



January 20, 2021

Board of County Commissioners' Office
Room 338
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VIA HAND DELIVERY

Re: Testimony for Remand Proceedings for Port of Columbia County's application for Comprehensive Plan Map Amendment, Zone Change and Goal 3 Exception at Port Westward (File No. PA 13-02 and ZC 13-01)

To the Board of Commissioners of Columbia County:

The following comments are submitted on behalf of Columbia Riverkeeper and 1000 Friends of Oregon (collectively "Riverkeeper"). Columbia Riverkeeper is a regional environmental organization that seeks to protect and restore the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. Representing over 8,000 members and supporters, Columbia Riverkeeper works to restore a Columbia River where people can safely eat the fish they catch, and where children can swim without fear of toxic exposure. 1000 Friends of Oregon is a nonprofit, membership organization that works with Oregonians to support livable urban and rural communities; protect family farms, forests and natural areas; and provide transportation and housing choice. 1000 Friends has members in all parts of Oregon including Columbia County. Columbia Riverkeeper was a named petitioner in both of the Land Use Board of Appeal ("LUBA") proceedings that resulted in remand back to the County to further evaluate the Port of Columbia County's ("Port") application. 1000 Friends was a named petitioner in the most recent LUBA proceeding. Both Columbia Riverkeeper and 1000 Friends of Oregon strongly oppose the proposed rezone.

I. Introduction

The Port of Columbia County (formerly Port of St. Helens) seeks to expand the Port Westward Industrial Park ("PWIP") by requesting a comprehensive plan map amendment, zone change, and exception to Statewide Planning Goal 3 to convert 837 acres of high-value agricultural land for rural industrial uses. The proposed rezone area, and surrounding lands, consists primarily of agricultural lands that produce high-value crops such as mint, blueberries, and other agricultural products. The rezone area is situated within the Beaver Drainage District, which is managed with a series of dikes and pumps to drain surface water from low-elevation agricultural areas to prevent flooding. Due to much of the area lying at elevations below the

Columbia River, the rezone area and surrounding lands have a very high water table, with wetlands located within portions of the rezone area.

The Thompson Property, included in the proposed rezone area, consists of freshwater emergent wetland and freshwater forested/shrub wetland. This area, as well as the Columbia River and surrounding riparian areas, provide important habitat for salmonid species listed under the federal Endangered Species Act. The surrounding area also provides habitat for the listed Columbia White Tailed Deer.

The Port's proposal, to nearly double the size of the existing Port Westward Industrial Park to make room for multiple large-scale and high-impact industrial uses, poses serious risks to the existing agricultural uses and natural resource values of the rezone area and surrounding lands. This remand proceeding marks the Port's third attempt at satisfying statewide standards to justify a Goal 3 exception that are intended to protect agricultural uses and natural resources. The Port has had over 7 years to prepare the necessary analysis and information to demonstrate that the proposed industrial uses will be compatible with existing uses and natural resource values in the Port Westward area. Yet, the Port's analysis continues to be woefully inadequate.

II. Legal Framework

Goal exceptions are governed by ORS 197.732 and administrative rules set forth in Chapter 660, Division 4. There are limited bases for taking an exception to a Statewide Planning Goal, briefly known as the "physically developed," "irrevocably committed," and "reasons" exceptions. ORS 197.732(2). An "exception" to a planning goal cannot be a comprehensive plan amendment that "establish[es] a planning or zoning policy of general applicability[.]" ORS 197.732(1)(b)(A); OAR 660-004-0005(1)(a); *Hood River Valley Residents Committee v. Hood River County*, 75 Or LUBA 452 (2017), slip op. 15.

Here, the Port is requesting a "reasons" exception to Statewide Planning Goal 3,¹ based on the provision for siting rural industrial development that is "significantly dependent upon a unique resource located on agricultural or forest land." OAR 660-004-0022(3)(a). The identified unique resource, on which all authorized uses of the rezoned area must be significantly dependent, is the existing deepwater port and dock facilities at Port Westward. *See* Staff Report, Attachment 1, Exhibit 3 (Supplemental Findings) at 3–5. When approving a reasons exception, the County's decision "must limit the uses, density, public facilities and services, and activities to only those that are justified in the exception." OAR 660-004-0018(4)(a). For each authorized use under a reasons exception, four standards must be met in order for a local government to adopt an exception to a goal:

- (A) Reasons justify why the state policy embodied in the applicable goals should not apply;
- (B) Areas that do not require a new exception cannot reasonably accommodate the use;

¹ Statewide Planning Goal 3 is "[t]o preserve and maintain agricultural lands."

- (C) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and
- (D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.

ORS 197.732(2)(c). These standards are further developed in OAR 660-004-0020 and -0022.

As relevant to this proceeding and the issue before the County, OAR 660-004-0020(2)(d) elaborates on the compatibility requirement set out in the statute. The rule provides:

“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 and production practices. ‘Compatible’ is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses.”

OAR 660-004-0020(2)(d).

III. Decision History and Scope of Remand

The Board of Commissioners of Columbia County (“County”) first approved the Port’s proposal in January 2014. The County’s decision approved a multi-layered reasons exception under all three reasons provided under OAR 660-004-0022(3) and authorized all uses within the Resource Industrial – Planned Development (RIPD) zone. Columbia Riverkeeper and local mint farmer, Mike Seely, challenged the County’s decision before LUBA. LUBA remanded the County’s first decision on multiple grounds after finding the County’s approach of authorizing an open-ended range of unspecified industrial uses to be “highly problematic for the Port to demonstrate compliance with all exception standards and applicable goal requirements.” *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171, 180, 206 (2014), *aff’d without opinion*, 267 Or App 637 (2014) (“*Riverkeeper I*”). In total, LUBA concluded that the County had not provided adequate justification for taking an exception to Goal 3.

With respect to the compatibility standard under ORS 197.732(2)(c)(D) and OAR 660-004-0020(2)(d), LUBA determined that the criteria could not be “meaningfully addressed unless the ‘proposed use’ is described sufficiently to identify and evaluate its likely adverse impacts. *Id.* at 203. LUBA found the County’s approach of relying on conditions of approval to ensure compatibility at the time of future development was “not consistent with the language of OAR 660-004-0020(2)(d)[.]” *Id.* at 204. LUBA explained what the compatibility standard requires:

“That language contemplates that the county has identified the proposed use, has determined that the use has adverse impacts incompatible with adjacent uses, but

has identified and imposed specific measures in the exception decision to reduce impacts and thus rendered the proposed use compatible. Identifying a process that in the future will identify the proposed use, identify the adverse impacts of that use, and then identify and impose any specific measures needed to reduce impacts and render the proposed use compatible, is something quite different.”

Id. LUBA clarified that the appropriate time for determining whether proposed uses are compatible or can be made compatible with adjacent uses is prior to adopting a goal exception. *Id.* at 206. LUBA concluded, “findings of compliance with the Goal 2 compatibility standard cannot be deferred to a subsequent permit proceeding.” *Id.*

On the first remand, the Port revised its application and proposal to five industrial use categories and proceeded under a single reason to justify the exception—that the proposed uses are significantly dependent on a unique resource located on agricultural land, under OAR 660-004-0022(3)(a). However, the Port and County again failed to identify the likely adverse impacts of the proposed uses and instead concluded that the potential adverse impacts of the five proposed use categories would be similar to the existing Port Westward industrial uses, which the County found were already compatible with surrounding agricultural uses. The County conditioned the rezone on non-specific requirements to “ensure compatibility” during future conditional use review. Columbia Riverkeeper, along with 1000 Friends of Oregon, again appealed the County’s decision to LUBA.

