

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

June 2009

DRAFT: June 25, 2009

I. SUMMARY

A. *Issues*

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

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

B. *Summary of this Action*

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

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

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

II. DISCUSSION

A. *Background*

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

Goal 16 of the Statewide Planning Goals is

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

Goal 17 of the Statewide Planning Goals is

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

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

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

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

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

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

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

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

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

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

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

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

We concluded that the acknowledged Comprehensive Plan uses the term “protect” in a manner that, consistent with the state definition, includes shielding mechanisms without requiring proof that no loss, destruction or injury will occur. The Comprehensive Plan states that the timing of dredging and dredged material disposal will be coordinated with state and federal resource agencies, local governments and private interests **to protect** aquatic and shoreland resources. Comp Plan Goal 16 Policy 24, N3. Policy 20.19 of the Goal 16/17 element of the Plan identifies policies that **protect** and enhance water quality to include control of non-point sourcewater pollutants by state water quality programs; the Forest Practices Act; administrative rules; no untreated waste discharges into tributary streams, enclosed bays or sloughs; containment and clean up equipment; and appropriate waste disposal receptacles. Again, protection is provided through shielding mechanisms whether in the form of infrastructure or regulation.

The acknowledged zoning ordinance also uses “protect” in a manner consistent with the state definition of protect. “The purpose of the MI zone is to manage Columbia River Estuary shore lands in urban and urbanizable areas and shore lands in rural areas especially suited for water dependent development and to reserve these shore lands for water-dependent industrial, commercial, and high-intensity recreational use.” LWDUO Section 3.622; LWDUO Section 3.634(10). Fence is not defined in the code or the LCDC definitions and a state law definition was not located but fence is defined in *Ballentine’s Law Dictionary*, 3d ed., p. 465, as

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

Development standards governing development in the Marine Industrial (MI) Zone provide fencing will be allowed where necessary to protect property. Similarly, the County’s Beach and Dune Overlay zone protects identified recreational, wildlife habitat and other resources and provides that fencing is permitted to protect vegetation. LWDUO 4.056(4)(C)(5).

Finally, the acknowledged County Standards Document establishes, in general terms, how development will occur in the County and is consistent with defining “protect” as shielding from loss or destruction or injury. Similar to the Comprehensive Plan and the LWDUO, the Standards Document calls for design and construction to be such that fish and wildlife and associated environmental values are protected. The Erosion Control standards are intended to protect the water quality of surface water and improve fish habitat. Storm sewer inlets are

protected by sediment traps and filter barriers. S2.504(b)(5). Fish and wildlife resources are protected by performing instream work during the Oregon Department of Fish and Wildlife (“ODFW”) inwater work window. S2.504(b)(5)(b).

The use of “protect” in the section of the Columbia River Estuary Shoreland and Aquatic Use and Activity Standards that includes policies applicable to dredging and dredging material disposal is consistent with the state definition of “protect.” The timing of dredging and dredged material disposal operations shall be coordinated with state and federal resource agencies, local governments and private interests to protect estuarine aquatic and shoreland resources.

S4.232(4). Dredging operations shall be consistent with state and federal resource agency conditions, the requirements of local governments and concerns of private interests, to ensure that project timing and dredging conditions protect estuarine resources. S4.232(F). Surface runoff from disposal sites is controlled to protect water quality. S4.232(20). Thus, we conclude that the LCDC definition of protect is met by compliance with acknowledged county zoning and standard regulations stating that implementation of particular measures accomplishes protection and by construction of the development and imposition of conditions that will either save or shield the protected resource from the potential harm identified in the policy.

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

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

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

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

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

To minimize impacts and protect habitat,

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

LUBA 2008-052 Record at 020896.

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

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

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

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

- Minimization of turning basin size;
- Siting of turning basin outside the intertidal area;
- Screening of intakes; and
- Upland disposal of materials.¹

LUBA 2008-052 Record at 020863, 005508.

