

*For: Monday, February 22, 2016, City Council Meeting*

## **Advance Packet Information**

Included in this packet is documentation to support the following Agenda items:

### **PUBLIC HEARINGS/FINAL ORDERS/RESOLUTIONS**

1. Continuation of the January 11, 2016 hearing in the matter of LUBA's remand of ANX-1-14 (Mahar/Tribble annexation) to the City's approval to annex approximately 13.33 acres into the City of Brookings. [Planning, pg. 2]
  - a. Final order [pg. 10]
  - b. Exhibits B-F and H-J [pg. 17]

\*Obtain Public Comment Forms and view the agenda and packet information on-line at [www.brookings.or.us](http://www.brookings.or.us), or at City Hall. Return completed Public Comment Forms to the City Recorder before the start of meeting or during regular business hours.

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# CITY OF BROOKINGS

## COUNCIL AGENDA REPORT

Meeting Date: February 22, 2016

Donna Colby-Hanks RLH  
Signature (submitted by)  
[Signature]  
City Manager Approval

Originating Dept: PWDS -Planning

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Subject: Final staff comments on issues raised in written testimony for Land Use Board of Appeal's remand (LUBA No. 2015-037) Mahar/Tribble annexation File No. ANX-1-14.

Recommended Motion: A motion to approve the Applicant's responses to the issues raised by Oregon Land Use Board of Appeals (LUBA) Remand; Statewide Planning Goal 16 (Estuarine Resources) impact assessment on the Chetco River estuary for File ANX-1-14 as well as approve the Remand Final Order supported by the Applicant's findings and written rebuttal, the analysis and findings contained in the January 11, 2016 staff report, and the responses and findings contained in the February 22, 2016 staff report as well as the conditions of approval.

Background/Discussion: The City Council conducted the initial hearing on this matter on January 11, 2016. A continuance was requested and provision was made for additional written comments and rebuttal. The written comments and rebuttal are attached to this memo as Exhibits B thru F and Exhibits H thru J. Exhibit I contains participants rebuttal and Exhibit J is the Applicant's final rebuttal. All other exhibits are participant comments. The expiration of the comment period was January 19, 2016 at 4:30 pm. On January 21, 2016, comments were received from D. Burger, Chetco River Watershed Council, which were submitted after expiration of the comment period and therefore are included in the rebuttal portion of the record as Exhibit I-1. Following is each concern raised and Staff's response:

1. **This concerns channel migration analysis. (M. Sherwood)(A. Vileisis)(C. Page)**

**Response and findings:** Pursuant to LUBA, the remand hearing is limited to assessment of potential impacts to the estuary as well as identification of methods of mitigation to avoid or minimize adverse impacts. The assessment only needs to address the impacts from the proposed residential development. LUBA determined that the assessment did not need to address a possible future reduction in the riparian buffer, placement of fill in the floodplain under Curry County approval, or the possible future restoration of Ferry Creek. These matters are outside the scope of the remand hearing.

Kenneth Phippen, National Oceanic and Atmospheric Administration/National Marine Fisheries Service (NOAA/NMFS), discusses channel migration of rivers in his letter dated September 8, 2014. He describes channel migration as a natural occurrence and does not assert that the residential development will affect the natural migration of the river.

Frank Galea, certified Wildlife Biologist and author of the Impact Assessment Report provided, does not identify impacts to the estuary from residential development of this property as affecting the migration of the river.

A letter (Exhibit H-2) was received from Donald Porior PE, Porior Engineering, that states the proposed storm water mitigation will prevent any increase in flows from the development. Porior advises that bank stabilization using large rocks is not proposed and neither is fill or removal activities within the channel. In summary, Porior states the proposed project will not influence stream migration of the Chetco River. Based on the information from these professionals, the residential development of this property will have no effect on impacts to the estuary from migration of the river.

**2. This concerns enforcement and use of herbicides, pesticides or fertilizers on the subject property. (M. Sherwood)(A. Vileisis)**

**Response and findings:** Galea identifies in his Impact Assessment Report that the greatest potential for impacts to the estuary from residential development are from sewage and storm water runoff. Pollutants from runoff can include herbicides, pesticides, or fertilizers. To minimize the potential impacts only chemicals that are approved for application near aquatic environments shall be utilized on the property. Condition of Approval #9 proposes a requirement for restrictive covenants to be recorded against the property implementing this restriction.

The covenant would be transferred to any future property owner upon sale or division of the property. The purpose of the covenant would alert future owners of the limits of chemical use on the property. The Applicant's attorney testified at the January 11, 2016 hearing that restrictive covenants allow for enforcement by any property owner who is affected by the covenant. The attorney also testified that restrictive covenants have proven to be highly effective in restraining private behavior on private property.

These types of chemicals are under the jurisdiction of Oregon Department of Agriculture (ODA) and they are the regulatory authority in these matters. Any potential violation would need to be reported to ODA for investigation and enforcement. The City does not have staff with expertise in these matters and according to ODA would generally have no authority.

T. Bunch, ODA, provided recommendations for revisions to Condition of Approval #9 and those recommendations have been included as presented in Exhibit B-6. T. Bunch made no suggestion in his comments that the proposed restrictive covenants would be ineffective in preventing residential application of harmful pesticides.

**3. This concerns anticipated impacts on the physical characteristics of the estuary not being identified. (S. Malone)**

**Response and findings:** The Impact Assessment Report provided by the applicant describes the potential for impacts to each of the identified estuarine resources. The report identifies pollutants, both sediment and chemicals, as well as sewage as having the greatest potential for impacts.

The assessment describes each of the Federally protected wildlife species that could potentially occur near the subject property, suitable habitat conditions for each, and the potential for impacts to each from the proposed residential development. This is followed by a section that identifies recommendations for mitigating the impacts. The recommendations from the report have been included as proposed Conditions of Approval # 4 thru #10. Further, the applicant has stated that there is no proposal for any physical development within the Estuary Boundary.

**4. This concerns the applicant's failure to identify potential adverse impacts of the residential development due to the unknown scope and extent of the development. (S. Malone)(Y. Maitland)**

**Response and findings:** LUBA recognized in the Final Opinion and Order for LUBA No. 2015-037 that the subject property could potentially be developed with 59 to 60 single family dwellings. In addition, LUBA explained that the City must review potential adverse impacts on the estuary's physical process or biological values from development allowed under the proposed amendments.

**5. This concerns the assertion that the applicant has not complied with all of the requirements of Goal 16. (S. Malone)**

**Response and findings:** In the remand, LUBA identified Goal 16, Implementation Requirement 1 as needing to be addressed. Other components of Goal 16 were not identified as not being sufficiently addressed. As the applicant's attorney states in the written rebuttal, other argument related to Goal 16 is outside the scope of the remand.

**6. This concerns the applicant's failure to acknowledge that National Marine Fisheries Service plays a regulatory role under the Endangered Species Act. (S. Malone)**

**Response and findings:** LUBA remanded the annexation approval back to the City to address specific Goal 16 requirements. The remand does not require that all agencies that play a regulatory role be identified. Therefore this concern is outside the scope of the remand.

**7. This concerns the riparian area not being sufficient to prevent sediment transport. (S. Malone) Impacts from polluted storm water runoff (A. Vileisis) SLOPES not adequate for protection (C. Wiley)**

**Response and findings:** The proposed conditions of approval take into consideration all recommendations made in the assessment report. The report advises that the riparian area is not sufficient alone as a buffer for sediment. However, the removal of invasive species would improve its functioning which is addressed in proposed Condition of Approval #6.

The storm water created from the proposed development will be treated by a system developed and constructed using the City of Portland's storm water manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V) as recommended by Chuck Wheeler, a Fisheries Biologist working for the Oregon Coast Branch of NOAA Fisheries, as well as Best Management Practices from the Department of Environmental Quality. This is proposed in Condition of Approval #8.

**8. This concerns the impact to the estuary from withdrawal of water to serve the residential development. (A. Vileisis)(C. Wiley)**

**Response and findings:** The applicant's attorney addressed this concern in the final written argument. In *Mahar/Tribble I*, LUBA remanded for the City to adopt more adequate findings regarding the availability of city water to serve the annexation territory relative to capacity. *Mahar/Tribble I*, Final Opinion and Order of LUBA No. 2014-087, page 10. On remand in *Mahar/Tribble I*, the City found that the City's municipal water system has more than sufficient capacity to serve the potential development of the subject property. That finding was based on capacities included in the City's adopted Water Master Plan, adopted in 2014. The current application does not change the Water Master Plan. Opponents' concerns regarding municipal water withdrawals either have already been addressed during the development of the Water Master Plan, or are a collateral attack on the adoption of that plan. In all events, the newly raised concerns about municipal water withdrawal are not within the scope of LUBA's remand in *Mahar/Tribble II*.

**9. This concern suggests a requirement is needed for replanting or improving the riparian setback area. (A. Vileisis)(M. Sherwood)(C. Page)**

**Response and findings:** Frank Galea, certified Wildlife Biologist and author of the Impact Assessment Report, identifies riparian areas as important habitats for wildlife. He states they act as visual and sound screens between development and natural resources such as an estuary as well as removing sediment from storm water. Galea recommends the removal of invasive plants to enhance the riparian area. Proposed Condition of Approval #6 requires a riparian enhancement plan to be submitted to the City for approval, in conference with Oregon Department of Fish and Wildlife (ODFW), prior to any disturbance or development of the subject property. The plan shall show the areas where invasive species are proposed for removal and the method of removal. Although replanting was not a recommendation of the Assessment Report, any replanting must consist of native riparian species.

S. Mazur, ODFW, provided comments (Exhibit H-1), and stated that all riparian areas should be managed for native species not just the eastern boundary of the property. ODFW suggested that permanent fencing be used during and after construction to delineate the riparian areas as well as limiting ground disturbing activities to times when impacts to wildlife would be the least. An email clarifying ODFW's position was submitted by D. O'Connor as Exhibit I-2. The email acknowledged that the riparian area along the Chetco River, eastern boundary of the subject property, will be managed. However, the downriver portion of the subject property (commonly known as Snug Harbor) will remain undisturbed since the area has a functioning established riparian area. The suggestion of ODFW for a permanent riparian delineation fence has been included as proposed Condition of Approval #11, shown below.

**11. Prior to any disturbance or development of the subject property, a permanent riparian delineation fence shall be installed to provide a visual boundary between riparian areas and non-riparian areas. The fence is not intended to be a security fence.**

**10. This concerns modifications or impacts to (delineated wetland) Snug Harbor (A. Vileisis)(A. Orahoske)(M. Sherwood)**

**Response and findings:** The area of the subject property adjacent to Snug Harbor has been identified as Priority Dredge Disposal Site #3 in the Comprehensive Plan and must be protected. The area is within the 100 year floodplain as well as the Chetco Estuary Shorelands Boundary. As a protection measure, the Brookings Municipal Code Chapter 17.24.110(B) prohibits residential structures within the Chetco Estuary Shorelands Boundary.

Although the Department of State Lands wetland concurrence has expired, a small wetland has been identified that will require DSL and Army Corp approval for any alterations. The applicant has stated that no development is proposed for this area and it will remain open space.

Proposed Condition of Approval #5 will require a sediment fence to be placed between the development and the delineated wetland. Proposed Condition of Approval #4 requires all construction activities to comply with Oregon Department of Environmental Quality's Best Management Practices. The applicant has suggested in the final written rebuttal that an additional condition of approval be drafted that clarifies the development restrictions within this area. See proposed Condition of Approval #12 below. With the proposed conditions of approval, impacts to the wetland and Snug Harbor will be minimized or eliminated.

**12. Except for potential future stream and riparian restoration activities, no residential development activities shall occur in the area established as Priority Dredge Disposal Site #3 or after placement of fill per the CLOMR, the areas identified as the 100-year floodplain and the Chetco Estuary Shorelands Boundary.**

**11. This concerns adverse impacts to the estuary not being limited to aquatic and terrestrial species. (A. Orahoske)**

**Response and findings:** Adequate information was not provided to allow the impact of concern to be identified.

**12. This concerns the suggestion to reduce the building footprint to reduce the overall environmental impact. (Y. Maitland)**

**Response and findings:** There is no information in the record on the expected footprint or configuration of the dwelling units. The Impact Assessment Report identified several requirements to mitigate the impacts to the estuary. A reduction in the footprints of the dwelling units was not included, and therefore limits on building footprints are not proposed as a condition.

**13. This concerns claims that the City has an inadequate sewer collection system which effects the estuary. (C. Wiley)**

**Response and findings:** An Infrastructure Financing Agreement was entered into the record on page 478 of LUBA No. 2014-087.

The City and the applicant recognize in the Agreement that the development of the subject property cannot occur without adequate public sewer infrastructure and that an expansion of the City's sewer collection system is needed to support the proposed project. The system will be required to obtain approval from Oregon Department of Environmental Quality as well as the City. The expansion of the sewer system is required to be constructed in compliance with the City's "Engineering Requirements and Standard Specifications for Public Works Infrastructure". The purpose of the engineering requirements is to establish correct procedures, outline acceptable standards of workmanship, and indicate specifications for any projects. The standards provide assurances that the infrastructure is installed in a manner that protects the public as well as the environment such as the estuary.

Other existing City sewer infrastructure is not affected by the project and if there are impacts to the estuary from this infrastructure, it is not under the scope of the remand.

**14. This concerns a suggestion to prohibit docks. (A. Vileisis)**

**Response and findings:** The applicant has stated numerous times no physical intrusions into the estuary, including docks, are proposed.

**15. This concerns the suggestion to include a conservation easement and habitat restoration projects (C. Page)**

**Response and findings:** The Impact Assessment Report identified the riparian area as being impacted from invasive species. The invasive species reduce the ability of native riparian vegetation to remove sediment from storm water runoff. The report recommended that the invasive species be removed. Condition of Approval #6 requires the removal of invasive species to minimize impacts to the view from users of the river as well as improving the functioning of the riparian vegetation. This project must be implemented prior to any disturbance or development of the property. This was the only habitat restoration project identified to minimize impacts to the estuary.

A conservation easement will not affect the impacts of the residential development on the estuary nor will it mitigate the impacts. This matter is outside the scope of the remand hearing.

**16. This concerns the adequacy of the standard for the design of storm water facilities to accommodate 2.5 inches of rain in a 24 hour period. (A. Vileisis)(M. Sherwood)(C. Wiley)**

**Response and findings:** During the January 11, 2016 City Council meeting, the Applicant suggested that either the recommendation of Kenneth Phippen, NOAA/NMFS, for the storm water facility to be designed to accommodate 2.5 inches of rain in a 24-hour period or the City standard be used for the development of the storm water system. The current city standard is for storm drainage facilities to be engineered to accommodate a 25 year flood event (approximately eight (8) inches of rain in a 24 hour period as mapped by NOAA). That suggestion has been incorporated into proposed Condition of Approval #8 with added text being underlined as shown below.

**8. The storm water system to serve the development of the subject property shall be prepared by an Oregon-licensed civil engineer in accordance with the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V). The system must accommodate a minimum of 2.5 inches of rainfall in a 24-hour period or comply with the City of Brookings standard, whichever accommodates the greater event.**

**17. This concerns the need to address impacts from fill in the floodplain. (M. Sherwood)(A. Vileisis)**

**Response and findings:** LUBA determined in the remand that assessment of the impacts to the estuary did not need to address the placement of fill in the floodplain under Curry County approval. Therefore, this issue is not under the scope of the remand.

**18. This concerns the need to address impacts from, or a requirement to, restore Ferry Creek. (M. Sherwood)(A. Vileisis)(C. Page)**

**Response and findings:** LUBA states in the remand opinion for this matter that the City is not required to address the impacts from a future project to restore Ferry Creek. The restoration project is not proposed as a component of the annexation and it is not a necessary element for the residential development of the subject property. Any impacts to the estuary from possible future restoration of Ferry Creek are outside the scope of the remand hearing.

**19. This concerns the need to require the 75 foot riparian buffer be maintained. (M. Sherwood)(A. Vileisis)**

**Response and findings:** LUBA states in the remand opinion for this matter that the City is not required to address the impacts from a possible future reduction of the 75 foot riparian setback. This concern is outside the scope of the remand hearing.

**20. This concerns the lack of notification to Federal agencies of the Sept., 2014, hearing. (Y. Maitland)**

**Response and findings:** All federal and state agencies were notified of the current remand hearing of January 11, 2016, on December 17, 2015. Comments were received and are in the record from ODFW and ODA.

**21. This concerns the inclusion of the 2006 wetland delineation report into the record. (Y. Maitland)**

**Response and findings:** The document was previously entered into the record on page 200 of LUBA No. 2014-087. It remains a part of the record. It was included as an appendix to the Impact Assessment Report as it was cited in 4.12 *Sensitive Plants* as having additional information on potential habitat for the Western Lily.



**22. This concerns the suggestion that a traffic impact study should be required. (Y. Maitland)**

**Response and findings:** Once a proposal for development is submitted and details are known, the agencies with jurisdiction of the roads will be notified and comments will be sought. This is a requirement of the Brookings Municipal Code. However, this matter is not under the scope of the remand hearing.

**23. This concerns constraints identified in the City's findings regarding land excluded from the UGB expansion. (Y. Maitland)**

**Response and findings:** The findings referenced discuss constraints on lands that were not brought into the UGB with the most recent expansion. The subject property was not involved in the UGB expansion as it was included in the original UGB. This issue is not relevant to the subject property nor to the impacts on the estuary from the proposed residential development.

**24. Several concerns were raised regarding flood damages, steep slopes, Curry County's denial of an application, compaction of fill, road slippage, and lot coverage limited to 45% as well as amendments to Goal 14 in 2010 in regards to building on steep slopes and in the floodplain. (Y. Maitland) Also raised was a suggestion that the floodplain be protected and improved. (C. Page) Another concern was that the City is not in compliance with existing development needs. (C. Wiley) The City should develop a plan for additional storage of water to reduce pumping during the summer. (A. Vileisis)(C. Wiley)**

**Response and findings:** As indicated by LUBA, none of these concerns regard the impact of the residential development of the subject property on the estuary and are not under the scope of the remand hearing.

Analysis, findings and conclusions to Statewide Planning Goal 16, Implementation Requirement 1 can be found the Council Agenda Report for the January, 11, 2016, City Council meeting, Exhibit A.

Considering the materials found in Exhibit A as well as the responses and findings in this report, Staff finds the concerns raised have been adequately addressed. Staff recommends adoption of the Applicant's findings and written rebuttal, the analysis and findings contained in the staff report dated January 11, 2016, and responses and findings contained in the staff report dated February 22, 2016 to support the approval of this remanded annexation request.

**Attachment(s):** A. Draft final order  
B. Exhibits B thru F and H thru J

BEFORE THE CITY COUNCIL FOR  
THE CITY OF BROOKINGS, COUNTY OF CURRY,  
STATE OF OREGON

<b>In the matter of Planning Commission File No. ANX-1-14/Remand; a request for approval of the Applicant's response to the issues remanded by the Land Use Board of Appeals, LUBA No. 2015-037 for approval of annexation, Mahar/Tribble, LCC, applicant.</b>	) ) ) ) ) ) ) ) ) )	<b>Final ORDER and Findings of Fact</b>
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**ORDER** approving the materials submitted in response to the issue remanded by the Land Use Board of Appeals (LUBA), in the appeal of the City's approval of the annexation of approximately 13.33 acres of land located in Curry County, Oregon, and commonly known as Township 40 South, Range 13 West, Section 32D, Tax Lots 1500 and 2000 (“the subject property”), being located adjacent to the eastern boundary of the North Bank Chetco River Road right-of-way, and approximately 3,294 feet of the North Bank Chetco River Road right-of-way from the city limits boundary to the subject property.