LUBA again remanded the County’s decision on the compatibility standard, finding that the County had not identified any support for its presumption that the impacts of the five proposed industrial use categories would be similar to the existing Port Westward industrial uses. *Columbia Riverkeeper v. Columbia County*, 78 Or LUBA 547, slip op. 34–35 (2018) (“*Riverkeeper II*”). After finding that this unsupported presumption formed the basis for much of the County’s analysis, LUBA remanded for the County to “adopt more adequate findings regarding compatibility, supported by substantial evidence.” *Id.* LUBA provided guidance to the County on remand:

“[A]dequate findings regarding compatibility would start by identifying the likely adverse impacts of typical uses authorized under the five approved use categories, evaluating each use category separately, and if necessary specific types of uses within each use category. As petitioners argue, the potential adverse impacts of different types of liquid bulk terminals, *e.g.*, an oil terminal versus a fertilizer export operation, could be different enough to require a separate analysis. The findings should also address the characteristics of uses on adjoining areas, and assess vulnerability to potential externalities from industrial uses in the exception area, such as impacts on water quality.”

Id. at 36. LUBA also found that the County’s over-reliance on conditions of approval to demonstrate compatibility with surrounding agricultural uses represented an “impermissible deferral of demonstrating compliance with OAR 660-004-0020(2)(d).” *Id.*

On appeal from the Port, the Court of Appeals upheld LUBA’s decision regarding the compatibility standard. *Columbia Riverkeeper v. Columbia County*, 297 Or App 628, 646–57 (2019). Thus, for this second remand, the Port was again tasked with attempting to adequately identify the likely adverse impacts of the numerous uses authorized within the five proposed industrial use categories and demonstrating how those uses are compatible with other surrounding uses and natural resources, or could be rendered compatible through specific measures to reduce adverse impacts.

IV. The Port’s Remand Compatibility Analysis

In response to LUBA’s second remand, the Port retained Mackenzie to prepare a Land Use Compatibility Report (“Report”) for the proposed rezone and Goal exception. The Report begins by establishing the compatibility “study area,” which is defined by land parcels adjacent to the rezone area and contiguous parcels within 2,000 feet. Report at 7. The study area does not include surrounding natural resources or some of the most sensitive nearby agricultural operations. The Report then identifies adjacent land uses by simply listing, in the most general terms, the various uses that exist on the adjacent lands—agricultural, residential, industrial. *Id.* at 9–11. The Report does not include any detail on the nature of the adjacent uses. *Id.*

Next, the Report purports to assess the potential adverse impacts of the various uses within the five proposed industrial use categories. *Id.* at 12–14. This “assessment” consists of a basic list of different types of impacts associated with each use category. *Id.*, Table 1. The Report does not describe the scale or nature of the adverse impacts for any specific use within the proposed use categories. The Report then compares the general list of impacts for the proposed uses to a similar list of impacts for the existing uses within the rezone study area, again, with no discussion of the scale or nature of the impacts. *Id.* at 15–18. Based on this basic comparison, the Report concludes that adjacent uses would not experience any greater level of adverse impacts from the proposed industrial uses than is already experienced at Port Westward. *Id.* at 19. The Report concludes with listing numerous federal, state, and local agencies and regulatory programs that may be applicable to the various proposed industrial uses and relies on these programs to demonstrate compatibility. *Id.* at 20–49.

V. The Port’s Compatibility Report Does Not Demonstrate Compliance with OAR 660-004-0020(2)(d).

While the Port’s Compatibility Report is over 50 pages in length, it adds little substance to the County’s prior findings and evidence regarding compatibility and thus, similarly fails to satisfy the goal exception standard.

A. The Report’s identified study area is inadequate.

In defining the compatibility study area, the Report begins by incorrectly asserting that “the Port would be justified in identifying a compatibility study area that includes only those parcels which immediately abut the zone change area.” Report at 7. While the Report ultimately extends the study area beyond merely adjacent parcels to include “all contiguous parcels which are wholly or partially within 2,000 feet of the zone change area,” the identified study area is

nonetheless unjustifiably limited and inconsistent with the requirements of OAR 660-004-0020(2)(d).

First, the Report artificially limits the study area by confining it solely to contiguous land parcels. In doing so, the Report arbitrarily cuts off the compatibility study area at water bodies, which in some instances results in the study area ending at the boundary of the rezone area. *See* Report, Figure 3 (map of study area). Per the Report's own definition of "adjacent," and using the minimum threshold of land parcels for defining the study area, the boundary should extend at least to all parcels within 2,000 feet of the zone change area, regardless of whether they are contiguous or separated by a body of water. *See* Report at 7 (defining "adjacent" as including "not distant: nearby"). For example, along the northeastern boundary of the proposed rezone area it appears that the 2,000-foot study area should include parcels of land on Crims Island, across Bradbury Slough. The Report provides no indication that the adverse impacts of the proposed uses experienced on the Crims Island parcels would be any less or different than the impacts experienced on contiguous land parcels within 2,000 feet of the rezone area. Thus, there is no justification for limiting the study area to contiguous parcels, when there are likely to be the same or similar impacts on non-contiguous parcels within the same 2,000-foot distance from the rezone area.

Second, the Report does not provide adequate justification for limiting the consideration of adverse impacts to contiguous parcels that are within the 2,000-foot study area. The Report casts the 2,000-foot study area as a gratuitous expansion of what is required by the compatibility standard, offered by the Port out of the goodness of its heart. However, the language of the rule is not so confined, as the Port would have it. While the Report focuses on adjacent or contiguous parcels, the actual text of the compatibility standard is concerned more broadly with "adjacent uses." ORS 197.732(2)(c); OAR 660-004-0020(2)(d) (emphasis added). A particular land use often extends well beyond an individual parcel, particularly in rural areas such as Port Westward.

The proposed rezone area is surrounded primarily by agricultural uses. Report, Figure 4. While the Report's map showing adjacent uses stops at the 2,000-foot boundary, *see id.*, the uses themselves continue beyond the 2,000-foot mark. Indeed, the adjacent agricultural lands extend well beyond the Report's artificial 2,000-foot boundary. *See* Report, Figure 2 (showing zoning of broader Port Westward vicinity area). As discussed in detail below, the proposed uses are likely to cause adverse impacts to adjacent agricultural uses well beyond 2,000 feet from the rezone area. *See supra* Part V.D. For example, water quality and hydrologic impacts from the proposed uses will likely impact adjacent agricultural uses within the entire Beaver Drainage District. The rule provides no support for limiting the compatibility analysis based on adjacent or contiguous parcels, especially where, as here, the adjacent land uses cover broad areas of land and may be adversely impacted regardless of where the parcel lines are drawn.

Finally, by defining the study area based on land parcels, the Report entirely ignores a major component of the required compatibility analysis. The compatibility standard requires the County to demonstrate not only how the proposed uses are compatible with adjacent land uses, but also "that the proposed use is situated in such a manner as to be compatible with surrounding natural resources and resource management or production practices." OAR 660-004-0022(2)(d). This provision of the rule is clearly intended to extend the compatibility analysis beyond

“adjacent land uses” to require consideration of areas and activities that may not be confined to particular parcels or defined by the designated zoning. Moreover, in using “surrounding” instead of “adjacent” the rule indicates that a less rigid approach is warranted when evaluating compatibility with natural resources. As discussed further below, the surrounding area supports several important natural resource uses. The Report entirely excludes these areas and uses from the compatibility analysis and thus fails to demonstrate compliance with the rule.

B. The Report’s discussion of the surrounding uses and natural resources is inadequate.

In addition to the inadequacy of the compatibility study area, the Report also fails to adequately describe the adjacent and surrounding uses and natural resources that will be impacted by the proposed industrial uses. The Report glosses over the nature of adjacent agricultural uses and entirely omits any reference to surrounding natural resources and resource management and production. These inadequacies result in an incomplete picture of the area and uses surrounding the proposed rezone and renders the compatibility analysis effectively meaningless.

Completely missing from the Report’s description of the adjacent uses is any reference to the sensitive and high-value agricultural uses that occur adjacent to the proposed rezone area. The Report references agricultural uses generally in describing the adjacent and “non-adjacent” land uses, but then inexplicably makes multiple specific references to tree farms while at the same time lumping all other agricultural uses together as “other agricultural cropland.” Report at 9–11. These “other agricultural croplands” include a U-pick blueberry operation and the Seely Mint farm. *See* Exhibits 2, 3. Further south of the rezone area there are more sensitive agricultural operations, including an all-natural cannabis farm and the Hopville Farms commercial blueberry operation. Exhibit 4; Rec. 370–71 (James Hoffman comments).² The Report does not acknowledge the distinct nature of any of these adjacent agricultural uses. These are sensitive crops, which are sold for human consumption and must meet certain standards that do not apply to tree farms.