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

Large vertical piles will be used for inwater structures to minimize the number of piles that must be used and to allow vertical pile driving within a caisson filled with bubbles to avoid or minimize acoustic effects on fish and thus on traditional fishing areas. LUBA 2008-052 Record at 0020863. Safety zones will be established around pile driving and other construction activities to protect marine mammals. LUBA 2008-052 Record at 020896. Vibratory drivers,

¹ See discussion in prior findings of Policy 20.8 as well for a relevant discussion of the use of avoidance and minimization and the mitigation to achieve protection.

which tend to produce lower noise and vibration levels, will be used to the extent possible. LUBA 2008-052 Record at 019970. Lastly, pile driving may occur between the hours of 7 a.m. and 10 p.m. and dredging may occur 24 hours per day. These hours allow the work to be completed under a compressed schedule, reducing the number of construction days needed for pile driving and dredging. LUBA 2008-052 Record at 017663. These actions protect traditional fishing areas when disruption in water activity occurs.

Filling is also conducted so as to protect traditional fishing areas. S4.232(20) provides that water quality is protected by controlling surface runoff from dredge material disposal with disposal runoff water entering the receiving waterway through a controlled outfall at a location with adequate circulation and flushing characteristics. Surface runoff is controlled by the Project to protect water quality when disruptive inwater activity occurs. LUBA 2008-052 Record at 20869. The detailed erosion control plan required as a condition of approval must “contain adequate provisions to ensure that undesirable erosion, sedimentation, increased flood hazard and other changes in circulation will be avoided at the disposal site and in adjacent areas.” LUBA 2008-052 Record at 00029. Erosion control is a means of protection recognized in the Code. S.2501. The Bradwood Project, as a condition of approval, must obtain all required state and federal permits and obtain approval of its mitigation plan and erosion plan. 2008 LUBA Record at 00030, 00032. The Erosion Control Development Standards expressly state that the purpose of the section is “to protect the water quality of surface water, improve fish habitat and preserve topsoil by developing and implementing standards to help reduce soil erosion related to land disturbing activities.” S2.501. Water quality is protected and fish habitat enhanced through the use of measures that reduce erosion. The use of a sediment fence stops sediment and shields the lower elevations from excessive sediment exposure, protecting the resource. The Erosion Sediment Control standards set out in S2.504 provide that development will “[p]rotect storm sewer inlets and culverts by sediment traps or filter barriers.”

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

The southeast entrance to the Clifton Channel is the one usually taken by the boats coming from Westport or Cathlamet. Closure of that entrance would result in boats having to travel around the north end of Tenasillahe Island, increasing the number of miles needed to reach Clifton Channel. Staff concluded that dredging, construction of inwater structures and subsequent security measures may block water access at least some of the time and that some fish entrapment may occur. We conclude that the “traditional fishing area” in Clifton Channel is protected: fish, fish habitat, and both commercial and sport fishing will continue in the area. Other deep draft vessels similar in size to the LNG carriers traverse the Columbia River. While the LNG Carrier (LNGC) is in transit in the navigation channel, its impact on fishers will be like the impact of those other deep draft vessels navigating the river and therefore no different from the routine part of the use of traditional fishing areas. The Clifton Channel access will further be

protected through imposition of a condition of approval limiting its closure. Clifton Channel will remain open and available to users during all periods of construction and operation with entrance and egress into the southeast entrance to Clifton Channel being limited for only the 30 to 45 minutes when a ship is maneuvering at berth, protecting areas identified by Staff as traditional fishing areas.² This corresponds to closure only approximately 2% of the year. As proposed and conditioned, the Project protects the traditional fishing areas when disruptive inwater activity occurs because traditional fishing areas are saved *or* shielded from loss, destruction *or* injury *or* for future intended use when disruptive inwater activity occurs. Traditional fishing areas such as Clifton Channel will generally remain open and accessible to fishermen when the LNGC is berthed. LUBA 2008-52 Record at 00069, 004043, 008288.

We therefore conclude that the Project and related land use actions are consistent with Policy 20.2 and protect traditional fishing areas when disruptive inwater activities occur.

