

Sean T. Malone
Attorney at Law

259 E. Fifth Ave.,
Suite 200-G
Eugene, OR 97401

Tel. (303) 859-0403
Fax (650) 471-7366
seanmalone8@hotmail.com

April 13, 2015

Via Email

Mayor and City Councilors
C/O Donna Colby-Hanks
City of Brookings
898 Elk Drive
Brookings OR 97415
dcolbyhanks@brookings.or.us

Re: Comments for remand of File ANX-1-14

Dear Mr. Mayor and City Councilors,

On behalf of Oregon Coast Alliance (ORCA), please accept these comments related to File ANX-1-14. On remand from the Land Use Board of Appeals (LUBA), the applicant renews its request for a comprehensive plan change and zone change from Light Commercial (C-1) and Industrial (I) to Two-Family Residential (R-2). The applicant’s argument and proposed findings fail to satisfy LUBA’s remand instructions, and, therefore, ORCA requests that the City deny the applicant’s request on remand. ORCA incorporates by reference all materials and issues raised in writing and in person before the prior Planning Commission and City Council hearings that led to this remand.

Specifically, LUBA faulted the City for its failure to make adequate findings with regard to water availability relative to capacity and compliance with Goal 16:

- “we agree with petition that remand is necessary for the city to adopt more adequate findings, supported by substantial evidence, considering the availability of the city water supply to serve the annexation territory relative to capacity.”
- “The time to determine whether development allowed under proposed R-2 zoning complies with Goal 16 is when the zoning is adopted.

Issues were raised below by NMFS and others regarding adverse impacts on adjacent estuarine resources caused by residential development allowed under the proposed R-2 zoning. Such testimony appears to concern ‘activities which could affect the estuary’s physical processes or biological resources’ for purposes of Implementation Requirement 1. However, the city’s findings do not address that testimony, or conduct any kind of impact assessment of the kind described in Implementation Requirement 1. The findings state only that the applicant ‘has taken appropriate precautions to prevent any alteration of the estuarine ecosystem,’ but without identifying those potential alterations or what measures have been adopted to prevent them. We agree with petitioner that the city’s findings regarding Goal 16 are inadequate to demonstrate that the proposed amendments are consistent with the goal.”

First, the City has not correctly characterized the issues on remand. For example, the City argues that, for the Goal 16 issue, “LUBA concluded that the findings within the City’s decision were inadequate to demonstrate compliance with Goal 16. *See* Excerpt of Petition for Review, 4th Assignment of Error (arguing that the County misconstrued and made inadequate findings not based on substantial evidence regarding Goal 16 compliance). This remand issue is not evidence based in that there is substantial evidence in the record to support sufficient findings. Therefore, a public hearing is not required.” This characterization not only misinterprets relevant law and LUBA’s remand instruction but the statement is also practically unintelligible. The City did not satisfy Goal 16’s requirements, including the impact assessment, and, therefore, the City’s findings and compliance with Goal 16 warranted remand. Not permitting a hearing on this issue prejudices ORCA’s substantial rights.

City Water

The City obtains its water from the Chetco River (Exhibit A), and the Chetco River has recently been subject to low flows and concerns about saltwater intrusion (Exhibit B). While the applicant alleges that the City has sufficient capacity to support the proposed development, the applicant has not accounted for issues that affect the availability of the City’s water to provide for such capacity. For example, the applicant’s allegation does not account for saltwater intrusion, or other development, including but not limited to the Lone Ranch development, which the City has already committed to building. This development alone will contain 1,000 units with 2.5 people per unit and approximately 90 gallons per person per day. Those figures do not include the shopping/commercial center and recreational center that is also proposed as part of that development. Until the applicant demonstrates that there is sufficient water available from the Chetco River, a necessary condition precedent to the City’s water capacity, the applicant has not sufficiently demonstrated adequate water availability and capacity to serve the proposed development.