**WHEREAS:**

- 1. In its decision of an appeal by Oregon Coast Alliance of the City of Brookings' approval of ANX-1-14, the Land Use Board of Appeals (LUBA) remanded with the *Final Opinion and Order* dated October 6, 2015, to the City for additional findings for Statewide Planning Goal 16 (Estuarine Resources) Implementation Requirement 1 to assess the potential impacts to the estuary from residential uses and identify methods of mitigation to avoid or minimize adverse impacts; and
- 2. The applicant submitted materials to the city in response to the issue of the remand as follows:
- 3. Consistent with the LUBA Remand, the City Council considered the applicant's materials at a public hearing on January 11, 2016 and continued to February 22, 2016; and
- 4. The planning staff presented the Council Agenda Report with recommendations, and by oral presentation and evidence and testimony by the applicant and the public at the public hearing; and
- 5. At the conclusion of said public hearings, after consideration and discussion of testimony and evidence presented in the public hearing and submitted as written comments, the City Council, upon a motion duly seconded, approved the materials.

**THEREFORE, IT IS HEREBY ORDERED** that the materials (**Attachment A**) submitted in response to the issue of the remand are approved. Findings and conclusions consistent with the LUBA Remand are set forth as follows:

**Standards, Criteria, Findings and Conclusions for Statewide Planning Goal 16, Estuarine Resources**

The Statewide Planning Goal 16 Chetco River Estuary Boundary (“the Estuary Boundary”) is located along the eastern boundary of the subject property. The Estuary Boundary being the line of Mean Higher High Water (MHHW). Pursuant to the LUBA Remand, findings assessing potential impacts to estuarine resources and measures to prevent such impacts are required. As directed by LUBA, the relevant provisions of Statewide Planning Goal 16, Implementation Requirement 1 are set forth as follows:

*1. Unless fully addressed during the development and adoption of comprehensive plans, actions which would potentially alter the estuarine ecosystem shall be preceded by a clear presentation of the impacts of the proposed alteration. Such activities include dredging, fill, in-water structures, riprap, log storage, application of pesticides and herbicides, water intake or withdrawal and effluent discharge, flow-lane 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.*

***a. The type and extent of alterations expected;***

The applicant states in the findings that the proposed residential development of the property will not include any physical intrusion into the Estuary Boundary. However, future development would be located within close proximity to the Estuary Boundary. The potential impacts to the estuary resources are primarily based on pollution resulting from the residential development. The pollution could consist of both chemicals and sediment. The applicant has submitted a *Statewide Planning Goal 16 Impact Assessment Report* prepared by Frank Galea, a certified wildlife biologist with Galea Wildlife Consulting to fulfill the requirement of an assessment from the remand.

***b. The type of resource(s) affected;***

According to the Impact Assessment Report provided by the applicant in the findings, the resources that could be impacted with future development of the subject property consist of wildlife resulting from water quality degradation. The location of the proposed development could also impact aesthetic views of the estuary from river users if not

protected. No physical alterations within the Estuary Boundary are proposed.

***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;***

The applicant identifies potential impacts from development of the subject property on the following estuarine resources:

1. water quality degradation within the estuary from construction activities.
2. on-going water quality degradation from residential development located within close proximity to the estuary.
3. adverse impacts on wildlife utilizing estuarine resources as a result of water quality degradation during construction and post-construction.
4. adverse impacts on wildlife utilizing the estuarine resource and adjacent lands during construction activities.
5. adverse impacts on the aesthetic view from the estuarine resource.

Since no physical development will occur within the Estuary Boundary, there is no anticipated impacts on the physical characteristics of the estuary, navigation, or existing and potential uses of the estuary.

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

Water Quality Degradation

As stated in the Impact Assessment Report, the greatest potential for impacts to the estuary would be from the development's sewage and storm water runoff (sediment and pollution). There is also a potential for sediment to increase during the construction phase.

The residential development is proposed to be served by the City of Brookings public sewer system. This will eliminate the potential of sewage contaminants from entering the estuarine resource.

The Impact Assessment Report identified several recommendations to avoid or minimize adverse impacts on the estuarine resource from storm water runoff. The use of Best Management Practices as outlined in the report during construction will minimize potential impacts. The impacted riparian area can be enhanced by the removal of invasive plants to improve its functioning to remove sediment. Any replanting should consist of plants listed in the most current Appendix A of the Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds.

In addition, the applicant states in the findings that the storm water system for the future residential development of the property will be designed in accordance with the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V). The Impact Assessment Report noted this was recommended by Chuck Wheeler, Fisheries Biologist, Oregon Coast Branch, NOAA Fisheries West Coast Region.

The use of herbicides, pesticides or fertilizers can impact the estuarine resource. The applicant proposes that only herbicides, pesticides, or fertilizers approved by Oregon Department of Fish and Wildlife (ODFW) or the Oregon Department of Environmental Quality (DEQ) for use in close proximity to streams or rivers shall be applied on the subject property. However, these matters are under the oversight of Oregon Department of Agriculture. Any chemicals applied to the subject property shall be approved for application near aquatic environments.

### Wildlife Habitat

Several species of wildlife were identified in the detailed habitat assessment of the Impact Assessment Report as well as the optimal method for protection. Prior to any disturbance on the subject property a wildlife biologist must survey the area. Upon discovery of the western pond turtle or the northern red-legged frog, the species would need to be relocated to an undisturbed area. If any Migratory Bird Treaty Act nesting sites were discovered, a buffer of 300 feet would need to be maintained until the birds fledge.

### Aesthetic Resources

The applicant states in the findings that in order to minimize impacts to the view from users of the river, the applicant proposes to enhance the impacted riparian area by removing invasive plants. The invasive species adversely impact native riparian vegetation. Any replanting would need to consist of plants listed in the most current Appendix A of the Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds.

In addition, this approval is supported by the findings and conclusions contained in the staff report for the February 22, 2016 City Council meeting attached to and hereby made a part of this final order. The above analysis, findings and conclusions together with the Applicant's findings and written rebuttal, and the conditions of approval below, show that the criteria for the remand have been met.

**Conditions of Approval** (As amended by City Council at the remand hearing of February 22, 2016, added text is **bold**)

1. Prior to approval of any new development permits or final plat approval on the subject property, the Applicant is required to record a deed declaration against the subject properties that acknowledges the existence of the Infrastructure Financing Agreement between the parties and its essential role in determining sewer feasibility to achieve municipal zoning. The Deed Declaration shall state that the existence of the Infrastructure Financing Agreement between the City and the Mahar/Tribble LLC was essential in approving the municipal zoning for the property by determining the provision of sewer was feasible and shall state that the City is under no obligation to extend sewer in a manner other than specified in the terms of the Infrastructure Financing Agreement.
2. Prior to issuance of any development permits or final plat approval, the owners must furnish the City of Brookings with a legal description prepared by a registered professional land surveyor that describes Shoreland Boundary as approved herein for the entire length of the subject properties and the boundary shall be staked at 50-foot intervals by the surveyor who

prepared the legal descriptions. Notwithstanding the foregoing, the staking of the Shoreland Boundary on that portion of the subject property included within the approved FEMA Conditional Letter of Map Revision shall be completed contemporaneously with the completion of the FEMA Letter of Map Revision.

3. Development on the site is required to comply with the following Hazard Mitigation conditions:

a. Prior to issuance of any development permits or final plat approval, Applicant will provide a statement from an Oregon Registered Engineering Geologist that the fill placed four years ago satisfies the recommended 95% compaction and is appropriate for residential and street construction.

b. Prior to issuance of any development permits or final plat approval, Applicant will provide a statement from an Oregon Registered Engineering Geologist that any new fill will satisfy the recommended 95% compaction and is appropriate for residential and street construction.

c. Prior to issuance of any development permits or final plat approval on the portion of the subject property located within the existing 100-year floodplain, Applicant will complete the Letter of Map Revision process with FEMA that establishes the revised 100-year floodplain elevations and the floodway boundary for the site.

d. In the event any future development is to be located within the 100-year floodplain, topographic information will be provided for development permits that demonstrate the ground elevation building pads have been raised 1-foot above the 100-year floodplain elevation.

e. A report from an Oregon Registered Engineer or an Oregon Registered Engineering Geologist shall be provided with all building plans for residential foundations at the time of building plan submittal to the City that explain how the proposed foundation designs are consistent with Recommendations No. 4 through 6 set forth on Page 7 of the Geologic Hazard Evaluation Report dated February 29, 2008, and prepared by Garcia Consultants. A copy of the aforementioned report being contained in the record.

**4. Prior to any disturbance or development of the subject property, all required state and federal permits and approvals must be obtained and copies provided to the City. All construction activities on the subject property shall comply with Oregon Department of Environmental Quality's Best Management Practices (BMPs) in order to prevent sediment or fuel (leaked oils, diesel, gasoline or any other unnatural substance) movement to the estuary. BMPs shall include but not be limited to sediment fences, fill berms between construction areas and sensitive habitats, fuel mats under stored vehicles and construction equipment, use of fuel mats whenever re-fueling equipment.**

**5. Prior to any disturbance or development of the subject property, a sediment fence shall be placed between the development and the wetland delineated in the most current report with concurrence from the Department of State Lands.**

**6. Prior to any disturbance or development of the subject property, a riparian**

enhancement plan shall be submitted to the City for approval in conference with ODFW. The plan shall show the areas where invasive species are proposed for removal and the method of removal. Any replanting will consist of native riparian species set forth in the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds*, December, 2003, or any amendments thereof.

7. All residential development on the subject property, as well as other development allowed by the proposed zoning designation, shall be served by the City of Brookings municipal sewer and water systems.

8. The storm water system to serve the development of the subject property shall be prepared by an Oregon-licensed civil engineer in accordance with the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V). The system must accommodate a minimum of 2.5 inches of rainfall in a 24 hour period or comply with the City standard, whichever accommodates the greater event.

9. Only pesticides registered with the United States Environmental Protection Agency (U.S. EPA) and with Oregon Department of Agriculture (ODA) for application near aquatic environments shall be utilized on the subject property. Such applications must be in compliance with the label instructions and must be consistent with the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watershed*, December, 2003, or any amendments thereof. The Applicant shall provide to the City copies of any required approvals/permits from the Department of Environmental Quality (DEQ). If the services of a Commercial Applicator are utilized, they must be licensed by ODA. The Applicant shall cause a restrictive covenant to be recorded against the subject property implementing this restriction in the Official Records of Curry County, Oregon. A draft of the restrictive covenant shall be submitted to the City for approval prior to the execution and recording of the covenant.

10. Prior to the initiation of construction on the subject property, including clearing and grading, a survey by a qualified wildlife biologist shall be conducted for the following species: (a) migratory birds under the Migratory Bird Treaty Act; (b) the western pond turtle; and (c) the northern red-legged frog. Upon discovery of the western pond turtle or the northern red-legged frog, these species will be relocated to undisturbed areas of the subject property to avoid injury. In the event an active Migratory Bird Treaty Act nesting site is discovered (i.e. March through August), a 300 foot buffer will be maintained from the nest until such time the nestlings fledge.

11. Prior to any disturbance or development of the subject property, a permanent riparian fence shall be installed to provide a visual boundary between riparian areas and non-riparian areas. The fence is not intended to be a security fence.

12. Except for potential future stream and riparian restoration activities, no residential development activities shall occur in the area established as Priority Dredge Disposal Site #3 or after placement of fill per the CLOMR, the areas identified as the 100-year floodplain and the Chetco Estuary Shorelands Boundary.

**LET IT FURTHER BE OF RECORD** that City Council APPROVED the materials submitted in response to the issue of the remand based on the evidence in the record and the findings of fact.

Dated this 22nd day of February, 2016.

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Ron Hedenskog, Mayor

ATTEST:

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Donna Colby-Hanks, Planning Manager



BEFORE THE CITY COUNCIL FOR  
THE CITY OF BROOKINGS, OREGON

MAHAR/TRIBBLE, LLC,	)	FILE NO.: ANX-1-14 (Remand)
	)	
Applicant,	)	
	)	LUBA NO.: 2015-037
OREGON COAST ALLIANCE,	)	
	)	APPLICANT’S FINAL REBUTTAL
Appellant.	)	

**Introduction**

The law firm of Huycke O’Connor Jarvis, LLP represents Applicant Mahar/Tribble, LLC, concerning the above-stated matter. This submittal provides final written argument seeking approval of the application in File No. ANX-1-14 (Remand) consistently with the limited scope of remand in *Oregon Coast Alliance v. City of Brookings*, LUBA No. 2015-037 (Oct 6, 2015) (*Mahar/Tribble II*), as expressly acknowledged by the City. The hearing notice on remand stated that the purpose of the hearing was “to consider the applicant’s response to Land Use Board of Appeals’ remand to the City’s approval of the annexation of two lots,” and that “This hearing will consider only the remand item in regards to Statewide Planning Goal 16 impact assessment on the Chetco River Estuary.”

**Procedural Summary**

Applicant owns two parcels of real property located along the Chetco River Estuary. The City approved annexation of the two parcels and rezoned the land from light commercial/industrial to two-family residential. Oregon Coast Alliance (ORCA) appealed that decision in *Oregon Coast Alliance v. City of Brookings*, LUBA No. 2014-087 (Jan 6, 2015) (*Mahar/Tribble I*), asserting as pertinent here: (1) a challenge to City’s findings regarding City water supply and capacity to serve new residential development and (2) a challenge to Goal 16 (estuarine resources) compliance regarding an impact assessment required by Goal 16, Implementation Requirement 1.

LUBA remanded the decision for the City to adopt more adequate written findings regarding the availability of the City water supply to serve the proposed annexation territory relative to capacity and for the City to perform a Goal 16 impact assessment. On remand in *Mahar/Tribble I*, the City found that the City’s municipal water system has more than sufficient capacity to serve the potential development of the subject property. Final Order and Findings of Fact, File No. ANX-1-14/Remand, page 7 (April 27, 2015). That finding was based on capacities included in the City’s adopted Water Master Plan, which was adopted in 2014. Final Order and Findings of Fact, File No. ANX-1-14/Remand, page 8. The current application does not change the Water Master Plan. The 2014 Water Master Plan is judicially noticeable and can be located online at <http://or-brookings.civicplus.com/ArchiveCenter/ViewFile/Item/399>.

The City also determined that the Applicant had adequately presented potential impacts from residential development to the estuarine environment and provided mitigation methods. ORCA again appealed, assigning error solely to the City's adoption of the applicant's attorney's findings regarding Goal 16. LUBA again remanded in *Mahar/Tribble II*.

On January 11, 2016, the City conducted a public hearing on remand from *Mahar/Tribble II*. The Applicant presented evidence related to LUBA's remand. Other parties, including ORCA (collectively, "opponents"), presented testimony and submitted evidence in opposition to the application.

### **Argument**

In *Mahar/Tribble II*, LUBA held that, in assessing potential impacts to the estuary, the City should not compare potential impacts from light commercial/industrial uses to potential impacts from residential uses. LUBA held that the Applicant's attorney's statements are not substantial evidence that support technical conclusions regarding purported adverse impacts to the estuary and endangered salmon species. LUBA specifically held that the City must assess and address purported impacts from storm water runoff and the residential application of pesticides. LUBA rejected ORCA's collateral challenge to estuarine impacts from fill placed on the development site pursuant to a prior unchallenged county fill-placement approval. LUBA remanded "for the city to conduct an impacts assessment free of the identified analytical errors and adopt more adequate findings and conditions supported by substantial evidence." *Mahar/Tribble II*, slip op at 22-23.

**a. The impact assessment and proposed conditions provided by Applicant sufficiently address and resolve the analytical errors identified by LUBA.**

The Applicant's submissions on remand sufficiently identify the type and extent of impacts to be expected. Specifically, consistently with LUBA's remand order, the Applicant addressed potential water quality degradation that could be caused by sewage and storm water runoff. See *Mahar/Tribble Biological Assessment* at 16 (explaining that the greatest potential for impacts to estuarine resources from residential development would be sewage and storm water runoff).

The Impact Assessment Report suggests the use of best management practices such as sediment fences and fill berms during residential construction would minimize sediment and chemical migration from the property into the estuary. The Impact Assessment Report also suggested that enhancing the existing riparian area will mitigate potential future sediment and chemical migration from the property into the estuary.

The Applicant suggested and stipulated to conditions of approval to avoid or minimize potential adverse impacts to Chetco River estuarine resources. See Applicant's Submittal at 7.

**b. Opposition to the approval of the application on remand.**

Opponents raise the following challenges and concerns on remand:

- (1) The Applicant failed to specifically identify the extent and scope of any planned future residential development.
- (2) The Applicant failed to demonstrate compliance with all of Goal 16, including demonstrating a public need for residential development and that no feasible upland alternative exists.
- (3) The Applicant failed to respond to all prior comment letters.
- (4) Applicant has not established that the proposed condition imposing restrictive covenants on the use of pesticides can be effective in avoiding runoff into the estuary.
- (5) The evidence on remand fails to address channel migration concerns.
- (6) The evidence on remand fails to address floodplain fill.
- (7) The City should require the Applicant to restore Ferry Creek as a condition of approval.
- (8) Snug Harbor should be preserved as Coho rearing habitat.
- (9) Concern that municipal water withdrawals to accommodate residential development on the subject property will reduce water quality and quantity in the estuary.<sup>1</sup>

**c. Applicant has adequately addressed the following concerns:**

**The proposed condition imposing restrictive covenants on the use of pesticides will be effective in avoiding runoff into the estuary.**

Applicant's attorney testified at the remand hearing that restrictive covenants allow for enforcement by any property owner who is affected by the covenant. Applicant's attorney also testified that restrictive covenants such as those proposed have proven to be highly effective in restraining private behavior on private property.

That testimony is supported by an email from Ted Bunch of the Oregon Department of Agriculture, commenting on the proposed condition for a restrictive covenant. Mr. Bunch suggested minor changes in language, but nowhere suggested that the proposed restrictive covenants would be ineffective to prevent residential application of harmful pesticides. ANX-1-

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<sup>1</sup> Opponents submitted into the remand record the Final Recovery Plan for the Southern Oregon /Northern California Coast Evolutionarily Significant Unit of Coho Salmon, NOAA Fisheries (2014). ANX-1-14 (Remand) Exb G. That document is 1,841 pages long. Opponents fail to specify what part of that document is relevant to the City's decision beyond those salmon-related issues already specifically raised by opponents. In the absence of direct argument, the Applicant cannot and will not speculate as to the significance of that document for rebuttal purposes.

**The proposed annexation and zone change will not influence channel migration.**

To the extent opponents speculate that channel migration may be impacted by residential development other than the pre-approved fill on the subject property, the application does not propose any activity that will impact channel migration. See ANX-1-14 (Remand) Exb H-2, Donald Porior Letter (“the proposed project will not influence stream migration in the Chectco River”).

**Snug Harbor will be preserved as Coho rearing habitat.**

The Applicant has agreed that “the downriver portion of the subject property (commonly known as the Snug Harbor area) will remain undisturbed.” ANX-1-14 (Remand) Exb I.