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

1. Identification of Threatened and Endangered Species Policy.

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

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

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

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

Federally and state tested threatened and endangered species of salmonids were identified as potentially occurring in the area of the project. LUBA 2008-052 Record at 005022.³ Columbia white tailed deer are included on the federal list of endangered species. *Id.* at 005025. The stellar sea lion is federally listed as threatened. The marbled murrelet and northern spotted owl are listed by both the state and federal governments as threatened. LUBA 2008-052 Record at 005024-25.

²

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

³ Potential impacts on threatened and endangered species are discussed extensively in the LUBA 2008-052 Record at 005022-50117 and expressly incorporated herein.

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

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

The area proposed for dredging for the turning basin at Bradwood Landing is already deeper than 20 feet. Bradwood has intentionally designed the dredge footprint in habitat that is deeper than 20 feet (a depth considered to be deep water habitat) because it has a greatly reduced use by juvenile salmonids. The proposed dredge area is deep water habitat now and would continue to be deep water habitat after construction. Use of this type of habitat by juvenile salmon will be virtually unchanged because they predominantly use the top 10–15 feet of the water column regardless of total depth. We believe testimony on behalf of applicant to the effect that benthic invertebrates (small “bugs” that salmon and other fishes eat) that live in the deeper habitat substrate (surface) have been shown to quickly recover from dredging disturbance. LUBA No. 2008-54 Record at 003265. This is because they are present in high numbers in the area surrounding the disturbed area and they quickly re-colonize (move into) the dredged area. The young fish that would consume these invertebrates do not actually forage on the river bottom in the deep water habitat; they eat those materials and organisms that get suspended and float around closer to the surface of the water, and are constantly in motion from river currents and tidal currents. Bradwood Landing also protects habitat from incompatible development by using suction dredging, a technique that reduces turbidity. A minor increase in turbidity (suspended sediments) that contains these invertebrate food items actually has been shown to stimulate juvenile and adult salmon and other fishes to feed. LUBA 2008-052 Record at 000064-65, 003265-66, 020728, 002755. While the analysis was focused on juvenile Chinook salmonid including subyearling and yearling varieties, we received expert testimony that the analysis should extend to other salmonids. LUBA No. 2008-52 Record at 6009.

The policy providing that endangered or threatened species habitat shall be protected from incompatible development is designed to protect the habitat from “incompatible development.” The policy is not designed to protect habitat from any and all development or loss. The Bradwood site has long been recognized as appropriate for industrial port development. *See, e.g.*, LUBA 2008-052 Record at 003115, Lower Columbia River Ports

Region Study of Ports of Astoria, St. Helens and Portland; ODOT, 1975, LUBA 2208-052 Record at 003134, 003140-41. Habitat is protected from incompatible development through selection of a terminal site that has undergone industrial development since the 1840s rather than a more pristine site. LUBA 2008-52 Record at 005499, 005506.

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

Docked LNG ships will recirculate ballast water through the engines for cooling after the shore-based water supply is turned off and until the ship is ready to leave. LUBA 2008-052 Record at 005054. This avoids additional water intake and discharging heated water within the LNG berth and maneuvering area. LUBA 2008-052 Record at 005054. Heavy directional drilling will be the method for crossing streams known to contain listed salmonids to avoid impacts on listed species. LUBA 2008-052 Record at 005058.

General development standards within the Columbia River estuary require adequate landscaping, fencing and/or other buffering techniques to protect the shore land and aquatic areas. S.4.201. Protection from incompatible development is also provided because required buffer zones will be maintained between construction activities and significant wildlife resources. LUBA 2008-052 Record at 005501. Buffering shields a protected resource from an incompatible use and provides protection as discussed in Section A of these findings.