Goal 16 (Estuarine Resources)

Statewide Planning Goal 16 (Estuarine Resources), Implementation Requirement 1, states in relevant part that:

Actions, which would potentially alter the estuarine ecosystem, shall be preceded by a clear presentation of the impacts of the proposed alterations. Such activities include dredging, fill, in-water structured, riprap, log storage, application of pesticides and herbicides, water intake or withdrawal and effluent discharge, flow land disposal of dredged material, and other activities which could affect the estuary's physical processes or biological resources.

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

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

R 42. In response to the above requirements, the City's findings and the applicant's argument before LUBA were generally irrelevant. The City also concluded, without support, that "the application has taken appropriate precautions to prevent any alteration of the estuarine ecosystem." The City's proposed findings on remand fail to improve on the prior shortcomings, and completely fail to satisfy any of Goal 16's requirements identified above. In fact, the proposed findings fail to respond to the comments from the public and federal agencies from the original proceeding before the City, which demonstrated that there would be impacts to the listed species:

- "Because future development cannot occur but for the annexation, the effects from future development need to be considered in this current decision. *The development of lots on these parcels will adversely affect our trust resources....* We have little information describing the future development." R 236-237 (emphasis added) (NMFS comments).
- "The SONCC coho salmon recovery plan (in press) analyzed current and historic habitat and fish and abundance trends. It found the key limiting stresses are 'lack of floodplain and channel structure' and 'degraded riparian forest conditions.' One of the key limiting threats was 'urban/residential/industrial development.' The development of this property needs to protect or improve floodplain and channel structure and riparian forest conditions to be consistent with the plan. Any further degradation of the limiting stresses will not be consistent with recovery and difficult to permit. The first three of the following comments directly relate to the limiting stresses and need special consideration." R 237 (NMFS comments).

- “Any encroachment on the floodplain causes negative impacts to the river system. Floodplain filling reduces the cross-sectional area of the stream. Reducing the cross-sectional area will result in two outcomes. At any given flood flow, the water elevation will be higher and the velocity of the water will be greater. A higher water elevation will impact more properties. Greater water velocities increase erosional power, results in bank failures and the need for bank stabilization measures. The same negative impacts from stabilization as outlined in # 1 above will occur.” R 238 (NMFS comments).
- “In the soon to be released SONC Coho Recovery Plan, the Chetco River’s coho are listed as the core recovery population in Southern Oregon.” R 177 (Native Fish Society Comments)
- “Coho salmon – federally listed here as a threatened species – depend on lower river backwaters such as the channel at the lower end of this property. Coho restoration depends on reclaiming tidal waterfronts such as this, according to the National Marine Fisheries Service Recovery Plan for the SONCC coho salmon. The proposed development would do just the opposite.” R 277 (Kalmiopsis Audubon Society).
- “The Chetco River coho salmon population is not viable and at risk of extinction, because the estimated average spawner abundance over the past three years has been less than the depensation threshold.” R 190 (Native Fish Society quoting SONCC Coho Recovery Plan as it relates specifically to the Chetco River)
- “Key concerns in the Chetco River were primarily loss of over-winter tributary and freshwater estuarine habitat complexity and floodplain connectivity for juveniles, especially in the lowlands which are naturally very limited in this system and have been impacted by past and current urban, rural residential, and forestry development practices.” *Id.*
- “Winter rearing habitat is severely lacking because of channel simplification, disconnection from the floodplain, degraded riparian conditions, poor large wood availability, and an estuary which has been altered and reduced in size due to development, channelization, and diking.” *Id.*
- “The lower Chetco River channel has been disconnected from its estuary, floodplain, wetlands, and smaller tributaries. Tributary channels and floodplains have been simplified.” *Id.*
- “Development continues to occur adjacent to the estuary, and fill material has reduced the size and function of the estuary.” R 191 (Native Fish Society quoting SONCC Coho Recovery Plan as it relates to the Chetco River).
- “Contrary to the testimony given by Mahar/Tribble’s attorney in exhibit F, the riparian zones of both lots are ecologically functional and very important for fish and wildlife.” NFS at R 178; 179 (riparian zone).