Applicant proposes an additional condition of approval that, except for potential future stream and riparian restoration activities, no residential development activities shall occur in the area downstream of the proposed 100 year flood elevation shoreline boundary after placement of fill per CLOMR, as depicted on the Property Map of Proposed Development on North Shore of Chectco River for Comprehensive Plan Review, previously submitted to the City in File No. ANX-1-14 and attached hereto for reference.

**d. The opponents to the application raise issues that are outside the scope of LUBA’s remand. The City need not and should not address those issues.**

LUBA remanded specific aspects of the City’s decision, and the City has expressly limited its consideration on remand to those issues. Thus, the City need not and should not consider and decide new arguments that are not related to or directed at the issues on remand. Limiting the scope of the remand avoids redundant proceedings and facilitates the legislative policy that “time is of the essence in reaching final decisions in matters involving land use.” ORS 197.805; *see also Beck v. City of Tillamook*, 313 Or 148, 152 (1992).

LUBA’s remand order was limited to previously raised purported estuarine impacts from storm water and pesticide runoff from residential development, and the lack of substantial evidence that those runoff impacts could and would be mitigated by storm water filtration, sewage conveyance systems, and the existing riparian buffer.

The following issues are outside the scope of remand and need not be considered or decided by the City:

**Opposition: The Applicant failed to specifically identify the extent and scope of any planned future residential development.**

Under the current application, the Applicant is not required to identify the scope of any future residential development. LUBA explained that under Goal 16, Implementation Requirement 1, the City must review “potential adverse impacts on the estuary’s physical

process or biological values from development allowed under the proposed amendments.” *Mahar/Tribble II*, slip op at 8. That is, the City must review general potential impacts from residential development. Nothing in Goal 16 or LUBA’s remand order require the Applicant to specify the scope of future development.

**Opposition: The Applicant failed to demonstrate compliance with all of Goal 16, including demonstrating a public need for residential development and that no feasible upland alternative exists.**

In *Mahar/Tribble I*, the opponents argued only that the Applicant failed to provide an impact assessment as required by Goal 16. Any other argument related to Goal 16 is outside the scope of remand and has been waived.

**Opposition: The Applicant failed to respond to all prior comment letters.**

Again, LUBA specified the “analytical errors” that are to be corrected on remand. Neither the Applicant nor the City is required to revisit and address all prior comments.

**Opposition: The evidence on remand fails to address floodplain fill.**

In *Mahar/Tribble II*, LUBA specifically stated:

“[T]he impact assessment is properly limited to the ‘actions’ that trigger Implementation Requirement 1: here, the application for annexation and zone change before the city. The city is not required to consider the potential adverse impacts of alterations approved in earlier decisions not before the city. Accordingly, the city is not required to address potential adverse impacts of the previously approved fill in approving the proposed annexation and zone change.”

*Mahar/Tribble II*, slip op at 21-22. Thus, any potential impacts from fill on the subject property are not at issue on remand.

**Opposition: The City should require the Applicant to restore Ferry Creek as a condition of approval.**

In *Mahar/Tribble II*, LUBA specifically stated:

“[R]esidential development under the proposed annexation and zone change is [not] predicated on restoration of Ferry Creek. As far as the record establishes, restoration of Ferry Creek is not proposed as part of this application, or a necessary element of residential development of the subject property under the new R-2 zoning.”

*Mahar/Tribble II*, slip op at 20. Thus, any potential impacts from restoration of Ferry Creek are not at issue on remand and restoration of Ferry Creek is not a necessary or appropriate condition of approval.

**Opposition: Municipal water withdrawals to accommodate residential development on the subject property will reduce water quality and quantity in the estuary.**

In *Mahar/Tribble I*, LUBA remanded for the City to adopt more adequate findings regarding the availability of city water to serve the annexation territory relative to capacity. *Mahar/Tribble I*, slip op at 10. On remand in *Mahar/Tribble I*, the City found that the City's municipal water system has more than sufficient capacity to serve the potential development of the subject property. That finding was based on capacities included in the City's adopted Water Master Plan, which was adopted in 2014. The current application does not change the Water Master Plan. Opponents' concerns regarding municipal water withdrawals either have already been addressed during the development of the Water Master Plan, or are a collateral attack on the adoption of that plan. In all events, the newly raised concerns about municipal water withdrawal are not within the scope of LUBA's remand in *Mahar/Tribble II*.

**Conclusion**

Applicant has adequately presented potential estuarine impacts of the proposed annexation and zone change and provided methods to avoid or minimize adverse impacts. The City has restricted the remand to evidence and argument related to the analytical errors identified by LUBA in *Mahar/Tribble II*. Applicant has adequately addressed opponents concerns that are within the scope of the remand. Accordingly, the City should adopt findings, impose appropriate conditions, and approve the application.


Respectfully submitted February 2, 2016.

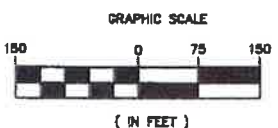
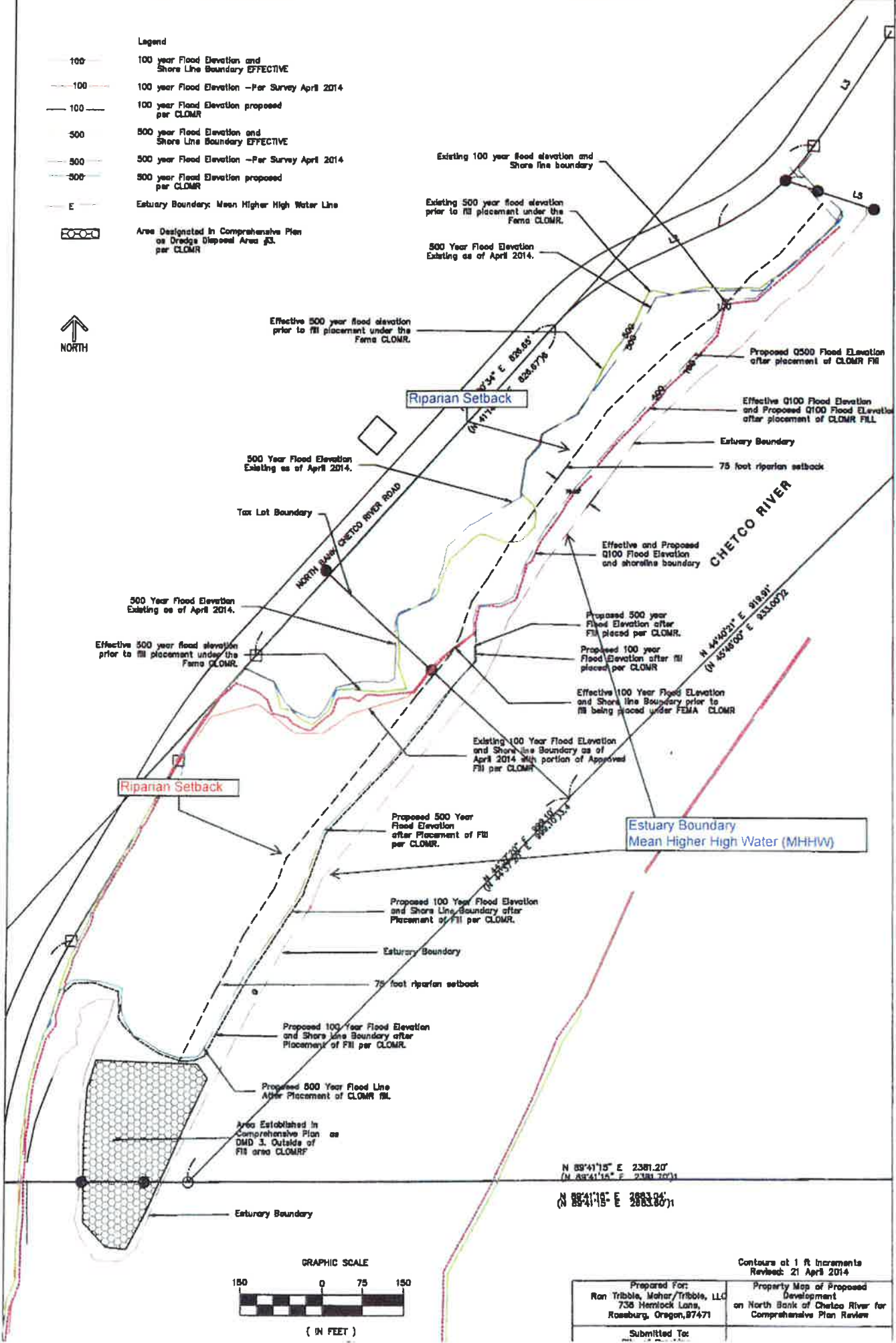
HUYCKE O'CONNOR JARVIS, LLP



H. M. Zamudio, OSB No. 121554

**Attachments:** Property Map of Proposed Development on North Shore of Chectco River for Comprehensive Plan Review

- Legend**
- 100 — 100 year Flood Elevation and Shore Line Boundary EFFECTIVE
  - 100 — 100 year Flood Elevation —Per Survey April 2014
  - 100 — 100 year Flood Elevation proposed per CLOMR
  - 500 — 500 year Flood Elevation and Shore Line Boundary EFFECTIVE
  - 500 — 500 year Flood Elevation —Per Survey April 2014
  - 500 — 500 year Flood Elevation proposed per CLOMR
  - E — Estuary Boundary: Mean Higher High Water Line
  -  Area Designated in Comprehensive Plan as Dredge Disposal Area #3, per CLOMR



N 89°41'15" E 2381.20'  
 (N 89°41'15" E 2381.20')  
 N 89°41'18" E 2883.00'  
 (N 89°41'18" E 2883.00')

Contours at 1 ft increments  
 Revised: 21 April 2014

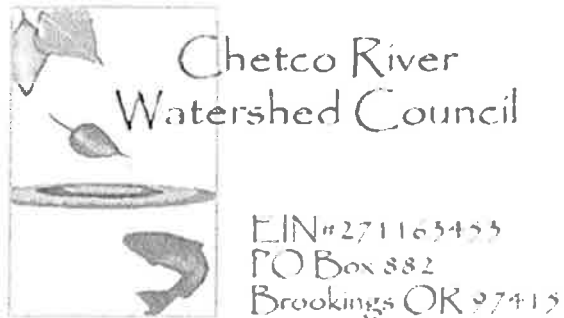
Prepared For: Ron Tribble, Mohar/Tribble, LLC 736 Hemlock Lane, Roseburg, Oregon, 97471	Property Map of Proposed Development on North Bank of Chetco River for Comprehensive Plan Review
Submitted To:	

## Index for ANX-1-14 Remand Exhibit I-- rebuttal

Submitted prior to 4:30 pm on Tuesday, January 26, 2016

Doc. #		Dated	From	page #	Description
Exhibit	I-1	1/16/2016	D. Burger, Chetco River Watershed Council	2	letter received 1/21/2016
	I-2	1/25/2016	S. Helm for D. O'Connor	3	email





## “Stewardship and Advocacy”

January 16, 2016

City of Brookings  
898 Elk Drive  
Brookings, Oregon 97415

RE: File No. ANX-1-14, Mahar/Tribble Property Annexation

The Chetco River Watershed Council joins with many other organizations in opposing the annexation and proposed development of this floodplain/floodway. Along with natural resource agencies who have raised significant concerns with the cumulative impacts from further removal of floodplain habitat and floodway function, as well as degraded estuarine resources.

These cumulative impacts to the highly modified Chetco estuary cannot be understated or adequately mitigated by the developer. Long-term consequences to the Snug Harbor backwater eddy and scoured deep pool has not been adequately considered. This unique deepwater habitat provides high-flow refugia in winter and cool over-summering coho habitat in the summer. The potential for disturbed and exposed soils from construction of the Ferry Creek diversion, combined with the sediment input from the proposed housing development could have the potential to fill in the pool in Snug Harbor. Removal of this unique habitat could significantly impact over-summering coho salmon and further reduce limited estuarine resources. Hydraulic computer modeling is required to properly assess the potential for loss of critical habitat for federally listed coho salmon and limited Chetco estuarine resources.

NOAA Fisheries has clearly stated their objections to the City in their September 8, 2014 letter. Mr. Phippen stated that that one of the key limiting threats to the estuary and its coho salmon was urban/residential/industrial development. To quote, **“The development of lots on these parcels will adversely affect our trust resources”**, (specifically federally protected coho salmon).

Mr. Pippen's characterized the lower portion of the watershed as a highly modified environment with degraded baseline conditions for water quality and physical habitat characteristics. The SONCC recovery plan identified the lack of floodplain and channel structure as a key limiting stressor. Therefore, further developments in the floodplain will impair the recovery of coho salmon. Their scientists recommendations should be acknowledged and followed.

With ample upland areas available for housing development, this flood hazard Zone should be conserved and eventually restored to a functional floodplain. Ferry Creek should be day-lighted to provide better fish habitat, as ODFW requested, and improve estuary resources in the Chetco River, as required by Statewide Goal 16.

The CRWC therefore requests the City of Brookings deny the Mahar/Tribble floodplain annexation request in order to protect the Chetco River Estuary resources its' limited water quality and quantity, and its vital salmon fisheries for future generations to enjoy and utilize. Environmental stewardship and long-term management will ensure the safety of the public, the fisheries, and the Chetco Estuary.

Sincerely,

A handwritten signature in black ink, appearing to read "Don Burger", with a long horizontal flourish extending to the right.

Don Burger  
President  
Chetco River Watershed Council



---

## Fwd: Mahar/Tribble Anx-1-14

1 message

---

**Shala Helm** <shalahelm@gmail.com>

Mon, Jan 25, 2016 at 4:26 PM

To: Donna Colby-Hanks <dcolbyhanks@brookings.or.us>

Good Afternoon Donna:

Dan would like to have this email submitted into the record pursuant to his discussions with Steven Mazur.

I apologize for sending this through my personal email, however, our server is down and is blocking any incoming emails.

Please let me know if you require any additional information in order to have this entered into the record.

Thanks, Shala

Shala C. Helm

Assistant to Daniel O'Connor and Erik J. Glatte

Huycke O'Connor Jarvis, LLP

823 Alder Creek Drive

Medford, OR 97504

Phone: 541-772-1977

Fax: 541-772-3443

On Mon, Jan 25, 2016 at 9:19 AM, Steve Mazur <steve.j.mazur@state.or.us> wrote:

Steven Mazur

Assistant District Fish Biologist

Rogue Watershed District

South Coast District

541-247-7605

**From:** Steve Mazur

**Sent:** Monday, January 25, 2016 7:09 AM  
**To:** 'Dan O'Connor' <dano@medfordlaw.net>  
**Subject:** RE: Mahar/Tribble Anx-1-14

Dan,

Thanks for addressing ODFW's comments dated January 14, 2016 concerning the Mahar/Tribble, LLC; File No.: Anx-1-14. If you need anything further, feel free to contact me. Steve

Steven Mazur  
Assistant District Fish Biologist  
Rogue Watershed District  
South Coast District  
541-247-7605

**From:** Dan O'Connor [mailto:dano@medfordlaw.net]  
**Sent:** Monday, January 25, 2016 8:54 AM  
**To:** steve.j.mazur@state.or.us  
**Cc:** Shala Helm <sch@medfordlaw.net>  
**Subject:** Mahar/Tribble Anx-1-14

Steve:

Thank you for taking the time this morning to go over your comments dated January 14, 2016 concerning the above-stated matter. Pursuant to our discussion, the purpose of this correspondence is to confirm the intent of your comments and the applicant's position:

1. Applicant agrees to install a permanent riparian delineation fence along the riparian area. The purpose of the aforementioned fence is to provide a visual delineation between riparian areas and non-riparian areas (e.g. 3-foot high rod iron fence) and is not intended to be a security fence.
2. As discussed, the riparian areas along the Chetco River will be managed. The downriver portion of the subject property (commonly known as the Snug Harbor area) will remain undisturbed since this area has a functioning established riparian area.
3. Applicant acknowledges that ODFW does not regulate pesticides, herbicides and fertilizers. Oregon Department of Agriculture regulates the foregoing and Applicant will comply with ODA

requirements for riparian area treatments.

4. Applicant appreciates the suggestion and will most likely commence the initial grading work during the dryer months. As discussed, your suggestion only related to the initial grading work not ongoing development (i.e. home building). Notwithstanding the foregoing, Applicant will cause the biologist survey to be conducted no matter what time of your grade work is initiated as a precaution.

Please let me know if I have misstated your understanding of our discussion in any manner. Your attention to this matter is greatly appreciated.

Thanks, Dan

Dan O'Connor

Huycke O'Connor Jarvis, LLP

823 Alder Creek Drive

Medford, OR 97504

Phone: 541-772-1977

Fax: 541-772-3443

The information contained in this e-mail is intended only for the use of the designated recipients named above. This email, and any documents, files or previous e-mails attached to it, may be a confidential attorney-client communication or otherwise privileged and confidential. If you are not the intended recipient, you are hereby notified that you have received this transmittal in error, and that any review, dissemination, distribution or copying of the transmittal is **STRICTLY PROHIBITED**. If you have received this e-mail in error, please notify us immediately by telephone at 541-772-1977. Thank you.

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## Index for ANX-1-14 Remand Exhibit H-- additional evidence

Submitted prior to 4:30 pm on Tuesday, January 19, 2016

Doc. #		Dated	From	page #	Description
Exhibit	H-1	1/14/2016	S. Mazur, ODFW	2	email
	H-2	1/16/2016	D Porior, PE	1	letter to D. O'Connor
	H-3	1/19/2016	C. Wiley	1	comments

Brookings  
Email



Donna Colby-Hanks <dcolbyhanks@brookings.or.us>

---

## Mahar/Tribble, LLC; File No.: Anx-1-14

---

Steve Mazur <steve.j.mazur@state.or.us>  
To: Donna Colby-Hanks <dcolbyhanks@brookings.or.us>

Thu, Jan 14, 2016 at 10:39 AM

Donna,

The Oregon Department of Fish and Wildlife would like to provide a few comments on the Mahar/Tribble, LLC **Applicant's findings and Goal 16 Assessment.**

### Applicant's findings

#### *Conditions of Approval*

1. ODFW like included in the BMP's the option of using permanent fencing to delineate all riparian areas during and after construction.
2. The Applicant should be required to manage all riparian areas for native species, not just the eastern boundary.
5. Herbicide, pesticides, and fertilizers are not regulated by ODFW
6. ODFW would suggest the Applicant limit ground disturbing activities during the times when wildlife impacts would be the least. This would reduce the need to survey and potentially move wildlife. ODFW would suggest a time frame of July-October.

### Goal 16 Assessment

#### *4.15 Ferry Creek*

ODFW agrees with this assessment, but would place the option of running Ferry Creek into Snug Harbor the preferred option. ODFW would remind the Applicant that any alteration to the existing Ferry Creek culvert would probably trigger ODFW Fish Passage Criteria and any design would need to meet those criteria.

#### *4.16 Riparian Habitats*

This section only looks at the Chetco River riparian. The document needs to address setbacks for Ferry Creek.