Moreover, the Port fails to disclose that the Lower Columbia Tree Farm, LLC/Greenwood Resources, which managed the tree farm on lands surrounding the rezone area has discontinued its operations and all of those lands have been or are in the process of being sold off for other uses. Exhibit 5. Thus, the Report’s reference to only this one type of agricultural use is even more problematic as it does not accurately represent the current or future state of the surrounding uses.

² Citations to “Rec.” are to the record of the current remand proceedings before the County, as compiled on the County’s website (<https://www.columbiacountyor.gov/departments/BoardofCommissionersOffice/PortWestwardRezoneRecord>). Citations to “2014-Rec.” refer to the record for LUBA Case Nos. 2014-017/2014-018, which is incorporated into the record in this proceeding. Citations to “2018-Rec.” refer to the record for LUBA Case No. 2018-020, which is incorporated into the record in this proceeding.

LUBA directed the County, on remand, to adopt findings that “address the characteristics of uses on adjoining areas[.]” *Riverkeeper II*, 78 Or LUBA 547, slip op. at 36. By lumping all agricultural uses together, the Report makes it effectively impossible for the County to make adequate findings regarding compatibility. The Report’s broad generalization of other adjacent agricultural uses is a clear attempt by the Port to avoid addressing the important distinctions between the characteristics of commercial tree farms and blueberry, heirloom mint, and other crop production and how those uses may be differently impacted by the proposed uses.

Additionally, the Report neglects to disclose that over 450 acres of the proposed rezone area that has historically been used as a tree farm are being converted to other agricultural uses pursuant to recently issued leases from the Port. *See* Report at 9. In 2010, the Port entered into a purchase agreement for 740 acres that were previously owned and managed as a poplar plantation by the Lower Columbia Tree Farm. Exhibit 6. Per that agreement, tree farming on the property could continue until 2025 or until the Port identified an alternate use of the property. *Id.* In May 2020, the Port entered into two new lease agreements for the subject property to allow cattle grazing and an expansion of the Seely Mint farming operation into the rezone area. *Id.* The Report does not acknowledge these agricultural uses.

Perhaps the most glaring omission from the Report’s description of the compatibility study area is any reference to the important natural resources and resource management and production operations surrounding the rezone area, as is required by OAR 660-004-0020(2)(d). For example, the Report does not include any discussion or consideration of adverse impacts on the Columbia River, Bradbury Slough, or other surrounding waterways. The Report states that the reason for this omission is that “[t]he extent of the County’s zoning authority is limited to land uses rather than waterways such as the Columbia River . . . so waters of the United States and waters of the State have not been cataloged here.” Report at 9, n 13. However, the compatibility standard is not limited to those areas or uses for which the County has zoning authority and there is no justification for the Port’s failure to evaluate compatibility with respect to these important natural resources.

It is the Port’s burden, as the applicant, to demonstrate with substantial evidence that the goal exception criteria are satisfied. However, in an effort to highlight the gross inadequacy of the Port’s analysis, Riverkeeper submits the following examples of surrounding natural resources and resource production and management uses that are missing from the Report. If the Port were to conduct a complete analysis, it is likely that additional natural resources and uses would be identified.³

The Columbia River, as well as riparian areas surrounding the rezone site that are below the ordinary high water line, are designated critical habitat for thirteen separate evolutionarily significant populations of salmon and steelhead listed under the federal Endangered Species Act. 2014-Rec. 3040, 4253; *See* Exhibit 1 at 9–10 The Columbia River also supports important

³ If the Port supplements the Compatibility Report to attempt to correct these inadequacies and address surrounding natural resources, Riverkeeper intends to request that the County reset the schedule for public testimony to allow the public to submit opening argument and evidence in response to the Port’s supplemented application materials.

commercial and tribal fisheries. The Port Westward area is within the Columbia River Estuary, which serves as key transition habitat for listed anadromous fish species. 2014-Rec. 4585. The Thompson property and adjacent riparian areas are not merely “forested,” as the Report characterizes them. These areas contain protected wetland features, including Freshwater Forested/Shrub Wetlands and Freshwater Emergent Wetlands, that are part of the U.S. Fish & Wildlife Service’s National Wetlands Inventory. 2014-Rec. 4250.

Across Bradbury Slough, Crims Island is also almost entirely protected wetland areas. *Id.* The majority of Crims Island is also designated and managed as part of the Julia Butler Hansen National Wildlife Refuge which provides important habitat to threatened Columbia white-tailed deer, as well as migratory waterfowl and other wildlife. Exhibit 7 at 15, 19. Between 2004 and 2006, several federal agencies partnered to complete a major restoration project to restore tidal marsh and riparian forest on Crims Island to provide rearing and foraging habitat to fall Chinook, chum, and coho salmon. *Id.* at 37; *see* 2014-Rec. 4797, 5658. There are several other restoration sites in the vicinity of the rezone area that would be impacted by the proposed uses. *See* 2018-Rec. 1587–94, 2141–42, 2307–08, 2311. The Report lacks any acknowledgment or analysis of impacts to these sites.

The Columbia River and the area surrounding the proposed rezone area supports many vital natural resources, including fish and wildlife and their habitats. *See e.g.* 2014-Rec. 2334–2541. Numerous state, federal, and private entities have devoted significant time and money to manage and restore these important natural resources. The Port completely disregards these resources in its compatibility analysis. The compatibility standard requires a demonstration that the proposed uses will be compatible with surrounding natural resources. OAR 660-004-0020(2)(d). Having entirely failed to conduct this analysis, the Report does not provide any evidence to support a finding that this prong of the compatibility standard has been satisfied.

The Report also fails to adequately discuss the nature of surrounding residential uses and incorrectly minimizes the extent of adjacent residential uses. Similarly, the Report does not include any mention of community water systems in the area that might be impacted by the proposed industrial uses.

C. The Report fails to provide any context for the scale of anticipated impacts of the proposed industrial uses and existing uses at Port Westward.

Section IV of the Report is presented as the Port’s assessment of the potential adverse impacts of the proposed industrial uses on the parcels included in the study area. Report at 12. However, the Report’s discussion of adverse impacts is a far cry from the type of analysis or assessment that is required by the compatibility standard and that was called for by LUBA. Instead, the Report merely identifies a list of potential adverse impacts for the proposed industrial uses, the existing PWIP uses, and the uses on parcels within the study area, and offers an overly simplistic assessment of those impacts based on comparing the list of impacts in each use category. Report at 12–18.

The Report begins by identifying the range of potential adverse impacts for the five proposed use categories. Report at 13–14. This exercise consists of merely listing out types of

adverse impacts that apply to all categories and then noting, for each individual use category, whether any additional impacts apply. *Id.* The Report treats all of the individual uses within each use category as having the exact same list of potential adverse impacts. *Id.* The Report notes, “[t]he differences among uses is largely a matter of scale and probabilities associated with the different production processes. For instance, potential fuel spills for Dry Bulk would generally be limited to those volumes contained in vehicles or machinery, whereas Liquid Bulk carries the risk of fuel spills from storage tanks and loading and unloading to and from the zone change area.” Report at 13. However, the Report does not go any further in actually describing or analyzing the important differences in scale of the potential impacts of the various proposed uses. This is in direct disregard of LUBA’s direction on remand:

“We also agree with petitioners that adequate findings regarding compatibility would start by identifying the likely adverse impacts of typical uses authorized under the five approved use categories, evaluating each use category separately, and if necessary specific types of uses within each category. As petitioners argue, the potential adverse impacts of different types of liquid bulk terminals, *e.g.*, an oil terminal versus a fertilizer export operation, could be different enough to require a separate analysis.”

Riverkeeper II, slip op 36 (emphasis added). Simply acknowledging the potential differences in the impacts of the proposed uses, without any actual discussion or analysis of those differences, does not satisfy the compatibility standard. A starker example of the problematic nature of the Port’s overly simplistic approach is in the Report’s representation that two vastly different uses in the liquid bulk use category—petroleum and milk—will pose the exact same adverse impacts. Report at 14. It is absurd to assert that the fire and explosion risk at a milk processing or storage facility would be equivalent to that of a bulk petroleum processing and storage facility.