The proposed findings fail to respond to the comments above and similarly fail to satisfy Goal 16’s requirements. Indeed, some of the commenters from above include agencies tasked with the recovery of listed species, including those that will be affected by the proposal:

“NOAA Fisheries [formerly known as the National Marine Fisheries Service] is responsible for the stewardship of the nation’s ocean resources and their habitat. We provide vital services for the nation: productive and sustainable fisheries, safe sources of

seafood, the recovery and conservation of protected resources, and healthy ecosystems – all backed by sound science and an ecosystem-based approach to management.”

Ex. C. The applicant, on the other hand, has not provided *any* information from professional sources regarding impacts to the estuary and/or biological resources. The unsupported conclusions of the applicant do little to dispel the concerns of federal agencies with significant expertise on the issue at hand. For example, the proposed findings, which mirror the applicant’s arguments state:

“The required riparian buffer between the estuary boundary and future development will be maintained providing protection from possible impacts generally associated with residential development. The application of pesticides and herbicides shall not be allowed within the riparian buffer. Maintenance of the riparian buffer will preserve the aesthetic and recreational characteristics of the estuarine resource.”

There are many problems with these findings. Issues of “aesthetics” and “recreation” are irrelevant to goal 16. The issue is the potential impact on the estuarine and biological resources, which the applicant and the proposed findings fail to address. As noted in the SONCC Coho Recovery Plan, there are significant impacts arising from development in the area to listed species:

“Development continues to occur adjacent to the estuary, and fill material has reduced the size and function of the estuary. Marina development and other commercial activities in and near the estuary combine with urbanization to create a high amount of impervious area that can contribute to non-point source pollution. Paved roads, parking lots, rooftops, or other surfaces that do not absorb rainfall tend to send much more water to streams, elevating peak flows and contributing pollution to streams (Booth and Jackson 1997).”

Ex. D. In addition, in the Chetco River, the “extinction risk” for SONCC Coho Salmon is “high.” *Id.* The impact to Chetco salmon is so great that the phase of recovery is “extinction prevention,” and the “population [is] likely below depensation threshold.” *Id.* The stress for “lack of floodplain and channel structure” is “very high,” *id.* and the threat from urban/residential/industrial development is also “very high.” Further, the proposed finding that the “City standards and other applicable agencies minimizing the potential adverse impacts on the estuarine resource” is conclusory and fails to account for the fact that the Chetco River populations of Coho are currently at “extinction risk.”

The proposed finding that “[t]he application of pesticides and herbicides shall not be allowed within the riparian buffer” is also unfounded and insufficient. The application of such chemicals within the residential development is not limited, and, unless otherwise demonstrated, it is likely that these chemicals will end up in the estuary. FEMA has determined that “pesticides can alter fish behavior” and listed pesticides as a “primary constituent element of salmon habitat that are most directly susceptible to development.” Ex. E.

FEMA also advises that “placement of fill that would contribute to loss of floodplain area and flood storage capacity” and other development of the floodplain as an “unacceptable risk of take.” *Id.* FEMA also notes that “[a] prevalent hazard mitigation strategy has been to remove areas from the Special Flood Hazard Area by placing fill to elevate building sites above the base flood elevation and building dikes and levees to isolate sites from flood waters. However, by preventing these areas from flooding, functional habitat elements of the floodplain are destroyed.” *Id.* Here, the applicant’s proposal is premised on placing fill in the floodplain, and, therefore, the proposal will have adverse effects on estuarine and biological resources, including listed species.

The applicant’s argument that the riparian buffer will be maintained is also questionable because the applicant admitted in the record before LUBA that the riparian buffer will be changed: the “Applicant has been in communication with both the City and the Oregon Department of Land Conservation and Development (DLCD) concerning the adoption of a ‘safe harbor’ riparian ordinance pursuant to OAR 660-023-0090(8). The ‘safe harbor’ ordinance would allow for riparian setback reductions through riparian enhancements and/or mitigation.” R 543. Thus, the notion that the riparian buffer will be maintained has already been contradicted by the applicant’s own allegations in the record, and, therefore, the applicant must account for the impacts of reducing the buffer. The applicant has, thus far, failed to do so.