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

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

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

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

Nesting, roosting, feeding and resting areas used by resident and migrating birds are protected. Some concern was raised regarding bald eagles. LUBA 2008-052 Record at 001384, 009195. There are no bald eagle nests within 0.5 miles of the terminal site. LUBA 2008-052 Record at 005100, 013307. Bradwood Landing will minimize construction, operation and maintenance activities within 0.5 miles of any nest (or 0.25 miles if any nest is within line-of-sight of the Project). Bradwood Landing will also avoid removal of potentially suitable bald eagle nest or roost trees (e.g., mature deciduous or coniferous trees that offer an unobstructed view of the surrounding area). LUBA 2008-052 Record at 005099. Other birds' nesting, roosting, feeding and resting areas are similarly protected as set forth in LUBA 2008-052 Record at 005022-050117.

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

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

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

- (1) limiting the manner in which a use is conducted, "including restricting the time an activity may take place and restraints to minimize such environmental effects as noise, vibration, air pollution and odor,"

- (2) requiring diking, screening, landscaping or other facility to protect adjacent property, and
- (3) requiring the protection of existing trees, vegetation, water resources, wildlife habitat or other significant natural resources.

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

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

- Avoiding some areas by reducing the facility footprint and reconfiguring the terminal to lessen fill impacts and restore temporary work areas to highest habitat value;
- Maintaining required buffer zones between construction activities and significant wildlife resources;
- Reducing the number of pier pilings needed by using fewer larger diameter pilings, thus reducing inwater construction time and completing work when the fewest fish are present;
- Locating the turning basin and berth so as to eliminate the need to dredge an access channel;
- Selecting a site that has been historically an industrial development and that has naturally occurring deep water to eliminate the need to dredge in shallow water habitat;
- Using bubble filled caissons to reduce noise and minimize fish impacts during construction of pilings;

- Changing Project design to provide screened water to ships at dock for cooling engines and filling ballast tanks, to shield fish (including listed salmonids) from entrainment;
- Preserving existing shoreline bathymetry in shallow water and near shore areas to maintain migration corridor for juvenile fishes;
- Creating, improving and protecting hundreds of acres of wetlands while only impacting approximately 13 acres of wetlands to construct the LNG terminal;
- Providing compensatory mitigation for wetland and shallow-water fish habitat wetlands;
- Restoring estuarine influence of up to 65 acres of isolated, degraded and diked wetlands;
- Providing functions of pocket estuaries – protected from high flows, gives animals/fish sheltered refuge;
- Restoring habitat complexity and microhabitats that have been lost over time due to filling for dikes, riprap, seawalls, railroad and road building;
- Limiting through use of the tethered tugs the speed of LNG ships on the river to speeds below which most wake stranding occurs; and
- Requiring submittal of a shoreline monitoring plan.

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

We find that the requisite protection is provided, utilizing the LCDC definition of “protect” as applied through CCP 16/17 Policies 20.2 and 20.8.⁴

⁴ Further, we note that LUBA has previously recognized that where appropriate, a county may balance policies that could be viewed as contradictory. On page 7-169, under “Navigational Structures,” the standards document states that:

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

If a conflict is found here, Clatsop County similarly seeks to balance development with protection. LUBA has held, “When an applicable comprehensive plan policy has overlapping or conflicting policies, it is permissible for a local government to interpret and apply them in a manner that balances those policies. *See Waker Assoc., Inc. v. Clackamas County*, 111 Or App 189, 194-95, 826 P2d 20 (1992) (‘a balancing process that takes account of relative

(Continued...)

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

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

1. Identification of the Scale Policy.

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

In its decision, LUBA concluded that the County may conclude that small to moderate scale development is that occupying fewer than 100 acres. LUBA concluded, however, that while it was not clear dredging would properly be considered a part of the acreage, the County should include inwater structures, the power line and the pipeline when evaluating the scale of development against the 100-acre standard. LUBA stated that the focus of the scale limitation is development activities. On remand, the County must address the appropriate components of scale and analyze the Project’s compliance with the scale policy.

2. The Development Activities at Bradwood Are of Small or Moderate Scale, Not Involving Extensive Filling to Create New Land Areas.