These inadequacies are carried forward to the Report’s discussion of the adverse impacts of the existing industrial uses at the Port Westward Industrial Park, as well as the adjacent agricultural and residential uses within the study area. Report at 15–17. For the existing PWIP industrial uses, the Report lumps them together into a single category and lists the same generalized range of potential impacts that were identified for the proposed use categories. Report at 15. Based on this simplistic comparison, the Report concludes, the “existing industrial uses within the study area have potential adverse impacts which entirely align with those noted for the proposed uses.” *Id.* (emphasis added); *see also* Report at 16 (“The potential offsite impacts from the five proposed industrial uses are largely the same as those that are already present from the existing industrial uses.”).

This approach is problematic for at least two reasons. First, even if this sort of generalized and high-level assessment of potential adverse impacts was warranted for the proposed and yet-undeveloped industrial uses in the rezone area (which it is not), it is certainly not adequate for assessing the actual adverse impacts of the long-existing industrial uses at Port Westward. The Port’s approach is simply lazy and fails to meet the requirements of the standard.

Second, the limited scope of the existing uses at the PWIP cannot serve as proxies for the open-ended and broad categories of industrial uses proposed for the rezone area. For example,

the adverse impacts of an electrical generating facility cannot reasonably be equated with those of an industrial sawmill or pulp and paper operation. Nonetheless, the Report relies on the “successful coexistence of existing industrial and non-industrial uses in the area” as “strong evidence that the rezone area’s five rural industrial uses can indeed be made compatible with adjoining uses.” Report at 19. As in the prior remand proceeding, evidence (or lack thereof) regarding the adverse impacts of the few existing industrial uses at Port Westward is not substantial evidence to support a finding of compatibility for the broad range of industrial uses proposed by the Port. *Riverkeeper II*, slip op 35–36. The Report offers almost nothing new to the inadequate analysis that formed the basis of the County’s unlawful and unsupported decision in 2018.

The Report applies this same flawed approach to assessing the adjacent agricultural and residential uses. While the Report again acknowledges that any adverse impacts from agricultural and residential uses are “likely at a small scale,” the Report provides no discussion of the varying scale of impacts associated with the different uses. Report at 15. This failure results in the absurd and incorrect implication—highlighted in Table 3 of the Report—that certain impacts from agricultural and residential uses are equal to those of large-scale industrial operations. Report at 18. The Report then suggests that the proposed industrial uses may actually be less impactful than agricultural or residential uses, because “the industrial uses are subject to more stringent environmental regulation than non-industrial uses.” Report at 16. The Report’s own examples demonstrate the absurdity of this comparison. For instance, it is a matter of common sense that a single-family residential on-site wastewater system would be regulated differently than wastewater treatment at large-scale industrial facility. *See* Report at 16–17. The Report entirely ignores the differences in scale between these various uses and cannot be taken seriously.

Moreover, even if comparison of the impacts of the existing industrial, agricultural, and residential uses to the proposed industrial uses was adequate for demonstrating compatibility, there are several identified adverse impacts that are not associated with the existing uses. Specifically, the Report identifies “navigation impacts,” “dike impacts for any levee modifications,” “wildlife impacts” and “combustibility” as adverse impacts which apply only to the proposed uses and are not associated with any of the existing industrial, agricultural or residential uses. Report at 18, Table 3. However, the Report does not provide any discussion or analysis of these impacts—beyond simply listing them—or otherwise explain how they will be compatible with the existing surrounding uses and natural resources.

Finally, it is unclear why the Report analyzes the “adverse impacts” of the adjacent agricultural and residential uses at all. The Port is required to demonstrate that the proposed industrial uses are compatible with the existing surrounding uses, not the other way around. The rezone area and the surrounding lands have already been planned and zoned for agricultural and residential uses. It is the Port’s proposed industrial uses that do not belong and that must meet the criteria required to justify taking an exception to Goal 3, which is intended to protect agricultural land. LUBA directed the County to “address the characteristics of uses on adjoining areas, and assess vulnerability to potential externalities from industrial uses in the exception area[.]” *Riverkeeper II*, slip op 36 (emphasis added). By falsely equating the scope and scale of impacts

from agricultural uses with those of the proposed heavy industrial uses, the Report entirely fails to satisfy LUBA's directive.

Without disclosing and analyzing the scale of potential adverse impacts of the proposed industrial uses, it is impossible for the County to determine whether those uses are compatible or what specific measures are needed to reduce adverse impacts to a compatible level. The Report asserts that "rural industrial uses can safely exist side-by-side with non-industrial uses if appropriate mitigation is in place[.]" Report at 19. But how is the County to determine what "appropriate mitigation" is without knowing the scale of the impacts to be mitigated? As discussed further below, buffers, setbacks, and other mitigation measures are meaningless unless they are specifically designed to address particular impacts. This necessarily requires an analysis of the scale and extent of the potential adverse impacts. The County cannot make a finding of compatibility based on the Port's bare-bones Report.

D. The Report fails to adequately address adverse impacts to surrounding agricultural uses and natural resources.

Because the Report completely fails to provide any level of detail of the potential adverse impacts of the proposed uses, it is virtually impossible to analyze whether those uses will in fact be compatible with the surrounding agricultural uses and natural resources. The proposed uses include multiple heavy industrial uses, which have the potential to cause harmful pollution to surrounding water sources, pose serious health and safety risks to the area, and impact wildlife and habitat.⁴ Riverkeeper again notes that it is the Port's burden to demonstrate that the proposed uses will be compatible, which necessarily requires a complete disclosure of the potential adverse impacts of those uses. However, in an effort to further illustrate the inadequacies of the Port's analysis, Riverkeeper discusses several of the most likely adverse impacts of the proposed uses and how those impacts are incompatible with surrounding uses.

1. Water Quality/Hydrology

The Report does not discuss the specifics of the wastewater and on-site stormwater that will be produced with each of the various proposed uses. The Report also does not discuss the

⁴ The Report asserts, "in large part specifically to maintain compatibility with neighboring properties, the Port selected a narrow list of uses after evaluating and rejecting other uses with objectionable impacts." Report at 19, n 19. This is false. The Port's April 13, 2017 remand application states, "as suggested by LUBA, on remand the Port has also narrowed down its list of proposed uses in the exception area from all those authorized under [CCZO] Section 680 to the [five proposed use categories]." April 13, 2017 Remand Application at 2. The Port narrowed the list of uses because LUBA indicated that it would be difficult for the County to justify a goal exception for every single use allowed in the RIPD zone, particularly where many of those uses have no dependence on the deepwater port and dock. *Id.* at 5, 7. The Port eliminated uses because they are not justified under its chosen reason; that decision had nothing to do with avoiding objectionable impacts to neighboring uses. This is clear from the fact that the five proposed uses include some of the most intensive and polluting activities allowed in the RIPD zone.

level of fill and surface hardening that will be required to make the rezone area developable for industrial uses and how that will impact the hydrology and surface water flow of the surrounding area. Water quality and surface water flows are important factors that impact agricultural operations. Industrial development also presents significant impacts to surrounding natural resources from stormwater and other pollution. The Report does not address these impacts in any level of detail.

Dr. Johnathan Rhodes prepared a report in 2017 to address the likely impacts of the five proposed use categories on hydrology and water quality of the surrounding area. Despite having been provided a copy of the Rhodes report in the prior remand proceeding, and being specifically directed by LUBA to address water quality impacts on this remand, the Port has again failed to address these issues. *Riverkeeper II*, slip op 26; Rec. 372–79. Dr. Rhodes prepared a report based on over 35 years of professional experience in hydrology and hydrogeology, as well as an onsite review of the area. Rec. 373.