The applicant uses an incorrect standard under Goal 16. The proposed findings state that “[t]he approval of the Application and any resulting future development of the subject property will have no significant adverse impact on Chetco River estuarine resources.” This is a high standard that would be difficult to meet. The Goal 16 impact assessment standard, however, is much lower because it requires the applicant to account for “actions which would potentially alter the estuarine ecosystem” and “activities which could affect the estuary’s physical process or biological resources,” not “significant adverse effect.” Indeed, given that the Chetco River population of Coho salmon is at “extinction risk,” even a modest effect could have serious consequences resulting in “take” under the ESA. As noted below, if the City approves this application, the City can be held liable for take under Section 9 of the ESA.

Furthermore, the proposed findings contain little more than a conclusory finding with regard to the proposed work on Ferry Creek. The record already indicates that ESA consultation would be required for work done on Ferry Creek:

“The Corps has determined the project may affect Southern Oregon Northern California coho salmon, a species protected by the Endangered Species Act, and Essential Fish Habitat for salmon species as designated under the Magnuson-Stevens Fishery Conservation and Management Act. The Corps utilized a programmatic biological opinion (BiOp) to assess compliance with these laws and provide coverage for incidental take. The BiOp is titled *Revisions to the Standard Local Operating Procedures for Endangered Species to Administer Stream Restoration and Fish Passage Improvement Activities Authorized or Carried Out by the U.S. Army Corps of Engineers in Oregon (SLOPES IV Restoration)*, dated February 25, 2008.”

R 424 (“[t]he ODFW was issued permit number NWP-2008-222 for the purpose of removing an existing culvert from Ferry Creek to provide salmon habitat. I understand this work was not completed. The permit is expired and any work on Ferry Creek would need to have another application submitted”; and “[d]uring the permitting process [the Corps] would coordinate with DEQ for water quality certification, National Marine Fisheries and/or US Fish and Wildlife Service on Endangered Species Act and/or Magnuson-Stevens Act.”). The simple fact is that replacement of a culvert on Ferry Creek that leads to the Chetco River required ESA consultation because it “may affect” listed species, but, according to the City, no impacts would occur from constructing a housing development adjacent to the floodplain that filled significant portions of the floodplain. The applicant must account for the impacts that will occur as a result of the Ferry Creek work now, as noted by LUBA, not at a later time.

Finally, the applicant continues to rely on its alleged CLOMR-F. There are considerable problems in doing so. First, a CLOMR-F requires that the applicant demonstrate ESA compliance before the CLOMR-F issues:

“The CLOMR-F or CLOMR request will be processed by FEMA only after FEMA receives documentation from the requestor that demonstrates compliance with the ESA. The requestor must demonstrate ESA compliance by submitting to FEMA either an Incidental Take Permit, Incidental Take Statement, ‘not likely to adversely affect’ determination from the Services or an official letter from the Services concurring that the project has ‘No Effect’ on listed species or critical habitat.”

Ex. E; Ex. F (“Proposed placement of fill in the floodplain.” – “ESA compliance must be documented to FEMA prior to issuance of CLOMR-F. FEMA must receive confirmation of ESA compliance from the services.”); *id.* (“Because Conditional Letters of Map Revision based-on Fill (CLOMR-Fs) and Conditional Letters of Map Revision (CLOMRs) are submitted to FEMA prior to construction, there is an opportunity to identify if threatened and endangered species may be affected by the potential project. If potential adverse impacts could occur, then the Services may require changes to the proposed activity and/or mitigation.”). Here, the applicant has not demonstrated that such compliance has occurred. Had there been ESA compliance, then the applicant could simply rely on the ESA documentation for impacts to estuary and estuarine resources, including listed species, but the record contains no such demonstration. Indeed, as noted in the record before LUBA, some of the agencies did not know that an application was pending before City.