As discussed in our prior findings in support of Ord 08-05 and incorporated herein by reference to the extent consistent with these supplemental findings, the development activities do not involve extensive fill to create new land areas. We also note that the reference in the policy to creation of new land areas is consistent with our conclusion below that the focus for establishing scale in this context is land-based activities.

We conclude that land-based development activity is small to moderate in scale if it permanently occupies fewer than 100 acres. The Goal 9 inventory is of industrial *lands* and describes the size of Bradwood in the context of its land area. Clatsop County Goal 9 at p. 78,

impacts of particular uses on particular goals and the logical relevancy of particular goals to particular uses is a decisional necessity.’)” *Milne v. City of Canby*, 46 LUBA 213, 234 (2004). The County Plan expresses a preference for development of existing port sites such as at Bradwood. CP P20.3. Shorelands with adjacent deep water access, adequate rail or road access shall be reserved for water dependant recreational, commercial and industrial port development. CP P20.3. Bradwood is such a site. The Clatsop County Goal 16 and 17 policies call for the protection of threatened and the protection of endangered species habitat from incompatible development. Traditional fishing areas will be protected when disruptive inwater activities occur. Comprehensive Plan policies also call for preservation of the fishing industry by “the close evaluation of industrial development and other activities to ensure compatibility and maintenance of water quality.” Northwest Community Plan General Policy 2. The policy that traditional fishing areas will be protected when disruptive inwater activities occur presumes that disruptive in water activities may in fact occur. The policy that threatened and endangered species will be protected from incompatible development presumes that development may occur. These policies considered together and balanced are consistent with the LCDC definition of “protect,” and the Plan does not require a showing that threatened and endangered species habitat or that traditional fishing areas will not be affected in any way or incur any loss, but rather promotes sensitive development that results in compatible development.

91.⁵ The Goal 9 element of the Comprehensive Plan states that “[t]he need for industrially zoned *land* is as much a result of local economic policies and economic development strategies as it is market demand. The purpose in providing a supply of manufacturing *land* is to guarantee the economic well-being of a community.” Policy 78 (emphasis added). The plan discusses the activity of the Clatsop County Economic Development Committee (“EDC”) and goes on to state that:

“Nowhere is the lack of a coordinated comprehensive economic planning strategy more apparent than in the area of manufacturing zoned land. Until the EDC took it upon itself to categorize existing vacant land, no single agency had ready access to industrially available vacant land.

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

* * * * *

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

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

Id. (emphasis added).

The Industrial Lands Inventory then goes on to state:

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

⁵ “The need for industrially zoned land is as much a result of local economic policies and economic development strategies as it is market demand. The purpose in providing a supply of manufacturing land is to guarantee the economic well being of a community.” http://clatsopcounty.us/Assets/Dept_12/PDF/Comp%20Plan%20Goal%209.pdf, p.78.

Elsewhere in the Plan it states:

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

* * * * *

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

Id. at 12.

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

The repeated references to land, parcels and tracts in the Goal 9 discussion further indicates that the County’s focus is on land area and not water area. We conclude large scale industrial development is that where the developed industrial site occupies more than 100 acres of land.⁶

Given that small to moderate scale occupies fewer than 100 acres of land we must determine the scale of development at Bradwood. The industrial site in this case is the Marine Industrial Zoned site, identified in the Industrial Lands Inventory and as modified by subsequent County action, including applicant’s applications considered in Ord 08-05. As LUBA noted in its decision, development is “any man made change to improved or unimproved real estate, including but not limited to construction, reconstruction, conversion, relocation or enlargement of any structure; any mining, excavation, landfill or land disturbance, or any use or extension of the use of land.” LWDUO 1.030.⁷ Manmade changes to the MI industrial site include construction of the LNG terminal facility. A structure is anything constructed, erected, portable

⁶ Further, we conclude that even if the dredge area were properly considered part of the development activity, it would not be properly considered part of the 100 acres. The Industrial Lands Inventory describes the deep draft accessibility of the site as a feature of its location rather than as a component of its size. Clatsop County Goal 9 p. 91. We also note that the river is already deep adjacent to the Bradwood MI site, and the Project does not propose a large increase in the depth of the river in this location. LUBA 2008-052 Record at 003265-003266.