Let me know if you need any clarification. Thanks. Steve

Steven Mazur

Assistant District Fish Biologist

Rogue Watershed District

South Coast District

541-247-7605

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**2 attachments**



**Applicant's findings.pdf**  
457K



**Goal 16 Assessment.pdf**  
2621K



Porior Engineering LLC  
Donald Porior  
Engineering and Land Surveying

69262 Wildwood Road  
North Bend, Oregon, 97459  
600 West Street, Brookings, Oregon  
Phone/fax: 541-756-6747 541-290-1693

16 January 2016

Dan O'Connor  
Huycke O'Connor Jarvis, LLP  
823 Alder Creek Drive  
Medford, OR 97504  
Phone: 541-772-1977  
Fax: 541-772-1978

Facility: Tribble Property - Potential for Stream Migration from Development

Mr. O'Connor

This letter responds to concerns for Stream Migration in the Chetco River from the proposed development.

As part of our analysis, we considered any potential impacts to the public from development. Considerations and concerns included any work or modifications that would affect the Chetco River by changing the direction of flows into the river, create a rise in the stream water or change the velocity of flows as a result of work in the proposed development.

1. The proposed development does not impact the Chetco River. The existing banks are not changed. Vegetation along the banks will not be disturbed accordingly the roughness (n) remains unchanged and water velocities during storm events will not be affected.
2. Storm flows entering the Chetco River from normal runoff and stream runoff will not change. As noted earlier in our discussions on water quality, storm water mitigation will prevent any increase in flows from the development. That modulation will insure that storm flows and runoff will be equal to or less than flows prior to the development.
3. Bank stabilization using Large Rocks along the Chetco River is not proposed. Stream Flows in the Chetco River will not be redirected from development work.
4. Channel changes caused by either fill or removal activities within the channel are not proposed. Channel migration from those activities will not be affected from the development work.

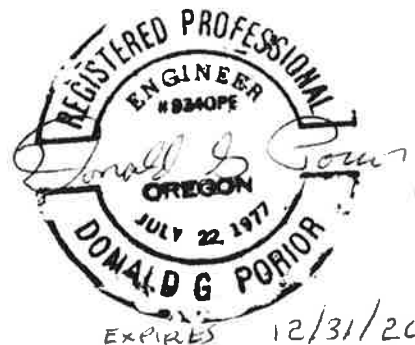
In summary the proposed project will not influence stream migration in the Chetco River.

Respectfully Yours,



Donald Porior, PE

Cc: Ron Tribble, Owner



Catherine Wiley  
96370 Duley Creek Rd.  
Brookings, OR 97415

January 19, 2016

To: Brookings City Council

Re: LUBA Remand; Chetco River Estuary vs. Mahar/Tribble Development

Testimony provided on 1/11/16 by the attorney advocating on behalf of Mahar/Tribble inferred that the SLOPES protocols/parameters would be adequate in dealing with potential impacts on the Chetco estuary.

Since the attorney is from Medford, and Tribble from Roseburg, perhaps this assumption presented as testimony could be understood.

However, any/all general scientific guidelines must have exceptions. This includes screening for life threatening diseases, when there are issues such as family history, as well as considerations when proposing development in tsunami/floodplain/tidal zones in temperate rainforests in an estuary area.

According to testimony, we are supposed to believe that planning for 2.5 inches of rain in a twenty-four (24) hour period is adequate protection for our estuary.

One should review the average rainfall for our specific area of the Northwest Pacific coast. Then, one should review documented winter storm events. This area has been known to get 2.5 inches of rain in an HOUR...not 24 hours. Since October, 2015, we have resumed our normal rain pattern; currently attaining over fifty (50) inches, with much more due. This does not include the impacts of our well known "Chetco effect", nor correlated "King" or extreme tides, which significantly raise rain and water levels in the proposed development area.

SLOPES is not adequate here. There is **no** methodology **proven** to protect the Chetco estuary from contaminants, silt or runoff: inevitable if this development is approved.

## Exhibits received at City Council meeting

Hearing Date: January 11, 2016

7:00 pm - Council Chambers

Doc. #		Dated	From	page #	Description
Exhibit C		1/11/2016	M. Sherwood, Native Fish Society	4	testimony
Exhibit D		1/11/2016	Y. Maitland	11	testimony w/attachments
Exhibit E		1/11/2016	C. Wiley	9	testimony w/attachments
Exhibit F		1/11/2016	C. Page	2	testimony



**NATIVE FISH SOCIETY**

*Advancing the Recovery of Native, Wild Fish in Their Homewaters*

January 11, 2016

FR: Mark Sherwood, Southern District Manager, Native Fish Society  
 TO: Brookings City Councilors, Mayor Hedenskog, City Manager Gary Milliman  
 RE: Impacts to Estuarine Resources from Annexation, Rezoning and Shoreline Boundary Change  
 Mahar/Tribble Property

Dear Brookings City Councilors, Mayor Ron Hedenskog and City Manager Gary Milliman,

My name is Mark Sherwood and I live at 320 Railroad St. in Brookings. These comments represent the concerns of the Native Fish Society and our over 3,000 members who support the conservation and recovery of the Northwest's wild, native fish. I'm also representing myself as a concerned citizen of Brookings and an avid angler.

Thank you for the opportunity to comment on the Goal 16 estuary impacts resulting from ANX 1-14 the second remand of the Mahar/Tribble property on North Bank Chetco Rd.

I'd like to begin by setting the record straight. Not a single fish and wildlife agency (state or federal) or conservation organization currently supports the annexation and rezoning of the Mahar/Tribble property as is proposed -- not ODFW (with Ferry Cr. restoration not being planned ODFW does not support the project) not the National Marine Fisheries Service (per ~~Chuck Wheeler's~~ stern letter and the Coho Recovery Plan's concern about develop adjacent to estuaries) nor does the Native Fish Society feel that the applicant's stipulations will ensure sufficient protection and mitigation for estuarine resources.

The Chetco's small estuary already suffers significant degradation from past development. Today, development and bank hardening has left less than 1.5 miles of the Chetco's estuary in a natural and functional state. What we're discussing today is a development that by all credible accounts will further reduce the river's ability to produce Chinook, coho, and steelhead.

Ken  
 Plummer  
 MS

Comments on the Applicants Submittal:

**1. From page 7 of the applicant's submittal:**

No herbicides, pesticides or fertilizers shall be applied on the subject property unless such herbicides, pesticides and fertilizers are: (a) approved by ODFW or the Oregon Department of Environmental Quality (DEQ) for use in close proximity to streams and rivers (i.e. environmentally friendly products); and (b) such applications are consistent with the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds*, December, 2003, or any amendments thereof. Applicant shall cause a restrictive covenant to be recorded against the subject property implementing this restriction in the Official Records of Curry County, Oregon. A draft of the restrictive covenant shall be submitted to the City for approval prior to the execution and recording of the covenant.

Who would enforce the covenant preventing future property owners from using unapproved herbicides, pesticides or fertilizers? Are there examples of such covenants being effective in preventing these kinds of pollutants from impacting sensitive areas?

**2. Additional considerations from the September 8, 2014 NOAA recommendations to prevent harm to the estuary?**

Does the applicant or city plan on incorporating the recommended analysis of channel migration; or address the issue of additional floodplain fill found in Mr. Phippen's letter?

Particularly concerning is the prospect of future emergency hardening of the streambank, which could occur were the property developed and subsequently threatened by a high water event or a future migration of the river channel. A similar situation occurred in Gold Beach over the contested Sebastian Shores development. Like the Mahar/Tribble, the developers of Sebastian Shores planned residential development adjacent to an estuary and within the tsunami inundation zone. When the mouth of Hunter Creek shifted toward the development last year, homeowners filed for an emergency fill permit with the Department of State Lands and were allowed to artificially harden the bank with large boulders. This emergency action protected their homes, but came at a cost to the estuary. What can the applicant or the city of Brookings do to prevent a similar future occurrence on this site on the Chetco? If restrictive covenants have a proven track record for legally binding future owners/tenants and would prevent this type of damage, would the city and/or the applicants be agreeable to such a measure?

**3. Ferry Creek Restoration**

Previous iterations of this development included the restoration of Ferry Creek by removing the stream from its current 300ft culvert and directing the creek adjacent to N. Bank Chetco River Rd. to the inlet of Snug Harbor. This restoration alternative appears again in the Galea Wildlife Consulting as a beneficial action. However, after my personal conversations with Ron Tribble, my understanding is that

this restoration alternative is not being pursued by the applicant. Has the city or the applicant stipulated that this restoration will occur as part of the development as currently proposed? Providing this additional channel, and streambed could improve estuarine conditions for salmonids over present conditions.

A community such as Brookings, which relies in a large part on tourism, sport and commercial fishing jobs (combined these represent at least 22% of employment in Curry Co.) we cannot afford to take additional impacts to the estuary lightly. Sport fishing brings \$10 million dollars to Curry Co. and a Chetco is a big part of that draw. There is a direct relationship linking together the Chetco's estuarine health, the health of our salmon and steelhead runs, and the economic health of our community. The City of Brookings should work to stimulate responsible development that does not trade our valuable run of salmon and steelhead for additional tax revenue.

Additionally, threatened SONCC coho salmon occupy the estuary directly adjacent to the Mahar/Tribble property as well as Ferry Creek and are highly susceptible to additional pollutants or additional loss of estuarine habitat. These fish are indicators for the health of the estuary. Historically, the Chetco's coho run was over 4,000 fish, today they number in the hundreds. The same declines face our famous Chinook and steelhead runs, if our community doesn't endeavor to save what estuary remains and restore additional estuarine habitat where possible.

**Recommendations:**

- Require an environmental engineer to complete a channel migration analysis.
- Restrict any structures from within the 100-year channel migration zone.
- Prohibit any new fill within the 50-year floodplain.
- Agree to leave Snug Harbor as open space, with its riparian and floodplain habitat intact.
- Daylight and restore Ferry Creek to provide additional habitat for salmon and steelhead.
- Require that Mahar/Tribble receive approval for the necessary permitting to reestablish the Ferry Creek channel reconstruction through the Army Corps of Engineers and NMFS before approving annexation and zone change.
- Require that Ferry Creek restoration meet NMFS's SLOPES design criteria.
- Require that the County's 75 foot riparian buffer be maintained throughout the property, no matter where the Shoreland Boundary is located or relocated.
- Require that no herbicide or fertilizers be utilized in riparian buffers into the future.
- Require that the buffer be replanted with native vegetation to facilitate shade with the oversight of the Oregon Department of Fish and Wildlife.
- Require an appropriate environmental engineer to design and build stormwater treatment facilities effective at treating 2.5 inches of rain in a 24-hour period.
- Initiate city planning for storing additional fresh water for municipal use and plans to limit pumping during summer and fall during low flows. This would be beneficial to estuarine health, salmon and the community.

Warmly,

A handwritten signature in black ink, appearing to read 'M. Sherwood', written in a cursive style.

Mark Sherwood  
Southern District Manager  
Native Fish Society

Yvonne Maitland  
15676 Oceanview Drive  
Harbor, Oregon 97648

2/11/2016

Re: File ANX-1-14 LUBA Remand

Mayor Hedenskog and Council members,

It would be reasonable to assume that the Mahar-Tribble (M/T) property has not only severe constraints, is substandard, and most likely exceeds the carrying capacity of the proposed site which sits on fill and must satisfy a recommended 95% compaction. The entire Chetco estuary is in a flood and tsunami inundation zone. Also it is a slide-risk area. Landslides have occurred on both the north and south banks of the Chetco River Road. There is road slippage above the steep embankment and a continuous problem as heavy winter rains and storm water runoff cause damage to the city infrastructure.

Having read numerous comments from citizens, organizations and agencies, there is no doubt in my mind that the affect of this high density, urban residential development will have negative impacts on the river system, salmonids and estuary resources. Although the city of Brookings failed to notify the Army Corps of Engineers and NOAA/National Marine Fisheries Service at the first held September 8, 2014, M/T public hearing, the expert involvement of federal agencies will benefit the Chetco River and estuary.

The city is well aware of all these issues and constraints which are associated with the M/T proposed development, but is nonetheless willing to accommodate a significant increase in density, from 38 to 59 housing units on 13.33 acres. The M/T application for 38 housing unit was previously denied by the Curry County Planning Commission (March 26, 2009) DLCD's Dave Perry wrote, "We recommended the request be denied."

August 12, 2009, City of Brookings pre-application meeting notes with Dave Perry and Planning Director are especially interesting because of the statement that only 45% coverage of the subject property with structures is allowed in the R-3 zone. Applicant indicates over 50% of the property would be left in 'open area'.

Habitat Impact Assessment Report prepared by Frank Galea, Crescent City California, December 2015.

5.0 Potential Impacts of Development to Chetco River Estuary:

The project property has approximately 6.2 acres of previously developed area within which to develop the housing project. This excludes the undeveloped portion of the property to the west, and the current riparian strip along the river. The proposed project can therefore be built on land which was previously commercially impacted, with no need to degrade surrounding natural areas."

Clarification is needed as to how much acreage is left in the surrounding natural area?



The report has minimal information regarding the Chetco River fisheries. [I have attached NMFS September 8, 2014 letter.]

Land Use Board of Appeals – LUBA Remand, 10/6/2015

Under Goal 16, Implementation Requirement 1, potential adverse impacts of the proposed action – here, urban residential development allowed under the R-2 zone – must be identified and evaluated, and if necessary avoided or minimized, ...

A reduction in the building footprint would lessen the overall environmental impact.

LUBA Judges concluded, “City findings were inadequate to demonstrate compliance with Goal 16 – Estuarine Resources.” The proposed high density housing is located within close proximity to the Chetco Estuary Boundary. “Applicant acknowledges that potential impacts on the estuary resource from development are possible.” (Primarily pollution of chemicals and sediment) This is an improvement from the previous statement that the subject property “will have no significant adverse impact on Chetco River resources.”

The proposed high density housing is located within the close proximity to the Chetco Estuary Boundary. Applicant acknowledges that potential impacts on the estuary resource from development are possible (primarily pollution of chemicals and sediment). This is an improvement from the previous statement that the subject property “will have no significant adverse impact on Chetco River resources.”

The 2006 Wetland Delineation Report is null and void. The Division of State Lands, November 13, 2006 wrote: “This jurisdictional determination is valid for 5 years from the date of this letter – unless new, it necessitates a revision. The report is 9 years old. Why is it included?”

AUGUST 11, 2009 Curry County Roadmaster believed a traffic impact study may be warranted. He wrote, “Potentially this development could add 600 trips a day to this section of the North Bank Chetco River Road.” Will a traffic impact study for the 59 units be required? How many trips are projected per day?

The UGB expansion:

City Findings at Rec. 519: The excluded lands to the northeast and on the north bank of the Chetco are extremely steep. Many of the remaining parcels are unbuildable. The roads are very steep, substandard, and end in dead-ends. There is no adequate access for emergency vehicles at current development densities. Residents are concerned that if urban services were available there would nonetheless be development pressure which would result in a further reduction to their safety. The city does not want responsibility for this area.

Final Order and Findings of Fact - dated 11<sup>th</sup> day of January, 2016.

Conditions of Approval. (As amended by City Council)

3d In the event any future development is to be located within the 100 – year floodplain, topographic information will be provided for development permits that demonstrate the ground elevation building pads have been raised 1 – foot above the 100 year floodplain elevation.

The City amended Goal 14 and deleted the previous findings which prevented development from areas located on steep slopes and within the Chetco River floodplain. (October 18, 2010) I fail to see how the present policy promotes public health, safety and general welfare of its citizenry, nor does it benefit the Chetco River or its Estuary.

Flood Damage Prevention – 17.098.030 Statement of purpose. [In part]

F. To help maintain a stable tax base by providing for the sound use and development of areas of special flood hazard so as to minimize future flood blight areas:

H. To ensure that those who occupy the areas of special flood hazard assume responsibility for their action. However the warning and disclaimer of liability –

17.098.110 – This chapter shall not create liability on the part of the city of Brookings, any officer or employee thereof or the Federal Insurance Administration, for any flood damages that result from reliance on this chapter....

September 8, 2014 City Council minutes. “In particular, she [Maitland] said, “The area should remain undeveloped.” I cannot ask for the impossible. What I said, “Mayor and City Council should deny the application until such time when more accurate information is made available and necessary permits are secured.” The minutes should reflect the truth.

Please place my comments in the record. Thank you.

  
Yvonne Maitland

Attachments:

1. 1 page Location map. June 2008.
2. 5 page correspondence from Keneth W. Phippen U.S. Dept. of Commerce
3. 1 page diagram depicting old and revised UGB location relative to applicant.
4. 1 page map depicting Chetco River’s location of three Natural areas, including Snug Harbor.

DeLORME



Tribble-Mahar site

Owner—Developer  
 Ron Tribble  
 North Bank Road  
 Brookings, OR 97415

Garcia Consultants—Geologists  
 12303 Galice Road PO Box 1801  
 Merlin, OR 97532 Gold Beach, OR 97444  
 541 474-2717 541 247-0368

Por. SW 1/4, Sec. 32, T40S, R13W, WM, Curry Co, OR

**Location Map**  
 January 2008



EXHIBIT 1-1  
UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
2900 NW Stewart Parkway  
ROSEBURG, OREGON 97471

September 8, 2014

Donna Colby-Hanks  
City of Brookings Planning Department  
898 Elk Drive  
Brookings, Oregon 97415

Re: Comment on the request from Maher/Tribble, LLC, Property Development to Annex Land into the City of Brookings, Curry County, Oregon (File No.: ANX-1-14)

Dear Mrs. Colby-Hanks:

The National Marine Fisheries Service (NMFS) reviewed the August 19, 2014 Public Notice for the proposed annexation in to the City of Brookings (City) of two parcels (13.33 acres) adjacent to the Chetco River in Curry County, Oregon. This letter is written because trust resources within our jurisdiction may be affected by the future development of this property. These trust resources include Southern Oregon/Northern California Coasts (SONCC) coho salmon (*Oncorhynchus kisutch*), southern distinct population segment Pacific eulachon (eulachon) (*Thaleichthys pacificus*), and southern distinct population segment North American green sturgeon (green sturgeon) (*Acipenser medirostris*), all listed as threatened under the Endangered Species Act (ESA). Furthermore, we have designated SONCC coho salmon critical habitat under the ESA, and essential fish habitat (EFH) for various life stages 20 species of groundfish, five species of coastal pelagics, and two species of Pacific salmon under the Magnuson-Stevens Fishery Conservation and Management Act (Table 1). We submitted a similar comment letter to Curry County on January 12, 2009, during their decision process for development of this property.

The NMFS is very sensitive to actions affecting the Chetco River because the population level of SONCC coho salmon in the Chetco River is currently very low and the lower portion of the watershed is already a highly modified environment, featuring degraded baseline conditions for water quality and physical habitat characteristics.

### Proposed Plan

The proposed annexation by the City will not authorize activities resulting in effects to our trust resources. However, the annexation is a required step for the future development of these parcels. 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. This description is based on what information is available online and what was available to us for our 2009 letter to the County. The new sub-division would allow at least 38 lots to be built, many of which are adjacent to the Chetco River. A variance was requested to reduce the 75-foot riparian setback requirement to 50 feet with allowances for decks overhanging to within 40 feet of the Chetco River. Ferry Creek would be removed from its culvert and redirected towards Snug Harbor through a new channel. All stormwater would be collected and routed through a detention facility and bio-filtration swale.

### Comments

The NMFS appreciates several aspects of the sub-division design. Native vegetation planting and prohibiting the cutting of native trees in the riparian zone are particularly commendable. Unfortunately, NMFS has concerns with some aspects, as well that overshadow the proposed conservation measures.