Dr. Rhodes’ report discusses the probable adverse impacts to water quality from industrially polluted water, and the area’s high water table, resulting in frequent mixing of ground and surface water during rainy winter months. Rec. 373–79. The report notes the risk of water contamination caused by increased surface flow of polluted runoff onto agricultural lands due to fill material that will be necessary to raise site elevations to achieve the flat land surface needed for large industrial uses. Rec. 375–76.⁵ The Rhodes report concludes that it is “impossible to prevent stormwater discharge from the Project areas to adjacent land and waters.” Rec. 377. Industrial pollutant runoff can increase algae and result in elevated levels of metals and hydrocarbons in agricultural water supply, all which increase cost and negatively affect marketability of farm crops. Rec. 378. Dr. Rhodes also noted that if the then-existing poplar tree plantations were harvested (which is certain to happen in light of the recent/pending sale of those parcels), those areas would likely develop wetlands due to a rise in the water table. Rec. 375.

Riverkeeper also submits the report of Dr. Richard Horner with these comments, which elaborates on the issues identified in the Rhodes report and further discusses the likely impacts of industrial stormwater pollution on the Columbia River aquatic ecosystem and its resources and beneficial uses. Exhibit 1. Dr. Horner notes that the Compatibility Report “is virtually silent on potential effects on Columbia River and wetlands water quality and aquatic life and how deleterious impacts will be countered.” *Id.* at 6. Dr. Horner points out the differences in stormwater pollutants associated with the existing PWIP uses and the uses within the five proposed use categories. *Id.* at 7–8. With respect to the wetland hydrology of the Port Westward area, Dr. Horner elaborates on the important functions of wetlands and advises, “[d]evelopment without awareness of these intricate relationships and measures to counter their effects is likely to increase storm runoff drainage to the wetlands on the Port Westward site. This outcome would

⁵ The Beaver Drainage District (“BDD”), which encompasses most of the rezone area and surrounding lands, is not certified by the U.S. Army Corps of Engineers as meeting the requirements for accreditation under National Flood Insurance Program (“NFIP”) Levee System Evaluation. Exhibit 11. NFIP accreditation means that the levee system is equipped to handle a 100-year flood event. Because the BDD is not certified, any construction within the BDD, including the rezone area, will need to be raised above the floodplain.

alter hydrology and, probably, also the floral and faunal diversity.” *Id.* at 16–17; *see also* Exhibit 13 at 8–9. As discussed further below, Dr. Horner also points out the flaws in the Port’s reliance on federal and state regulatory programs to adequately mitigate adverse impacts from stormwater runoff.

These potential impacts are particularly problematic for agricultural uses in the area in light of the Report’s reliance on the Beaver Drainage District’s dike system to isolate any potential industrial pollution from the Columbia River. Report at 44. The BDD serves to drain water from inland low-lying agricultural and residential areas that surround the rezone area to the south, east and west. If the pumps are turned off to isolate industrial pollution or spills, the lands within the BDD could be inundated rapidly, which would cause agricultural fields to become flooded with contaminated water. *See* Exhibit 14 (photos of natural flooding/inundation of fields at Port Westward). This would cause serious impacts to sensitive crops such as mint and blueberry, and may permanently damage soils with industrial contaminants. 2018-Rec at 1024–25. Even without flooding, agricultural users rely on the BDD ditches to convey irrigation water for crops. If water within the drainage ditches becomes contaminated with industrial pollutants, there would be serious impacts to surrounding agricultural operations.

Impacts to groundwater and surface water sources in the Port Westward area would also have serious potential impacts on community water systems that supply domestic and drinking water to nearby residential and commercial users. *See e.g.* Exhibit 12. The Report does not address these potential impacts.

2. Dust and Other Airborne Contaminants

The Report also fails to adequately address the potentially damaging impacts of dust and other airborne contaminants from the proposed industrial uses on surrounding agricultural uses. As discussed above, the lands surrounding the rezone area are farmed with sensitive crops that are grown and sold for human consumption, such as blueberries, mint, and marijuana. These crops must meet specific food safety and other certification standards in order to be marketable. Dust, particulates, and other airborne pollutants from the proposed industrial uses may interfere with the marketability of these sensitive crops.

The proposed use category “Dry Bulk” includes grain storage, processing and transport related uses, such as a grain elevator that handles corn, soybean, or wheat products. Dust particles from a bulk grain facility will likely travel to nearby farms and contaminate crops. Grain products cannot be loaded onto barges or other bulk carriers while it is raining because moisture can spoil the product. Exhibit 18. Thus, bulk transfers of grain will happen during dry periods when dust is likely to travel further to surrounding agricultural fields. Dust particulates associated with various grain products could have serious impacts on nearby agricultural operations and profitability.

For example, wheat dust would likely cause nearby mint grown for tea to lose its certification as a gluten-free product. This sensitive crop cannot be washed to remove dust or other contaminants because washing mint causes the oils to seep out of the leaves and can lead to mold due to excessive moisture content. Additionally, if bulk grain operations include corn or

soybean products that are genetically modified, dust that lands on nearby blueberry crops could result in farmers losing their non-GMO certification. These contaminants would also interfere with organic crop certifications.

Other uses within the five proposed use categories have additional potential adverse impacts on agricultural operations through airborne contaminants associated with petroleum, chemical, or other hazardous material processing and handling. The proposed uses will also result in significantly increased traffic to the Port Westward area, including along gravel roads. Dust generated from increased traffic on gravel roads would similarly impact sensitive mint and blueberry crops. Moreover, surrounding agricultural operations frequently use these roads to transport machinery from field to field. Delays in these operations caused by increased traffic would likely increase costs for farmers due to lowered efficiency in labor and production.

The Report does not acknowledge the scope or extent of these potential impacts on surrounding uses. The Port cannot adequately mitigate for impacts that it does not study or disclose. The Report does not demonstrate that the proposed uses will be compatible with surrounding agricultural uses.

3. Health and Safety

The Report minimizes the potential health and safety impacts associated with liquid bulk and natural gas uses that involve the bulk transport, storage and processing of fossil fuels and other volatile chemicals and substances. The Report simply notes “fire/explosion” as a potential adverse impact of each of the proposed use categories, without providing any context for the varying scale of that risk across specific use types. The risks and resulting impacts of a fire or explosion at a liquified natural gas facility or petroleum processing facility are much greater than those at a breakbulk facility that handles wind turbine components. Certain liquid bulk and natural gas uses also pose significant safety and environmental risks, including the danger of oil spills and health hazards from toxic diesel pollution from trains and sulfide gas from crude oil. 2014-Rec. 765–856. The Report does not identify any of the unique risks or potential impacts posed by these types of uses, which are proposed for the rezone area.

The Report also fails to acknowledge the potential risk of an earthquake at Port Westward and how the proposed uses would dramatically increase the adverse impacts of an earthquake event on surrounding uses and natural resources. Port Westward is at risk of a catastrophic earthquake from the Cascadia Subduction Zone, which has a 15–20 percent chance of rupture in the next 50 years and could be similar in impact to the Magnitude 9 earthquake that hit Japan in 2011. The entire Port Westward area, include the rezone area and surrounding agricultural areas are at a high risk of liquefaction in the event of a large earthquake. Exhibit 16. Bulk fossil fuel storage and processing facilities pose serious health and safety risks from explosions and fire as a result of seismic vulnerabilities.

A recent example of the potential risks posed by proposed bulk petroleum and natural gas storage uses is the October 2019 explosion at the NuStar Energy facility in Crockett, CA after a 4.5 magnitude earthquake struck near the facility. Exhibits 19–21. The tanks erupted in flames for several hours and an explosion blew the roof off one of the storage tanks. Thousands of local

residents were forced to stay in their homes to avoid dangerous air pollution, the nearby interstate I-80 was closed for several hours, and it is estimated that thousands of barrels of industrial chemicals were released from the tanks. *Id.* The impacted tanks were only at 1% of their storage capacity, indicating that the impacts could have been much worse had the tanks been filled. Exhibit 20.