⁷ An extension of the use of land relates to an expansion of the permitted timeline for a development (*see, e.g.*, LWDUO 5.030, discussing extensions to conditional use approvals). No extension of use is proposed here.

or located on the ground or water or attached to the ground or to an existing structure, including but not limited to residences, apartments, barns, stores, offices, factories, sheds, cabins, mobile and floating homes and other buildings. *Id.* A building is a “structure built for the support, shelter or enclosure of persons, animals, chattels or property of any kind.” *Id.* Because development, by definition, includes structures attached to the MI land or the ground or facility, the powerline, pipeline and inwater structures within the County (and thus subject to the County’s jurisdiction) are included in the acreage calculation. Access improvements, such as improvements to the state owned Hwy 30, the County owned Clifton Road or the turning basin are not development activities at the site as intended by the scale limitation or the 100 acres identified in the Industrial Lands Inventory and are not included.⁸

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

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

The proposed dredging is not a man made change to improved or unimproved real estate. Real estate is not defined in the LWDUO or other local regulations so we refer to secondary sources and conclude it refers to land.⁹ Our view of real estate is supported by those LWDUO

⁸ Also, roads are properly distinguished from structures in this case. A county road is an improved travel surface placed within a dedicated right-of-way that has been formally accepted by the county for access purposes and that is maintained by the county. This is distinguishable from a structure that is anything constructed, erected, portable or located on the ground or water or attached to the ground or to an existing structure, including but not limited to residences, apartments, barns, stores, offices, factories, sheds, cabins, mobile and floating homes and other buildings. LWDUO 1.030. In S4.210, the county sets forth standards applicable to the maintenance and construction of roads, bridges and railroads in the Columbia River Estuary and shoreland and aquatic areas and notes that these land transportations should be designed and sited to enhance areas in the Marine Industrial Shorelands. The roads are not identified as part of the industrial use.

⁹ When words are not defined, LWDUO 1.035 requires that the County look to other statute or regulation in the State of Oregon. As such we look to an Appraiser Certification and Licensing Board regulation OAR 161-002-0000(31) where “real estate” is defined as:

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

ORS 696.010(16) defines real estate to include:

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

(Continued...)

identified activities that qualify as changes to real estate. The activity of dredging does not include the “construction, reconstruction, conversion, relocation or enlargement of a structure” and thus is not an improvement in the use of land. Similarly, the dredging is not “landfill” or “land disturbance” because it occurs in water as opposed to on land. The dredging is not “mining” because it occurs in the water.¹⁰ The only possible remaining development activity that could include dredging is “excavation.” “Excavation” is “the removal by man of sand, sediment, or other material from an area of land or water for other than commercial or industrial use.” LWDUO 1.030. The proposed dredging does not qualify as “excavation” because the dredge material will be used to raise the site of the facility and because the dredging will create a turning basin that will be used to access the industrial site and allow the applicant to put the land to an industrial use. The proposed removal is for industrial use because it will allow for industrial access.

If, however, the dredging is considered “development” generally, the County concludes that it does not qualify as “development” at Bradwood. In providing that development at Bradwood will be small to moderate in scale, the context of the Comprehensive Plan establishes the Board of Commissioners’ intent was to limit “development” to that occurring on land. In the section on using the Comprehensive Plan, the Plan states that it contains information, explanation and findings in narrative form and that these statements have significance in clarifying the County’s position on each subject in the Plan. (LUBA 2007-052 Record at 000127.)

The Goal 16 section of the Comprehensive Plan addressing Bradwood states that “[t]his area includes the industrial area at Bradwood, a stretch of steep forested shoreline to the east and portions of the Columbia River. This subarea is in Clatsop County.” The plan goes on to state that the Bradwood industrial site is currently proposed for use as a rock quarry. “It is designated as a dredged material disposal site. Bradwood is privately owned.” (Clatsop County Goal 16, Policy 30.21.) Bradwood is in the subarea and identified here as the industrial site in private ownership. This description of the Bradwood site does not include the river.