The SONCC coho salmon recovery plan (in press) analyzed current and historic habitat and fish 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.

**1. Channel migration.** Large rivers, such as the Chetco River, routinely move across their floodplains. Over time, these channels naturally migrate from one side of the valley to the other. While the north bank of Chetco River in the project area has been relatively stable the last decade or so, aerial photos from 1940 and 1955 show that the stream used to be further north, especially in the downstream portion of the project area. Natural migration of the channel will bring it back towards the north in the future. Nowhere in the provided information was a discussion of a channel migration study, or any other analysis, provided that might inform this and future decisions of the probability that structures would be at risk from future channel migration.

Understanding channel migration is critical in protecting NMFS' resources. Channel migrations form natural river features, such as alcoves and side-channels, and result in varying water depths, varying size in streambed substrate, and stream habitat features. Juvenile salmon and EFH species will use these habitats for feeding and resting because shallow-water areas and small structural elements create localized eddy currents and provide space to hide and avoid predation.

When channel migration occurs, landowners routinely apply for bank stabilization projects to protect structures that were built without consideration of channel migration. Bank stabilization reduces fish habitat quantity and quality because streambank hardening fixes the river in place and limits formation of natural river features. The method of stabilization almost always contains riprap. A large body of literature exists documenting the negative effects of riprap bank

protection on aquatic resources. Furthermore, bank stabilization usually just shifts erosional forces upstream or downstream, and results in the need for additional stabilization in a self-replicating cycle.

### ***Recommendation***

To minimize the probability of needing bank stabilization measures in the future, the annexation approval should be conditioned to (1) require an appropriate environmental engineer to complete a channel migration analysis, and (2) restrict any structures from within the 100-year channel migration zone. This is not to be confused with the 100-year flood level.

**2. Floodplain fill.** The information discusses fill placed in portions of the property to raise them above the floodplain and a conditional letter of map revision (CLOMR) from the Federal Emergency Management Agency (FEMA). The fill would be placed as close as 25 feet from the top of bank. The NMFS assumes this area is on the downstream end of the property where the historical photos show an overflow channel from the main river into the top end of Snug Harbor.

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.

### ***Recommendation***

To minimize the impacts to flood flow conveyance, the annexation approval should be conditioned to prohibit fill within any areas below the 50-year flood elevation.

**3. Instream infrastructure.** Streamside housing developments increase the demand for instream infrastructure improvements, such as docks and boat ramps. The negative effects on our trust resources from these structures is well documented in the literature and many of our consultations with Federal agencies under the ESA. Docks increase predation on juvenile fish moving around the structure. Over-water structures create a light/dark interface that allow ambush predators to remain in a darkened area (barely visible to prey) and watch for prey to swim by against a bright background (high visibility). Boat ramps adversely affect the streambanks and riparian areas by eliminating riparian vegetation and replacing it with hard surfaces. Boat ramps also commonly require bank stabilization measures to keep them functional. Resulting in the adverse impacts outlined in #1 above.

### ***Recommendation***

To minimize the impacts to juvenile fish and the demand for development associated instream infrastructure, the annexation approval should be conditioned to prohibit any docks or boat ramps associated with the development now and into the future.

**4. Stormwater treatment.** Our understanding is that the applicant will route all drainage from impervious surfaces into a detention area and bio-filtration swale. However, the treatment capacities and efficiencies of the system are not available. The current standard for consultations between us and the U.S. Army Corps of Engineers (Corps) is “stormwater quality treatment practices and facilities will be designed to accept and fully treat the volume of water equal to 50% of the cumulative rainfall from the 2-year, 24-hour storm for that site.” For this site, the 2-year, 24-hour storm is 5 inches, meaning the stormwater facilities need to be sized to treat 2.5 inches of rain in a 24-hour period.

Stormwater runoff from impervious surfaces delivers a wide variety of pollutants to aquatic ecosystem. Of particular concern are metals (e.g. copper and zinc) and petroleum-related compounds (polynuclear aromatic hydrocarbons). These pollutants are a source of potent adverse effects to our trust resources, especially coho salmon. These pollutants also accumulate in the prey and tissues of juvenile salmon where, depending on the level of exposure, they cause a variety of lethal and sublethal effects.

***Recommendation***

To minimize the impacts to aquatic resources, the annexation approval should be conditioned to require an appropriate environmental engineer to design and build stormwater treatment facilities effective at treating 2.5 inches of rain in a 24-hour period.

**5. Ferry Creek channel.** The Corps permit (NWP2008-222) for re-establishing the Ferry Creek channel has expired as has the ESA biological opinion covering it. A new permit and ESA consultation will be required. Most restoration activities permitted by the Corps are designed to meet the proposed design criteria within the current Standard Local Operating Procedures for Endangered Species (SLOPES) restoration programmatic biological opinion (NMFS no.: NWR-2013-9717). Designed appropriately, the Ferry Creek channel reconstruction action could meet these criteria.

***Recommendation***

To ensure fish passage and maximize benefits from the channel restoration, the annexation approval should be conditioned to require an appropriate environmental engineer to design the Ferry Creek channel restoration to meet the SLOPES Restoration design criteria. To achieve a channel design consistent with SLOPES Restoration the design development will need close coordination with my office and ultimately require my approval for inclusion in SLOPES Restoration or result in a successful individual ESA consultation.

Thank you for the opportunity to comment on the proposed action. If you have any questions, please contact Chuck Wheeler, fishery biologist in the Oregon Coast Branch of the Oregon Washington Coastal Area Office, at 541.957.3379.

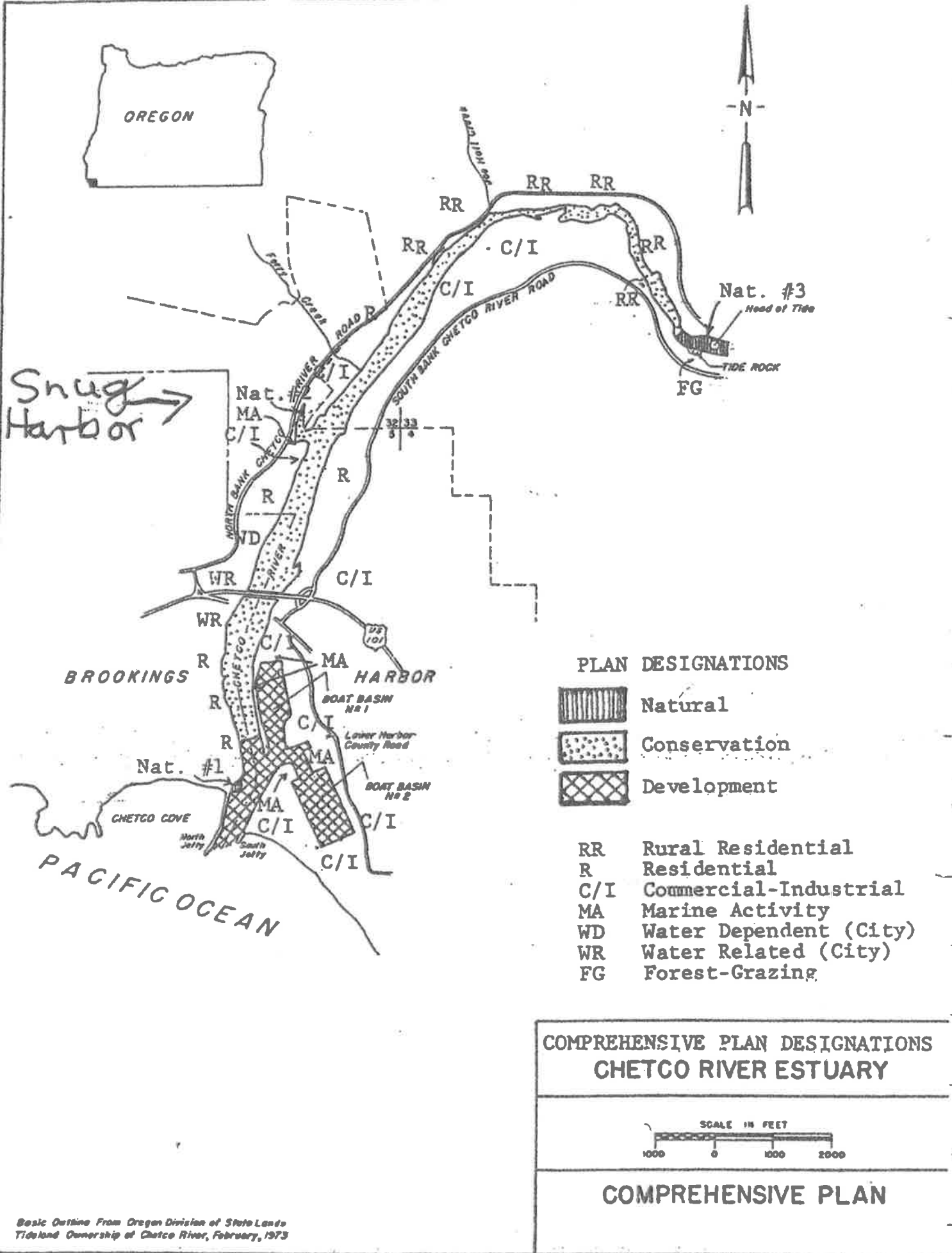
Sincerely,

A handwritten signature in black ink, appearing to read "Kenneth W. Phippen". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

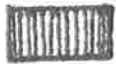


Kenneth W. Phippen  
Oregon Coast Branch Chief  
Oregon Washington Coastal Area Office

cc: Anita Andazola, Corps of Engineers





PLAN DESIGNATIONS

-  Natural
-  Conservation
-  Development

- RR Rural Residential
- R Residential
- C/I Commercial-Industrial
- MA Marine Activity
- WD Water Dependent (City)
- WR Water Related (City)
- FG Forest-Grazing

COMPREHENSIVE PLAN DESIGNATIONS  
CHETCO RIVER ESTUARY



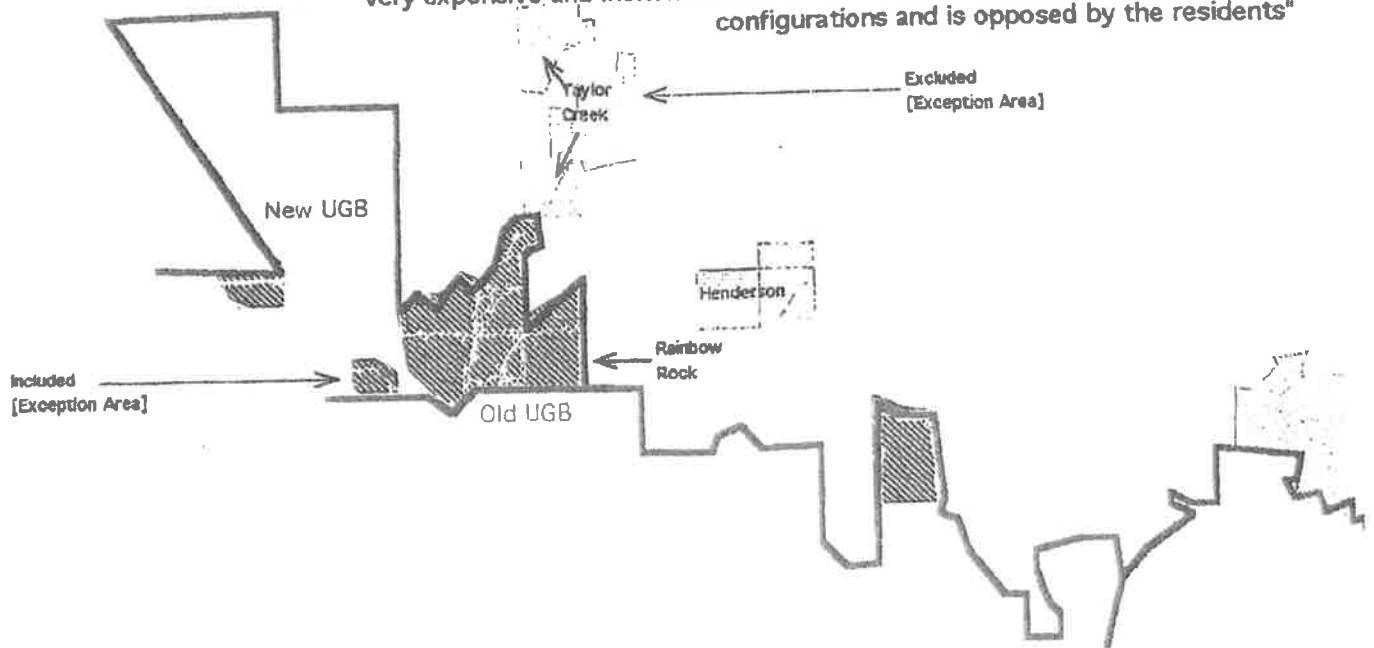
COMPREHENSIVE PLAN

Basic Outline From Oregon Division of State Lands  
Tideland Ownership of Chetco River, February, 1973

Cape Ferrello

City Findings at Rec. 518:

"An effort has been made to include all existing exception areas within the new boundary. However, a few exception areas were excluded because they cannot reasonably accommodate the proposed urban growth in a manner consistent with the urbanization goal factors. All of the excluded exception areas are effectively fully built-out and, as result of topography, covenants and other reasons significant increases in density, are impracticable for further development. Upgrading of utilities and roads to urban standards would be very expensive and inefficient due to their configurations and is opposed by the residents"



City Findings at Rec. 519:

"The excluded lands to the northeast and on the north bank of the Chetco are extremely steep. Many of the remaining parcels are unbuildable. The roads are very steep, substandard, and end in dead-ends. There is not adequate access for emergency vehicles at current development densities. Residents are concerned that if urban services were available there would nonetheless be development pressure which would result in a further reduction to their safety. The city does not want responsibility for this area."

"Extending the boundary north to Cape Ferrello and other areas would require the inclusion of an intervening area with class III and IV soils, to have an efficient and logical boundary. The resulting development pattern would be an undesirable strip along 101 and require long utility extensions through difficult terrain in which there would be few potential hook-ups."

Catherine Wiley  
96370 Duley Creek Rd.  
Brookings, OR 97415

January 11, 2016

To: Brookings City Council

Re: Meeting: Agenda Item 4. A. ANX-1-14 LUBA Remand: Mahar/Tribble Proposal

The record will verify that this second LUBA Remand is based on the fact that the Brookings City Council agreed with the applicants' attorney during their hearing on 4/13/15: issues cited as deficient by LUBA regarding Goal 16, Estuarine Resources: the Chetco River estuary did not need to be addressed and would not be heard.

It is blatantly apparent that City staff are consistent in agreeing with the applicants' position: virtually quoting the applicants' response to the LUBA remand in the staff recommendation. This, despite the recent Dyer Partnership Wastewater Facilities Report; the documentation of current infrastructure failures during normal winter conditions; non-compliance with EPA and DEQ guidelines; and, the recent Planning Commission approval of extension for the Borax/ Rio Tinto development. **All** water withdrawals and effluent/stormwater spills intrinsically impact the Chetco estuary. These issues, among many others, document the fact that negative impacts on the Chetco estuary are *cumulative*: not based on one development plan or infrastructure inadequacy alone.

The City has maintained their position that Goal 16 did not have to be addressed regarding the Borax/Rio Tinto annexation, rezoning, and planned development of 1,000 housing units, a shopping center, gas station and college: claiming there would be no impact(s) since potable water would not be needed from the Chetco. Obviously, this position has been adopted regarding the Mahar/Tribble proposal, as well. The legal requirement of the City Charter, that, "...the City must provide water services to properties in the Urban Growth Area that want to annex..." was

not revealed. Subsequently, the City presented and supported a ballot measure to have this requirement eliminated. The measure was defeated.

On 1/5/16, the City recommended to the Planning Commission that this City Charter language be removed from the Comprehensive Plan with no explanation or justification.

Therefore, the previous commitment to Borax/Rio Tinto's development stands, and has been extended multiple times, without ever addressing the impacts on the estuary. Water has been being provided to the college from the Chetco for over three (3) years.

In addition, the Dyer Report (4.1.2 Priority 1) states, "The existing sewer collection system is not capable of handling flow volumes projected from this development (Borax/Lone Ranch) nor do sewer lines currently exist to link the development to Brookings."

The Comprehensive Plan (7. A. 2), b.) Goal 11 states, "The City of Brookings will provide wastewater collection in the Urban Growth Boundary north of the Chetco River when land is annexed to the city." The property has been annexed and the college completed over three years ago. There is still no sewer service.

The Dyer Report also states (p.3-9) EPA Non-excessive Inflow, "Inflow in the (sewer) system is greater than the EPA guidelines. An ongoing Capacity Management with an Operations and Maintenance program (CMOM) is required." There is also documentation of critical system deficiencies in the Report, but absolutely no reference/inclusion of the plans, needs, and/or impacts intrinsic in the proposed Mahar/Tibble development, on the North Bank of the Chetco, in the tsunami and floodplain zone.

The 12/31/2015 City Manager's Weekly Report documents multiple infrastructure failures related to normal winter rain levels, including a, "Report to DEQ on recent sanitary sewer overflow issues", as well as water line breaks and leaks.

All of these issues currently/potentially impact the estuary, and document the inadequacy of the City to be in compliance with existing development needs.

How can there possibly be compliance with Comprehensive Plans and governmental requirements when proposed developments are approved without due consideration/assessment of the *cumulative* impacts on our river and its estuary?

### Attachments:

1. Testimony, 1/5/16 regarding proposed deletion of City Charter wording from Goal 11.
2. Dyer Partnership Wastewater Facilities Plan Report: 4.1.2 Priority 1
3. Brookings Comprehensive Plan: Goal 11, 7.A. 2,b
4. Dyer Report (p.3-9): EPA Non-excessive Inflow
5. Weekly Report 12/31/15, pp. 3&4

Added Note: The City Manager, Gary Milliman, made a written, public accusation to the City Council (& published in the Curry Coastal Pilot) that I was the individual who filed the LUBA complaint through ORCA. This accusation was made *after* his receipt of the second LUBA remand. I made a formal request for retraction. His original accusation was retracted, but was "justified" by his public report that I had "...submitted at least three letters to the city regarding the (Mahar/Tribble remand) issues". Documentation verifies that those purported "letters" were, in fact, testimony submitted by me in public hearings.

THIS submission is TESTIMONY, not a letter.

Attachment 1.

Catherine Wiley  
96370 Duley Creek Rd.  
Brookings, OR 97415

To: City of Brookings Planning Commission

Re: 1/5/2016 Meeting: Agenda Item 5.1; Wastewater Facilities Plan

Note: I am unable to testify in person due to a prior commitment. I will be out of town at the time of the Planning Commission meeting.

My testimony is submitted to object to the proposed elimination of wording, documented under: 7.B. Water Distribution; 2) The City of Brookings, c. "Due to City Charter language, the City must provide water services to properties in the Urban Growth Area that want to annex unless the legal voters of the City authorize another water provider to serve."

The agenda item and attached reports (i.e. Dyer Partnership, etc.) have absolutely no relevance to the City Charter, or potable water supply, rights/issues.

This specific component of the legal requirements in the City Charter were not revealed during the Borax/Rio Tinto MPOD, or annexation and rezoning.