In addition to risks with storage tanks, bulk petroleum and natural gas facilities also involve high-risk transport of volatile liquids. Oil trains associated with bulk fossil fuel storage and processing have a high rate of hazardous spill incidents. Exhibit 22 at 41; Exhibit 23. In 2016, an oil train derailed in the Columbia River Gorge in Mosier, Oregon spilling 1,000 barrels of oil and affecting local drinking water facilities. Exhibit 24. In August 2018, a train carrying tar sands crude oil derailed in Doon, Iowa and released 230,000 gallons of tar sands crude into a local river. Exhibit 25. In September 2019, a Union Pacific train carrying liquified petroleum gas (LPG) derailed in Portland and struck a support beam for an overpass bridge, closing off the main access point to the Swan Island industrial area. Exhibit 26. Thankfully, none of the tank cars leaked, which likely would have caused significantly more damage to the bridge and surrounding area and prolonged disruption of access to Swan Island. And just last month, a train carrying crude oil to a refinery in Whatcom County, Washington derailed in a small community and burst into flames, causing road closures and evacuation of the surrounding community. Exhibit 27.

Any one of these extremely high-risk events at Port Westward could cause serious impacts to nearby agricultural uses and natural resources. A major spill or explosion involving hazardous materials could contaminate nearby water sources and land, destroying crops and rendering agricultural operations impossible for the long term. The Report fails to explain how these potential adverse impacts are compatible with the surrounding high-value agricultural uses or how the unspecified mitigation measures will ensure compatibility.

4. Impacts to Fish & Wildlife

As discussed in detail above, the compatibility standard requires the Port to demonstrate that the proposed uses are compatible with surrounding natural resources and resource management and production practices, but the Report almost entirely ignores the important natural resource values surrounding the proposed rezone area. *See infra* Part V.B. In identifying the potential adverse impacts of the proposed uses, the Report lists “wildlife impacts” for each of the five proposed use categories. Report at 13. Notably, this is one of the identified impacts which the Report attributes only to the new proposed industrial uses and thus, offers no point of comparison for impacts associated with existing uses in the PWIP or surrounding area. However, the Report provides no discussion or explanation of the scope, extent, or type of adverse impacts that the proposed uses will have on wildlife.

The segment of the Columbia River that passes along Port Westward is designated for multiple beneficial uses, including fish and aquatic life, wildlife and hunting, and fishing, as well as a migration corridor for salmon and steelhead. OAR 340-41-0101, Tables 101A & 101B. The River supports multiple species of salmonids, which are vital to tribal, recreational and commercial fishing practices up and down the River. Exhibit 1 at 9, Exhibit 28. Sturgeon also

use habitat in the vicinity of Port Westward. Exhibit 1 at 10. Wetlands surrounding the rezone area and on nearby Crims Island support a diversity of wildlife and fish species and provide important ecological functions. *Id.* at 10–11.

The proposed industrial uses have the potential to negatively impact the fish and wildlife populations and habitats at and around Port Westward, particularly through water pollutants. *Id.* at 11–17. In his report, Dr. Horner explains how certain pollutants associated with uses in the proposed industrial use categories are likely to impact water quality and aquatic resources. *Id.* Dr. Horner also discusses the likely impacts on wetland hydrology and functioning as a result of fill and intrusion from development in the rezone area. *Id.* at 16–17. The Compatibility Report does not address any of these potential impacts.

The proposed rezone area and surrounding lands also provide important habitat for the endangered Columbian White-tailed (“CWT”) deer. Several agencies have undertaken significant efforts to protect the CWT deer’s habitat within the region, including establishing the Julia Butler Hansen National Wildlife Refuge for Columbian White-tailed deer on nearby Crim’s Island in 1971. Exhibit 7 at 16. In 1983, the U.S. Fish & Wildlife Service adopted a recovery plan for the CWT deer. Exhibit 9 at 60. One of the key measures of that plan is to “ensure that at least 4,600 hectares (11,500 acres) of low-lying pastureland in private ownership will remain in agricultural production with farm management practices....” *Id.* The entire Port Westward area is designated as a priority area for CWT deer. *Id.* at 65. The Report does not address the potential impacts to CWT deer from the proposed uses or how the rezone will interfere with ongoing recovery and habitat restoration efforts on surrounding lands.

E. The Port cannot rely on other federal, state, and local regulatory programs to demonstrate compatibility.

The Report’s ultimate conclusion regarding compatibility relies almost entirely on federal and state regulatory programs, which involve issues that are outside the County’s authority and that may or may not apply to the proposed uses until long after the County has made the decision to convert this high-value agricultural land for heavy industrial uses. Specifically, the Report states, “[t]he fundamental reason the existing PWW uses and the five rural industrial uses identified for the zone change are compatible with adjoining uses is that industrial operations are highly regulated at the Federal and State levels to minimize adverse impacts to adjacent land uses and area waterways.” Report at 19. The Port’s reliance on these other permitting programs is problematic for several reasons.

First, given the Report’s lack of detail and specificity regarding the type and scale of anticipated impacts for each of the proposed use categories (and specific uses within those categories), it is impossible for the County to accurately assess the level of mitigation needed to ensure compatibility. Without adequately identifying the scale and extent of adverse impacts, the Port and County cannot determine which of the federal, state, and local regulatory programs will apply to the proposed uses and therefore, whether mitigation of impacts through those programs will actually occur.

The Report takes a spaghetti-at-the-wall approach by presenting a 24-page list of what appears to be every federal, state, and local regulatory program, administered by various agencies to address multiple categories of impacts, that *could* potentially apply to the proposed uses. Report at 20–44.⁶ The Report concludes, “[t]he regulations are adequate to ensure the adverse impacts from the five rural industrial uses can be adequately mitigated so as to be rendered compatible with adjacent land uses, as required for the requested Goal Exception.” *Id.* at 19. However, the Report does not explain which regulatory programs (and within them which permits, standards, or mitigation requirements) will actually apply to the various uses being proposed for the rezone area. Instead, the Report provides an overly simplistic table, listing the various regulatory programs and checking the box for which programs “would likely apply to representative examples for each of the five proposed rural industrial uses[.]” *Id.* at 46, Table 5. The problem with this approach is illustrated in the Report itself, which provides: “As these regulatory programs *may* be applicable to the five proposed industrial uses, their application *will have the effect of maintaining compatibility* among the proposed rural industrial uses and adjacent land uses as required under ORS 197.732 and OAR 660-004-0020.” Report at 20 (emphases added). The Port cannot rely on regulatory programs that may or may not apply to the proposed uses to demonstrate compatibility.

Second, even assuming that the identified regulatory programs will apply to the various proposed uses, many of them do not adequately address adverse impacts to surrounding agricultural uses and natural resources. Indeed, none of the identified federal, state, or county regulatory programs are designed to address adverse impacts to, or ensure compatibility with, agricultural uses. For instance, federal regulatory programs under the Clean Water Act and Clean Air Act impose limits based on generalized standards intended to reduce or minimize pollutant levels across a broad area, such as an entire waterbody or airshed. The Report does not explain how these programs will adequately mitigate the likely adverse impacts of the proposed uses such that they will be compatible with surrounding agricultural and natural resource uses. The Port cannot pass the buck on its obligation satisfy the compatibility standard and demonstrate that a goal exception is justified.

Dr. Horner’s report discusses this issue with respect to the likely industrial stormwater impacts from the proposed uses. As discussed in detail above, the proposed uses will have potentially significant impacts on surrounding agricultural uses and natural resources from industrial stormwater. *See infra* Part V.D.1. Dr. Horner notes that the primary regulatory mechanism that would address industrial stormwater at Port Westward is Oregon’s Stormwater Discharge General Permit No. 1200-Z. Exhibit 1 at 19; *see* Report at 31 (indicating 1200-Z permit would apply to proposed uses). The 1200-Z permit applies certain terms to all industrial stormwater dischargers and additional terms for particular industrial sectors. Ex. 1 at 19. Thus, as Dr. Horner notes, “the permit cannot take into account site-specific circumstances.” *Id.*; *See* Exhibit 13 at 4 (stormwater permits are “usually statewide, one-size-fits-all permits in which general provisions are stipulated.”). This is particularly important here, where the Port is proposing industrial uses which do not currently exist in Oregon, such as petroleum processing

⁶ The Report reveals the form-over-substance nature of this exercise in admitting that some of the listed regulatory programs do not apply to any existing or proposed use at Port Westward. *See* Report at 32 (acknowledging that DEQ Biosolids Program does not apply to rezone).

and methanol production, and are thus beyond the existing experience of the 1200-Z permit. Exhibit 1 at 19. Additionally, the 1200-Z permit relies on self-reporting by permittees based on only four water quality samples per year. *Id.* Thus, Dr. Horner notes, “this regulatory mechanism is limited in its ability to ensure aquatic resource protection.” *Id.* A 2009 study commissioned by the National Academy of Sciences discusses the limitations of stormwater regulatory programs at the federal and state level and notes that “stormwater discharges would ideally be controlled through direct controls on land use[.]” Exhibit 13 at 6. In other words, state and federal permitting programs cannot substitute for mitigation measures and conditions that are specifically designed to address impacts at the local level.