Finally, if the City approves this application, the City will be putting itself at great risk of authorizing ESA take of listed species. For example, when an applicant is pursuing a CLOMR-F, the local government must make certain findings:

“FEMA also looks to the local government issuing a floodplain development permit associated with a CLOMR or LOMR request for confirmation of ESA compliance. Applicants for a LOMR or CLOMR must attach a Community Acknowledgment Form signed by an official representing the local jurisdiction. The Community Acknowledgment Form includes the following statement,

Based upon the community's review, we find the completed or proposed project meets or is designed to meet all of the community floodplain management requirements, including the requirement that no fill be placed in the regulatory floodway, and that all necessary Federal, State, and local permits have been, or in the case of a Conditional LOMR-F, will be obtained.

A local government's decision to sign the Community Acknowledgment form can be based on the same criteria it uses to confirm ESA compliance for any floodplain development permit.

Ex. E. Because this application will adversely affect listed species in an area where the extinction risk is "high," the City is exposing itself to significant liability, including the risk of defending against an ESA take case and being responsible for attorney's fees. *See* 16 U.S.C. § 1532(13) (defining person to include "any officer, employee, agent, department, or instrumentality...of any...municipality..."). A number of courts have now held that the "take" prohibition extends not only to acts of parties that directly kill or harm a listed species or its habitat, "but also bans those acts of a third party that bring about" the taking, which can include acts by a governmental party who is authorizing the conduct at issue. *See e.g., Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir. 1997) *cert. den.* 525 US 830 (1998) (Mass. officials liable under ESA for licensing commercial fisherman who used methods that harmed listed whales).¹ Even causing an "imminent threat" of harm to a listed species constitutes a "take" under the ESA.² In other words, the City will likely be liable for take if it approves this application.

Because the applicant has failed to satisfy any of the requirements related to the remand issues, ORCA respectfully requests that the City deny the application.

¹ *See also Palila v. Hawaii Dept of Land & Nat. Res.*, 639 F.2d 495, 497-98 (9th Cir. 1981)(holding state's practice of allowing feral goats and sheep in palila's habitat constituted a taking); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir. 1989)(holding EPA caused illegal take by registering certain pesticides for specific uses that would likely harm listed species); *Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir. 1991)(holding USFS caused illegal take of listed woodpeckers by approving timber management plan that allowed timber companies to clear cut certain lands); *US v. Town of Plymouth*, 6 F.Supp 2d 81, 90-91(D.Mass 1998)(holding town liable for take of piping plovers caused by off road vehicle use that town allowed on its local beach); *Loggerhead Turtle v. County Council of Volusia*, 148 F.3d 1231, 1249 (11th Cir. 1998) *cert den.* 526 US 1081 (1999)(County Council held liable for take created by inadequately protective lighting ordinances); *Pacific Rivers Council v. Oregon Forest Indus. Council*, No. 02-243-BR, 2002 U.S. Dist. LEXIS 28121, 2002 WL 32356431 at *11 (D. Or Dec. 23, 2002) (finding that state forester's authorization of logging operations that are likely to result in a take is itself a cause of a take); *Seattle Audubon Soc'y v. Sutherland*, 2007 U.S. Dist. LEXIS 39044 (W.D. Wash. May 30, 2007)(holding that WA DNR officials implementing the state Forest Practices Act could potentially be liable for take of spotted owls); and *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1079 (D. Minn. 2008)(holding the Minn. DNR violated ESA take prohibition by authorizing lynx trapping).

² *See, Forest Conservation Council v. Rosboro Lumber*, 50 F.3d 781, 784-85 (9th Cir. 1995).

Thank you,

A handwritten signature in blue ink that reads "Sean T. Malone". The signature is fluid and cursive, with a large initial "S" and "M".

Sean T. Malone
Counsel for ORCA