Subsequently, the City presented and supported a ballot measure to have this City Charter requirement changed/eliminated. This was not approved by the citizens of Brookings.

Removal of this mandated component of the City of Brookings Charter, with no rationale or justification, gives the appearance of trying to hide or negate the legal mandate of the people and the City Charter.

Thank you for your consideration.

*Catherine Wiley*

## 4.1.2 Priority 1 - New Sewer Improvements to Serve Lone Ranch Vicinity & Harbor Sanitary District

### Basic Alternatives

#### 1. No Action

The existing sewer collection system is not capable of handling flow volumes projected from this development nor do sewer lines currently exist to link the development to Brookings. No action will prevent significant development north of Brookings along Highway 101, particularly in the Lone Ranch Development area.

#### Environmental Impacts

The area will remain lightly developed with future development possible only on larger lots using septic tanks. Ultimately, this will lead to an increase of groundwater pollution from leaking or overloaded septic systems.

#### Land Requirements

None, the existing collection system remains as is.

#### Potential Construction Problems

None, the existing collection system remains as is.

#### Sustainability Considerations

- a. Water and Energy Efficiency. Not applicable.
- b. Green Infrastructure. Not applicable.
- c. Other. Not addressing construction of the necessary lines providing adequate capacity for future development in this area will result in larger capital improvement projects in the future when construction of the sewer lines will face conflict with future development along the route.

#### Cost Estimate

Not applicable, no action is taken.

#### 2. Construct Improvements to Serve Lone Ranch Vicinity and Harbor

A significant portion of the projected growth in Brookings is anticipated to be in the Lone Ranch Development and surrounding area. There are seven projects in this category. This will require extension of the City sewage collection system northward. Closer to town, several of the existing mains will require replacement with higher capacity mains to convey the anticipated flows. Proposed similar improvements have previously been identified in the *Wastewater Facilities Plan* by HGE, Inc. in November 2007 as the "West Side Interceptor and Extensions North Projects". The need for these improvements, which in 2007 appeared imminent, abated when development activity ceased due to the recession. It is anticipated that the reviving economy will require a resumption of planned growth and the need for these previously planned improvements. A study titled "Lone Ranch Infrastructure Review", by The Dyer Partnership, August 2015 investigated the previous recommendations and updated them in view of the current plans to develop Lone Ranch in terms of infrastructure sizing and routing. Significant changes

- walking trails
- 5 picnic tables
- ocean access/ beach access
- Fire pit
- Restroom facilities
- 4 Seating benches
- d. Easy Manor Park
  - .8 acres
  - playground facilities (remodeled in 2010)
  - 4 Picnic tables
  - 4 Seating benches
  - 2 Bar-ba-que grills
  - Restroom facilities
- e. Stout Park
  - 3.3 acres
  - walking paths
  - 8 Seating benches
  - Model railroad garden
  - Manley Arts Center
- f. Numerous mini parks around the City (pocket parks).

3) The City adopted a Parks Master Plan in Aug., 2002. This Plan is incorporated herein by reference.

F. Other facilities and services provided in the City of Brookings are

- 1) Schools
- 2) Transportation for the elderly.
- 3) Regional recreational facilities such as state parks and harbor facilities.

7. The following entities will provide services outside of the city limits within the Urban Growth Boundary.

A. Wastewater Collection

- 1) The Harbor Sanitary District.
  - a. Collects wastewater within their district south of the Chetco River and pumps to the City's wastewater treatment plant.
  - b. Has stated, expansion of the District will only occur when it is in compliance with the Districts adopted Growth Management Policy (Resolution 07-18-R).
- 2) The City of Brookings
  - a. Will provide wastewater collection in the Urban Growth Boundary, south of the Chetco River outside of the Harbor Sanitary District boundaries when land is annexed to the city.
  - b. Will provide wastewater collection in the Urban Growth Boundary north of the Chetco River when land is annexed to the city.

B. Water Distribution

- 1) The Harbor Water District People's Utility District
  - a. Pumps from an intake on the south bank of the Chetco River.
  - b. District boundaries include the entire Urban Growth Boundary expansion south of the Chetco River except for the areas north of its intake facility and the top of the Harbor Hills.
  - c. Is willing to expand its boundaries to include the entire Urban Growth Boundary south of the Chetco River.



**EPA Non-excessive Inflow**

Non-excessive inflow is analyzed by investigating plant flows during periods of intense winter rainfall. Major rainfall events and the resulting system flows during winter months are analyzed. Inflow is surface runoff that enters a sewer system through manhole covers, cleanout covers, cross connections between storm sewers and sanitary sewers, and illegal connections of roof drains, yard drains, or catch basins. EPA’s non-excessive inflow criteria are based on “the average daily flow during periods of significant rainfall (i.e. storm event that creates surface ponding and surface runoff; this can be related to a minimum rainfall amount for a particular geographic area)”. The average per capita flow for the system is calculated and compared to the EPA maximum flow criteria of 275 gpcd. Flows can exceed EPA guidelines if the plant operation is not impeded by such flows. Under these conditions, provided the treatment plant does not experience hydraulic overloads during storm events, flows below 275 gpcd are considered to have a non-excessive inflow component.

For the City of Brookings, the average daily flow recorded during a period of significant rainfall occurred the week ending November 20, 2012. Flows of 5.802 MGD were generated after receiving rainfall of 6.72 inches in one day. Under these conditions and based on a 2013 population of 9,259, the resulting system flows (combined infiltration and inflow) were determined to be 627 gpcd. Since the flow is over 275 gpcd, a cost effective analysis is needed to determine if the inflow is excessive.

The EPA I/I analysis is summarized in Table 3.3.1.1.

**TABLE 3.3.1.1  
I/I ANALYSIS SUMMARY**

Description of Flow Condition	Flow Rate	EPA Criteria (Maximum Flow)
Base Sewage	88 gpcd	NA
Infiltration (High Ground Water)	165 gpcd	120 gpcd
Inflow (High Rainfall Levels)	627 gpcd	275 gpcd

Inflow in the system is greater than the EPA guidelines. An ongoing Capacity Management with an Operations and Maintenance program (CMOM) is required. A CMOM program typically includes video inspection of the entire collection system every five years and repair of collection system defects. In addition, a new sanitary sewer system evaluation (SSE) should be performed in the five-year intervals. An SSE typically includes line grit removal and cleaning, video inspection, physical inspection of manholes, performance of flow testing at structures, smoke testing of lines, evaluation of Daily Monitoring Reports and mapping of results. The first priority for the City is to repair deficiencies identified during smoke testing. As resources come available the infiltration deficiencies should be addressed.

**3.4 Reasonable Growth**

Reasonable growth capacity is determined by evaluating current sewage flow rates, current pollutant loads, and population growth forecasts. Flow and load projections are for a 20-year period from initiation of operations of new equipment. Daily flows and loads are determined from rainfall statistics and system flow records.

Flows and loads have specific recurrence intervals, or probabilities of occurrence, that utilize estimated future wastewater design flows and loads. Information regarding dry weather and wet weather flows as well as infiltration and inflow (I/I) are important in the design of wastewater collection, treatment and disposal facilities. The Maximum Monthly Dry Weather Flow (MMDWF) usually determines the maximum organic loading of the major treatment process units. The Maximum Monthly Wet Weather



# WEEKLY REPORT

Attachment 5  
(1 of 2)  
...to the Brookings City Council

WEEK ENDING: DECEMBER 31, 2015

close the road at night. Developing a plan to stabilize the situation and fully open the road make take several months of analysis and engineering. One of the issues they are dealing with is ownership of the land that moved, which is almost entirely outside of the ODOT right-of-way.

## HIGHWAY 101 SINKHOLE – INDICATOR OF MORE FAILURES TO COME?

ODOT staff also informed me that the culvert collapse resulting in the sink hole near Fireside Diner south of town may be worse than it looks. This culvert was installed in the 1970's and there is indication of erosion and collapse under the Highway. ODOT staff said that there are many similarly-aged culverts all along Highway 101 that need replacement, but that State culvert replacement funds are inadequate to address the need. The State Legislature failed to approve a transportation funding bill in 2015 and may not consider a funding bill until 2017. Federal funding has also diminished while the need grows.

## DEPARTMENT REPORTS

### BUILDING - Provided by Public Works & Development Director LauraLee Snook

- Received a complaint regarding 14 cats causing health issues due to extreme amounts of defecation and spraying at 614 Ransom Avenue. Neighboring property owner has been sent an abatement notice.
- Plans to be submitted for construction of the VA Clinic next week, per architect Matt Dodson.
- Discussion with developer regarding the potential construction of a 2500 sq.ft. performing arts center to be located at the intersection of Fern and Spruce Streets.

### FIRE - Provided by Fire Operations Chief Jim Watson

- 11 service calls: 4 medical aides, 3 MVCs , 1 public assists & 3 fire related. 2 burn permits issued. No water used from hydrants.
- Monday drill: Rescue Techniques and Knots. Currently at 24 volunteers. Staff is preparing to run a Volunteer fire fighter recruit hire test in mid January.
- Staff has been out assisting clearing debris during periods of heavy rain.

### PLANNING - Provided by Planning Manager, Donna Colby-Hanks

- House Bill 3223 was adopted by the Oregon Legislature and will become effective January 1, 2016. This bill requires additional noticing for certain land use applications requesting the division of property. Staff will be developing a process to assure compliance with the new requirements.
- Violations
  - Site visit conducted at a Tanbark property for unauthorized conversion of a single family dwelling into multiple dwelling units. Additional work is needed to completely resolve the violation.
  - Notice to Abate sent to Otter Terrace property owner advertising an unauthorized short-term rental.
  - Notice to Abate was sent to the property owner on Richard Street where a filled ravine was excavated without the required hillside development approval.

### POLICE - Provided by Public Safety Director Chris Wallace

- Administration participated in KPOD (Cop Talk) at which time we discussed several ways to stay safe during this year's many New Year celebration events.
- Administration continued working with Curry County Emergency Management regarding installation of Everbridge (Emergency Notification System) and Ops Center which is a software package that will be used in the Emergency Operations Center to better track resources and requests during a disaster.
- Officers handled 265 calls for service, conducted 53 traffic stops and issued 13 traffic citations. There were 3 false alarms, 5 misuses of 911 and 120 total calls to 911. No medical transports into Brookings proper from Pelican Bay State Prison.



# WEEKLY REPORT Attachment 5 (2 of 2)

...to the Brookings City Council

WEEK ENDING: DECEMBER 31, 2015

## **PWDS DIRECTOR - Provided by Public Works & Development Director LauraLee Snook**

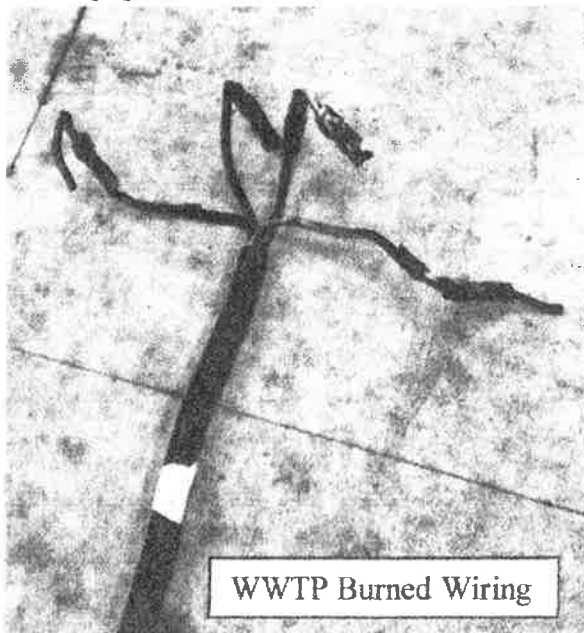
- Responded to a drainage complaint at 516 Redwood Avenue, it was determined that the drainage is private, owner was advised of this and the process needed for City to take over responsibility.
- Looking forward to a very busy 2016 as we race to complete budgeted CIP projects, prioritize projects for the next budget cycle and start working toward a succession plan for assumption of duties within the Public Works and Development Services Department upon my retirement October 1, 2016!!

## **PUBLIC WORKS - Provided by Public Works Supervisor Richard Christensen**

- Emergency Repairs – 8" C-900 city waterline broke on Christmas Day at Harris Beach Multi Use Path.
- Inspection – Forward 90% Easy Street Sidewalk Project construction plans to CCEC engineer, sent hydraulic shoring out for repairs and certification, completed preliminary plan review of Ross Road Storm Drain Project, work on multiple customer complaints, requests and abatements.
- Meters – Read meter books 19-24, replaced two meter box lids and 60 various customer service calls.
- Cross Connection – work on fabricating new backflow tester's bench.
- Parks – Take Natures Coastal Holiday figurines from Azalea Park back to storage.
- Sewer – Report to DEQ on recent sanitary sewer overflow issues.
- Storm – Replaced City Hall recycling bin and maintenance shed from parking lot to new city ditch.
- Streets – Remove brush and bushes from City Row at 5<sup>th</sup> / Limbaugh and 2<sup>nd</sup> / Easy. Rock ROW at 1118 Easy Street and AC cold patch potholes all over town.
- Water - Bury 12" C-900 waterline on Hwy 101 that was exposed by severe storm event and repair 8" waterline on Harris Beach Multi Use Path.
- Other – 6 underground locate requests, replaced ¾" swivel union to Vac Truck hose reel; had Proficient Auto install warning beacon on back hoe and order parts to repair TV van steering column.

## **WATER & WASTEWATER - Provided by Treatment Plants Supervisor Ray Page**

- Staff assisted PW on Christmas Evening. A water mainline leak surfaced on the Harris MUP.
- The source to the failure of our screenings compactor at the headworks of the wastewater facility was identified as a short. The wire that shorted is in the below ground raceways and requires a special Tray Cable. Water had intruded into a spliced section that had been inadequately protected by shrink tubing. The equipment is back online but will need further work when the correct cable arrives.



- Planned power outage on Mountain Drive did not affect any water customers. Staff made certain that the reservoirs were full prior to the outage and that the stations were enabled post outage.
- A water pump motor burned out at the water plant. It is undetermined at this time if the motor drive has been damaged as well.
- Assisted contractors by locating underground utility maps for the wastewater entrance.
- Dec 24-30, 2015 the WWTP discharged 18,727,000 gallons of disinfected effluent.

**CARL J. PAGE**ARSconsulting@aol.com

at → 12580 Hwy 101

My name is Carl Page and I live in Smith River. As a fisheries biologist over the past twenty years, I have conducted many water quality studies and fisheries investigations, including species-specific habitat assessments on many coastal lagoons and estuaries.

I would like to contribute my concerns with cumulative effects from the continued loss and fragmentation of the remaining floodplain upon the ecological processes critical to the natural function of the estuary and entire watershed,

I would also like to quote from Mr. Ken Phippin, the Oregon Branch Chief of the National Marine Fisheries Service, in his letter to the City of Brookings dated September 8, 2014. He states; “The NMFS is very sensitive to actions affecting the Chetco River because the population level of SONCC coho salmon in the Chetco River is currently very low and the lower portion of the watershed is already a highly modified environment, featuring degraded baseline conditions for water quality and physical habitat characteristics.”

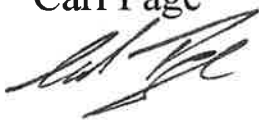
The SONCC coho salmon recovery plan analyzed current and historic habitat and fish abundance trends. It found one key limiting stressor was the lack of floodplain and channel structure. One of the key limiting threats was urban/residential/industrial development.’ And ‘Any further degradation of the limiting stressors will not be consistent with the recovery (plan), and difficult to permit’. “The development of this property needs to protect or improve floodplain and channel structure and riparian forest conditions.” The most important point was made, “The development of lots on these parcels will adversely affect our trust resources”.

These NMFS concerns included the diversion of Ferry Creek and the impacts to Snug Harbor, a deep backwater high-flow refugia that may be filled in with sediment from the redirected Ferry Creek and <sup>the</sup> development of the 59 duplexes. Their other concerns were channel migration onto this floodway and bank stabilization to reduce erosion, “further reducing fish habitat quality and quantity.”

None of these NMFS recommendations have been addressed by the City Council, and none of their concerns were mentioned in the Mayor’s public forum article titled ‘Balancing environment and development’. With the future development of over 100 homes just above the 101 Bridge, the Chetco River will have lost almost all of its North Bank floodplain to housing development.

The Chetco Estuary habitats, its fisheries, water quality and quantity, all will be negatively impacted, and the recovery of coho salmon may be impaired by this annexation and development. The Chetco River Watershed Council urges the City Council to reconsider this annexation and development. Rather a conservation easement and habitat restoration projects could restore this area and help preserve these estuarine resources and follow ~~ing~~ guideline from Statewide Goal 16.

Carl Page



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## Supplemental Packet For City Council

Hearing Date: January 11, 2016      7:00 pm - Council Chambers

### Exhibit B

Doc. #	Dated	From	page #	Description
B-1	1/6/2016	M. Sherwood, Native Fish Society	2	testimony
B-2	1/8/2016	T. Bunch, Oregon Dept of Agriculture	1	email
B-3	1/11/2016	S. Malone	3	email comments
B-4	1/11/2016	A. Vileisis	10	testimony w/attachment 1
B-5	1/11/2016	A. Orahoske	5	testimony w/attached recovery plan (executive summary only)
B-6	1/11/2016	Staff	2	written responses to Exhibit B-1 and B-2 submitted in supplemental packet



## NATIVE FISH SOCIETY

*Advancing the Recovery of Native, Wild Fish in Their Homewaters*

Exhibit B-1

January 6, 2016

FR: Mark Sherwood, Southern District Manager, Native Fish Society  
TO: Brookings City Councilors, Mayor Hedenskog, City Manager Gary Milliman  
RE: Impacts to Estuarine Resources from Annexation, Rezoning and Shoreline Boundary Change Mahar/Tribble Property

Dear Brookings City Councilors, Mayor Ron Hedenskog and City Manager Gary Milliman,

My name is Mark Sherwood and I live at 320 Railroad St. in Brookings. These comments and questions represent the concerns of the Native Fish Society and our over 3,000 members who support the conservation and recovery of the Northwest's wild, native fish. I'm also representing myself as a concerned citizen of Brookings and an avid angler. My hope in submitting my questions to you prior to next Monday's city council meeting, is to receive your answers and incorporate that information into my comments.

Comments on the Applicants Submittal:

### **1. From page 7 of the applicant's submittal:**

No herbicides, pesticides or fertilizers shall be applied on the subject property unless such herbicides, pesticides and fertilizers are: (a) approved by ODFW or the Oregon Department of Environmental Quality (DEQ) for use in close proximity to streams and rivers (i.e. environmentally friendly products); and (b) such applications are consistent with the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds*, December, 2003, or any amendments thereof. Applicant shall cause a restrictive covenant to be recorded against the subject property implementing this restriction in the Official Records of Curry County, Oregon. A draft of the restrictive covenant shall be submitted to the City for approval prior to the execution and recording of the covenant.

Who would enforce the covenant preventing future property owners from using unapproved herbicides, pesticides or fertilizers? Are there examples of such covenants being effective in preventing these kinds of pollutants from impacting sensitive areas?

### **2. Additional considerations for the NOAA recommendations to prevent harm to the estuary?**

Does the applicant or city plan on incorporating the recommended analysis of channel migration; or address the issue of additional floodplain fill found in Mr. Phippen's letter?

