP construction safety inspectors shall be on-site during any time dredging operations are underway and shall be responsible for warning any recreational boaters who enter the construction area.

Condition of Approval #11: As a general condition, JCEP shall ensure that sections of the pipeline that cross the Federal Navigation Channel (FNC) are submerged on the FNC bottom to allow for vessel passage. The sections of floating pipeline shall be temporarily removed to allow for vessel passage, when necessary.

Condition of Approval #12: JCEP shall be responsible for costs of City review of information and monitoring associated with project conditions, including but not limited to: investigations of non-compliance with conditions of approval by third parties, and/or investigations undertaken by the City of Coos Bay Staff for compliance regardless of notice of non-compliance by third parties.

Condition of Approval #13: Prior to the commencement of any activity authorized under the Estuarine and Coastal Shoreline Uses and Activity Permit, JCEP shall provide the City of Coos Bay evidence of an approved Final EIS.

Condition of Approval #14: City of Coos Bay Public Works has identified an existing utility that is installed under the Bay in the vicinity of the proposed navigational reliability improvements. Consistent with the testimony offered by JCEP, the proposed dredging activity shall not impact this existing utility.

IX. Conclusion

Based on the evidence in the record, the City Council must conclude whether all applicable approval criteria for these applications are met, or not. The Planning Commission has forwarded City Council a recommendation for approval.

Based on the evidence currently in the record the applicant has failed to meet the findings for project approval. LCOG Staff recommends the Council deny Project 187-18-000153 with the following findings:

- **The applicant has failed to meet criteria showing demonstrated need for the proposed use or activity, based on one or more of the requirements of Goals 3 to 19.**
- **The applicant has failed to meet the criteria that dredging is required to maintain adequate depth to permit continuation of the present level of navigation in the area to be dredged.**

- **The applicant has failed to meet the requirement of CBMC 17.360.060(1) that the proposed amendment is in the public interest**

X. Attachments and Exhibits

Attachment A: Application(s)

- Exhibit 1: NRI (Dredge Detail)
- Exhibit 2: Pre-Application Conference Notes
- Exhibit 3: Support Letters (Roseburg Forest Products, Coos Bay Pilots Association, Port)
- Exhibit 4: Jordan Cove LNG Coast Guard Letter of Recommendation/Analysis
- Exhibit 5: Memo describing dredge work and impacts
- Exhibits 6 & 7: Site and Context Maps
- Exhibit 8: Property Owner (DSL) Certification and Consent
- Exhibit 9: Memorandum of Agreement between JCEP and the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians

Attachment B: Comprehensive Plan Update Map(s)

Attachment C: Applicant's Timeline Request Letter

Attachment D: DEQ 6.9.3 DEQ Findings: Turbidity; 1.4 WQC Decision

Attachment E: Sylvia Yamada, Ph.D. Study on Dungeness Crab

Exhibit A.4: Draft Spill Prevention, Control and Countermeasure Plan (SPCC) – On City's website at <http://coosbay.org/departments/community-development-department>

Exhibit G.2: ECONorthwest Economic Analysis

Exhibit MM: Energy Conservation with NRIs in Place

Exhibit II: Marine Mammals

Exhibit JJ: Snowy Plover, Blue Heron, and Diving Waterfowl

Exhibit HH: Recreational Impacts and Mitigation

Exhibit GG: Eelgrass Baseline Information

Exhibit EE: Crustacean and Shellfish

Exhibit FF: Fish

Exhibit BB: Dredge Pollution Control Plan - On City's Website

Exhibit PP: Page 46

Exhibit PP: Pages 16-20