Finally, these regulatory programs are routinely violated by regulated entities and are often poorly enforced and implemented. Several specific local examples are indicative of the inadequacy of the various regulatory programs to ensure adverse impacts are adequately addressed. For example, a review of Oregon DEQ’s enforcement database shows that the agency levied penalties in 180 separate enforcement actions related to air, water, and land-based permitting violations over a 12-month period between November 2019 and November 2020. Exhibit 29. This high level of noncompliance demonstrates the inadequacies of these regulatory programs in protecting the environment and preventing adverse impacts from pollution sources.

In many instances, the responsible regulatory agency does not step in to enforce these programs in response to industry violations. In October 2020, Columbia Riverkeeper sued the Port of Longview under the federal Clean Water Act over the Port’s failure to comply with the conditions of its Industrial Stormwater General Permit. Exhibit 30. The alleged violations include the Port of Longview’s failures to collect adequate samples, prevent illicit discharges, timely submit required monitoring reports, implement an adequate pollution control plan or best management practices, and to take appropriate corrective actions as required by the permit. *Id.* Similarly, in November 2020, Riverkeeper notified the Port of Vancouver of its intent to sue for similar violations of the Port’s Industrial Stormwater General Permit. Exhibit 31. These types of citizen enforcement actions are necessitated by the failure of state or federal regulatory agencies to enforce their regulatory programs, whether as a result of inadequate agency resources and staffing or a lack of political will.

These factors also likely contribute to ongoing inadequacies with the agencies’ implementation and application of these regulatory programs. A 2019 study by the National Academy of Sciences identified recommendations to EPA for updating and strengthening the Multi-Sector General Permit for industrial stormwater and noted that EPA has been slow to adapt the program to the best available science and new information. Exhibit 32 at 7–14.⁷ In 2018, Riverkeeper sued Oregon DEQ over inadequacies in its stormwater permitting program. Exhibit 33. The lawsuit resulted in a settlement that requires DEQ to add protections for heavily polluted water bodies and increase reporting obligations on permitted entities. *Id.*

In 2017, in response to a draft industrial stormwater permit for the Tesoro-Savage oil-by-rail terminal proposed in Vancouver, WA, numerous parties, including state and federal agencies, conservation organizations, scientific experts and the general public, weighed in to

⁷ Oregon’s 1200-Z permit is modeled after EPA’s Multi-Sector General Permit.

document how the proposed project would harm designated uses, violate water quality standards and conflict with state policy to improve water quality. *See* Exhibit 34. Ultimately, the project was rejected by state officials. A similar type of facility would be authorized under the Port’s proposed rezone and goal exception. Recently, a federal court in Washington vacated federal permits for the proposed Kalama Methanol Refinery after finding that the Army Corps of Engineers failed to comply with the National Environmental Policy Act and Clean Water Act when issuing the permits. Exhibit 35. Specifically, the court found that the agency failed to consider the cumulative impact of greenhouse gas emissions caused by the project and regional pipeline and failed to consider the project’s costs to the public. *Id.* Northwest Innovation Works, the company behind the Kalama refinery, already holds a lease option to develop the same type of facility within the proposed rezone area. Exhibits 36 & 37.⁸

The various regulatory programs referenced in the Report are clearly inadequate to ensure that adverse impacts are addressed and mitigated to an extent to achieve compatibility with surrounding agricultural, residential and natural resource uses. The Port cannot rely on these programs as a substitute for a legally adequate compatibility analysis.

VI. The Proposed Conditions of Approval are Inadequate to Demonstrate Compatibility.

The Port’s Compatibility Report and the County Planning Staff Report rely on conditions of approval to “ensure that the future development is fully protective of and compatible with its surrounding.” Report at 49–53; Staff Report at 27–28, Attachment 1 at 3–5 (Ordinance No. 2018-1). With one exception, these conditions are the exact same set of conditions that were imposed in the County’s prior remand decision. The Port proposes that the County adopt one new condition of approval to require future industrial applicants to confirm “prior to occupancy” that they have obtained all applicable Federal, State, and local permits. The proposed conditions are not adequate to demonstrate compatibility and constitute an impermissible deferral of compliance with the compatibility standard.

Indeed, LUBA already rejected this approach as inadequate to satisfy the compatibility standard in *Riverkeeper I*. 70 Or LUBA at 203–04. In that decision, the County had relied on site design and conditional use standards, which would be applied to future development proposals, to ensure that compatibility would be addressed. LUBA held that approach was “not consistent with the language of OAR 660-004-0020(2)(d)” that allows compatibility to be demonstrated through “measures designed to reduce adverse impacts.” *Id.* LUBA explained that the county could not simply identify some other process in the future that would identify and impose specific mitigation measures as the basis for finding compatibility. *Id.*

On remand, the County adopted a longer set of approval conditions, including Condition 4, which required future applicants to conduct an agricultural impact assessment at the time they submit a development application. Ordinance 2018-1 at 4. On appeal, LUBA again rejected the

⁸ On January 19, 2021, Washington Department of Ecology denied a key shorelines permit for the proposed Kalama methanol facility after deciding it would have significant negative impacts on the climate, Washington’s shorelines, and the public interest.

County’s overreliance on conditions of approval. *Riverkeeper II*, slip op at 36–37. LUBA held that because the County had failed adequately address the characteristics of the surrounding uses and the vulnerability of those uses to the potential adverse impacts of the proposed uses, the decision over-relied on conditions of approval and thus, represented an impermissible deferral of demonstrating compliance with the compatibility standard. *Id.*

The same issue is being repeated in this remand. As discussed throughout these comments, the Port’s analysis fails to adequately describe the surrounding agricultural uses and natural resources, fails to adequately disclose the types and scale of impacts presented by the proposed industrial uses, and fails identify mitigation measures that will ensure compatibility. The conditions of approval adopted in Ordinance 2018-1 continue to be inadequate to demonstrate compatibility. For example, the Report relies on these conditions as providing “appropriate mitigation” to ensure compatibility through the use of buffers, setbacks and other separation. Report at 19. However, the conditions do not specify what types of buffers or setbacks will be provided. Instead, Condition 4(c)—which is part of the condition “to ensure compatibility with adjoining agricultural uses”—merely provides,

“All development adjacent to land zoned PA-80 shall include buffers that are established and maintained between the industrial uses and adjacent land uses on PA-80 zoned land, including natural vegetation and where appropriate, fences, landscaped areas and other similar types of buffers.”

Ordinance 2018-1 at 4. The Port has not provided any evidence demonstrating what types of buffers will be required to adequately mitigate the various adverse impacts from the proposed industrial uses. The County’s other conditions of approval that are intended to ensure compatibility fail for this same reason. Thus, the County cannot rely on these vague conditions as “measures designed to reduce adverse impacts.” OAR 660-004-0020(2)(d).

The proposed addition of a new condition of approval requiring applicants to obtain all Federal, State, and local permits does not resolve the issues with the County’s prior decision. Importantly, the proposed condition only requires applicants to demonstrate compliance with these other regulatory programs “prior to occupancy.” Staff Report at 26. Many of the adverse impacts discussed above and ignored in the Report will occur during site preparation and construction, well before the proposed industrial facilities are ready for occupancy. At that point, it will be far too late for the County to ensure compatibility with surrounding uses and natural resources. Additionally, the County has no control over whether future applicants actually comply with permitting requirements prior to occupancy.