Particularly concerning is the prospect of future emergency hardening of the streambank, which could occur were the property developed and subsequently threatened by a high water event or a future migration of the river channel. A similar situation occurred in Gold Beach over the contested Sebastian Shores development. Like the Mahar/Tribble, the developers of Sebastian Shores planned residential development adjacent to an estuary and within the tsunami inundation zone. When the mouth of Hunter Creek shifted toward the development last year, homeowners filed for an emergency fill permit with the Department of State Lands and were allowed to artificially harden the bank with large boulders. This emergency action protected their homes, but came at a cost to the estuary. What can the applicant or the city of Brookings do to prevent a similar future occurrence on this site on the Chetco? If restrictive covenants have a proven track record for legally binding future owners/tenants and would prevent this type of damage, would the city and/or the applicants be agreeable to such a measure?

### **3. Ferry Creek Restoration**

Previous iterations of this development included the restoration of Ferry Creek by removing the stream from its current 300ft culvert and directing the creek adjacent to N. Bank Chetco River Rd. to the inlet of Snug Harbor. This restoration alternative appears again in the Galea Wildlife Consulting as a beneficial action. However, after my personal conversations with Ron Tribble, my understanding is that this restoration alternative is not being pursued by the applicant. Has the city or the applicant stipulated that this restoration will occur as part of the development as currently proposed? Providing this additional channel, and streambed could improve estuarine conditions for salmonids over present conditions.

Thank you in advance for your answers to these questions.

Warmly,

A handwritten signature in black ink, appearing to read 'M. Sherwood', written in a cursive style.

Mark Sherwood  
Southern District Manager  
Native Fish Society



Brookings  
Email

Powered by:  Brookings

Donna Colby-Hanks <dcolbyhanks@brookings.or.us>

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## chemical application near Chetco River

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Theodore R Bunch Jr <tbunch@oda.state.or.us>

Fri, Jan 8, 2016 at 12:30 PM

To: Donna Colby-Hanks <dcolbyhanks@brookings.or.us>

Cc: ODENTHAL Michael L <michael.l.odenthal@state.or.us>, Jim Johnson <jim.johnson@state.or.us>, Brian BOLING <Brian.BOLING@state.or.us>

Greetings Donna,

May this find you well.

Regarding statements made under # 9, I might suggest the following changes.

1. Delete herbicides. "Pesticides" is an umbrella term that means, as examples, insecticides, fungicides, herbicides, etc.
2. I might add to the beginning of this section "Only pesticides registered with the United States Environmental Protection Agency (U.S. EPA) and with the Oregon Department of Agriculture may be used."
3. Lastly, I might add "such applications must be made according to label instructions ..."

Hope this helps!

Should you have any questions, please don't hesitate to contact me directly.

Ted

p.s. - as an aside, if an applicator wanted label interpretations to see if a particular product may be used on a particular site, ODA may be able to assist. IF an application is made to or near surface water, a DEQ NPDES permit MAY be required.

[Quoted text hidden]

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# Sean T. Malone

## Attorney at Law

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Suite 200-G  
Eugene, OR 97401

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

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January 11, 2016

Via Email

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

Re: Comments for 2<sup>nd</sup> remand of File ANX-1-14

Dear Mayor Hedenskog and City Councilors,

Again, 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). Unfortunately, the applicant has again failed to present an application that passes legal muster under Goal 16.

Under Goal 16, the applicant must present “a clear presentation of the impacts of the proposed alteration” and readers must be able to “gain a clear understanding of the impacts to be expected,” including the “[t]he type and extent of alterations expected”; “[t]he type of resource(s) affected”; “[t]he 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 “[t]he methods which could be employed to avoid or minimize adverse impacts.” See Goal 16, Implementation Requirement 1. Again, the applicant has failed to satisfy LUBA’s instruction on remand.

First, ORCA disagrees with the finding that “[t]here are no anticipated impacts on the physical characteristics of the estuary, navigation, or existing potential uses of the estuary because no physical development will occur within the Estuary Boundary.” The pollutants from residential development affect the physical characteristics of the estuary, and the variety of

comments previously submitted indicate a host of impacts from residential development.<sup>1</sup> It is unclear how this could not be the case. This attempt to brush impacts under the rug is not a “clear presentation of the impacts.” The impact also alleged that “[t]he project, as proposed, would have minimal impacts upon the estuary.” Page 3. This is nothing more than a generalized allegation devoid of substance or detail.

Second, the applicant has failed to identify the potential adverse impacts of the R-2 zone because the applicant has not identified the extent and scope of the development. Here, the applicant has done nothing more than allege general residential development. Because the applicant has not provided any detail as to the development, the applicant cannot satisfy the requirements of Goal 16.

Third, the applicant has not complied all of the requirements of Goal 16. Now that the applicant has set forth an impact assessment prepared by a professional consultant that purports to satisfy the requirements of Goal 16, the applicant must now demonstrate compliance with all of Goal 16. Goal 16 specifically states that “[o]ther uses and activities which could alter the estuary shall only be allowed if the requirements in (b), (c), and (d) are met,” which provide:

“(b) if a need (i.e., a substantial public benefit) is demonstrated and the use or alteration does not unreasonably interfere with public trust rights;  
(c) if no feasible alternative upland locations exist; and  
(d) if adverse impacts are minimized.”

The applicant has not attempted to satisfy this important component. For example, the applicant has not demonstrated that there is “no feasible alternative upland locations” and that there is a “substantial public benefit” and there is no unreasonable interference with “public trust rights.”

Fourth, the applicant fails to acknowledge that the National Marine Fisheries Service (NMFS) also plays a regulatory role under the ESA. Instead, the applicant only refers to the US Fish and Wildlife Service, which does not regulate anadromous fish species under the ESA. This demonstrates how little attention was provided to threatened salmonids. Again, it does not even appear that the applicant has reviewed the recovery plan for threatened salmonids, which provides that “urban/residential/industrial development” is a key limiting factor for SONCC coho salmon. The applicant’s failure is surprising because the the National Marine Fisheries Service alleged that “[b]ecause 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.*” Despite this allegation, the application discloses virtually no impacts to salmonids. *See* Pages 11-12. The applicant’s consultant has not identified any harm

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<sup>1</sup> ORCA incorporates its prior comment letters by reference. The applicant failed to adequately respond to the comments presented in ORCA’s comment letters, and, therefore, this matter will likely be remanded back to the City.

to salmonids. The only mitigation measures proposed is an “enhanced riparian area.” It does not appear as though the applicant has addressed the recovery plan threatened salmonids. The applicant proposes to remove invasive plants along the riparian area, but the applicant has not demonstrated whether that will, in turn, cause increased sediment delivery to the estuary. In essence, the applicant’s failure to take a hard look at Coho Salmon in the Chetco River does not satisfy the requirements of the impact assessment and other requirements contained in Goal 16.

Fifth, the applicant is correct to state that “[a]ny construction, vegetation clearing or heavy equipment activity on the property has the potential to increase sediment flows to the Chetco River.” Page 12. However, the applicant has not indicated what, aside from generalized residential development, will occur on the property. For example, how many houses are proposed, how much impervious surface area, and so forth? The applicant’s proposal lacks detail to adequately inform the impact assessment. The applicant concedes that “[t]he limited amount of current riparian habitat between development and the river is insufficient as a buffer to prevent sediment transport.” *Id.* If the amount of land is currently insufficient, then it is questionable how the applicant can allege that “[a]n enhanced riparian area will eventually mitigate the project by providing an improved buffer to the river from construction and other activities.” *Id.*

Sixth, prior comments acknowledged that “[a]ny 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). The proposal will clearly “encroach” on the floodplain, and, therefore, the applicant should have disclosed the impacts from this encroachment.

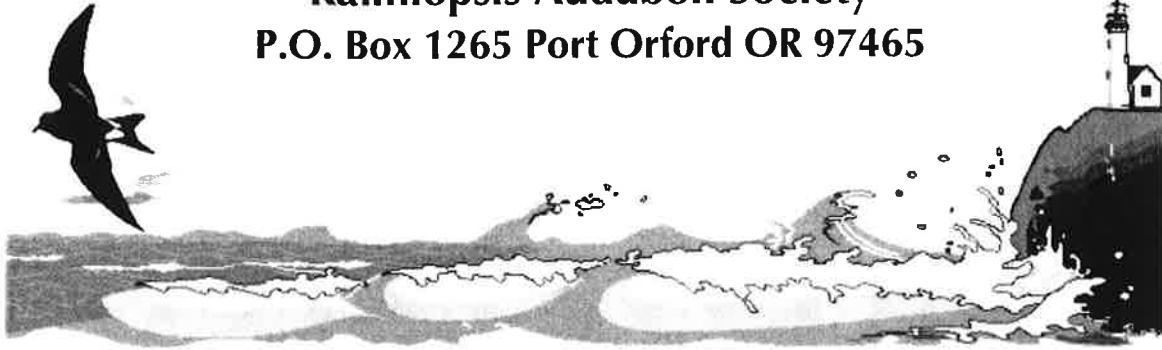
ORCA respectfully requests that the record be left open for 14 days to allow the parties to respond to testimony and evidence.

Thank you,



Sean T. Malone  
Counsel for ORCA

**Kalmiopsis Audubon Society**  
**P.O. Box 1265 Port Orford OR 97465**



January 11, 2016

To: City Council of Brookings

Regarding: ANX-1-14, LUBA remand regarding property owned by Mahar-Tribble

Dear Brookings City Council members:

I am writing on behalf of the Kalmiopsis Audubon Society. Our group has more than 200 members in Curry County, including many from Brookings, who are concerned about habitat for birds, fish, and wildlife, and about the long-term health of the Chetco River, and so we have been concerned about the 59-unit development currently being planned for the north bank on the Mahar-Tribble property and appreciate the opportunity to provide written comments at this remand hearing. Owing to a recent injury, I regret that I am unable to attend this meeting in person.

During consideration of preliminary steps for development, including an annexation, zoning change, and comprehensive plan amendment, LUBA remanded 2 key issues to the city of Brookings for more careful consideration owing to inadequate findings: the matter of water availability and compliance with Goal 16: Estuarine Resources.

From the perspective of fish and wildlife, these issues are very closely interrelated, and so we were disappointed that the city decided not to consider the matter of Goal 16 its previous hearing because the issue is of utmost importance to the Chetco's salmon.

As the current remand indicates, now is the time to address this concern. If the annexation, zone change and Comprehensive Plan amendment are approved now, when will there be an opportunity to address the important concerns we are raising for the long-term health and well-being of the Chetco River, its estuary, and estuary-dependent fishes? It is the role of the City Council to take a big picture view –to take into account not only what might benefit some individuals in the short run but also what will benefit residents in the long run. It is clear that the Chetco River and its fishery are crucially important to the long term future of the city –in terms of water supply but also with regards to salmon runs, which form the basis of the winter economy.

The Chetco River's coho is a federally "threatened" species that the National Marine Fisheries Service now considers to be at a "high risk of extinction." (NMFS, *Final Recovery Plan for SONCC Coho*, 2014, 13-6; [http://www.nmfs.noaa.gov/pr/recovery/plans/cohosalmon\\_soncc.pdf](http://www.nmfs.noaa.gov/pr/recovery/plans/cohosalmon_soncc.pdf))

This "high-risk" ranking should serve as a wake up call that elected officials must make decisions that will help to conserve the salmon for which the Chetco is renowned and not continue to whittle away at the habitat they need. Extinction happens through a thousand cuts, and in the Chetco's estuary many of those "cuts" have already been made, making survival difficult for this fish that depends on off-channel estuarine habitat and flood plains for critical rearing habitat.

The developer's attorney has argued that the comprehensive plan amendment (a change of the shoreland boundary) under consideration will not harm the Chetco's estuary, but clearly it is the decision that will lay the foundation for the placement of a large amount of fill and an extremely high-density development that will surely have impacts to the estuary. These include but are not limited to the following:

- Polluted runoff from increased area of impervious surfaces, including the streets, driveways and roofs associated with the proposed development.
- Runoff of herbicides and pesticides that will be used on future landscaping of residential developments into estuary
- Potential modification of a slough at the lower end of the property (abutting Snug Harbor) that affords crucial estuarine rearing habitat for salmon.
- Potential clearing of a riparian forest at the lower end of the property that provides the crucial services of providing shade, protection and structure during high water, and a likely recharge area for groundwater that would help to mitigate for elevated temperature in low flow seasons.
- Potential thinning of the riparian buffer zone that will reduce the availability of shade to the river and result in elevated temperature in the estuary in low flow seasons.
- Prevention of future channel migration, which is, in effect, "channelization" that will preclude the process of off channel, estuarine habitat creation in the future. (This was described in a letter from NMFS to the City of Brookings dated Sept. 8 2014.)
- Because the channel will inevitably seek to migrate over the long term, this might compel future property owners to add rip-rap, which would significantly degrade the estuary. This has happened at the mouth of Hunter Creek, where the Sebastian Shores development was inappropriately located too close to an active channel, putting the property and lives of homeowners at risk.

All these likely impacts will contribute additional stresses for the Chetco's already imperiled and "threatened" coho.

According to the National Marine Fisheries Service, in 2007-2008, ODFW convened a panel of expert fisheries and watershed scientists as an initial step in their development of a recovery plan for Oregon's Southern Oregon-Northern California Coastal coho salmon. Based on the input of panel members, ODFW summarized the concerns for the Chetco River population in a 2008 report as follows:

*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 and practices. (Recovery Plan, 13-6)*

The concerns identified by the expert panel would only be exacerbated by the placement of a large amount of fill and a high-density development on this floodplain parcel.

Indeed, the SONCC coho recovery plan ranks 'Channelization/Diking' and 'Urban/ Residential/ Industrial Development' as "key limiting threats." (Recovery Plan, 13-1)

By filling in the floodplain for development, the project proponent will essentially be eliminating floodplains' critical functions from the lower river and estuary. In particular filling will further reduce "floodplain connectivity." When floodplains are flooded during high water events, they absorb water like a sponge and then gradually release it back into the river's main channel, helping to keep water in the lower river and estuary cool and clean. Eliminating flood plain connectivity now will alter the river's hydrology forever. This concern was raised by the National Marine Fisheries Service in its letter to the Brookings City Council dated, Sept. 8, 2014. (Attached)

We are also concerned that municipal water withdrawals needed to accommodate the addition of 59 household units to be supplied by the city will further reduce water quality and quantity in the lower river and its estuary. According to the NMFS, SONCC coho recovery plan, "juvenile summer rearing habitat is impaired by high water temperatures resulting from degraded riparian conditions and water withdrawals." (Recovery Plan, 13-10)

The lower Chetco River is already over allocated by water diversions during low flow months. According to US Forest Service data, minimum instream flow levels were not met in 11 of the 25 years from 1970 to 1994, and the number of days per year below this level ranged from two to 77 days (USFS 1996, Recovery Plan, 13-11). Just last September, we can all remember the Chetco's flows fell to such gravely low levels that Harbor's municipal intake was contaminated by salt water.

Currently, municipal uses account for most of the water withdrawals from the Chetco River and its tributaries. Supplying water to a new high-density development would very likely further impact the river by increasing the city's demand to tap more water from the river.

Reduced river flows would also increase the likelihood of impaired water quality in the estuary. According to the NMFS coho recovery plan, "Reduced freshwater flows into the estuary contribute to and exacerbate stagnation and water quality problems. Lack of juvenile rearing

habitat and impaired water quality in the estuary constitute an overall high stress for coho salmon.” (Recovery Plan, 13-10)

One reason water quality in the estuary is poor owes to low dissolved oxygen in the summer. Elevated temperature makes it more difficult for water to hold oxygen, creating a double impact for juvenile fish that have a strict thermal tolerance.

In addition, this development will have impacts on fish in the estuary during high flows. By filling in the floodplain for development, the project proponent will essentially be eliminating floodplains’ critical functions from the lower river and estuary. Reduced floodplain connectivity will lead to increased current velocity, which makes reaches less suitable for coho rearing. During winter storms, discharge of the Chetco River routinely increases from less than 1,000 cfs to over 20,000 cfs within 24 hours –with effect of displacing juvenile rearing coho, whisking them too far downstream in the estuary and prematurely out to sea. (Recovery Plan, 13.9). This makes off channel habitat in the estuary, such as the slough at the lower end of the property, incredibly important. Although the developer has indicated he will avoid filling that critical off channel habitat, we are concerned that the comprehensive plan change may enable him to do just that.

In our opinion, the materials submitted for this hearing by the proponent do not show adequate protection for the Chetco estuary. Although the project proponent has suggested that there will be removal of non-native blackberry and planting of native vegetation to provide shade –both of which will be welcome improvements –these are not adequate mitigations for the larger risks to salmon habitat within the Chetco estuary.

Here at the outset of the 21<sup>st</sup> century, we should all understand the crucial roles that estuaries play for fish and wildlife. They are the nursery grounds for fish in both our rivers and oceans. These fisheries are key elements of local quality of life and the local economy, especially in the winter months. Explicitly recognizing the high value of estuaries, the state of Oregon has made special provisions in land use planning with its Goal 16.

In conclusion, we ask that the City Council respect this important directive and either reject this request on remand for approval of the Mahar-Tribble annexation, zone change and Comprehensive Plan amendment, or as an alternative or adopt the following conditions as suggested by the Native Fish Society in its April 2015 comments:

- Require an environmental engineer to complete a channel migration analysis.
- Restrict any structures from within the 100-year channel migration zone.
- Prohibit any new fill within the 50-year floodplain.
- Prohibit the addition of any docks or floating structures.
- Agree to leave Snug Harbor as open space, with its riparian and floodplain habitat intact.
- Daylight and restore Ferry Creek to provide additional habitat for coho salmon.
- Require that Mahar/Tribble receive approval for the necessary permitting to reestablish the Ferry Creek channel reconstruction through the Army Corps of Engineers and NMFS before approving annexation and zone change.
- Require that Ferry Creek restoration meet NMFS’s SLOPES design criteria.
- Require that the County’s 75 foot riparian buffer be maintained throughout the



property, no matter where the Shoreland Boundary is located or relocated.

- Require that no herbicide or fertilizers be utilized in riparian buffers into the future.
- Require that the buffer be replanted with native vegetation to facilitate shade with the oversight of the Oregon Department of Fish and Wildlife.
- Require an appropriate environmental engineer to design and build stormwater treatment facilities effective at treating 2.5 inches of rain in a 24-hour period.
- Initiate city planning for storing additional fresh water for municipal use and plans to limit pumping during summer and fall during low flows. This would action would be mutually beneficial to future residential development and salmon.

Only by adopting such conditions could the proposed annexation, rezoning and comprehensive plan amendment begin to address concerns about protecting crucial estuary values. And only by adopting such conditions will we be able to assure the future of the Chetco's salmon.