The Goal 16 section goes on to state that:

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

Both of these definitions suggest that “real estate” does not include activities or man made changes occurring under water.

¹⁰ “Landfill” is not defined. LWDUO 1.030 defines mining as “premises from which any rock, sand, gravel, stone, topsoil, clay, mud, peat or mineral is removed or excavated for sale, or other reasons, and exclusive of excavating and grading for streets and roads and the process of grading a lot preparatory to the construction of a building for which a permit has been issued by a public agency.”

(impacting aquatic areas in excess of 20 acres) along the Columbia River for the purpose of creating additional industrial land is not appropriate. In order to fully utilize the marine industrial shore lands, it would be appropriate to fill the old Bradwood mill pond. This pond covers an area of less than 10 acres.” (Clatsop County Comprehensive Plan Goal 16/17, Policy 30.21.)

This supports our conclusion that land is the concern in the scale of development provision and not the water area since it is the industrial site which is identified as offering limited potential for small to medium sized industrial development.

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

3. Calculation of Scale

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

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

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

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

LUBA 2008-052 Record at 005128.

The power line right-of-way for operations is 17.8 acres. LUBA 2008-052 Record at 000220.

The length of the pipeline in Clatsop County is 6.2 miles (reference DEIS Table 2.1.4-1, pp. 2-25, LUBA 2008-052 Record at 004751), based on 30' wide maintained pipeline corridor (reference DEIS pp. 4-115, LUBA 2008-052 Record at 004690): $(6.2 \text{ miles} * 5280 \text{ ft/mile}) * 30 \text{ ft} / 43560 \text{ sqft per acre} = 22.55 \text{ acres}$ in pipeline development.

This reflects a total of 40.1 plus 17.8 plus 22.55 acres or 80.4 acres, fewer than 100 acres (conservative since it includes pipeline and powerline areas some distance from the Bradwood industrial site)¹¹, and small to medium/moderate in scale.

As discussed in the County's prior findings, the Goal 9 element of the Comprehensive Plan discusses land sites utilizing 100 acres in size as large. The total maximum area of the terminal site, the pipeline in Clatsop County and the power line is 80.4 acres.¹²

Since the maximum developed area at Bradwood contains fewer than 100 acres, the development is consistent with and meets any applicable scale policy related to development at the Bradwood site being small to moderate in size.

Lastly, if the dredging is considered "development" at Bradwood, it is not large in scale and is therefore also consistent with the plan policy. The 1990 exception for the Bradwood subarea notes that the dredge volumes associated with this prior exception are less than those typically expected at other sites because the water is already deep and close to the navigation channel. Clatsop County 12/90 Exception at 5. Dredge volumes along the dock areas would be minimal due to existing deep water and close proximity to the navigational channel. The self-scouring river characteristics will also reduce the frequency and volume of future maintenance dredging at this site. *Id.* at 5. Similarly, the water to be dredged as part of this application is also already deep and close to the navigation channel, resulting in dredge activity that is not large in

¹¹ LUBA 2008-052 Record at 015856, 015857, 020954.

¹² The permanent pipeline right-of-way is 50 feet wide (reference DEIS p. 2-35, LUBA 2008-052 Record at 004759). The permanent right-of-way is not a disturbed area and should not be considered development. We find, however, that even if it were considered development, the total acreage would remain below 100 acres, and the Project meets the scale policy.

$$40.1 \text{ acres} + 17.8 \text{ acres} + 50' * 6.2 \text{ miles} * \frac{5280 \text{ ft}}{1 \text{ mile}} * \frac{1 \text{ acre}}{43560 \text{ ft}^2} = 95.5 \text{ acres}$$

scale. Further, the record shows that in the context of other Columbia River dredging projects, ranging from 5,000 cubic yards to 19,000,000 cubic yards, the proposed dredging is medium or moderate in scale. LUBA 2008-052 Record at 003265-003266. This is moderate and not large.

III. CONCLUSION

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