A recent example illustrates that industrial operators, such as those being proposed for the rezone area, cannot be relied upon to obtain all necessary federal and state permits prior to engaging in activities that will harm surrounding uses and natural resources. Columbia Riverkeeper recently filed a Clean Water Act suit against Perennial Wind Chaser, LLC for failing to obtain a required DEQ stormwater permit prior to beginning construction on its gas-fired power plant in Hermiston, Oregon. Exhibit 38; *see also* Exhibit 40 (Notice of Intent to Sue Zenith Energy for similar violations). The facility had gone ahead with constructing an access

road on the site, despite a condition imposed by state regulatory authorities requiring the facility to obtain all necessary permits prior to construction. Exhibit 39.

Reliance on these other permitting processes to demonstrate compatibility constitutes an impermissible deferral of the determination that is required by OAR 660-004-0020(2)(d). “Generally, whether a comprehensive plan amendment complies with an applicable statewide planning goal or an administrative rule implementing the goal must be determined before the plan amendment is adopted, and cannot be deferred to a subsequent permit proceeding after the plan amendment is adopted.” *Riverkeeper I*, 70 Or LUBA at 205. In order for such a deferral of compliance to be permissible, the Port and County must demonstrate that later permitting processes are “‘infused’ with the same participatory rights” as this goal exception proceeding. *Id.* at 204–05 (citing *Gould v. Deschutes County*, 216 Or App 150, 162 (2007)). The Report makes no reference to the participatory rights involved in any of the numerous and potentially applicable federal, state, or local regulatory programs.

VII. Conclusion

The Port has had multiple chances to attempt to demonstrate that its open-ended and undefined proposal to expand the Port Westward Industrial Park satisfies the standards for taking an exception to Goal 3. Yet, after 7 years the Port has still failed to adequately identify the scale and extent of likely adverse impacts from the proposed uses, or to properly recognize the sensitive and important agricultural and natural resource uses that surround the rezone area. For the reasons presented above, the Port has failed to demonstrate that the proposed rezone satisfies the compatibility standard of the goal exception rules. Riverkeeper urges the Board of Commissioners to deny this application.

Respectfully,

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Enclosures:

- Table of Exhibits
- Exhibits 1–40

Table of Exhibits
Columbia Riverkeeper & 1000 Friends of Oregon
Testimony on Port of Columbia County Rezone Application – Second Remand
January 20, 2021

Exhibit	Document Description
1	Dr. Richard R. Horner, <i>Assessment of the Port of Columbia County's Compatibility Report for Industrial Development at Port Westward</i> . Nov. 2, 2020.
2	Google Maps image, Port Westward area showing Seely Mint farm. Accessed December 21, 2020.
3	Oregon Farm Bureau webpage for Poysky Farm. Accessed November 30, 2020.
4	Oregonic Farms, website homepage. Accessed December 21, 2020.
5	Article: <i>Oregon poplar acreage headed for auction</i> . Capital Press. November 4, 2019.
6	Port of Columbia County News Release: <i>Port approves new agricultural lease agreements with Seelys and Columbia River Ranch</i> . June 3, 2020.
7	U.S. Fish & Wildlife Service, Lewis and Clark and Julia Hansen Butler National Wildlife Refuges Comprehensive Conservation Plan and Environmental Impact Statement, August 2010. (Excerpts)
8	Oregon Conservation Strategy, Columbia River-Blind Slough Swamp, CAO 006. Accessed December 3, 2020.
9	NRCS, Long Range Strategic Approach to Conservation in Columbia County, Oregon. December 2010. (Excerpts)
10	NRCS, DRAFT Watershed Plan – Environmental Assessment for Lower Columbia Watershed Partnership Regional Conservation Partnership Program. May 4, 2019. (Excerpts)
11	U.S. Army Corps of Engineers, Portland District, Phase I Levee System Evaluation for National Flood Insurance Program Accreditation, Beaver Drainage District. March 19, 2014.
12	Oregon DEQ, Source Water Assessment Report, PGE Beaver Generating Station, Oregon. December 14, 2000.
13	Natural Research Council, <i>Urban Stormwater Management in the United States</i> . 2009. The National Academies Press. (Excerpts)
14	Photos of rezone area and surrounding lands experiencing flooding, groundwater inundation. Taken January 3, 2021.
15	FEMA, National Flood Insurance Program, Flood Insurance Rate Map No. 41009C0050D. November 26, 2010.
16	DOGAMI Hazard Maps for Port Westward Area. Generated via https://gis.dogami.oregon.gov/maps/hazvu/
17	George Plaven, <i>Developing dispute: NW Oregon port, farmers at odds over industrial expansion</i> . Capital Press. December 17, 2020.
18	Bulk Carrier Guide, Grain loading standards for seagoing bulk carriers – Limitations involved. (Accessed December 16, 2020).

19	Associated Press, <i>Officials Investigating if Earthquake Triggered Explosion, Fire at Bay Area Fuel Storage Facility</i> . KTLA5. October 16, 2019.
20	Katie Dowd, <i>Massive fire at refinery in Crockett sends flames, black smoke into air</i> . SF Gate. October 16, 2019.
21	Alix Martichoux, <i>I-80 reopens in both directions after crews contain fire at NuStar in Crockett</i> . SF Gate. October 15, 2019.
22	Crosby, S., et al. <i>Transporting Alberta's Oil Sands Products: Defining the Issues and Assessing the Risks</i> . March 22, 2013. (Appendices and references omitted).
23	Andy Rowell, <i>Transporting Tar Sands "As Dangerous" As Shale Oil</i> , Oil Change International. March 2, 2015.
24	Associated Press, <i>14 oil train cars derail in Columbia River Gorge, railcars erupt in flames; i-84 reopens</i> . KATU. June 3, 2016.
25	Associated Press, <i>Railroad: Northwest Iowa oil train derailment was related to flooding</i> . August 10, 2018.
26	Associated Press, <i>Train with liquefied gas derails, strikes overpass support beam in Portland</i> . September 8, 2019.
27	Elise Takahama, et al., <i>Investigation continues around oil-train derailment, fire in Custer, Whatcom County</i> . Seattle Times. December 22, 2020.
28	Webpage: Spirit of the Salmon Plan, <i>The Tribes' Treaty Reserved Fishing Rights</i> . CRITFC. (Accessed January 12, 2021).
29	Summary Report of Oregon DEQ Enforcement Actions November 2019 through November 2020.
30	Complaint, <i>Columbia Riverkeeper v. Port of Longview</i> , Case No. 3:20-cv-05981, Dkt. 1 (W.D. Wash. Oct. 2, 2020).
31	Letter: Notice of Intent to Sue Under the Clean Water Act. From: Kampmeier & Knutsen PLLC, obo Columbia Riverkeeper; To: Port of Vancouver. November 5, 2020.
32	National Academies of Sciences, Engineering, and Medicine 2019. <i>Improving the EPA Multi-Sector General Permit for Industrial Stormwater Discharges</i> . Washington, DC. The National Academies Press. (Excerpts). February 20, 2019 News Release included.
33	Tony Schick, <i>Oregon Settles Lawsuit Over Stormwater Pollution</i> . Oregon Public Broadcasting. August 20, 2018.
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35	Order on Cross Motions for Summary Judgment, <i>Columbia Riverkeeper, et al. v. U.S. Army Corps of Engineers, et al.</i> , Case No. 19-6071-RJB, Dkt. 83 (W.D. Wash. Nov. 23, 2020).
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37	Anna Del Savio, <i>Methanol company switches land option at Port Westward</i> . Pamplin Media Group. May 10, 2019.

38	Complaint, <i>Columbia Riverkeeper v. Perennial Power Holdings, Inc., et al.</i> , Case No. 2:20-cv-2256, Dkt. 1 (D. Or. Dec. 28, 2020).
39	Ted Sickinger, <i>Despite troubled past, critics say Oregon Department of Energy is ignoring rules to benefit power plants.</i> The Oregonian. October 27, 2020.
40	Letter: Notice of Intent to File Suit for Violations of the Clean Water Act, From: Kampmeier & Knutsen PLLC, obo Columbia Riverkeeper and Willamette Riverkeeper; To: Zenith Energy Terminal Holdings, LLC. January 11, 2021.