Sincerely

*Isi Ann Vileisis*

President, Kalmiopsis Audubon Society

Attachments:

NMFS to City of Brookings, letter, Sept. 8, 2014



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE  
2900 NW Stewart Parkway  
ROSEBURG, OREGON 97471

September 8, 2014

Donna Colby-Hanks  
City of Brookings Planning Department  
898 Elk Drive  
Brookings, Oregon 97415

Re: Comment on the request from Maher/Tribble, LLC, Property Development to Annex Land into the City of Brookings, Curry County, Oregon (File No.: ANX-1-14)

Dear Mrs. Colby-Hanks:

The National Marine Fisheries Service (NMFS) reviewed the August 19, 2014 Public Notice for the proposed annexation in to the City of Brookings (City) of two parcels (13.33 acres) adjacent to the Chetco River in Curry County, Oregon. This letter is written because trust resources within our jurisdiction may be affected by the future development of this property. These trust resources include Southern Oregon/Northern California Coasts (SONCC) coho salmon (*Oncorhynchus kisutch*), southern distinct population segment Pacific eulachon (eulachon) (*Thaleichthys pacificus*), and southern distinct population segment North American green sturgeon (green sturgeon) (*Acipenser medirostris*), all listed as threatened under the Endangered Species Act (ESA). Furthermore, we have designated SONCC coho salmon critical habitat under the ESA, and essential fish habitat (EFH) for various life stages 20 species of groundfish, five species of coastal pelagics, and two species of Pacific salmon under the Magnuson-Stevens Fishery Conservation and Management Act (Table 1). We submitted a similar comment letter to Curry County on January 12, 2009, during their decision process for development of this property.

The NMFS is very sensitive to actions affecting the Chetco River because the population level of SONCC coho salmon in the Chetco River is currently very low and the lower portion of the watershed is already a highly modified environment, featuring degraded baseline conditions for water quality and physical habitat characteristics.

### **Proposed Plan**

The proposed annexation by the City will not authorize activities resulting in effects to our trust resources. However, the annexation is a required step for the future development of these parcels. 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. This description is based on what information is available online and what was available to us for our 2009 letter to the County. The new sub-division would allow at least 38 lots to be built, many of which are adjacent to the Chetco River. A variance was requested to reduce the 75-foot riparian setback requirement to 50 feet with allowances for decks overhanging to within 40 feet of the Chetco River. Ferry Creek would be removed from its culvert and redirected towards Snug Harbor through a new channel. All stormwater would be collected and routed through a detention facility and bio-filtration swale.

### **Comments**

The NMFS appreciates several aspects of the sub-division design. Native vegetation planting and prohibiting the cutting of native trees in the riparian zone are particularly commendable. Unfortunately, NMFS has concerns with some aspects, as well that overshadow the proposed conservation measures.

The SONCC coho salmon recovery plan (in press) analyzed current and historic habitat and fish 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.

**1. Channel migration.** Large rivers, such as the Chetco River, routinely move across their floodplains. Over time, these channels naturally migrate from one side of the valley to the other. While the north bank of Chetco River in the project area has been relatively stable the last decade or so, aerial photos from 1940 and 1955 show that the stream used to be further north, especially in the downstream portion of the project area. Natural migration of the channel will bring it back towards the north in the future. Nowhere in the provided information was a discussion of a channel migration study, or any other analysis, provided that might inform this and future decisions of the probability that structures would be at risk from future channel migration.

Understanding channel migration is critical in protecting NMFS’ resources. Channel migrations form natural river features, such as alcoves and side-channels, and result in varying water depths, varying size in streambed substrate, and stream habitat features. Juvenile salmon and EFH species will use these habitats for feeding and resting because shallow-water areas and small structural elements create localized eddy currents and provide space to hide and avoid predation.

When channel migration occurs, landowners routinely apply for bank stabilization projects to protect structures that were built without consideration of channel migration. Bank stabilization reduces fish habitat quantity and quality because streambank hardening fixes the river in place and limits formation of natural river features. The method of stabilization almost always contains riprap. A large body of literature exists documenting the negative effects of riprap bank

protection on aquatic resources. Furthermore, bank stabilization usually just shifts erosional forces upstream or downstream, and results in the need for additional stabilization in a self-replicating cycle.

***Recommendation***

To minimize the probability of needing bank stabilization measures in the future, the annexation approval should be conditioned to (1) require an appropriate environmental engineer to complete a channel migration analysis, and (2) restrict any structures from within the 100-year channel migration zone. This is not to be confused with the 100-year flood level.

**2. Floodplain fill.** The information discusses fill placed in portions of the property to raise them above the floodplain and a conditional letter of map revision (CLOMR) from the Federal Emergency Management Agency (FEMA). The fill would be placed as close as 25 feet from the top of bank. The NMFS assumes this area is on the downstream end of the property where the historical photos show an overflow channel from the main river into the top end of Snug Harbor.

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.

***Recommendation***

To minimize the impacts to flood flow conveyance, the annexation approval should be conditioned to prohibit fill within any areas below the 50-year flood elevation.

**3. Instream infrastructure.** Streamside housing developments increase the demand for instream infrastructure improvements, such as docks and boat ramps. The negative effects on our trust resources from these structures is well documented in the literature and many of our consultations with Federal agencies under the ESA. Docks increase predation on juvenile fish moving around the structure. Over-water structures create a light/dark interface that allow ambush predators to remain in a darkened area (barely visible to prey) and watch for prey to swim by against a bright background (high visibility). Boat ramps adversely affect the streambanks and riparian areas by eliminating riparian vegetation and replacing it with hard surfaces. Boat ramps also commonly require bank stabilization measures to keep them functional. Resulting in the adverse impacts outlined in #1 above.

***Recommendation***

To minimize the impacts to juvenile fish and the demand for development associated instream infrastructure, the annexation approval should be conditioned to prohibit any docks or boat ramps associated with the development now and into the future.

**4. Stormwater treatment.** Our understanding is that the applicant will route all drainage from impervious surfaces into a detention area and bio-filtration swale. However, the treatment capacities and efficiencies of the system are not available. The current standard for consultations between us and the U.S. Army Corps of Engineers (Corps) is “stormwater quality treatment practices and facilities will be designed to accept and fully treat the volume of water equal to 50% of the cumulative rainfall from the 2-year, 24-hour storm for that site.” For this site, the 2-year, 24-hour storm is 5 inches, meaning the stormwater facilities need to be sized to treat 2.5 inches of rain in a 24-hour period.

Stormwater runoff from impervious surfaces delivers a wide variety of pollutants to aquatic ecosystem. Of particular concern are metals (e.g. copper and zinc) and petroleum-related compounds (polynuclear aromatic hydrocarbons). These pollutants are a source of potent adverse effects to our trust resources, especially coho salmon. These pollutants also accumulate in the prey and tissues of juvenile salmon where, depending on the level of exposure, they cause a variety of lethal and sublethal effects.

***Recommendation***

To minimize the impacts to aquatic resources, the annexation approval should be conditioned to require an appropriate environmental engineer to design and build stormwater treatment facilities effective at treating 2.5 inches of rain in a 24-hour period.

**5. Ferry Creek channel.** The Corps permit (NWP2008-222) for re-establishing the Ferry Creek channel has expired as has the ESA biological opinion covering it. A new permit and ESA consultation will be required. Most restoration activities permitted by the Corps are designed to meet the proposed design criteria within the current Standard Local Operating Procedures for Endangered Species (SLOPES) restoration programmatic biological opinion (NMFS no.: NWR-2013-9717). Designed appropriately, the Ferry Creek channel reconstruction action could meet these criteria.

***Recommendation***

To ensure fish passage and maximize benefits from the channel restoration, the annexation approval should be conditioned to require an appropriate environmental engineer to design the Ferry Creek channel restoration to meet the SLOPES Restoration design criteria. To achieve a channel design consistent with SLOPES Restoration the design development will need close coordination with my office and ultimately require my approval for inclusion in SLOPES Restoration or result in a successful individual ESA consultation.



## TU Celebrates 50 Years of Protecting Cold, Clean, Fishable Water.

WILD RIVERS COAST CHAPTER PO. BOX 421 Smith River, CA 95567 Non Profit Tax ID #26-3315149

January 11, 2016

City of Brookings  
898 Elk Drive  
Brookings, Oregon 97415

RE: File No. ANX-1-14, Mahar / Tribble Property Annexation and Impacts to Chetco River Estuarine Resources

On behalf of Wild Rivers Coast Chapter of Trout Unlimited, I submit the following comments on the above captioned matter. Trout Unlimited is opposed to this annexation and residential development on the banks of the Chetco River estuary due to significant adverse impacts to estuarine resources, including but not limited to aquatic and terrestrial species such as Coho Salmon and overall ecological function.

The National Marine Fisheries Service ("NMFS") Recovery Plan for threatened Coho Salmon (Southern Oregon / Northern California Coast Coho Salmon Evolutionary Significant Unit, hereinafter "SONCC Coho") specifically states that the Chetco River estuary is currently impaired due to development.

#### Impaired Estuary/Mainstem Function

The Chetco River estuary was historically small, and much of what once was estuarine rearing habitat no longer serves this function for coho salmon (Massingill 2001f). There is little to no remaining estuarine rearing habitat or refugia for smolts or adults. Upstream of the mouth, steep terrain adjacent to the mainstem limits the availability of tidal estuarine habitat. Formerly productive Tuttle Creek is disconnected as it now flows through several hundred feet of culverts underneath an RV Park. Reduced freshwater flows into the estuary contribute to and exacerbate stagnation and water quality problems. Lack of juvenile rearing habitat and impaired water quality in the estuary constitute an overall high stress for coho salmon.

Recovery Plan at 13-10.

What little functional estuarine habitat available for Coho Salmon remains is fragmented and of critical importance to the species recovery. The subject property sits adjacent to the estuary and is immediately adjacent to Snug Harbor, an important salmonid rearing habitat, especially SONCC Coho. The proposed annexation and residential development will adversely impact this habitat and jeopardize the recovery of SONCC Coho. The

SONCC Coho Recovery Plan and additional letters from NMFS in the record and discussed by the Land Use Board of Appeals for the present matter clearly indicate that the proposed annexation and development on the subject parcel will further degrade the Chetco River estuary and adversely affect estuarine resources. We incorporate by reference the NMFS SONCC Coho Recovery Plan and submit the entire document to the record in this matter.

We request that the City of Brookings deny the applicant's annexation request and instead begin immediate discussions with local stakeholders, and federal and state wildlife agencies to protect the Chetco River estuary, as required by Goal 16.

Sincerely,

Andrew J. Orahoske  
Attorney at Law  
PO Box 3156  
Brookings, Oregon 97415  
541.469.5331

Attachments:

National Marine Fisheries Service. 2014. Final Recovery Plan for the Southern Oregon / Northern California Coast Evolutionary Significant Unit of Coho Salmon.

Available at:

[http://www.nmfs.noaa.gov/pr/recovery/plans/cohosalmon\\_soncc.pdf](http://www.nmfs.noaa.gov/pr/recovery/plans/cohosalmon_soncc.pdf)

# Final Recovery Plan for the Southern Oregon/ Northern California Coast Evolutionarily Significant Unit of Coho Salmon (*Oncorhynchus kisutch*)

2014

Photo courtesy Thomas Dunklin

Executive summary only.  
Entire document can be  
reviewed at the planning  
department.

**WEST  
COAST  
REGION**



**NOAA  
FISHERIES**



## **Executive Summary**

### **Need for Recovery**

Thousands of coho salmon once returned to spawn in the rivers and streams of Northern California and Southern Oregon. Not long ago, these watersheds provided conditions that supported robust and resilient populations of coho salmon that could persist under dynamic environmental conditions. The combined effects of fish harvest, hatcheries, hydropower operations, and habitat alterations caused by land management led to declines in these populations. The National Marine Fisheries Service's (NMFS) evaluation of declining coho salmon abundance and productivity, as well as range reductions and diminished life-history diversity, supported the decision to list the Southern Oregon/Northern California Coast (SONCC) Evolutionarily Significant Unit (ESU) of coho salmon as a threatened species under the Endangered Species Act (ESA) in 1997, a decision that was reaffirmed in 2005.

Recovery can only be achieved through coordinated efforts to build strong conservation partnerships. Conservation partners may be individuals, groups, and government or non-government organizations including NMFS, industry, or tribes who have an interest in the recovery of SONCC coho salmon. The ESA envisions recovery plans as the central organizing tool for guiding each species' recovery process. The recovery plan is a road map to recovery – it lays out where we need to go and how best to get there. The SONCC Coho Salmon ESU recovery plan (Plan) was developed to provide a roadmap to recovery of this species which conservation partners can follow together. Specifically, the Plan is designed to guide implementation of prioritized actions needed to conserve and recover the species by providing an informed, strategic, and voluntary approach to recovery that is based on the best available science. Use of a recovery plan ensures that recovery efforts target limited resources effectively and efficiently. The Plan also provides recovery targets to work toward, as well as criteria by which progress toward recovery will be tracked.

### **Current Species Status (Chapter 2)**

The SONCC Coho Salmon ESU includes all naturally spawned populations of coho salmon in coastal streams between Cape Blanco, Oregon and Punta Gorda, California, as well as coho salmon produced by three artificial propagation programs: Cole Rivers Hatchery, Trinity River Hatchery, and Iron Gate Hatchery. An ESU is comprised of groups of populations with geographic and evolutionary similarities that are considered a "species" under the ESA. NMFS originally listed the SONCC coho salmon ESU as threatened under the ESA in 1997 (62 FR 24588, May 6, 1997). In 2005, following a reassessment of its status and after applying NMFS' hatchery listing policy, NMFS reaffirmed its status as threatened and also added several hatchery programs to the listed ESU (70 FR 37160, June 28, 2005).

NMFS issued guidelines in 1990 (55 FR 24296, June 15, 1990) for assigning listing and recovery priorities. Three criteria are assessed to determine NMFS' species' priority for recovery plan development, implementation, and resource allocation: 1) magnitude of threat; 2) recovery potential; and 3) existing conflict with activities such as construction and development. The recovery priority number for the SONCC coho salmon ESU is 1, as reported in the 2011-2012

Biennial Report to Congress on the Recovery Program for Threatened and Endangered Species (NMFS 2013).

In 2006, NMFS modeled the historic population structure of the SONCC coho salmon ESU (Williams et al. 2006; Chapter 2, this volume). Each population is described in terms of its modeled capacity to support rearing juvenile coho salmon, based on the intrinsic ability of the habitat to support this life stage. This capacity is described as Intrinsic Potential or IP. Williams et al. (2006) calculated the number of kilometers of IP for each population. The role each population played in the historic function of the ESU is primarily based on how much IP it contains. Populations with more than 34 IP-km are described as independent because, due to their size, they are not dependent on strays from nearby populations to persist over time. Populations with from 5 to 34 IP-km are described as dependent because they are too small to persist without immigration from independent populations. NMFS grouped populations with similar geologic and genetic features into seven diversity strata (Williams et al. 2006). Williams et al. (2006) originally described 45 populations in the SONCC coho salmon ESU (Williams et al. 2006), but this recovery plan describes 40 populations, due to the recalculation of the amount of IP in some populations and exclusion of populations with less than 5 IP-km. Figure ES-1 shows the SONCC coho salmon ESU, including all 40 populations and seven diversity strata.

Populations with extremely low numbers of spawning adults can suffer from depensatory effects, which are problems with successful reproduction such as spawners being too scarce to find each other. The number of spawners needed to avoid depensatory effects is called the depensation threshold. Based on the amount of IP-km in each population, this recovery plan describes the extinction risk of each independent population. An independent population with spawner numbers below the depensation threshold is at high risk of extinction. Currently, over three quarters of SONCC coho salmon independent populations are at high risk of extinction (Figure ES-2). In a recovered ESU, these populations would be at moderate or low risk of extinction.

## MEMO

**TO:** City Council  
**FROM:** Donna Colby-Hanks, Planning Manager  
**DATE:** January 11, 2016  
**SUBJECT:** Staff responses to Exhibit B, ANX-1-14 Remand

### **Staff responses to concerns presented by Mark Sherwood, Native Fish Society, Exhibit B-1**

#### Enforcement of the use of herbicides, pesticides or fertilizers

Response: Frank Galea, certified Wildlife Biologist and author of the Impact Assessment Report, identifies in his report that the greatest potential for impacts to the estuary from residential development are from sewage and storm water runoff. Pollutants from runoff can include herbicides, pesticides, or fertilizers. To minimize the potential impacts only chemicals that are approved for application near aquatic environments shall be utilized on the property. A condition of approval is proposed that will require a restrictive covenant to be recorded against the property implementing this restriction. The covenant would be transferred to any future property owner upon sale or division of the property. The purpose of the covenant is to alert future owners of the limits of chemical use on the property.

These types of chemicals are under the jurisdiction of Oregon Department of Agriculture (ODA) and they are the regulatory authority in these matters. Any potential violation would need to be reported to ODA for investigation and enforcement. The City does not have staff with expertise in these matters and according to ODA would generally have no authority. Questions regarding the effectiveness of their program should be addressed to ODA.

#### Channel migration and floodplain fill concerns .

Response: Pursuant to LUBA, the remand hearing is limited to assessment of potential impacts to the estuary as well as identification of methods of mitigation to avoid or minimize adverse impacts. The assessment only needs to address the impacts from the proposed residential development. LUBA determined that the assessment did not need to address a possible future reduction in the riparian buffer, placement of fill in the floodplain under Curry County approval, or the possible future restoration of Ferry Creek. These matters are outside the scope of this remand hearing.

Kenneth Phippen, National Oceanic and Atmospheric Administration, discusses channel migration of rivers in his letter dated September 8, 2014. (letter attached) He describes channel migration as a natural occurrence and does not assert that the residential development will affect the natural

migration of the river. The Impact Assessment Report does not identify impacts to the estuary from residential development of this property as affecting the migration of the river. Based on this professional information, the residential development of this property will have no effect on the impact to the estuary from migration of the river. There is no requirement for the Applicant to analysis the migration of the river or subsequent hardening of the riverbank with rip rap as these matters are outside the scope of this remand hearing. Impacts from additional floodplain fill are also outside the scope of this remand hearing.

#### Ferry Creek Restoration

Response: LUBA states in the remand opinion for this matter that the City is not required to address the impacts from a future project to restore Ferry Creek. The restoration project is not proposed as a component of the annexation and it is not a necessary element for the residential development of the subject property. The impacts to the estuary from possible future restoration of Ferry Creek are outside the scope of the remand hearing.

#### **Staff response to email from Theodore Bunch, Jr, Oregon Department of Agriculture, Exhibit B-2**

##### Suggestion for revisions to Condition of Approval #9

Response: Theodore Bunch, Jr, Oregon Department of Agriculture, reviewed the proposed Conditions of Approval as they relate to his department and made several suggestions for revisions to condition #9. Staff recommends the incorporation of those suggestions into condition #9 as shown below. Added text is underlined and deleted text is ~~stricken~~.

**9. Only pesticides, ~~herbicides, or fertilizers approved~~ registered with the United States Environmental Protection Agency (U.S. EPA) and with the ~~by~~ Oregon Department of Agriculture (ODA) for application near aquatic environments shall be utilized on the subject property. Such applications must be in compliance with ~~manufacturer's~~ label instructions and must be consistent with the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watershed, December, 2003*, or any amendments thereof. The applicant shall provide to the City copies of any required approvals/permits from the Department of Environmental Quality (DEQ). If the services of a Commercial Applicator are utilized, they must be licensed by ODA. The Applicant shall cause a restrictive covenant to be recorded against the subject property implementing this restriction in the Official Records of Curry County, Oregon. A draft of the restrictive covenant shall be submitted to the City for approval prior to the execution and recording of the covenant.**

**Exhibits B-3, B-4 and B-5 were received without sufficient time to allow staff an opportunity to evaluate and develop written responses.**